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UNITED STATES ATOMIC ENERGY COMMISSION

ORAL ARGUMENT

IN THE MATTER OF:

TOLEDO EDISON CO. and CLEVELAND
ELECTRIC ILLUMINATING CO.
(Davis-Besse Nuclear Power Station)
and
CLEVELAND ELECTRIC ILLUMINATING CO.,
et al.
(Perry Nuclear Generating Station,
Units 1 and 2)

Docket No. 50-346A

Docket Nos. 50-440A
50-441A

Place - Washington, D. C.

Date - Friday, 3 January 1975

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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

ORAL ARGUMENT

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In the matter of: :

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TOLEDO EDISON COMPANY and :

CLEVELAND ELECTRIC ILLUMINATING :

COMPANY :

:

(Davis-Besse Nuclear Power Station) : Docket No. 50-346A

:

and :

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CLEVELAND ELECTRIC ILLUMINATING :

COMPANY, et al. :

:

(Perry Nuclear Generating Station, : Docket Nos. 50-440A

Units 1 and 2) : 50-441A

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

Friday, 3 January 1975

Oral argument in the above-entitled matter was convened,
pursuant to notice, at 9:30 a.m.

BEFORE:

- JOHN FARMAKIDES, Chairman,
Atomic Safety and Licensing Board Panel
- JOHN BREBBIA, Esq., Member
- DOUGLAS RIGLER, Esq., Member

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1 APPEARANCES:

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

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

7 BENJAMIN H. VOGLER, Esq., ROY LESSY, Esq. and RONALD
8 HAUSER, Esq., Office of the General Counsel, United
9 States Atomic Energy Commission, Washington, D. C.
20545; on behalf of the Regulatory Staff, Atomic
Energy Commission.

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

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C O N T E N T S

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ORAL ARGUMENT:

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MELVIN G. BERGER

on behalf of the Department of Justice

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ROY P. LESSY, JR.

on behalf of the AEC Regulatory Staff

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DAVID HJELMFELT

on behalf of the City of Cleveland

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W. BRADFORD REYNOLDS

on behalf of the Applicant

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P R O C E E D I N G S

CHAIRMAN FARMAKIDES: Let's proceed now.

On December 5, 1974, the Atomic Energy Commission Staff filed a motion for an order compelling production and delivery of documents requested of Applicants. The Staff asserted that Applicants had failed to produce and deliver copies of documents as required by Commission rules and this Board's "order and on objections to interrogatories and document request."

On December 9, 1974, the Department of Justice filed a similar motion and on December 12, the Department of Justice requested that Applicants' subpoenas be quashed and that the taking of depositions by Applicants be delayed until after the production of the documents requested by the Department of Justice from Applicants.

The city of Cleveland filed a similar motion to quash on December 17.

Also, on December 12, the city of Cleveland moved for an order directing that all of Applicants' documents be produced in a central depository in Washington, D. C., for inspection and copying. On December 16th the Applicant filed a response replying in effect that the documents produced by each of the five Applicants numbered in the hundreds of thousands and would require substantial time for the documents to be reproduced, transported, un-

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1 packed, reorganized and presented here in Washington,
2 D. C.

3 The Applicants further alleged that such re-
4 quirement, if made, would in the long run cause far more
5 serious delay than if the documents were made available in
6 the home offices of the five Applicants.

7 On December 17th the Board Chairman met in-
8 formally with the parties to discuss the matter. During
9 that session certain proposals for resolving the problem
10 were discussed informally; however, no final agreement
11 was made because of the lack of certain facts, and we asked
12 the Applicant then to make these facts available and he
13 did in a letter dated December 19, 1974.

14 The Applicant responded to the several questions
15 posed at the informal conference stated inter alia,
16 that they estimated the documents produced to number
17 approximately 2,400,000 contained in approximately 550
18 file drawers.

19 They also indicated that a minimum cost for
20 reproducing per page was 6 cents per page.

21 They also stated that a significant percentage
22 of the material produced was relevant to day-to-day
23 operations and would disrupt the companies if they were
24 required to make them available in a central depository
25 in Washington, D. C.

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1 On December 20 -- that was a Friday -- on Decem-
2 ber 20, we had a telephone conference call in which we dis-
3 cussed the matter further and the Staff indicated its
4 desire to have oral argument.

5 They filed the motion on that day and we indicated
6 that oral argument would be held. We asked the parties
7 during the telephone conference as to their convenience
8 and we settled on this date.

9 The purpose of our business, therefore, today
10 is to have the oral argument requested by the Staff,
11 joined by the Department of Justice, on the Staff's motion
12 to compel production and delivery of documents.

13 By way of preliminary and background, that
14 introduces the purpose of today's conference.

15 Let me ask the parties to identify themselves
16 for the record.

17 Would you start, Mr. Hjelmfelt?

18 MR. HJELMFELT: David Hjelmfelt, city of Cleve-
19 land, and Mr. Reuben Goldberg and Mr. Robert Hart.

20 CHAIRMAN FARMAKIDES: For the Applicants.

21 MR. REYNOLDS: Bradford Reynolds, and Gerald
22 Charnoff.

23 CHAIRMAN FARMAKIDES: For the Staff?

24 MR. VOGLER: Ben Vogler, accompanied by Mr.
25 Roy Less, and Mr. Donald Hauser of the AEC Regulatory

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1 Staff.

2 CHAIRMAN FARMAKIDES: For the Department of
3 Justice?

4 MR. BERGER: Melvin Berger, accompanied by Steven
5 Charno.

6 CHAIRMAN FARMAKIDES: The State of Ohio is
7 not here; and AMP-O is not here.

8 We're prepared to begin, I believe.

9 Mr. Lessy, won't you start, sir?

10 MR. LESSY: Mr. Berger will present the Depart-
11 ment's position first.

12 CHAIRMAN FARMAKIDES: All right, Mr. Berger.

13 Before you start, how much time do you anticipate
14 you will need?

15 MR. BERGER: I would estimate 20 minutes or so.

16 CHAIRMAN FARMAKIDES: Did you have additional
17 time beyond that, Mr. Lessy?

18 MR. LESSY: Yes, approximately the same, sir.

19 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt?

20 MR. HJELMFELT: Perhaps five minutes, maybe a
21 little more.

22 CHAIRMAN FARMAKIDES: Mr. Reynolds?

23 MR. REYNOLDS: Well, it depends a lot on what's
24 said as to the time I would take. By the time the schedule
25 gets to me, I would say probably 20 minutes would be

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1 adequate.

2 CHAIRMAN FARMAKIDES: Thank you.

3 Let me also note that we have received five
4 briefs, that filed by the Applicant, which really was in
5 essence a -- excuse me, it was in the form of a motion for
6 protective order. And also one filed by the Staff.

7 And one filed by Justice.

8 We have also indicated in our Order and Notice
9 of Oral Argument issued December 23, 1974, that supple-
10 mental briefs or memorandums may be filed on or before
11 January 7, 1975.

12 We will adhere to that schedule.

13 Mr. Berger?

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ORAL ARGUMENT OF MELVIN G. BERGER, ON BEHALF OF THE
DEPARTMENT OF JUSTICE.

MR. BERGER: Should we be standing?

CHAIRMAN FARMAKIDES: Whatever is convenient to you.
Some find it convenient to stand, but we have no preference.

MR. BERGER: I would say that the decisions reached
will probably set the tone for the rest of the proceedings
in this case.

It will determine whether or not we are going to
continue going on in this chaotic manner that we have had
in the last month or so or whether all parties will be
complying with requests and orders of other parties and
will stop bickering and get this proceeding under way.

I would like to note for the record a misrep-
sentation that appears in Applicant's brief, particularly page
3, the second part of footnote 2 at the bottom of that
page, and that indicates the department hand-carried its
responses to the interrogatories and requests for document
production on December 3 to Applicant's office.

This is not correct.

Those responses were mailed in a box on December
29 -- excuse me, November 29, 1974, which was the Friday
before production was due.

CHAIRMAN FARMAKIDES: What are you referring to,
sir?

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1 MR. BREBBIA: He is referring to the Applicant's
2 motion for protective order.

3 MR. BERGER: Footnote 2 "continued."

4 CHAIRMAN FARMAKIDES: All right, sir.

5 MR. BREBBIA: We got it.

6 MR. BERGER: These documents were mailed personally
7 by me, not by a secretary, and I deposited them in the mailbox
8 on that Friday, as is stated in our certificate of service.
9 They were not hand-carried to Applicants and they were not
10 delivered on December 3, as is stated in there.

11 There are presently three items at issue in this
12 proceeding. There were a number of others when the
13 Department filed its motion to compel, but in various
14 respects they have been mooted.

15 The primary issue is the service of documents,
16 whether or not Applicants will be required to serve documents
17 on the Department and the Staff.

18 Two other areas are involved here. One is a
19 list showing the particular paragraphs to which each document
20 is responsive to the joint request.

21 The other is a list requesting certain information
22 about documents which are no longer in the possession,
23 custody or control of the Applicants.

24 Applicants have apparently not responded at all
25 to the two items involving the listings and I guess we must

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1 assume that they do intend to comply with both of these items
2 since they have not responded in any manner to them.

3 In my oral presentation I will not go over what
4 is said in our brief directly. I will merely respond to some
5 of the things that Applicant has said.

6 MR. BREBBIA: Excuse me a moment. Do I understand
7 you to say that the two lists that you mentioned, two items,
8 two and three, are no longer in issue here, it seems?

9 MR. BERGER: They are in issue because they have
10 not been produced, but Applicants have not responded as to
11 why they didn't produce them or why they -- they have not
12 objected to our motion to compel on these two items.
13 They have not answered our arguments in any respect.

14 I would like to start out by inviting the Board's
15 attention to pages 5 and 6 of the Department's brief wherein
16 we state a requested -- a requested production agenda.
17 This is somewhat different than the one originally requested
18 in our motion to compel and its an attempt to meet many of
19 Applicant's objections to service of documents as we requested
20 in our motion to compel.

21 I would like to go over the items quickly to out-
22 line the proposal.

23 Applicants would be required to deliver to the
24 office of their Washington, D. C., attorney in installments,
25 the documents which are responsive to the joint request.

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1 This would include both the material that is directly
2 responsive to the joint requests, some 1,200,000 documents, as
3 well as the other material which Applicants have cross-
4 referenced in the response to the City of Cleveland's
5 request. We do not know how much material is involved.

6 Such production would be at the rate of 15 file
7 drawers per week. This would enable Applicants to keep the
8 overwhelming majority of material at their offices at all
9 times and only a minimal amount would ever be removed from
10 their premises.

11 Applicants would pay the cost of transportation
12 to Washington and back.

13 The Department will inspect and copy documents
14 at Applicant's attorney's office; no documents would ever
15 leave the office and, therefore, Applicants would maintain
16 control and possession of those documents at all times.

17 Applicants would be required to provide the first
18 12,000 document pages to the Department free. The rest would
19 -- the rest of the copying would be by the Department, which
20 would supply ink, paper, and labor, and would be allowed
21 to use the copying machines available in Applicant's
22 attorney's office. We should note that this would split the
23 cost of reproduction to a 99 percent to 1 percent split.
24 Applicants have produced over 1,200,000 documents in
25 response to the Department's request. Our request that they

5mil 1 give us 12,000 document pages is only 1 percent of that
2 total.

3 Now, if Applicants have indeed made a concession
4 attempt at getting only relevant material together in
5 response to our request, then the Department will be bearing
6 99 percent of the cost of copying these documents.

7 CHAIRMAN FARMAKIDES: You are saying, then, it is
8 conceivable that you are going to copy all the documents?
9 That is where you get your 99 percent?

10 MR. BERGER: Yes, in fact there are more documents
11 because we have not taken into account the cross-references
12 of the City of Cleveland and we don't know, as we said, how
13 many are involved.

14 Provision 6 would grant the Department a 20-day
15 period to reinspect documents at Applicant's office --
16 Applicant's offices, that is, their home offices, not their
17 attorney's offices. This would be in order to enable the
18 Department to reexamine certain documents which might not
19 be examined in the first instance because we are not sure of
20 the signature of those documents.

21 It would, to a large extent, overcome the
22 prejudice that we would suffer by having this seriatim
23 inspection.

24 The seventh item is that Applicants would supply
25 the two lists which we are requesting and which two they have

6mil 1 not objected to.

2 There are a number of reasons why the Department
3 believes that these stated conditions should be imposed by the
4 Board. We feel that they are reasonable and that Applicants
5 will not be required to bear a very heavy burden in order
6 to comply with those provisions.

7 I would like to start by -- start this section
8 of the argument by indicating that Applicants have argued
9 at page 5 and particularly paragraph 6 of their brief that
10 the Commission's Rules of Practice do not require relinquish-
11 ment of control of the documents or their delivery. Well,
12 our new offer, I believe, takes care of the relinquishment
13 of control argument because Applicants would not have to
14 relinquish control. They would have control of those docu-
15 ments at all times.

16 The Applicants have also argued that the Rules of
17 the Commission do not require delivery of documents to the
18 Department.

19 However, I think that they have not addressed
20 themselves to the joint request which asks for delivery
21 and which was never objected to. The joint request said that
22 documents should be served on the Department. Well, our
23 offer today does away with that condition. We are no longer
24 requesting that we be served with these documents.

25 MR. BREBBIA: Excuse me a moment. What do you

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1 make of Applicant's argument as stated in its brief citing
2 Moore's Federal Practice and several cases to the effect
3 that Applicant is not required to pay for the production
4 of any documents?

5 MR. BERGER: Well, I think that there is authority
6 to the contrary and Applicants have basically cited some
7 old cases in support of this.

8 MR. BREBBIA: They did cite old cases, yes, they
9 cited Moore's Federal Practice, which I am sure you are aware,
10 as a secondary authority in the Federal Rules area, is
11 probably the most prominent text.

12 MR. BERGER: We are only asking that they pay 1
13 percent of the copying. We would bear the burden of at
14 least 99 percent of the copying, possibly even more than that.
15 We are only requesting they provide 12,000 copies.

16 CHAIRMAN FARMAKIDES: That is the first 12,000.

17 MR. BERGER: Right.

18 CHAIRMAN FARMAKIDES: There is a big difference
19 there.

20 Do you have any authority to the contrary in
21 response to Mr. Brebbia's question? You indicate there is
22 authority to the contrary. Do you have any such authority
23 at hand?

24 MR. BERGER: For payment for copies?

25 CHAIRMAN FARMAKIDES: Yes.

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1 MR. LESSY: May I ask a question, sir? What page
2 of Applicant's brief is that?

3 MR. BREBBIA: It is only several pages. I don't
4 happen to have it here looking at it now. I read it last
5 night. I read one of the cases. I didn't have the Federal
6 Rules and Decisions, so I didn't read the first one. But I
7 did read one of the others.

8 MR. BERGER: In the cases cited in Moore, I think
9 we find in each case the Court is not ordering the Applicants
10 -- not ordering the party which is to produce documents to
11 pay for copies. They are not in default of a legitimate
12 order that is outstanding. The issue is raised at the outset
13 at a hearing such as the one we had on September 15 or 16 --

14 MR. BREBBIA: I understand that part of your
15 argument. I was curious as to whether you had any case
16 authority leaving aside the default question, to the contrary
17 as to there being required to pay for any documents.

18 I believe there begins appearing at page 9 of
19 their motion for protective order, I guess 10, concerning
20 delivery.

21 MR. LESSY: Is that page 11, sir?

22 MR. BREBBIA: 10 and 11, yes, 11.

23 MR. LESSY: There is a section citation, but not a
24 page. Does the Applicant have a page number, offhand?

25 MR. REYNOLDS: Well, I --

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MR. BREBBIA: You can go on with your argument.

I just asked the question. There is no point in getting bogged down now.

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1 CHAIRMAN FARMAKIDES: One other point you made,

2 Mr. Berger, which you made. You indicated that the Applicant

3 had not officially objected to producing and delivering materials

4 here. But in their brief the Applicants said, in effect, that

5 they had no idea that they would screen out this number of

6 documents, roughly two and a half million documents.

7 What is your response to that?

8 MR. BERGER: I think there are numerous responses

9 to that.

10 First, I would like to refer to a section in the
11 second prehearing conference, particularly pages 621 to about
12 633: In that section we find a ten or twelve page discussion
13 of the number of documents that Applicants have to go through,
14 and this was in response to a City of Cleveland's
15 interrogatories and, if you recall, Mr. Hauser was sitting in
16 back, at the back table, and he was asked how many documents
17 do you have, and he said "roomsful."

18 At that point I think Applicants well knew that
19 they would be producing a tremendous number of documents, yet
20 they never raised the issue. We come to December 2, which
21 is the date of production, and even on that day Applicants
22 never told us that they had a large number of documents.

23 The Department and the Staff were in constant
24 communication with Applicants over the period of October
25 through November in settlement discussions. Yet they never

1 mentioned that they had a large number of documents and that
2 they had a problem in this respect.

3 I might add again that the Department of Justice
4 had a similar problem with regard to some material, which
5 appeared to be producible under the Applicant's discovery
6 request, although it was of questionable relevancy. This
7 material related to the Securities and Exchange proceeding
8 regarding American Electric Power Company.

9 When the Department found this large quantity
10 of material, we called the Applicants and asked if it would
11 be all right if we did not screen it ourselves but made it
12 available to them at our offices, and they said yes.

13 There was a letter of October 25th which Applicants
14 cited in their December 16 motion to the effect that that was
15 the agreement that was reached. That was more than five weeks
16 prior to the December 2 date.

17 They were fully aware at that time that problems
18 like this might arise. Yet they never mentioned it.

19 The first time we knew that they had a large
20 quantity of material, such as the two million documents, was
21 at the informal conference we had on December 17.

22 MR. BREBBIA: Let me interrupt you a moment,
23 Mr. Berger. Let's -- as I understand it, Applicants have
24 another contention and that contention is, so what? Let's
25 assume for the moment that we did know, and we didn't notify

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1 you, that we are permitted by the rules to notify you in our
2 motion for protective order for the first time, even if we
3 knew six months ago.

4 What do you say to that proposition?

5 MR. BERGER: Well, I think Applicants have a -- are
6 required to make a timely motion for protective order. I
7 realize the section that Applicants have cited in Moore's
8 Federal Practice to the effect that it doesn't have to be
9 timely. I would like to beg the Board's attention to the fact
10 that no cases are cited in Moore to support that proposition.

11 There is considerable authority to the contrary.
12 I would like, if I may, to read a short selection from
13 Wright and Miller's Federal Practice, particularly Section 203.15,
14 pages 262 and 263.

15 I would like to quote that: "Prior to 1970,
16 the Protective Order Rule required that an application for
17 an order be made seasonably. This requirement was not included
18 when the Rule was made, Rule 26C, but undoubtedly the courts
19 will consider the timeliness of a motion under the amended
20 Rule and will, as in the past, look at all the circumstances
21 in determining whether the motion is timely. Ordinarily,
22 the order must be obtained before the date set for the discovery
23 and failure to move at that time will be held to preclude
24 objection later. But it may be that this rule would not be
25 applied, if there was no opportunity to move for a protective

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1 order. A party may not remain completely silent, even when
2 he regards a notice to take his deposition, of receipt of
3 interrogatories or requests to inspect as improper."

4 MR. BREBBIA: What do you consider to be the last
5 date on which a timely motion for protective order could have
6 been filed in the circumstances of this case?

7 MR. BERGER: I would consider that the date would
8 have been shortly after, very shortly after, Applicants
9 became aware that a large quantity of material was going to
10 be produced in response to the request.

11 MR. BREBBIA: What is the latest date, Mr. Berger,
12 is what I am trying to find out.

13 MR. BERGER: The latest date?

14 MR. BREBBIA: Right.

15 MR. BERGER: Would probably be somewhere around --

16 MR. BREBBIA: About November 30, November 29?

17 MR. BERGER: No, no, much earlier than that.
18 At the end of October. At that time Applicants had almost
19 three weeks to start their search. The Board ordered on the
20 11th to --

21 MR. BREBBIA: I don't want to belabor this.
22 As it turns out, the motion was made after the delivery date;
23 is that correct?

24 MR. BERGER: It was made --

25 MR. BREBBIA: After the delivery date.

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MR. BERGER: Yesterday.

MR. BREBBIA: Yes. So, if you want to go as far as you can go within the time frame, would November 29th be the latest, in your opinion, be the latest date as proper to to file the motion?

MR. BERGER: I would say it's earlier. November 29th certainly would have been questionable. But it certainly is better than January 2, 1975, which was yesterday.

One month to the day after the requested production was due.

I might also add that in the December 16th conference, Applicants continually objected to the burden that they would have because of the breadth of the discovery requests; yet they did not seek a protective order at that time either.

They should have been on notice at that time that they had that problem, and they were on notice that that might cause a problem.

CHAIRMAN FARMAKIDES: But, as Mr. Brebbia says, we have now a protective order before us.

MR. BERGER: Yes.

CHAIRMAN FARMAKIDES: Let me ask you one other question: Do you think this is appealable?

Assuming we denied the motion for protective order, is that appealable?

MR. BERGER: I think it's an important enough issue in this proceeding, because it will readjust the

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1 time frame to such a tremendous extent that it will force upon
2 us a tremendous delay in this proceeding.

3 MR. BREBBIA: Are you talking about in terms of
4 your offer; or are you talking in terms of your having to
5 go to the various cities to look at the documents, when you
6 talk about this?

7 There will be some delay by the fact we are sitting
8 here, and it hasn't been done yet, but you talk about
9 tremendous delay. Are you referring to the time schedules
10 that you set out, or the timing, if you have to travel to
11 the cities to review the documents?

12 Are you talking about the time delay, if we accept
13 your offer, or a compromise and result in a suspension of
14 15 file drawings?

15 MR. BECKER: Well, there is no doubt that our
16 own time schedule envisions a delay of some 100 days. We
17 have also estimated that it would take almost twice that
18 long, if we were required to travel to the cities.

19 MR. BREBBIA: The latter is the delay you speak of,
20 that is, when you refer to tremendous delay, rather than the
21 compromise, because if we accept the compromise and it's
22 accepted by the Applicants, that presumably would put an end
23 to any appeal in the situation and would set forth a time
24 frame?

1 Obviously, the 130 days that we are asking is a
2 lot more than we originally contemplated three or four
3 months ago, but at that time nobody appeared to know that
4 there would be so much material.

5 Some delay is obviously going to result from this,
6 and we have already wasted on the order of five weeks from
7 the original date when production was required.

8 MR. BREBBIA: I am curious, though, I might add,
9 as to who is bearing the burden of delay in this proceeding?
10 It has been my assumption that it was in the Applicants'
11 best interest to have a speedy conclusion of this matter.
12 Seeing as how they are building this plant, and it won't be
13 licensed until this proceeding presumably is ended at some
14 point, it would seem to me, in terms of the government, that
15 you wouldn't care if this production took years.

16 I am not being callous when I say that.
17 I mean in terms of -- as a rule, if you are in an antitrust
18 case with the Department of Justice, you have an interest,
19 a public interest, in the conclusion of a proceeding, wherein
20 you want an order to issue preventing certain practices that
21 are involved in the proceeding.

22 This is a different kind of a situation, though,
23 here, and the operation of the plant, as I understand, cannot
24 go forward until the conclusion of this proceeding.

25 So, it appears to me, at least, that any injury

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1 done in terms of delay would be caused to the Applicants.

2 Maybe I am mistaken.

3 Is that --

4 MR. BERGER: I think Mr. Lessy will probably
5 address himself to answering that more fully than I will,
6 although, I will say, we have an allocation of resources
7 problem. Schedules are made, this is not the only matter that
8 me or Mr. Charno are assigned to. Sometimes we have to
9 schedule things a fairly long time in advance.

10 This particular period of time on my calendar
11 was quite clear. I thought I would be reviewing documents
12 and being involved in taking depositions and so on.

13 Now I find that I have not done that. I have
14 other matters to attend to in the next few months and that
15 will affect my ability to proceed.

16 CHAIRMAN FARMAKIDES: I think we are all alert
17 to that last point, Mr. Berger. I think this is true of
18 all of us.

19 But let's go back to the question I asked.
20 Assume the motion for protective order is denied. Is that
21 appealable? If so, is it appealable beyond the Commission
22 into the federal courts? If so, how much time is this going
23 to consume?

24 MR. BERGER: I really have not addressed myself
25 to the question of whether it's appealable or not.

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CHAIRMAN FARMAKIDES: But you see what I am

getting to?

MR. BERGER: Yes.

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1 CHAIRMAN FARMAKIDES: Frankly, that is why it was
2 so important if the parties could sit down and resolve this
3 informally.

4 Apparently we couldn't do it. We tried. We
5 couldn't do it.

6 So now we are at a point where there is an issue
7 and you have asked the Board to resolve that issue, and we
8 certainly will resolve it.

9 It doesn't mean you can't get together immediately
10 after this argument and seek to resolve it among yourselves.
11 Sometimes whatever resolution the Board might come up with,
12 as I have said before, serves no one's immediate needs.

13 MR. BERGER: We feel that we have made considerable
14 concessions from our original position, and we find that
15 Applicants have maintained their original position.

16 CHAIRMAN FARMAKIDES: Your concession is rather
17 that it being produced in the Department of Justice, that
18 it be produced in the Applicant's offices here, which is in
19 essence the same point the City of Cleveland raised.

20 MR. BERGER: Cost of reproduction is another thing.

21 Half the material was estimated to be \$95,000 as
22 the Applicants have stated. All we ask is that they produce
23 one percent of it. That is a saving of almost \$200,000
24 in reproduction costs.

25 CHAIRMAN FARMAKIDES: But isn't it typical in any

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1 of these cases that you very seldom copy more than one
2 percent of discovered documents and aren't you then in
3 effect saying you want the Applicant to assume the entire
4 burden of paying for that cost?

5 MR. BERGER: Applicants have taken the position
6 that they have produced only relevant documents.

7 We believe they have produced tens of thousands
8 of irrelevant documents.

9 CHAIRMAN FARMAKIDES: Can you anticipate using
10 two and a half million documents in a case, sir?

11 If you are --

12 MR. BREBBIA: I am leaving.

13 CHAIRMAN FARMAKIDES: We have all got problems.
14 Excuse me, Mr. Berger.

15 MR. BERGER: Well, I don't anticipate that we
16 would be using that many documents, but if we look at --
17 there have been four other cases, antitrust reviews, that
18 have come to the discovery point and we look at the amount
19 of documents produced in those cases, we find that in each
20 of three of the four, in Alabama, there were about 10,000
21 produced; in Consumers, 25,000 produced; and in Duke, there
22 were about 100,000 produced. In each case, the
23 Applicants paid for the copying.

24 MR. BREBBIA: How many -- were there as many
25 companies involved in those proceedings, in any one of those

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1 proceedings as there are in this one, i.e., documents being
2 discovered from the number of entities that you have here
3 that would cause the difference in the volume of the documents?

4 MR. BERGER: There is a difference in the number
5 of applicants, but it would not support the vast disparity
6 in the number of documents.

7 We find -- well, taking the worst case, Consumers
8 Duke, excuse me, which produced 100,000 documents, if we
9 multiply that by five, assuming that we have five
10 applicants here instead of one in Duke, then we should only
11 have 500,000 documents, and some of the applicants in this
12 case are nowhere near the size of Duke Power Company.

13 Pennsylvania Power is a much smaller company.

14 MR. BREBBIA: Let me ask you another question,
15 Mr. Berger; do you quarrel with the statement that
16 Applicants would have been within their rights to require
17 you to inspect these documents at their headquarters, had
18 they moved timely in this direction, had they opposed your
19 initial request for the production of the documents here
20 in Washington?

21 MR. BERGER: I don't think they would have had a
22 right to do it.

23 I think the Board would have had to consider all
24 factors and determine what would be most equitable.

25 MR. BREBBIA: You do understand that it is very

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1 common in discovery in federal courts to order as certainly
2 the Justice Department understands this, to order access at
3 the normal -- the normal burdensome argument made in cases
4 I have been involved in results in the Judge saying, all
5 right, I will tell you, I am going to give you -- do
6 you want to give them access to your files, I will order
7 your files open to them and I will require them to go and
8 look at them.

9 That is where it comes out, from my experience.

10 MR. BERGER: I believe that is a standard practice
11 but I note there is authority to the contrary at certain
12 times.

13 Document depositories are desirable, at times,
14 and courts have ordered that in order to simplify the
15 issues. This is particularly true in complex litigation.

16 At paragraph 10 of of Applicant's brief, they
17 have cited a number of cases in support of their argument
18 that copying is not -- production is not -- excuse me --
19 that document production is not required and neither is
20 copying.

21 I would just like to note for the record that
22 there have been decided six cases and the dates of these
23 cases are very significant. We have 1938, 1940, 1941, 1947,
24 1949, 1950.

25 The most recent case, of course, is 25 years old.

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1 MR. BREBBIA: Let's have a later case that is
2 contrary then.

3 MR. BERGER: That they do not have to --

4 MR. BREBBIA: No, no, that supports your position.

5 MR. BERGER: Well, we have authority at page 14
6 of our brief, the awarding of expenses incurred in compliance
7 is a very traditional remedy and to that we cite two cases
8 at footnote 14 on page 14 of our brief. One is a 1964
9 opinion, one is a 1954 opinion.

10 But the point I would like to make with respect
11 to these six cases is the fact that we are looking at
12 copying and reproduction in an era of when that was truly a
13 burdensome task. The traditional method of copying at that
14 time would have been to have been a secretary transcribe a
15 document word for word, or to send it out to have a photo-
16 stat made, both of which are much more difficult than
17 the type of copying that we have today, where we go over to
18 a machine and press a button and in a minute we have a dry
19 copy.

20 MR. BREBBIA: But there was microfilm in those
21 days.

22 CHAIRMAN FARMAKIDES: The major portion of that
23 cost is the handling of the documents, though, as the
24 Applicants state.

25 MR. BERGER: Labor and reproduction.

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1 CHAIRMAN FARMAKIDES: Packaging and transporting
2 and transferring and handling them. The major cost of that
3 is the labor.

4 It isn't a question of going over and pushing a
5 button. Pushing that button and getting a document may well
6 be 4 cents or so a page, but the labor involved in doing
7 that chore is the major cost of the thing.

8 MR. BREBBIA: 500 file drawers is a lot of file
9 drawers, to my experience.

10 I am not in the furniture business, but I can
11 do the multiplication.

12 MR. BERGER: Admittedly that is a lot of file
13 drawers.

14 There is authority, however, and I think we cite
15 some in our brief, that just because there is cost or expense
16 involved in complying with discovery does not mean that you
17 should not be required to do it and it is particularly true
18 where we have a situation as we have here, where the
19 Applicants have not complied with an outstanding order and
20 of then coming in and seeking relief.

21 It would be somewhat different if they had come
22 in initially and raised these questions.

23 I also find that we can distinguish most of
24 the cases cited on various grounds and we will cover that in
25 our reply brief. I don't think it is worth the time here

mm7 1 to go into details of these various cases.

2 As a second major point we have argued that
3 the Applicants are now estopped from objecting to the
4 requested discovery because they have been outside the time
5 limit.

6 I believe we covered that in prior discussions,
7 as to whether their motion can be considered timely at this
8 time.

9 I might add one citation which ironically is
10 actually cited in Applicant's own brief, but for another
11 point, to the effect that Applicants have argued that
12 Moore states that you don't have to have a timely motion for
13 a protective order since the 1970 amendments to the federal
14 rules.

15 Well, at a case cited at page 17 of Applicant's
16 brief, although admittedly for a different proposition,
17 Krantz versus the United States in a 1972 decision, the
18 Court stated that, page 557, that one cannot wait an
19 unreasonable amount of time before objecting to discovery
20 methods.

21 That seems to say that the courts have not inter-
22 preted Moore quite as broadly as the Applicants have
23 apparently interpreted it.

24 Again, I refer to the Miller and Wright selection
25 that I read sometime ago this morning.

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1 Another major point of contention of the Department
2 is that even if Applicants can properly raise the objection to
3 the joint request at this time by the motion for protective
4 order that the request itself is not really unduly burdensome.

5 I think again we have gone into some of that.

6 The Department is requesting only 12,000 copies,
7 that it would relieve Applicants of a major burden of copying
8 all of their documents as they might have been required to
9 do, that at least three other Applicants in this forum have
10 borne the cost of reproduction, Alabama, 10,000; Duke,
11 100,000 --

12 MR. BREBBIA: Excuse me, Mr. Berger. If 100,000
13 applicants had borne the burden, that wouldn't persuade
14 me that these Applicants would be required to do it.

15 I don't think -- that isn't law, certainly. That
16 is what we have sought to have here and you do in
17 all hearings, you seek cooperative efforts whereby the
18 applicants in the cases you are citing agreed to cooperate
19 and produced the documents and didn't feel it was particularly
20 onerous to do so, and they did so but that is not law, at
21 least to my mind.

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1 MR. BERGER: Well, I don't think it is, either,
2 but --

3 MR. BREBBIA: And it is not even useful precedent
4 to my way of thinking.

5 MR. BERGER: I think it goes to the good faith of
6 Applicant's people here. If you have three people simimilarly
7 situated agreeing to do it and you have a fourth Applicant
8 not doing it, I don't think you can say the fourth is right
9 and the others are wrong.

10 MR. BREBBIA: If you had two million relevant
11 documents, you wouldn't be persuaded in the argument that
12 those who had previously produced 100 thousand, that that
13 should be precedent for requiring two million?

14 I don't know that any of the two million are rele-
15 vant for that matter, but they cite in the burden some neces-
16 sary argument, as I understand it, the fact that they do have
17 over two million documents which, if true, certainly sets this
18 apart from, I guess, any case so far considered by the Commis-
19 sion.

20 MR. BERGER: Of course, Applicants had the oppor-
21 tunity to cut the scope of discovery and they did not. They
22 did not object to some of these requests, and they have had
23 the opportunity to.

24 Now they are coming in at this late date trying
25 to do that.

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i MR. BREBBIA: If they had objected to the scope
2 and you would have been put to the question of relevance and
3 you persuaded us they were relevant, then we would order
4 production of the documents and we would order production
5 of two million documents.

6 You certainly wouldn't be interested in having
7 the Applicants reduce the number of relevant documents --
8 assuming the documents are relevant -- I don't think. That
9 would be a position that I had not seen the Department in, in
10 the past anyway.

11 MR. BERGER: No, no, I agree with you. However,
12 if Applicants had the problem, why didn't they call us up and
13 mention it?

14 This is a very perplexing thing. We were negotiat-
15 ing with them on possible settlement conditions over this
16 entire period of time, and they never mentioned it.

17 It is something that is very difficult for me to
18 explain. I don't know why they didn't mention it.

19 I would like to go to an item that is mentioned
20 in Applicant's brief at page 11 -- no, I believe I have the
21 wrong page. It is footnote 7, page 12.

22 They point out there a number of things, but one I
23 would like to discuss in particular is this case they have
24 cited where the court indicated that -- this was a case in
25 which documents were in France and the question was whether

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1 they would require people who were going to screen these docu-
2 ments to go to France or whether they would have the documents
3 moved to the United States.

4 They eventually decided that the documents should
5 be moved to the United States, and the court based its opin-
6 ion heavily on the fact that there was no affidavit in the
7 record indicating the cost of shipping the documents to the
8 United States.

9 Well, we are still in the dark as to what the
10 cost would be in shipping these documents to Washington.

11 MR. BREBBIA: I think they also add in the ques-
12 tion of the cost of reproduction. If they are to make de-
13 livery of the documents for your inspection, all of the docu-
14 ments, then they make the claim that 8 cents times -- well,
15 you come out to that \$95 thousand reproduction figure as
16 opposed to your figure of 8 times 12 thousand documents if
17 there were on-site inspection. Isn't that -- don't they make
18 the argument that that is part of the cost?

19 MR. BERGER: With respect to copies for us, we will
20 pay for everything over twelve thousand.

21 MR. BREBBIA: Wait a moment. You don't understand.

22 I think in the argument about the expense they in-
23 clude, if they have to deliver the documents for inspection,
24 then they have to reproduce them. And added to the shipping
25 and handling is the cost of reproducing the two million, I

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1 presume.

2 MR. BERGER: The question is why do they have to
3 reproduce them? It's hard to believe that two and a half
4 million documents are so vital that they would need copies
5 at all times.

6 Our request is framed in a manner where they would
7 be producing only a small quantity of documents each week.

8 MR. BREBBIA: You are talking about your compromise
9 offer?

10 MR. BERGER: Yes. They would be producing a small
11 number of documents each week. We are not asking them to
12 take their entire files and move it out of the office. They
13 would move one or two file cabinets per week out of the office.

14 MR. BREBBIA: And you offer -- you only ask for
15 the cost of the initial twelve thousand from them, and none
16 of the others would have to be copied because you would con-
17 template them being delivered here in the depository under
18 their control and inspect them and return them to them any-
19 thing but what you want to copy and what you had copied you
20 would then leave there on the premises; that is your offer?

21 MR. BERGER: Yes, that is what we are anticipating.
22 We ask that the documents be here one week, no longer. We
23 will look at them within that one week so they would be out
24 of their office one week plus shipping time.

25 MR. BREBBIA: Before we go further, am I to

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1 understand that in your offer that you have got a firm cut-
2 off date of one week, and regardless of whether it turns
3 out that all fifteen file drawers in a given week are rele-
4 vant, that you people will complete your inspection of them
5 within a week, no matter whether they are all relevant?

6 MR. BERGER: We will commit ourselves to that, and
7 I might add this is one advantage of having it in Washington
8 where we can get help on a part-time basis to come over and
9 look at these documents.

10 If we are out in Pittsburgh or Akron, this is
11 impossible. Here we can get people for a half-day or a day
12 at a time, and we will commit ourselves to the firm date.

13 MR. BREBBIA: Do you not have any field offices
14 or a field office in this area where help would be available
15 to you if you were required to do it at their offices?

16 MR. BERGER: There is a field office in Cleveland.
17 The amount of help we could get there would depend a lot on
18 the conditions that they have in their office, what commit-
19 ments they have.

20 Certainly, the available manpower in Washington
21 is far greater than it would be in Cleveland.

22 MR. BREBBIA: According to the Applicants, Mr.
23 Goldberg or somebody in his office has seen fit to make an
24 on-site inspection of some of these documents.

25 I don't know what relevance that has to your

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1 argument.

2 MR. BERGER: Mr. Goldberg never made the same re-
3 quest that we made. He intended to go out and look at them
4 and, of course, after he saw the volume he, too, has come in
5 and asked they be moved to Washington.

6 MR. BREBBIA: I have read his latest filing; yes.

7 MR. RIGLER: Let me ask the Applicant a question
8 at this point, please.

9 If we required the Department to go to the various
10 sites around the country and they inspected these documents
11 and designated some for copying, what would be the mechanics
12 of getting the documents back to the Department?

13 Would each Applicant reproduce documents designated
14 by the Department? Would the Department be responsible for
15 copying its own documents and shipped back here?

16 What would the procedures be?

17 MR. REYNOLDS: Well, the procedure would be to
18 copy those documents at the company that the Department re-
19 quested be copied.

20 I assume that -- well, I don't know whether the
21 volume might require some transportation which I assume the
22 Department would absorb and bring them back to Washington.

23 But the copying facilities would be available at
24 the company for copying all documents that the Department
25 wanted produced.

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1 MR. BREBBIA: Who would pay for them?

2 MR. REYNOLDS: The Department would pay that.

3 MR. BREBBIA: You provided the machine; they pro-
4 vided the labor and --

5 MR. REYNOLDS: If they provided the labor, ink,
6 and paper, we would provide the machine and costs would be
7 adjusted accordingly.

8 But that still would require a cost which they
9 would assume. It is the same arrangement that is now being
10 handled with the City of Cleveland in inspecting the documents
11 out on location; and, also, it is the same arrangement that
12 the City of Cleveland has with the Applicants in terms of the
13 inspection the Applicants are making at the site for the --
14 at the City of Cleveland site.

15 MR. BERGER: I would like clarification for the
16 record of what you determined to be the cost of the machine,
17 the use of the machine, aside from paper, ink, and labor.

18 CHAIRMAN FARMAKIDES: Wait a minute, now. At
19 that informal conference we had on the 17th I thought it was
20 decided that all you would do is trade paper and perhaps ink
21 and you would use each other's machines.

22 I thought that that was what was going to happen.

23 Mr. Reynolds, isn't that correct?

24 MR. REYNOLDS: That is correct. This is obviously
25 a labor cost in using machines which --

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1 CHAIRMAN FARMAKIDES: Not if the Department of
2 Justice, for example, is using that machine with its own peo-
3 ple to make copies.

4 MR. REYNOLDS: Oh, I'm sorry. If they are using
5 their own people to make copies, that is correct.

6 CHAIRMAN FARMAKIDES: So you would charge the
7 labor cost if they don't use their own?

8 MR. REYNOLDS: If they provide their own paper
9 and ink, we would adjust the cost so it would not include the
10 cost of paper and ink.

11 CHAIRMAN FARMAKIDES: We have asked you a lot of
12 questions, Mr. Berger, and we appreciate your candid re-
13 sponses. And we intend to ask the same questions of everybody.
14 You are not being singled out merely because you are the
15 first.

16 But you suggest 15 file drawers a week. There are
17 roughly 550 file drawers approximately, which suggests 33
18 weeks?

19 MR. BERGER: That is the total for everybody. The
20 number of file drawers for us would be somewhat less than
21 that, perhaps half that.

22 CHAIRMAN FARMAKIDES: But don't forget now the
23 City has also come in asking for central depository here.

24 So this is roughly 33 to 34 weeks, maybe 35 weeks,
25 assuming a couple weeks slippage, which is roughly 7 to 8

blt9 1 months.

2 Did you anticipate a delay of 7 to 8 months merely
3 to review 15 file cabinets a week here in Washington, D. C.?

4 MR. BERGER: Well, if our figuring was 130 days
5 for our own request, approximately 130 days, we figured 8 or
6 9 months if we had to go to the field to do it.

7 That would be much more time-consuming.

8 CHAIRMAN FARMAKIDES: You estimated it would take
9 between 8 and 9 months if you had to visit each of the Appli-
10 cants?

11 MR. BERGER: Yes.

12 This is -- perhaps I should explain how these
13 figures were generated.

14 They were not just picked off the top of our head.
15 We have had very recent experience with Pacific Gas and Elec-
16 tric in which a number of people had to go out to the West
17 Coast to review documents, and we took -- in that situation
18 there were half a million documents produced. A number of
19 people went out to review the documents, and using the fig-
End 5 20 ures we have from that we generated these figures.

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1 CHAIRMAN FARMAKIDES: There is a difference, though,
2 of going to Pacific Gas and Electric and going to Ohio.

3 MR. BERGER: Obviously, yes.

4 CHAIRMAN FARMAKIDES: Cleveland is roughly an hour
5 and a half, and Pacific Gas and Electric is probably four and
6 a half.

7 MR. BREBBIA: More than that.

8 CHAIRMAN FARMAKIDES: Usually, five hours, sorry.
9 So it's a different situation, sir.

10 MR. BERGER: The situation would be comparable in
11 that the government is not favorably disposed to sending a
12 man to Cleveland or one of the other cities for two or three
13 days. If he would go it would be for a week or more at a
14 time. This is the same with Pacific Gas and Electric.

15 CHAIRMAN FARMAKIDES: Don't forget the point, too,
16 gentlemen, that is discovery a right that you have under
17 our rules?

18 I don't think so, as I read the rules. It's not
19 a right.

20 The question arises how much discovery do you need
21 in fact for you to be able to present a case?

22 Isn't that the perspective in which we are looking
23 at this problem?

24 MR. BERGER: Yes, I think it is. But I must admit
25 I see Applicants stating a position months ago and not giving

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1 an inch on it. They have not compromised at all.

2 CHAIRMAN FARMAKIDES: Why should they?

3 MR. BERGER: Well, to get this proceeding moving
4 along.

5 CHAIRMAN FARMAKIDES: As Mr. Brebbia pointed out,
6 that is really to their disadvantage, if the proceeding does
7 not move along. The Department of Justice is interested in
8 the public interest, and not interested so much in a time
9 frame, except as it might impact on the immediate scheduling
10 of your activities.

11 MR. BERGER: We are also interested in bringing
12 to a close Applicants' alleged anticompetitive acts. I
13 think the public interest is served in bringing that to an
14 end as soon as possible.

15 MR. BREBBIA: Well, wait a minute now. If, in
16 fact, there are -- this is not a case where the Department
17 has sued CEI or any of these people for antitrust violations.
18 If there are anticompetitive acts alleged and proven in this
19 proceeding, as I understand, they only go to what, if any,
20 restrictions we would put on the licensing of the plant and,
21 therefore, perhaps present -- well, I think you are misstating
22 the fact to say that you would be bringing to a conclusion anti-
23 competitive acts, say, in a year instead of two years.

24 In the context of this kind of a proceeding, in
25 any event.

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1 As long as the plant is not licensed and as long
2 as the plant is not in operation, there are no benefits derived
3 by Applicants from the plant. That's what we're talking about,
4 right, the licensing of these plants being built?

5 MR. BERGEF: From the plant, yes. An interesting
6 point which you have brought up is that Applicants have
7 precipitated this whole hearing by filing an application for a
8 nuclear power plant license. At the bottom of page 12 of
9 their brief, again, footnote 7 in the last paragraph, they
10 cite two cases which I think would be interesting to comment
11 on.

12 The courts in these cases held that one who
13 chooses the forum of suit is not in the position to complain
14 about having to bring requested documents into the forum of the
15 suit.

16 Well, we agree with that. But Applicants have
17 taken the position here that they are similar to party
18 defendants. That's a little hard for me to see.

19 Certainly, the Department didn't start this. The
20 Staff didn't. Neither did the City of Cleveland.

21 Applicants in this case have precipitated the
22 action by requesting permission to do certain things.

23 MR. BREBBIA: By being the Applicant, so to
24 speak.

25 MR. BERGER: By being the Applicants, yes. So

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1 they are more analogous to the party plaintiffs; they
2 seek to disturb the status quo. They are not in the position
3 of a defendant. I think that that should -- those cases, I
4 feel, do support our position rather than theirs. They
5 have chosen this forum.

6 My next to the last point is that, even if aspects
7 of the requested production are deemed to be burdensome, that
8 Applicants have filed blanket objection to these requests, which
9 should not be sustained.

10 In this regard, I would like to invite attention
11 to page 10 our our brief, where we have a fairly extensive
12 quotation from -- actually footnote 14 of the Atomic Licensing
13 and Appeal Board, Number 122, that decision dealing with
14 Consumers' Power.

15 I would like to invite attention to the second
16 paragraph, wherein we find the Board stating that in the
17 future a licensing board confronted with an all-encompassing
18 indiscriminate claim of burden will be justified in rejecting
19 the claim in its entirety, upon a finding of the lack of
20 merit with respect to at least one of the discovery items.

21 MR. BREBBIA: Let me ask the question in that
22 regard, Mr. Berger, I think that's ordinarily a very valid
23 point in discovery requests and oppositions to them.

24 You know, the burden is normally broken down
25 into the component parts of the documents that you are after.

1 I have a little trouble with that argument in
2 this particular hearing, because if I assume that all of the
3 documents are relevant and that may be a key question, but if
4 I were to make the assumption that they were all relevant, I
5 would then assume that you would want to inspect them all, if they
6 were all relevant. And then I have a little problem with what
7 bits and pieces they might produce, such as you have suggested
8 in your brief search of incorporations or items like that.

9 I don't think, really, the production of a few
10 documents would answer the question we have here if, in fact,
11 we are dealing with -- which I don't know -- two million
12 relevant documents.

13 I think then, you have a unusual case of burdensome-
14 ness, if they are making that argument, by the simple bulk of
15 two million documents.

16 It's the IBM type of case, where the production
17 of 30 or 50 documents will go nowhere to solution of this
18 problem.

19 Anyway, go ahead. I think it's a little different
20 situation than the normal one.

21 MR. BERGER: Perhaps, if we knew what the problem
22 was with each request, we might be able to work it out a little
23 better. Obviously, there are some requests that there really
24 is no burden, and very little information could be easily
25 provided, such as annual reports. They probably have hundreds

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of those lying around which could be given to us.

There are others which probably involve other problems, but we don't know. Perhaps we could work some of them out, if we knew what the problem was with each request.

We don't know the quantity of material they are talking about, with respect to each request.

Again, Applicants could have complained about the scope of some of these at an earlier date, but they didn't, or if they did, the Board felt that their arguments were not valid.

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1 MR. BREBBIA: Let me ask you one more question
2 that I asked you before: Is there or is there not available
3 to you, field office help in this situation?

4 MR. BERGER: Theoretically I guess there might
5 be, but I --

6 MR. BREBBIA: I don't mean theoretically. I am
7 not asking you a theoretical question.

8 MR. BERGER: I do not know if there would be help
9 available from the Cleveland office or how much would be
10 available. I don't know that.

11 MR. BREBBIA: If it were available, is it the
12 type of help that could in fact inspect the documents and
13 be of assistance to you as opposed to going over there and
14 copying all of them?

15 MR. BERGER: I am sure that some of it would be
16 professional help; I don't know how much, though.

17 None of it is trained in electric power. All
18 the electric power cases are handled in Washington.

19 MR. BREBBIA: If you have extra people assisting
20 you in the central depository, are you talking about
21 electric power people?

22 MR. BERGER: Yes.

23 MR. BREBBIA: They would be viewing them here?

24 MR. BERGER: Yes. We have approximately 25 - 30
25 attorneys and I would say at least half of them are actively

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1 engaged in electric power cases.

2 MR. BREBBIA: My question was, would it be electric
3 power people that would be inspecting documents if we ordered
4 the establishment of the depository in Washington?

5 MR. BERGER: Yes, it would be.

6 MR. BREBBIA: And it would not be that kind of
7 help that you would get out of a field office?

8 MR. BERGER: No, they do not handle electric
9 power cases. It would not be that kind of help available.

10 Lastly, I would like to state the Department's
11 position that even if production is deemed to be burdensome,
12 that Applicant's noncompliance with the joint request and the
13 Board's October 11th order has by case law been willful and
14 therefore production should be ordered.

15 The Supreme Court has stated, as reiterated at
16 page 12 of our brief, that a mere failure to comply with an
17 order amounts to a refusal to comply with that order.
18 And other case law supports the proposition that to have a
19 willful failure to comply merely requires an intentional
20 failure to comply as opposed to an accidental or involuntary
21 noncompliance. I think the case law fairly well establishes
22 that the noncompliance of the Applicants has been willful.

23 Again the Supreme Court in a case cited at page 12,
24 looked carefully at the good faith of the party in determining
25 what sanction if any should be imposed. I think in this case

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1 we should look at a number of things with respect to the
2 Applicants' acts in this proceeding, to see if there is a
3 high degree of good faith, or a low degree of good faith.

4 For instance, Applicants did not serve notarized
5 answers to interrogatories in a timely manner; no explana-
6 tion was given for this. We received them sometime later,
7 although Applicants had apparently ample time to generate
8 the answers to the interrogatories. They had from at least
9 October 11, when the Board Order came down, until December 2.
10 Yet they didn't get that in.

11 They did not supply a list of privileged documents
12 on the December 2 cutoff date.

13 They finally did supply that two weeks late
14 on December 16. There was no explanation as to why it was
15 not provided on time. To this day we still don't know why
16 it was not provided on time.

17 On December 2, Applicant's response indicated
18 that they were going to withhold so-called confidential
19 documents from production.

20 This was in direct contravention of the Board's
21 October 11 Order, which issued a fairly extensive protective
22 order delineating the procedure to be followed with respect
23 to confidential documents.

24 At the December 17 conference, only then did the
25 Applicants apparently change their mind and explain that the

1 confidential documents were in fact being treated as per
2 the Board's Order.

3 Applicants have also filed what we believe to
4 be the base of an incomplete interrogatory answers.
5 This is discussed in our motion to compel, and I won't go into
6 that.

7 Applicants have not supplied the descriptive
8 lists that we noted before. Again, no explanation has been
9 given why these were not provided.

10 Applicants did not mention the problem of
11 document production until more than two weeks after the
12 discovery date.

13 Applicants are now seeking a protective order
14 more than four months after they probably should have applied
15 for it in September before the Board ruled on the objections.

16 I might add that the Department is usually as a
17 matter of practice, willing to negotiate the scope of
18 discovery items, but in this case we found that Applicants
19 never even requested that we negotiate the scope of these
20 items. If they were having problems, they should have
21 gotten on the phone and asked us about narrowing them down
22 to avoid some of these problems. But. they did not.

23 I think the last item I wanted to cover was the
24 projected time schedule. I think we have gone through that
25 pretty much.

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1 MR. BREBBIA: You have set that forth in your
2 brief, right?

3 MR. BERGER: Yes, it is.

4 MR. BREBBIA: I would think it would be enough.

5 MR. BERGER: It is a little different from what
6 the Applicant proposes, of 30 days which is a preposterous
7 time.

8 The Staff time is noted as a minimum time schedule.
9 Our time schedule is firm. If adopted, we will comply with
10 it. We will not seek any extensions of time, assuming that
11 there are no additional obstructions placed in our way to
12 completing discovery.

13 MR. BREBBIA: That is a strong statement.

14 Are you sure that --

15 MR. BERGER: Well, if the documents come to
16 Washington, there is not much of a problem for us.

17 We have at least a large staff available for
18 part-time help and we can get it done. We will get it done.

19 Thank you.

20 CHAIRMAN FARMAKIDES: Thank you, Mr. Berger.

21 In essence, you are saying that if the documents
22 come to Washington, you can review them within four to five
23 months, approximately?

24 MR. BERGER: 130 days. Yes.

25 CHAIRMAN FARMAKIDES: If your motion is not granted,

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1 it would take eight to nine months, double?

2 MR. BERGER: That is correct.

3 CHAIRMAN FARMAKIDES: So the net delay is roughly
4 four to five months between granting and denying your
5 motion?

6 MR. BERGER: Yes, that is correct.

7 CHAIRMAN FARMAKIDES: In addition to the time,
8 the problem would be the cost.

9 Who incurs the cost, the Department of Justice, in
10 terms of your transportation costs and copying costs?

11 Or, the Applicant, in terms of their transportation
12 and copying costs?

13 MR. BERGER: Yes, I think those are the two major
14 points.

15 CHAIRMAN FARMAKIDES: Thank you.

16 Again, forgive us for jumping on you. We will
17 do the same with anyone else if there are any questions to
18 be answered.

19 Mr. Lessy?

20 MR. LESSY: May we have five minutes, sir, before
21 we proceed?

22 CHAIRMAN FARMAKIDES: Yes, sure.

23 Let's recess until 11 o'clock.

24 (Recess.)

25

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1 CHAIRMAN FARMAKIDES: Mr. Lessy.

2 I hope during the recess you people had the
3 opportunity to talk a little bit. I hope this will re-
4 solve some of the problems.

5 ORAL ARGUMENT OF ROY P. LESSY, JR., ON BEHALF
6 OF THE ATOMIC ENERGY COMMISSION.

7 MR. LESSY: We would like to thank the Board
8 for taking this opportunity to hear us in this respect
9 and we would like to say a few words. Staff is not the
10 prosecutor but is attempting to represent the public
11 interest in a licensing procedure where the Attorney
12 General has determined that a hearing is necessary
13 to determine whether a situation exists inconsistent with
14 the antitrust laws.

15 The Staff in order to fulfill its role must
16 ascertain the facts. After it has done this, then it can
17 possibly side with the Applicants or with Justice or with
18 Intervenors or what-have-you. We have options open to us.

19 Staff has not conducted an extensive investi-
20 gation of these Applicants. In order to perform its
21 statutory function, however, it requires three things at
22 a minimum: one, it requires cooperation; two, it requires
23 fair play by the rules of the game, and in this case the
24 rules of the game are the rules of practice of the
25 Commission; and third, it requires reasonable access to

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1 materials.

2 Staff though, because of the past few months, has
3 been forced to take a very hard line with these Applicants
4 and I want to examine just briefly the events of those
5 months, which has forced Staff's position in this matter.

6 Before I do that I want to make one other
7 point.

8 We feel that we must look at what's happened
9 here in this proceeding from the point of view of Perry
10 but also from the point of view of contested antitrust
11 licensing proceedings in general. That is the scope of
12 our argument.

13 Now the pleadings recite, especially those of
14 the Department and Staff, a number of dates. But I want
15 to focus on six of those dates, which we should keep in
16 mind.

17 The first date is August 23, 1974. The Depart-
18 ment and Staff at that time filed their joint request for
19 production of documents and interrogatories. In that
20 joint request, that joint request was generally the type
21 of document production that had been requested in previous
22 antitrust proceedings and at the conclusion of my remarks
23 I will present documentary proof of that.

24 Actually it was a little more limited than your
25 general request.

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1 Secondly, and it is not a matter of controversy.
2 We specifically requested certified copies of documents
3 to be delivered to Staff and to the Department.

4 Thirdly, the rules provide for a 30-day period
5 to object with respect to that.

6 So, on August 23, we filed the joint request.
7 On September 9, 1974, Applicants finally filed ob-
8 jections to the joint request, including the scope of
9 discovery.

10 On September 22, 1974, the 30-day period for
11 objections ran under the rules.

12 On October 23, 1974, Applicants moved for a 30-
13 day extension "in order to assure a proper and complete
14 document production"and for a number of reasons the Staff
15 did not oppose that motion.

16 On 12-2-74 the Board's latest revised schedule
17 for the completion of documentary discovery ended. And
18 on 1-2-75 Applicants filed a motion for protective order.

19 On 12-3-74, I might add, we received delivery of
20 that which was produced by the Applicants.

21 Thus, and the point is clear, I think, on
22 12-3-74, 3-1/2 months after the joint request and a prehear-
23 ing conference, the Government first learned of Applicants'
24 position on discovery.

25 On 1-2-75 counsel for Applicants filed a

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1 motion that in Staff's view would have been appropriate
2 months ago.

3 Now, secondly, Staff feels that this Board must
4 weigh its decision in light of at least these four factors:
5 the first factor is -- and I will discuss this later --
6 Applicants failure to disclose their position on discovery
7 until the completion of documentary discovery and the
8 delay cause'.

9 The second one is Applicants' failure to comply
10 with the Commission's rules of practice, including
11 the failure to object within the prescribed 30-day
12 period provided in the rules and specifically provided on
13 page 1 of the joint request.

14 Third is the concept of waiver under the rules
15 of practice, judicial decisions and Atomic Energy decisions,
16 waiver of a right to object; and since we had not received
17 the motion for protective order, the untimely neglect
18 of that. And in light of the decision of the Board in
19 Consumers 1 and 2 and judicial decisions. If I might inter-
20 ject, Mr. Brebbia, in Consumers Power, there were a sub-
21 stantial number of documents involved in the subpoena
22 duces tecum, which means, as you know, that documents had
23 to be delivered to the site of the deposition and I think,
24 and I am not sure because I was not on that case, but I
25 think there were 25,000 involved, so that it is not a few

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1 number of documents but it is also not a million obvious-
2 ly.

3 MR. BREBBIA: Or 2 million.

4 MR. LESSY: Fifth, in addition to burden, this
5 practice before the Commission in antitrust matters, and
6 what has happened in other statute is particularly relevant
7 to what is happening here. It is not mandatory but I
8 think we ought to be in step with what else is going on.

9 I would like to discuss the first factor briefly
10 which was failure to disclose their position and delay to
11 the hearing caused thereby.

12 Parties have been talking and communicating in
13 this case and I don't think Applicants would say that they
14 would not have had an opportunity to state their position
15 on discovery at a time when we could have more timely
16 done something about it or the Board -- We could have had
17 this proceeding months ago if it was necessary. We could
18 have had an opportunity to discuss a compromise over
19 a longer period of time.

20 The delay caused by the failure to make timely
21 objections I feel works to the detriment to both Staff and
22 the Applicants in the hearing process. Staff's concern here
23 is not just for parity, although -- and we are concerned
24 about expeditious licensing procedures. The ultimate
25 losers I don't think is the Applicants if these units

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1 don't come on line, I think it is the public and I would
2 like to just read a decision by the Appeals Board on time.
3 This is Commonwealth Edison Company, April 25, 1974, Atomic
4 Safety and Licensing Appeal Board, the cite would be RAI 74-
5 4 page 467.

6 Our ruling on the timeliness of the instant
7 discovery request should not be taken as denigrating the
8 significance of requiring that parties discovery requests
9 be filed in a manner consistent with the goal of carrying
10 on a completing licensing proceedings expeditiously.
11 The rules reflect that proceedings be conducted expeditiously
12 and concern that flexibility is maintained to accommodate
13 that objective. As stated in the rules, this position
14 recognizes that "in fairness to all parties an obliga-
15 tion of administrative agency to conduct their function
16 with efficiency and economy require that Commission
17 adjudications be conducted without unnecessary delays."

18 It is our position that Applicants' conduct
19 here has caused an unnecessary delay that could have been
20 remedied.

21 Also, in terms of the effect of delay the
22 agency is under a Congressional mandate for expeditious
23 prelicensing antitrust reviews and it is something we
24 are extremely concerned about. Applicants could claim here
25 that this process, the antitrust review process has

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1 delayed these units and perhaps could try a legislative
2 move in order to get rid of our statute. Now what -- we
3 are aware of the fact that Congress has set a standard of
4 expeditious prelicensing antitrust review and we are con-
5 cerned that that standard be met. I feel it is our duty. I
6 guess the Board is under the same standard generally.

7 Staff works to improve the hearing process to
8 meet these ends, yet here Applicants have disregarded the
9 joint request. There is two things that have not been
10 dealt with. One is the situs of the discovery document.
11 And the second is the listing of responsiveness, that list
12 which says which documents are produced in response to which
13 question.

14 I think they have sidestepped the Commission's
15 rules on discovery and the intention and I think they have
16 overlooked the Board's order. The order required a listing
17 of those documents to which privilege was asserted. That
18 was -- on December 2, 1974, we did not receive that.
19 We did receive it at the informal prehearing conference
20 two weeks later. The issue is, does the Board want to
21 tolerate two weeks later? May we file our response to
22 Applicants' motion for protective order two weeks after next
23 Tuesday?

24 I don't think the Board would tolerate that.

25 MR. BREBBIA: Let me ask you a question, Mr.

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Lessy?

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MR. LESSY: Sure.

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1 MR. BREBBIA: These three points that were made
2 by Mr. Berger, two of which included lists, lists of documents
3 not in the Applicants' control, and the list showing the
4 paragraph to which the documents are responsive, that I
5 presume would have been a list of documents and beside each
6 document a designation of which paragraph of the interroga-
7 tories it was responsive to?

8 MR. LESSY: Yes, we were advised first: yes, that
9 was it.

10 MR. BREBBIA: Presuming this was one that had not
11 been produced --

12 MR. LESSY: Not produced or --

13 MR. BREBBIA: If you were in possession of that
14 list, would that in any way have facilitated your ability to
15 decide which of these millions of documents you might need?

16 MR. LESSY: Absolutely. That is why the list was
17 requested.

18 MR. BREBBIA: Well, the list has been mentioned,
19 but nobody so far has mentioned what assistance, if any --
20 it would have been in the context of the discussion we are
21 having today.

22 MR. LESSY: The second factor --

23 CHAIRMAN FARMANIDES: Before that, Mr. Lessy, if
24 the Applicants had in fact responded on the original due date,
25 December 2, I think it was, with all of their documents --

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MR. LESSY: Yes.

CHAIRMAN FARMAKIDES: -- how long do you think you would have required to review those documents?

MR. LESSY: A month and a half.

CHAIRMAN FARMAKIDES: In other words, you would have asked for extension of time?

MR. LESSY: No, because as I recall the original -- the amended schedule, depositions began approximately the 1st of January.

The Board's schedule -- documentary discovery ended December 2. Depositions began the first of the year and ends at the end of January.

We would have had enough time to prepare for depositions, the last two weeks in January, and I don't think any of us were going out to the West over New Year's.

CHAIRMAN FARMAKIDES: My point, however, is that you had committed yourselves to in fact reviewing all the documents produced within roughly 30 days, if they had been produced on December 2.

MR. LESSY: Six weeks, yes. Six weeks.

CHAIRMAN FARMAKIDES: Not six weeks, I think it was --

MR. BREBBIA: Well, prior to the depositions, about a month.

CHAIRMAN FARMAKIDES: Thirty days, yes.

blt 3

1 Now, Mr. Lessy, you are saying for that same number
2 of documents you are requiring far more than a month?

3 MR. LESSY: No, sir. Page 15 of Staff's brief,
4 if you will, that lists our time schedule; and for that same
5 number of documents we require a month and a half.

6 CHAIRMAN FARMAKIDES: You are requiring 15 more
7 days, 2 weeks more?

8 MR. LESSY: Let me check.

9 No, I don't think so.

10 MR. BREBBIA: The order Mr. Farmakides refers to,
11 the order of November 4, 1974, setting forth what you refer
12 to as the amended schedule, recites the date of November 30
13 for completion of the documentary discovery and December 1
14 as the date upon which depositions would begin.

15 It would therefore appear that in order to begin
16 the depositions, if you were timely, you would have had to
17 complete your review of all the documents within the 30 days.

18 MR. LESSY: I think we could have made a good faith
19 effort to do it, sir, and if the Chairman is suggesting that
20 we revise page 15 of our brief to reflect 30 instead of 45
21 days, I think that we could do that.

22 CHAIRMAN FARMAKIDES: All right, sir.

23 MR. LESSY: The second factor that I would like
24 to discuss is the failure of Applicants to comply with the
25 Commission's rules of practice.

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1 As I mentioned previously, the joint request was
2 very clear that it required -- we asked for on page 1 certi-
3 fied copies of the requested documents shall be served upon
4 the Staff and the Department of Justice; Section 2.741-D of
5 the Commission's rules provides in part that the Applicants
6 would have 30 days with which to respond, or any party, to a
7 request and that that response shall state with respect to
8 each item and category that inspection and related activities
9 will be permitted as requested unless the request is objected
10 to.

11 The rules obviously contemplate a waiver, and the
12 reason for that rule is time. As previously discussed, Appli-
13 cants did timely object to the joint request, but did not ob-
14 ject at any time to the specific request for the production
15 and delivery of certified copies.

16 MR. RIGLER: Are you thinking in terms of the blanket
17 certification, Mr. Lessy?

18 If they are to produce, say, hundreds of thousands
19 of documents --

20 MR. LESSY: Yes, sir. I guess there would be a
21 minimum of five, one from each Applicant, and if it came in
22 out of seriatim, I guess, with respect to each major de-
23 livery.

24 But that would still be blanket.

25 MR. RIGLER: Assuming that we would order compliance

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1 that the requested documents be related to specific interroga-
2 tories or requests for documentary production, would that re-
3 quire a seriatim or chronological listing of the documents?

4 MR. LESSY: As I understand you, sir, we want one
5 overall list that says that this contract, for example, is
6 in response to question No. 9.

7 In addition, we just want a broad certification
8 that that which is produced is in fact -- the intention, I
9 don't think, was to impose any burden by means of there having
10 to be certified copies, just that they be sworn to be, like
11 the notary seal at the end of it.

12 MR. RIGLER: But, say, interrogatory 15, there
13 would be a separate schedule that would list two or three
14 hundred documents identified how?

15 MR. BREBBIA: In answer to the document request,
16 such-and-such-- they were document requests as opposed to
17 interrogatories.

18 MR. RIGLER: Well, they could be responsive to
19 either, I suppose.

20 MR. LESSY: Right.

21 MR. RIGLER: But they would be identified how?

22 MR. LESSY: In answer to the document request 15
23 the following is produced: (1) contract between A and B; (2);
24 (3); (4); (5); et cetera.

25 And the documents as they came in, there would be

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1 a blanket certification.

2 Have I answered your question?

3 MR. RIGLER: Yes.

4 CHAIRMAN FARMAKIDES: Let me be clear.

5 Your point is that you would want a listing, a
6 specific identification of each document within that inter-
7 rogatory.

8 That is what you just said to me?

9 MR. LESSY: Which documents were produced in re-
10 sponse to which question.

11 For example, if a question were to go to negotia-
12 tions on the formation of the CAPCO pool, they could say,
13 "File drawer 8-A has those documents in it."

14 CHAIRMAN FARMAKIDES: Well, now you have said some-
15 thing else.

16 Let's be clear about this. You are saying two dif-
17 ferent things.

18 Assuming that we have a document request A: do
19 you envisage that the Applicant would respond to that request
20 by saying, "Here are all the documents unlisted; here are
21 all the documents responsive to document request A; we certify
22 they are true and correct, et cetera."

23 Is that what you envisage?

24 MR. LESSY: Yes.

25 CHAIRMAN FARMAKIDES: Or do you see, "Here are

blt 7

1 all the documents in response to request A, and each one
2 listed separately"?

3 The latter is a tremendous burden which you --

4 MR. LESSY: I think just the general demarcation,
5 the A.

6 CHAIRMAN FARMAKIDES: Document request A?

7 MR. LESSY: Right.

8 CHAIRMAN FARMAKIDES: All right, sir.

9 MR. LESSY: Is that not right?

10 Mr. Charno has a comment, sir?

11 CHAIRMAN FARMAKIDES: Yes, sir.

12 MR. CHARNO: That is not the request originally
13 made in the joint request.

14 At that point we contemplated individual document
15 identifications which would have been useful at that time.

16 At this time, however, I think the Department and
17 Staff are both willing to compromise upon a general iden-
18 tification of responsiveness.

19 MR. LESSY: That would be agreeable.

20 CHAIRMAN FARMAKIDES: As outlined by me, it would
21 be A. Just a general outline?

22 MR. LESSY: Yes.

23 CHAIRMAN FARMAKIDES: All right, sir.

24 MR. LESSY: Pursuant to 10 CFR 2.740-C, a party
25 from whom discovery is sought may move for protective order

blt^o 1 if it feels compliance with the request will subject it to
2 undue burden or expense and here no filing was made for
3 such protective order. Mr. Brebbia asked the question when
4 would be the last time that could be filed.

5 We have not discussed this generally, but my
6 feeling would be really any time up to November 29 or 30,
7 because they really were not required to produce until that
8 time. But certainly not January 2, 1975.

9 I think there is case law to support that.

10 MR. BREBBIA: Well, don't be vague. There are
11 dates we have been working with. They were required or
12 not required to produce the documents on November 30?

13 MR. LESSY: That was a weekend, so it carried
14 over.

15 MR. BREBBIA: Okay, December 2. So the last date
16 for filing -- for timely filing the motion you would state
17 would be December 2?

18 MR. LESSY: Yes. Or in advance of December 2.

19 MR. BREBBIA: Or the last date -- the last date
20 I asked for, though?

21 MR. LESSY: December 2.

22 MR. BREBBIA: Needless to say, you could file
23 one any time earlier.

24 CHAIRMAN FARMANIDES: In an earlier brief filed
25 by the City of Cleveland, there was one point where

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1 timeliness was a major issue, of course, and their point
2 was that 30 days or so -- their main point was that timeli-
3 ness depends on the circumstances of the case.

4 Isn't that correct, sir?

5 Now, here you say that approximately 30 days is
6 not timely as I understand it.

7 MR. BREBBIA: Thirty days late, you mean?

8 CHAIRMAN FARMAKIDES: Thirty days late, yes.

9 MR. LESSY: Yes, sir. Especially when there has
10 been an extension not opposed by the Government in order to
11 comply. But nevertheless an extension.

12 CHAIRMAN FARMAKIDES: That extension could be
13 interpreted to have resulted from the volumes of materials
14 screened.

15 MR. LESSY: No question.

16 CHAIRMAN FARMAKIDES: All right, sir.

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1 MR. LESSY: The third factor is that -- the factor
2 of waiver. Under the Rules of Practice in judicial decisions
3 and the AEC decisions.

4 The case law and the Commission's rules, we feel,
5 supports the view that Applicants have waived their rights to
6 object, either in the form of noncompliance or now in the form
7 of the untimely motion for protective order.

8 The general rule is set forth in Volume 8 of
9 Wright and Miller, Federal Practice and Procedure, Section 203.5,
10 page 262-263 which states Ordinarily, the protective order or
11 the order must be obtained before the date set for the discovery
12 and failure to move at that time will be held to preclude
13 objection later.

14 The principle has been followed in a number of
15 cases, one is Wong Ho v. Dulles, 261 Federal 2d--

16 MR. BREBBIA: Excuse me a moment. Are you not --
17 you were citing cases that do not appear in your brief?

18 MR. LESSY: This does, and I want to emphasize it.
19 Do you object to me citing a case in the brief, sir?

20 MR. BREBBIA: I want to copy it down if it is a
21 cite that does not appear in the brief.

22 MR. LESSY: The Wong Ho case is a circuit court
23 case in which it was held that it was not fair to enter a
24 deposition taken in Hong Kong, taken by the government, though
25 a California resident was not present, when that appellant had

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1 not moved for an order against taking the deposition in Hong
2 Kong at the time of the notice of the deposition being served.
3 If I may quote: "By his inaction in failing to timely move
4 for protective order, appellant waived his rights to cross-
5 examination."

6 I feel that is a strong case because we are not
7 waiving rights to object, we are waiving rights to cross-
8 examination.

9 Another case cited on page seven is Collins v.
10 Wayland, the Ninth Circuit Court of Appeals, certiorari denied,
11 322 US 744, in which the Court of Appeals upheld dismissal
12 of plaintiff's action where plaintiff twice failed to appear
13 out of state for a deposition.

14 On Page 8, Marriott Homes v. Harson, a federal
15 rules decision case, in 1970, which is significant in light
16 of Applicants' argument, the court held that the failure of
17 a party or his attorneys to give reasonable notice of their
18 inability to comply with a notice of taking deposition or to
19 seek a protective order vacating the notice of deposition,
20 violated the duty to make discovery and constituted willful
21 failure to attend deposition.

22 Not only is this clear and there are other citations
23 here, but the AEC in its first set of formal reports in the matter
24 of X-Ray Engineering, 1 AEC Reports, 553, applied the concepts
25 of waiver to failure to object to an initial decision order by

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1 a hearing examiner. I think that that goes hand-in-hand with
2 Staff's position here.

3 Now, I have one other matter I would like to point
4 out on the concept of waiver.

5 This is not in the brief and it's the matter of
6 Commonwealth Edison Company Zion Station Units 1 and 2,
7 decision of the Appeal Board, ALAB-196, the citation is
8 RAI-74-4, page 463.

9 Here the Appeal Board held that subpoena or
10 discovery requests filed outside the time period prescribed
11 by the Commission's rules or such different time period as
12 may be specified by the Licensing Board for pretrial discovery
13 are to be regarded as prima facie unreasonable, and Staff's
14 position with respect to that decision is that the same
15 reasoning would apply to motions for protective order.

16 The next to last point I would like to make is
17 addressing the argument of burden in light of decisions of
18 the Appeals Board in Consumers' Power and certain judicial
19 decisions.

20 The Appeals Board in Consumers', which was an
21 antitrust proceeding, at that stage reviewed two decisions
22 by the Licensing Board. This ruling -- page 9 of the brief --
23 concerned subpoena duces tecum obtained by the Applicant and
24 directed to 21 Michigan municipalities, who were not parties
25 to the licensing proceeding. The subpoenas sought production

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1 from the period 1960 to 1973 of a substantial number of
2 documents relating to virtually all facets of the marketing
3 operations conducted by the municipals.

4 The municipals moved to quash the subpoenas on
5 three grounds, including undue burden, and those subpoenas
6 had to be delivered to the place outside of their offices.

7 In this case, by the way, Mr. Chairman, the parties
8 were apparently able to reach an understanding limiting the
9 document request and interrogatories, but the Appeals Board
10 still commented on the concept of burden, and the Board said
11 that, as Mr. Berger pointed out, Applicant's steadfastly
12 maintained compliance with any portion of the request would
13 entail undue burden but, as should have been perfectly apparent,
14 some of the documents could have been furnished, some of the
15 interrogatories answered without the imposition any significant
16 burden.

17 The Appeals Board in that case was dealing with
18 a timely motion to quash subpoenas. There is also a quote
19 from that decision that "In the future a licensing board
20 confronted with an all-encompassing indiscriminate claim of
21 burden"-- which we submit we face here -- "will be justified
22 in rejecting the claim in its entirety upon a finding of lack
23 of merit with respect to at least one of the discovery items."

24 Additionally, there are a number of judicial
25 decisions under the federal rules which in antitrust matters --

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1 well, which establish the principle we feel that the claim of
2 undue burden must be weighed in terms of the need of the moving
3 party for the information requested.

4 And in antitrust -- there are a lot of antitrust
5 decisions which sustain the government's or plaintiff's right
6 to examine.

7 MR. BREBBIA: Excuse me, Mr. Lessy, but in the con-
8 text of cases like that, don't they usually stand for the the
9 proposition that in this case the Applicants are required to
10 produce the documents, whether or not they feel it's burden-
11 some? I don't think those cases go to where they would be
12 produced.

13 MR. LESSY: Situs of discovery? They only do that
14 to the extent that some of these cases involve subpoena
15 duces tecum, which at the place of discovery the Applicants
16 had to bring or the party had to bring them with them.

17 MR. BREBBIA: Most burdensome arguments that
18 I am familiar with, and that I have made myself on occasion,
19 go to the question of producing documents at all, not to
20 as a rule where they are produced. This is unusual, at least
21 in my experience, to find us confronting this.

22 MR. LESSY: I agree. I would just like to say,
23 as I opened, that in this matter, Staff needs these documents
24 in order to conduct its investigation and take a position in
25 this proceeding.

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1 MR. BREBBIA: But the Applicants have not taken the
2 position that they are not willing to produce the documents.
3 That is the point I make, in terms of these cases that you
4 have been talking about.

5 MR. LESSY: I agree with that. I agree with that,
6 except that they do touch on the argument of expense. Page
7 13 of the brief, Rockaway Pix Theatre v. MGM 31 Federal
8 Rules Decision, 15, a private antitrust action in New York in
9 1964. The court held that all sources of information should
10 be made available regardless of expense, and the mere fact
11 that production would be onerous or inconvenient is not per
12 se grounds of denial of the motion for inspection.

13 Now, these rules decisions deal with limited
14 motions and they are not long or involved decisions, so we have
15 no idea of knowing what they meant by onerous or inconvenient,
16 but at least there is a case that goes to that.

17 CHAIRMAN FARMAKIDES: But, Mr. Lessy, look, the
18 essence of what Justice has indicated to be the problem, and
19 what you have indicated to be the problem, and I am sure the
20 City will have the same thought, that is, is it a question
21 of burden to be assumed by the Applicant in delivering the
22 materials here, and the time involved? Or the burden to be
23 assumed by yourselves in going out there, and the time involved?

24 That is the essence of what we're talking about.
25 It's not the question of producing the documents. The documents

bw7

cite?

1 have been produced. They are available at the situs of the
2 Applicant. It's a question of who assumes the burden of going
3 or bringing them in here and the time involved.

4 Isn't that what we're talking about?

5 MR. BREBBIA: That is where we are today, of course.

6 MR. LESSY: On the --

7 MR. BREBBIA: That is not where we were a month ago.

8 MR. LESSY: Our position on burden is that in light
9 of failure to comply with practice and failure to file timely
10 objections and failure to disclose, and the time delay, that the
11 burden should be on them as a matter of law.

12 CHAIRMAN FARMAKIDES: Yes, sir.

13 MR. LESSY: Now, if this were a court of equity,
14 the Staff has addressed itself to that on page 14, to an
15 alternative position with respect to production and delivery
16 of documents.

17 The paragraph number two, in the event that this
18 Board is unwilling to order production and delivery, Staff is
19 prepared to reluctantly accept delivery of all documents
20 requested by Staff to the office of Applicants' Counsel in
21 Washington.

22 I would like to make two other points, as long as I
23 am addressing that.

24 The first is that the AEC and the Nuclear Regulatory
25 Commission, when it comes into being, does not have, and I

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1 don't think is scheduled to have any facility in that part of
2 Ohio or western Pennsylvania. That was something discussed.

3 The second thing is that Mr. Brebbia also asked the
4 question of whether this was appealable, or whether the de-
5 cision here would be appealable.

6 As I understand, it would only be appealable if the
7 Board certified it to be so that the Applicants could appeal
8 a motion, or granting our motion to compel, if the Board
9 so certified under the rules.

10 Likewise, the government could appeal denial --

11 MR. BREBBIA: I think the question is, though, could
12 they take us to court?

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1 CHAIRMAN FARMAKIDES: Would they have access to the
2 federal court system through their motion?

3 MR. LESSY: Without having thoroughly researched
4 it, I think not. If we have a change of heart I will file
5 by next Tuesday a change of opinion in that area. But my
6 view is that I know of no precedent for that action.

7 CHAIRMAN FARMAKIDES: Certainly that would be an
8 important factor in our reaching the decision, that is, to
9 evaluate the factors that impact time.

10 Don't misunderstand me, Mr. Lessy; as I said a year
11 ago, and I have said it before, I am very concerned about
12 time. That's an essential ingredient here. I am very
13 concerned about people filing timely. We made that point
14 earlier and we stated it in an order and we mean it.

15 But the question is, look, there is a problem;
16 we have to resolve it in such a way that we minimize the
17 burden to any one party and we certainly take into account the
18 various factors that impact on that burden, no doubt about
19 that.

20 MR. BREBBIA: Mr. Lessy, one more question. As I
21 note in your brief, you have not really joined in the
22 Department's request for relief. You have stated that if the
23 Board won't order the production of certified copies of all
24 the documents delivered to you, that you -- as far as you're
25 willing to go is a secondary request requiring the production

kms 2

1 of all the documents at one to a central depository.

2 MR. LESSY: No, no, I think our fallback position
3 is essentially the Department's first position. In other
4 words, Page 2 -- Paragraph 2 of Page 14 says Staff is
5 prepared to reluctantly accept delivery of all documents
6 requested by Staff to the office of their counsel. I
7 understand how you reached the conclusion that it would be
8 an instantaneous production, but I would like to modify
9 that, if it does lead to that conclusion, that --

10 MR. BREBBIA: You mean it would be 15 file
11 drawers a week?

12 MR. LESSY: That is correct, that's acceptable.
13 Or any other number of drawers.

14 MR. BREBBIA: Nevertheless the meaning of the
15 word "all" is not all at once?

16 MR. LESSY: Yes, sir.

17 The final point I would like to make is to
18 discuss practice in antitrust pceedings.

19 First of all, the discovery in Perry was not
20 substantially different from, is indeed maybe less, broad
21 than the discovery in other antitrust actions.

22 I have three --

23 MR. BREBBIA: In Perry, you said?

24 MR. LESSY: Yes, the discovery here in this case
25 is not substantially different from previous discovery

kms 3

1 requests --

2 MR. BREBBIA: -- that the Department has made in
3 these other cases?

4 MR. LESSY: Yes.

5 CHAIRMAN FARMAKIDES: Are the statement of issues
6 the same, though, Mr. Lessy, or are they different? How
7 can you really compare if the statement of issues are not the
8 same?

9 MR. LESSY: The statement of issues is whether
10 or not a situation exists inconsistent.

11 MR. BREBBIA: But as --

12 MR. LESSY: I can't address that right now. It
13 is a good question.

14 CHAIRMAN FARMAKIDES: Yes, sir, it is. You see
15 my point.

16 MR. LESSY: Yes, sir.

17 CHAIRMAN FARMAKIDES: It is obvious. How is this
18 meaningful unless you peg it to a reference point that is
19 the same?

20 Excuse me, sir.

21 MR. LESSY: The other point that I would like to
22 make with respect to practice in previous antitrust cases
23 is for some reason these applicants generate much more paper
24 in response to similar requests. In the Duke case 100,000
25 documents were delivered to Washington, D.C., to a central

kms 4

1 depository after Duke -- which is a very large company as
2 everyone knows -- screened 500,000 documents in North Carolina
3 and gave Staff and the Department unlimited access to those
4 documents and they were taken from counsel's office back to
5 the government, Xeroxed on government facilities, and then
6 returned.

7 CHAIRMAN FARMAKIDES: Mr. Lessy, there is one big
8 distinguishing feature there: there you had a joint state-
9 ment of issues agreed to by all the parties, refined and
10 finally accepted by the Board after the Board's further
11 refinement. You don't have this here.

12 There was a great limitation that came in. We
13 were unsuccessful at getting counsel here to do the same
14 thing.

15 MR. LESSY: I would be prepared on behalf of Staff
16 to attempt to do that, sir.

17 MR. BREBBIA: Well, at any rate, Mr. Lessy, the
18 issue is, if in fact the 2 million documents were deemed
19 by you, for instance, to be relevant, you would like to
20 look at 2 million documents, am I correct?

21 MR. LESSY: Yes, sir.

22 MR. BREBBIA: This question of Duke Power
23 screening them down from 500,000 to 25,000, that particular
24 aspect wouldn't seem relevant to me if in fact all of these
25 documents -- and I will say for the fifth time, I have no

kms 5

1 idea whether any of them are relevant, much less all of
2 them, but you wouldn't like to narrow your request by limiting
3 your viewing of them?

4 MR. LESSY: One factor I try to keep in mind,
5 that of these 2 million or so documents, I imagine one
6 document appears five times and is counted five times
7 because we are dealing with five different companies and all
8 intra-CAPCO correspondence would be reflected in each of
9 them. So that maybe Applicants should be asked to delete
10 from that number obvious duplications. That's just a thought
11 I throw out.

12 The point is that for some reason, and maybe
13 because there are five similar copies, these applicants
14 generate much more paper in response to requests.

15 Now, this is -- it's a very, I think, very broad
16 screening of the documents, but that's just --

17 Thirdly, in terms of practice, the very nature of
18 this proceeding requires extensive document production and
19 other applicants have always fully cooperated. The Applicants
20 make a point in their brief on this matter, that the scope
21 or the burden wasn't so large in other cases.

22 I think it appears on Pages 6 through 7 of their
23 motion for protective order. But as I read Pages 6 through 7,
24 the point that struck me was this: one, in each of those
25 matters, Alabama, Louisiana, Consumers', Duke, documents

kms 6

1 were brought to Washington, D.C., by Applicant.

2 Secondly, they were brought on a voluntary basis.
3 There was no mandate to bring them.

4 The point that strikes me is, obviously they are --
5 in those cases there was at least some attempt to cooperate
6 because it is a licensing proceeding. All we are trying to
7 do is get things cleared away to licinse Duke plants.

8 So that although those matters are cited by
9 Applicants because the numbers of sheets actually produced
10 and delivered to a central depository were not as great,
11 there was an element of cooperation and a central depository
12 in Washington.

13 That's all that I have, sir.

14 CHAIRMAN FARMAKIDES: Thank you, sir.

15 Do you have any questions?

16 MR. RIGLER: Would you tell me again about the
17 disposition of the privileged documents? You indicated there
18 was some problem which had been resolved.

19 MR. LESSY: With respect to privileged documents,
20 sir, the joint request that -- and Paragraph 149 of the
21 Board's order on objections in late October required that all
22 documents with respect to which privilege was asserted, a
23 listing of those documents and the description of the privi-
24 lege and other data should be furnished to the parties and
25 the Board so that the issues would become clear with respect

kms 7

1 to claims of privilege, attorney-client privilege, et cetera.

2 On December 2, 1974, when documents were "produced"
3 no such listing pursuant to Paragraph 149 and the joint
4 request was given. The listing turned up at the informal
5 prehearing conference with the Chairman approximately two
6 weeks later.

7 There were problems there, too. Problems with
8 respect to the fact that the documents were not or the listings
9 were not internally -- one company went through A to Z and
10 listed each privilege with respect to each document; another
11 company -- I think CEI -- listed general privileges with
12 respect to a large number of documents. But I don't want to
13 fight about that.

14 What I am upset about is that that listing for
15 two weeks, for a period of two weeks Applicants were in
16 essential noncompliance with the Board order, and this is
17 something that the Staff has been very upset about to the
18 point at high levels of Staff of discussing sanction, and
19 the Board has made no comment with respect to that.

20 I just wanted it on the record.

21 MR. RIGLER: On the other hand, you have not
22 asked for any relief, have you?

23 MR. LESSY: The issue is essentially moot now,
24 because the listing, albeit late, was provided.

25 MR. RIGLER: But no request for relief was made to

kms 8

1 the Board?

2 MR. LESSY: Right.

3 Well, that's right, yes, and secondly -- and the
4 issue of privilege is before a special panel, which claim is
5 not before this Board at the present time.

6 MR. RIGLER: Well, it is before the Board because
7 the Board has supervisory authority before the special master.

8 MR. LESSY: Excuse me. The claims of privilege
9 have been made, although late.

10 MR. BREBBIA: Your problem is that the Applicants
11 failed to comply with the order, i.e., the date on which
12 this document was supposed to be due.

13 MR. LESSY: Exactly.

14 CHAIRMAN FARMAKIDES: Mr. Lessy, I am concerned
15 when you say that you as the Staff are considering "sanctions."

16 MR. LESSY: Had considered sanctions.

17 CHAIRMAN FARMAKIDES: I don't know what that means,
18 and I don't want to get into it, but brief me if you mean
19 application to this Board for whatever sanctions you would
20 seek to obtain, that's one thing. If you mean other sanctions
21 then I think you should clarify it.

22 Let's be very clear now, insofar as this Board is
23 concerned, this Applicant is here under authority of law
24 seeking an application to construct a nuclear power plant.
25 The Department of Justice, yourselves and other parties,

kms 9

1 have indicated antitrust issues.

2 Fine. We are considering those issues.

3 I don't think this gives the Staff any other posi-
4 tion, sir, except that of a party in this proceeding.

5 I would acknowledge --

6 MR. LESSY: Could I clarify, sir?

7 CHAIRMAN FARMAKIDES: Excuse me.

8 I would acknowledge that the Staff and Justice
9 do have a public interest responsibility, but that responsibi-
10 lity is for you people to articulate. It is for this Board
11 to finally formulate what the public interest viewpoint
12 would be with respect to this matter before us.

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13 MR. LESSY: I'm sorry to interrupt.
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CHAIRMAN FARMAKIDES: Proceed.

2 MR. LESSY: This question of sanctions was raised
3 at the very highest levels of the Staff, not for sanctions,
4 for Staff to request sanctions in front of the Board in this
5 proceeding, but the whole question of noncompliance in
6 terms of sanctions generally would be requested under the
7 rules, or might be requested under the rules to the Director
8 of Regulations.

9 CHAIRMAN FARMAKIDES: You mean what?

10 A new rule making, issuing a new set of rules?

11 MR. LESSY: There are sanction provisions under
12 the rules that are directed to the Director of Regulations'
13 powers. That was something which was discussed and a course
14 which was not taken.

15 The course taken was a very, admittedly, a very
16 strong pleading requesting oral argument on this matter.

17 CHAIRMAN FARMAKIDES: All right, sir.

18 One more question on costs. If your motion
19 is granted and all the documents that we have been referring
20 to are deposited here in Washington -- I am sorry, are
21 brought to you, sir, are you prepared to undertake cost of
22 that delivery?

23 MR. LESSY: The position of Staff on that, sir,
24 is that we can pay the freight and any other reasonable
25 expense that the Board, in its discretion, may order.

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CHAIRMAN FARMAKIDES: Thank you, Mr. Lessy.

2

City of Cleveland, Mr. Hjelmfelt.

3

ORAL ARGUMENT OF DAVID HJELMFELT, ON

4

BEHALF OF THE CITY OF CLEVELAND, OHIO.

XXX

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MR. HJELMFELT: The position of the City of

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Cleveland is a little different from that of the Staff or

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Department, in that the City did not request that they be

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produced in the City of Washington. We merely asked for

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production of documents.

10

Based on what had occurred in the other AEC

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antitrust proceedings in discovery, the City had simply,

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perhaps naively, assumed that production would be in

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Washington D.C., therefore we did not make a specific request.

14

The problem we are all faced with here, it

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seems to me, is that there are no clear delineations of the

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amount of materials which would necessarily have to be

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produced in Washington D.C. if production was here so

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ordered.

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The amount of material listed in terms of pages

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can be quite misleading. As has been pointed out by the

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Department, certain of the requested materials are such

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matters as annual reports which, undoubtedly, there are no

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reproductions necessary of that sort of material, and numerous

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copies are certainly available to the company.

25

I think Mr. Lessy also pointed out that there are

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1 probably duplications of various CAPCO materials which are found
2 in the files of each company.

3 I would suggest that in that situation it might
4 be advisable that rather than having each individual copy
5 produced, that where the copies are similar, simply a notifica-
6 tion that a copy of such and such a document is also found
7 in the files of the other four Applicants.

8 MR. RIGLER: Isn't that going to require each
9 of the five Applicants, and I wonder then if you save any-
10 thing by adoption of that suggestion?

11 MR. HJELMFELT: Well, certainly they would have
12 to go through an examination of documents to reproduce them
13 to bring them here anyway, so I don't know that it would
14 cause any additional handling of the materials. Particularly
15 if they comply with the Department's and Staff's request
16 that they produce or develop some sort of index of the
17 documents.

18 It would seem to me that that would simply be
19 a matter of cross-checking.

20 MR. RIGLER: Is any one company likely to have
21 a more complete file of CAPCO documents than the other?

22 MR. HJELMFELT: I wouldn't be certain. It is
23 possible that CEI would have the most complete set, but I
24 can't say for certainty. I wouldn't be in a position to
25 know.

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1 CHAIRMAN FARMAKIDES: Would you have any
2 objection, Mr. Hjelmfelt, if the Board were to go look at
3 these documents?

4 Would any party have objection if we were to go
5 out Monday or Tuesday of next week?

6 MR. HJELMFELT: No, sir.

7 MR. REYNOLDS: No, sir.

8 MR. CHARNOFF: We would not.

9 No, sir.

10 MR. LESSY: No objection.

11 MR. BERGER: No, sir.

12 CHAIRMAN FARMAKIDES: How about next Tuesday then?
13 We need someone to show us where the documents
14 are.

15 We would sooner not have counsel present.

16 MR. CHARNOFF: Any date of your convenience, sir,
17 is fine with us.

18 MR. BREBBIA: Hold it a moment.

19 (Discussion off the record.)

20 CHAIRMAN FARMAKIDES: There is another point
21 here.

22 It may be preferable to have counsel join us, at
23 least one counsel from each party, and we can go as a group
24 and look at these files.

25 I seek your thoughts on this.

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Mr. Hjelmfelt?

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MR. HJELMFELT: I believe that we will have

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someone available who can do that, and in any event, we are

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probably going to have somebody at one of those cities looking

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at documents, when you show up.

6

CHAIRMAN FARMAKIDES: We would go to CEI, I

7

think, and perhaps Ohio Edison in Akron.

8

MR. CHARNOFF: We can arrange to have someone

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there.

10

CHAIRMAN FARMAKIDES: Staff?

11

MR. LESSY: Same, sir.

12

CHAIRMAN FARMAKIDES: Justice?

13

MR. BERGER: We can arrange that, yes.

14

MR. BREBBIA: Who, from your office has been

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viewing these documents, Mr. Hjelmfelt?

16

MR. HJELMFELT: I have spent some time in

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Cleveland and we have retained additional counsel to help

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us.

19

Mr. Brand has been to CEI, Ohio Edison and

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Cleveland Edison.

21

MR. BREBBIA: Would you give me a report. Are there

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two million documents, and what are they?

23

Are they electric bills, or what?

24

MR. HJELMFELT: I prefer not to comment as to

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the number. I would guess the two million might be how many

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1 pages there are. There is a considerable number of pages.

2 However, my experience has been that the response
3 made by CEI was frequently to find a file folder that
4 appeared to be responsive, and stick that in the materials
5 that were responsive to the document request. And when you
6 go through the file folder, you may find a piece of
7 correspondence which is, in fact, responsive, but it would
8 be accompanied by 20 copies of that same correspondence;
9 all the file copies, no matter how many are there, and you
10 have to thumb through to see when the next letter starts.

11 So there is a good deal of repetition.

12 MR. BREBBIA: Did you find any documents that
13 were unresponsive to the document requests, in the sense of,
14 say, electric bills that were sent out, or whatever?

15 Anything obviously unresponsive?

16 MR. HJELMFELT: We found some material which --
17 for example, some of our requests went to, as you recall,
18 we asked for documents pertaining to the transfer of customers
19 that -- the changeover of industrial customers particularly,
20 and commercial customers.

21 Among the materials that was produced were
22 the job orders directing a particular electrician or whatever
23 his rating is, to go out and pull the switches.

24 Obviously, that was not helpful and while maybe
25 in a very broad interpretation of relevancy, that did pertain

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1 to our document request, but it is not the sort of material
2 we are asking to be reproduced and it is not the sort of
3 material that we would ask to be brought forward to
4 Washington.

5 What I would suggest would be very helpful in
6 this regard in view of this material, and also as I understand
7 from Mr. Brand, the fact is some of the documents produced
8 are computer printouts and the like, that a rough screening
9 by counsel in each of the cities might eliminate a vast
10 amount of material that nobody would want to have produced
11 in Washington for further inspection.

12 That might be the course which should be followed.

13 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt, you were there
14 how many days, sir?

15 MR. HJELMFELT: I was there three days.

16 CHAIRMAN FARMAKIDES: How many file drawers did
17 you go through in those three days?

18 MR. HJELMFELT: I went through 15 file drawers,
19 but that is misleading, because the drawers I went through
20 were not necessarily full. Some of them were very full,
21 some had maybe one or two inches of materials in them.

22 CHAIRMAN FARMAKIDES: Could you estimate how many
23 inches of material did you go through?

24 MR. HJELMFELT: I would guess, if all the file
25 drawers were filled, it probably would have been about half

1 that, seven or eight file drawers filled.

2 I think they said 20 inches to a file drawer.

3 MR. BREBBIA: And it took you three days?

4 MR. HJELMFELT: Yes.

5 Mr. Brand has spent another week in Cleveland,

6 a week and two days in Cleveland; and a day each in

7 Toledo Edison and Ohio Edison trying to get a feel for:

8 what is there.

9 His estimate is for someone working steadily to
10 go through this material, it would be approximately three
11 for each city. That calculates out to approximately four
12 months.

13 Now, that also presumes you have somebody --
14 that is actual working time. If you have breaks where you
15 can't get anybody on the scene, it would take longer, of
16 course.

17 CHAIRMAN FARMAKIDES: Is there a percentage of hits
18 that you were able to state now?

19 One percent?

20 Five percent?

21 Percentage of those documents that you have asked
22 for copies of?

23 Excuse me.

24 MR. HJELMFELT: We don't have any report on what

25 Mr. Brand has turned up. We don't know how much he is going

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1 to ask to be reproduced.

2 CHAIRMAN FARMAKIDES: How many requests did you
3 make for reproduction?

4 MR. HJELMFELT: I would guess it might fill a
5 file drawer.

6 It is difficult to judge because I pulled out
7 pages and stuck them with a paper clip and set them aside, so
8 I had a big stack, but maybe only a page from each to be
9 copied.

10 MR. BREBBIA: But as a rough guess, you have one
11 out of seven?

12 CHAIRMAN FARMAKIDES: No, one out of fifteen.

13 MR. BREBBIA: No, he said if they were all together,
14 you would get seven, maybe.

15 MR. RIGLER: What was the subject matters of
16 the files you inspected?

17 MR. HJELMFELT: It was a variety.

18 It was responsive to several different requests,
19 and I did not get into the material on the CAPCO interrela-
20 tions, the Board of Directors' Minutes and that sort of thing,
21 because the materials which were responsive to our requests,
22 but were also responsive to Staff's and Justice' requests,
23 were put in files under their name in another section and
24 we were cross-referenced to them.

25 I simply didn't get around to going through that

1 material.

2 MR. RIGLER: Did you go through any correspondence
3 files of say, one of the operating executives?

4 MR. HJELMFELT: No.

5 I went through correspondence files which would
6 show up, for example, under a request for documents relating
7 to competition with MUNY system and it might be correspondence
8 from different people, not any one particular individual.

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1 MR. RIGLER: So what you went through was a file
2 accumulated from the individual files of a number of employees?

3 MR. HJELMFELT: Yes, and most of the materials
4 that I looked at was also -- seemed to come on a lower level
5 of management.

6 I had not reached the files that showed top manage-
7 ment.

8 MR. RIGLER: But in order to get into the files
9 you inspected someone had gone to individual officers' files
10 and pulled what they considered to be the relevant documents?

11 MR. HJELMFELT: It appeared to me that what they
12 pulled was files, not documents. So that I -- they wouldn't
13 go to a file and say, "This letter is relevant, this one, this
14 memo, et cetera." They just said, "This file looks relevant,"
15 so you get a file and you get 10 copies of a memo and three
16 or four memos that are not relevant or peripherally relevant
17 perhaps.

18 MR. BREBBIA: What you are describing is a tre-
19 mendous job for somebody, whichever way it goes.

20 MR. HJELMFELT: Yes, sir, it certainly is.

21 MR. BREBBIA: From what short view you have had
22 of it, it would seem so.

23 MR. HJELMFELT: The best way I think to reduce the
24 job at this point is a quick run-through that you can make
25 and eyeball certain amounts of material that you don't want

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1 to look at further, and I think that could reduce it a tre-
2 mendous amount.

3 CHAIRMAN FARMAKIDES: But you were suggesting that
4 that should be done by counsel for each of the Applicants?

5 MR. HJELMFELT: By each of the parties. I would
6 suggest that -- certainly, I would want somebody from Cleve-
7 land there to be doing it for us in our behalf, and I would
8 think Staff and Justice would want somebody doing it there
9 for them.

10 MR. BREBBIA: But your suggestion prior to any
11 production or physical transfer is that there be an initial
12 screening of these materials?

13 MR. HJELMFELT: Yes, sir, that is what I would
14 suggest would be the most expeditious and would relieve con-
15 siderable burden on all the parties probably.

16 CHAIRMAN FARMAKIDES: This would be done at the
17 site?

18 MR. HJELMFELT: At the site.

19 CHAIRMAN FARMAKIDES: Following this initial screen-
20 ing, you are suggesting that you would go at that site and
21 screen further?

22 MR. HJELMFELT: No; I am suggesting that the parties
23 go out to the site and make a rough screen --

24 CHAIRMAN FARMAKIDES: The parties make a rough
25 screen?

blt 3

1 MR. HJELMFELT: Yes, sir.

2 CHAIRMAN FARMAKIDES: I thought you said the Appli-
3 cants make a rough screen?

4 MR. HJELMFELT: Oh, no, I was saying that we would
5 like to make one at each site, which material we would find
6 was not necessary to be brought to Washington, screen it in
7 that way.

8 CHAIRMAN FARIAKIDES: And all the rest you would
9 ask then be brought to a central depository here?

10 MR. HJELMFELT: Yes, sir.

11 CHAIRMAN FARIAKIDES: All right, sir.

12 MR. HJELMFELT: I think basically that covers what
13 we have to say, except that I think the time that the Staff
14 has suggested, the 45 days, and now the reduction to 30 days
15 after compliance starts is too short.

16 I think it is unrealistic. We have also found --
17 when you get out to these cities it is helpful if you can
18 work as long as you can bear up and keep going, and it is my
19 understanding that when he was at CEI Mr. Brand worked twelve
20 hours a day on some days. That was before the extension of
21 time, and we were attempting to do what we can to meet the
22 deadline.

23 CHAIRMAN FARMAKIDES: Of course, Mr. Brand is an
24 energetic gentleman. Twelve hours a day is a strain.

25 MR. HJELMFELT: Yes, sir.

blt 4 1 CHAIRMAN FARMAKIDES: If you are eyeballing this
2 for the initial screen, you went into more detail at the time
3 you were there, but can you estimate what it would take to
4 eyeball this material?

5 MR. HJELMFELT: I would say a day in each city,
6 less than a day, but because of travel time it would take
7 longer than that.

8 MR. BREBBIA: Excuse me a moment, if there are, as
9 Applicants claim, as I counted them up, some 500 file drawers,
10 do you think that whatever city they are in that you could
11 screen these in 5 days; are you saying 5 days?

12 MR. HJELMFELT: I would guess for the rough sort
13 of screening I would want.

14 For example, when you pull open a file drawer and
15 you see it contains nothing but work orders to an electrician
16 to go change a switch, it is easy to cross that out.

17 CHAIRMAN FARMAKIDES: It is only 120 as to the City
18 of Cleveland, or whatever it is, of course.

19 MR. HJELMFELT: That is right, a lesser number
20 for us and for them. So we don't have to go through all of
21 them.

22 CHAIRMAN FARMAKIDES: Once you eyeball these, how
23 would you identify each document that you want to have shipped?

24 MR. HJELMFELT: I would think you would have to
25 go by file drawers or by files within the file drawer.

1 If you tried to go through each individual file
2 folder, then that 1 day is out. I would say it has to be
3 a very rough screen.

4 MR. BREBBIA: Do you think a rough screen would
5 be very productive in terms of reducing the number of docu-
6 ments to be produced here, assuming the Board were to order
7 that?

8 MR. HJELMFELT: My experience in Cleveland is
9 just that, and that is what Mr. Brand tells me from viewing
10 the five cities.

11 MR. RIGLER: Are these file drawers already set
12 aside with relevant documents in them?

13 MR. REYNOLDS: Yes, sir. They are all segregated.

14 CHAIRMAN FARMAKIDES: Excuse me, Mr. Hjelmfelt.

15 MR. HJELMFELT: As I was talking about the amount
16 of hours, when we got to Toledo Edison Mr. Brand was informed
17 that if he wanted to work more than 8 hours we would have to
18 pay for the overtime of anybody that they chose to have there
19 to view us, which puts an additional burden on going from
20 city to city and not being able to use your time.

21 CHAIRMAN FARMAKIDES: This is an ordinary routine
22 procedure, isn't it, Mr. Hjelmfelt?

23 If you are running a business on 8 hours a day and
24 someone wants to go beyond 8 hours a day, isn't that reason-
25 able?

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1 MR. HJELMFELT: It may be in some circumstances
2 except here where the parties are attempting to meet the most
3 expeditious possible schedule and are traveling some distances
4 to have the opportunity to view the documents and laying out
5 blocks of time.

6 I think it is different than if it is just a 1-day
7 or 2-day affair situation.

8 CHAIRMAN FARMAKIDES: All right, sir.

9 MR. HJELMFELT: In closing, I would just say that
10 as far as an extension of the time I would think 4 months is
11 the absolute minimum realistic estimate of what is needed
12 for an extension.

13 MR. BREBBIA: You are talking about prior to the
14 start of depositions?

15 MR. HJELMFELT: Yes, sir. And if you are going
16 to allow any time for someone not being there actually looking,
17 you know, 3 weeks in each city is 15 weeks, and you have 4
18 months there, short a week; so if you want to allow slippage
19 you have to make it 5 or 6 months.

20 MR. BREBBIA: Do you see it any different if there
21 was an initial screening of 5 days and documents were ordered
22 to be produced here?

23 Then what is your guess in that case?

24 MR. HJELMFELT: I would say that that would elimi-
25 nate some of the documents you have to bring down here, but

blt 7

1 I think the 4 months probably stands from our experience, be-
2 cause what I mean, when I say 4 months out there I am talking
3 about having somebody there all day each week for 4 months
4 and the problems that are supposed to be eliminated by bring-
5 ing the material here, the fact you will have problems of
6 a person not having a full week free, and so on.

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1 MR. BREBBIA: Presumably included in this time is
2 some time to digest the documents, isn't there?

3 We are trying to find out among other things, whether
4 there is any useful purpose by ordering the establishment of
5 a depository here and having the documents shipped here
6 after an initial screening, for example.

7 If there is a savings in time, fine, we would
8 consider that.

9 We would also want to know, on top of the number
10 of man hours though, spent screening the documents, how
11 much time the parties would need to digest them in order to
12 complete a deposition schedule with, say, one round
13 maybe, instead of maybe several rounds, because of the ina-
14 bility to digest the documents in time to take the
15 extensive depositions needed, as extensive as you want.

16 So, what are we talking about, four months still?

17 MR. HJELMFELT: Well, we are talking about four
18 months to review the documents.

19 If they were reproduced as you go along so that you
20 have got them at the end of four months, except maybe the
21 last day or two that you have looked at maybe, then a month
22 at the most to go over those documents.

23 A certain amount of digestion can occur while you
24 go through the documents.

25 MR. BREBBIA: Are you saying five months, now?

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1 I am asking for an estimate now of the total
2 time.

3 MR. HJELMFELT: I would say four months to
4 review, a month to digest, and five months then would be
5 as fast as you will realistically get to a point where you
6 can do a decent job on the depositions.

7 MR. BREBBIA: In your opinion does it make a
8 difference in terms of the time, just what disposition we
9 make of this motion for protective order, i.e.,
10 whether we order on-site inspection or whether we order
11 them brought to Washington, in terms of time, now?

12 MR. HJELMFELT: I think it does, because this
13 four months that I am talking about to review the documents,
14 presumes that that is four months actually looking at docu-
15 ments, and when you talk about having the problems of going
16 out someplace away from Washington, you extend the length
17 of time in which people can get these four months' worth of
18 days looking at documents.

19 The Department has recounted its problems with
20 travel for short periods of time, one-day periods, when they
21 have one day free to go look at documents or something, and
22 if they are going to get four months worth of time of
23 looking at documents included here, it would be -- it is
24 going to be spread over a long period of time and it will
25 be spread over a shorter period of time if the documents are

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1 in Washington.

2 MR. BREBBIA: Don't address yourself to the
3 Department. I am curious from the standpoint of your client
4 as to what the timing would be for you.

5 We have heard from the Department and what their
6 views are.

7 MR. HJELMFELT: Our problem is similar because
8 we can't be sure that our people are going to be available
9 always with the situation of being able to block out a
10 period of time to go to Cleveland or the other cities.

11 MR. BREBBIA: If we don't order the documents,
12 or some of the documents transported to Washington for
13 inspection, what is the difference in time in your opinion,
14 if any?

15 That is my question.

16 MR. HJELMFELT: It is difficult to judge, but
17 I would say you are talking about another two months, maybe.

18 CHAIRMAN FARMAKIDES: You have already completed two,
19 CEI and Toledo Edison, right?

20 MR. HJELMFELT: No, sir.

21 We have not completed any of them. We have spent
22 approximately two full weeks at CEI, at which time we
23 are going through and numbering the documents and getting
24 a list of what is produced and identifying what we want
25 reproduced.

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1 We have made short visits to Toledo Edison and
2 Ohio Edison to try to get a grip on what we are up against
3 elsewhere.

4 CHAIRMAN FARMAKIDES: Let me ask the Staff and
5 Justice, if I may, to comment on the proposal we have
6 just discussed with the city?

7 That is, an initial eyeballing, a rough screening
8 initially by the parties to consume a very minimum amount
9 of time followed by their suggestion, which is delivery of
10 documents to a depository here in Washington.

11 Mr. Berger?

12 MR. BERGER: I will let Mr. Charno answer that.

13 CHAIRMAN FARMAKIDES: Mr. Charno?

14 MR. CHARNO: No.

15 It is more difficult for the Department because
16 we have not seen any of the documents.

17 If there is a great deal of chaff, obviously
18 that would be an extremely helpful procedure.

19 CHAIRMAN FARMAKIDES: The Staff?

20 MR. LESSY: The Staff feels the duty to screen
21 his own party who is being discovered initially as a first
22 position.

23 If the Board disagrees with that then we wouldn't
24 have any objection to it. But that is our feeling that they
25 should not be permitted to impose the burden on us by having

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1 a very, very broad screen which is the first time I have
2 heard Mr. Hjelmfelt on the point.

3 Secondly, I would just like to, in response to
4 delivery to Washington, that is our second position and
5 that is acceptable to us.

6 Now I am getting a little concerned about the
7 costs based on the point they made about somebody staying
8 overtime and anything that can be added in. What I would
9 like to do is hope that the costs can be, of course, done
10 in an equitable manner, and my first impression is that
11 should be to the Applicant.

12 The date for supplemental briefs I think is
13 Tuesday, but I would like to submit a statement to the
14 brief on behalf of the Staff dealing with the issue of
15 costs, in light of the options discussed here today.

16 MR. BREBBIA: Let me interrupt for a moment,
17 Mr. Lessy.

18 What we are discussing at the moment is a dis-
19 cussion and suggestion by Mr. Hjelmfelt that one way to
20 reduce the volume of these -- the Applicants take the position
21 they have screened the documents.

22 The issue here is assuming they have not screened
23 them, they say they have, what they do is then -- if we put
24 them to the burden of delivering all the documents to
25 Washington, and they deliver the million or two million

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1 documents to Washington, the question is whether it serves
2 a useful purpose for the parties to go out one day in
3 each city and make what would obviously be an extremely
4 rough screening as Mr. Hjelmfelt suggested by package
5 file drawer, and say these are the documents we want shipped.
6 We are not even talking about what to do with them.

7 MR. LESSY: No objection to that.

8 MR. BREBBIA: Do you think it is a good idea,
9 though?

10 MR. LESSY: I think a better idea is that
11 Applicants be forced to do a reasonable screen, but if --

12 CHAIRMAN FARMAKIDES: All right.

13 MR. LESSY: -- but if that is not in the cards,
14 then this initial screening by counsel -- I assume we
15 could have counsel from the government there, one of us --
16 that is not objectionable to the Staff.

17 MR. BREBBIA: I say that because the cost in
18 this, it appears to me, is the cost of air transportation
19 and not the cost of reproducing the documents, or overtime
20 man-hours, or anything else.

21 MR. LESSY: Right.

22 Staff has no objection to that.

23 CHAIRMAN FARMAKIDES: Anything else,
24 Mr. Hjelmfelt?

25 MR. HJELMFELT: No, sir.

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CHAIRMAN FARMAKIDES: Mr. Reynolds?

MR. REYNOLDS: I would like to continue right through if the Board would.

CHAIRMAN FARMAKIDES: Yes, we would, too, but would you like a recess?

Let's take a recess until 25 after 12, then.

(Recess.)

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1 CHAIRMAN FARMAKIDES: Mr. Reynolds?

2 MR. REYNOLDS: Yes, sir.

3 ORAL ARGUMENT OF W. BRADFORD REYNOLDS, ON
4 BEHALF OF THE APPLICANTS.

5 MR. REYNOLDS: The Applicants' position is
6 that in response to the joint document request filed by
7 the Department of Justice and the AEC Staff and the
8 city's separate document request, Applicants at considerable
9 cost and disruption to its daily business operations
10 conducted extensive file searches, segregated the documents
11 and assembled them for inspection and copying in separate
12 files each identified with the request made.

13 On December 2 date we so notified the parties.

14 I will just for clarification interject briefly
15 that there was no intent to misstate the facts in the
16 footnote as to hand delivery that the Department of Justice
17 raised.

18 We had an agreement with the parties that in-
19 stead of mailing on Decembee 2, it would be hand-delivered
20 the next day because it would be received a lot earlier
21 and when we went to the Department of Justice with our
22 delivery we were handed a copy of theirs. It may well be
23 that other copies were mailed earlier than that, and I
24 was not aware of it and so I apologize for any misstate-
25 ment that might appear in the footnote.

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1 We have produced for inspection and copying at
2 each of the offices some 1.2 million documents in re-
3 sponse to the joint request by the Department of Justice
4 and the AEC Staff; and another addition 1.1 million
5 documents to the city for a total of 2.3 million docu-
6 ments approximately.

7 Now, the issue here is not the failure to produce.

8 MR. RIGLER: How were these documents classified?
9 You mentioned earlier that they were.

10 MR. REYNOLDS: The documents were arranged
11 according to each specific document request in file
12 drawers identified by that particular request.

13 Let me just interject at this point with respect
14 to the list of documents that have been alluded to,
15 the Applicants, when you talk of 2 million documents, the
16 Applicants instead of listing specifically chose the alter-
17 native, I guess it was that the Chairman referred to
18 earlier, of classifying each document in a file drawer
19 identified to the particular document request and they are
20 all so categorized and assembled and there is a list of the
21 file drawers which pertain to the particular document
22 request. Those lists are available and have been avail-
23 able at the point of production where we produced initial-
24 ly. By the same token as to the list of documents which
25 are not in Applicants' possession, custody, or control

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1 because they have been disposed of, only one of the Appli-
2 cants, Ohio Edison, has affidavit to that effect where
3 that has happened. Its affidavit is produced where the
4 documents have been produced at the office of Ohio Edison.
5 It has the affidavit identifying which documents are, in
6 fact, no longer in their possession.

7 The other allegation on noncompliance goes to
8 the privileged documents. We do not understand the Board's
9 order to set a time limit on that. It said that they would
10 be filed with the Board. The Applicant has filed the
11 list of privileged documents with the Board. The matter
12 is to be submitted to the Special Master and the filing was
13 made before submission to any Special Master. So, the
14 notion that there has been a general noncompliance, I
15 think is very misleading.

16 The case cited, the Supreme Court case cited in
17 the brief of the Department, Société Internationale
18 versus Rogers, states as the standard of compliance on a
19 good faith effort to comply the tests "whether the producing
20 party has attempted all which a reasonable man would have
21 undertaken in the circumstances to comply with the pro-
22 duction order."

23 Now, --

24 MR. BREBBIA: Let me interrupt you and ask you the
25 question of why it is that you failed to notify the

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1 Department or the Staff of your inability or whatever
2 reason you chose not to list the documents as they asked
3 you to do in their request.

4 MR. REYNOLDS: Well, I believe that our under-
5 standing of that was that there would be a listing which would
6 identify the documents with respect to each particular
7 request. As Mr. Lessy indicated, it was his understanding,
8 that was to list the file drawers that contained the docu-
9 ments that specifically answered each specific request.

10 MR. BREBBIA: I would have to go back and look
11 at it. My recollection is that that was not the request.
12 The initial request was to list the documents, not the
13 file drawers, number one.

14 MR. REYNOLDS: I think that as I say, the Ap-
15 plicants had no indication at the time of commencing their
16 file searches what was going to be produced, what the
17 volume was going to be. I believe in the space of 45 days
18 they went through a tremendous volume of material and
19 expended a tremendous effort to pull out the documents
20 in response to those requests. At the end of that period
21 we at that point focussed on the fact that it was virtu-
22 ally impossible to do a listing of documents to produce
23 documents here when you are talking about 2.3 million documents.

24 MR. BREBBIA: The second part of the request
25 that you people -- by the way, you didn't object to this,

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1 that is one of my problems, you did not object to this at
2 the time that we had the hearing on the question of the
3 document requests and the interrogatories; nor did you
4 enter an objection to my knowledge as to delivery of the
5 documents here to Washington.

6 MR. REYNOLDS: No, we had no reason to think
7 we would object at that time.

8 MR. BREBBIA: But when somebody went out there
9 and looked and saw there were so many documents and it
10 didn't take 45 days to determine there would be a lot of
11 documents, be it the first 25 thousand or 50 thousand
12 or 100 thousand, never mind the 2 million involved here,
13 why is it that you did not notify any of the other parties
14 of your intention not to deliver the documents or your
15 inability in view of the size and burdensomeness of
16 doing it, to make a delivery of the documents?

17 MR. REYNOLDS: Well, Mr. Brebbia, I think as
18 a practical matter what happened, as document searches
19 usually are conducted, is that each of the Applicants
20 went to their various heads of various divisions and asked
21 them with respect to the particular files under their con-
22 trol to conduct a file search and to pull documents.
23 That information was done over the period of time given
24 and it was not until the end of that period that we realized
25 what we were talking about, when people came in with the

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1 numbers of documents that they felt should be produced as
2 relevant to the requests. At that point we did notify
3 that we felt production should be taking place -- should take
4 place-- that we would produce and they would be made
5 available in the companies' headquarters.

6 MR. RIGLER: What date was that? You say at
7 that point.

8 MR. REYNOLDS: That was, we advised them in
9 our response to interrogatories on December 2 and in
10 a phone call that followed a day or two later we advised
11 of the quantity and that we had for that reason not deliv-
12 ered the material to Washington. There was then a motion
13 to compel that was filed and in response to that we out-
14 lined in the papers that are before the Board the spec-
15 ifics of the situation and filed our motion for protective
16 order.

17 MR. BREBBIA: The motion came after the due
18 date.

19 MR. REYNOLDS: Which motion?

20 MR. BREBBIA: For protective order.

21 MR. REYNOLDS: I believe that the rules say
22 is appropriate in a motion to compel. That is an
23 appropriate pleading in a motion to compel. In terms
24 of timeliness the earlier timeliness requirement in the
25 rules and under the Federal rules has been deleted.

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1 MR. BREBBIA: That may be true in the ordinary
2 circumstance, but in this case we have the added fact of
3 your failure to object to either the deliver to Washington
4 or a listing of the documents when these requests were
5 made by the parties, when we had a hearing on the subject
6 matter of interrogatories and document requests. You
7 entered no objection at that time, and neither did you enter
8 any objection until such time as you filed this -- well,
9 as to delivery of documents. You entered no objection nor
10 comment on the listing of them, as best I can tell, but
11 as far as the delivery of documents to Washington, your
12 first objection came after the delivery date in the form
13 of a motion.

14 MR. REYNOLDS: No, it did come after the delivery
15 date, but it came in an initial response, I believe,
16 filed December 16 with the Board on objections to the
17 motion to compel. That was the first formal objection.

18 MR. BREBBIA: I don't know that I can accept
19 the reasoning that it is timely to file for protective
20 order at any time after a motion to compel is made when
21 you are already on notice of the request of the parties
22 which -- previous notice, which notice you failed to
23 object to.

24 MR. REYNOLDS: Well, I think in terms of
25 raising an initial objection, and it was in connection,

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1 I believe with discussions specifically with you during the
2 prehearing conference of September 16, there was a collo-
3 quy as to whether Applicants intended to turn the keys over to
4 the parties in order to have a file search totally or whe-
5 ther the Applicants were going to screen. At that point
6 I very specifically indicated that I had no idea and
7 the Applicants had no idea what would be produced in
8 response to the various requests and until we had a defi-
9 nition as to scope, which came out on November 11, it was
10 impossible to make any meaningful file search. We had
11 no way at that point of raising any possible objection
12 and -- unless we put in a routine frivolous objection.
end 13 I couldn't have sustained an objection at that point.

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1 MR. BREBBIA: Well, you left the record, neverthe-
2 less, with the request for the production of these documents
3 in Washington and a listing of them -- you know, you left
4 it in a state where you failed to object to it and you didn't
5 comply with the request. Then you chose to file your pro-
6 tective order after the due date, after the date of the
7 delivery of the documents or the delivery date had passed, I
8 mean.

9 MR. REYNOLDS: I grant you that the record was left
10 in that state. We made a good faith effort to comply. We
11 did not file the initial objection and it was after the
12 delivery that we filed our protective order. I can't deny
13 that. That is the state of the facts.

14 But the whole purpose of protective orders
15 is to look to see under all the circumstances whether good
16 cause exists to give the protection that is being asked for
17 to afford that protection.

18 I think that the whole -- it comes normally in
19 response to a motion to compel. That's a normal response to
20 that kind of a motion.

21 I think here that notions of timeliness or what-
22 ever must give way when viewed in light of the tremendous
23 burden you are talking about Applicants having to assume, and
24 we are not in a situation where Applicants have acted as
25 willfully to delay this proceeding. Our efforts have been

kms 2

1 advance this proceeding and hopefully get it on a schedule
2 which is expedited.

3 It is contrary to our interest to try delaying
4 everything. We are not making any kind of effort to do that.

5 The motion was after delivery, but it seems to me
6 that there is sufficient grounds to warrant consideration
7 and granting of that motion in view of the circumstances
8 that have developed, which could not have been foreseen at
9 the time. The Applicants had as a precedent the other anti-
10 trust proceedings. Had our production been comparable to the
11 five file drawers in Farley we would have delivered and
12 not had the problem such as we have.

13 MR. RIGLER: Your original intent was to produce in
14 Washington, D.C.?

15 MR. REYNOLDS: Yes.

16 MR. RIGLER: Because you were aware that the ori-
17 ginal request called for production in Washington?

18 MR. REYNOLDS: Yes, within the scope I indicated.

19 MR. RIGLER: At what point did you become aware of
20 the sizable volume of the documents to be produced?

21 MR. REYNOLDS: I personally became aware the
22 very last week before filing our responses. It was November
23 27th, 28th, 27th or 28th.

24 MR. RIGLER: The problem must have developed before
25 that. Maybe it would be helpful if you told us about the

kms 3

1 procedures used to screen for the documents and what the
2 instructions were that were given the individual Applicants.

3 MR. REYNOLDS: The instructions given were basic-
4 ally generated at our offices. They were to screen their
5 files to pull documents that were deemed relevant and where
6 there was doubt as to relevancy that the documents should
7 be included.

8 MR. RIGLER: Who did this screening at the site
9 of the Applicants?

10 MR. REYNOLDS: It was done -- coordinated by the
11 general counsel's office of each applicant by one of the
12 attorneys in the office, and was carried out by various people
13 in various departments of the companies who were -- who had
14 control of separate files, and they have staff people who
15 would do the screening or they themselves would do the
16 screening and I'm not sure -- it varied in terms of company
17 to company.

18 MR. RIGLER: What sort of guidelines did these
19 clerical personnel have in determining relevancy of a docu-
20 ment or whether it was called for by the request?

21 MR. REYNOLDS: They had specific guidelines from
22 the local counsel who had the requests and was in constant
23 communication with us as to questions of interpretation which
24 came up, and advice was given accordingly on that.

25 CHAIRMAN FARMAKIDES: Do you have copies of those

kms 4

1 guidelines with you, Mr. Reynolds?

2 MR. REYNOLDS: I don't have them with me, I have
3 a copy of a memorandum at the office I can furnish the
4 Board, which I did file with them.

5 CHAIRMAN FARMAKIDES: With each of the counsel
6 of the various Applicants, you mean?

7 MR. REYNOLDS: It's our copy of our guidelines to
8 each of the Applicants with respect to document review.

9 CHAIRMAN FARMAKIDES: But you are not sure what
10 the guidelines were issued by the various counsel to the
11 clerical screening force?

12 MR. REYNOLDS: I am -- I had discussions with them
13 about those guidelines. I don't think that they were in
14 writing.

15 I have -- I don't think they wrote guidelines.

16 CHAIRMAN FARMAKIDES: But you have reason to be-
17 lieve that your guidelines were followed by the companies?

18 MR. REYNOLDS: Oh, yes, very definitely. I might
19 point out as Mr. Hjelmfelt has indicated by his search, that
20 he has found one full file drawer out of 7. That is close to
21 20 percent, 17 percent of documents that he deems relevant.
22 So it doesn't seem to me we are talking about a file search
23 that has not been attentive to the document request.

24 MR. BREBBIA: We are talking about relevancy, but
25 responsiveness to the document request. Not relevant to this

kms 5

1 hearing.

2 MR. REYNOLDS: But he has found 17 percent which
3 are relevant to this hearing. I would assume that would be
4 a smaller number than would be relevant to the document re-
5 quest from my reading of it.

6 MR. BREBBIA: Did any of your lawyers screen
7 these documents once produced by the various operating
8 personnel, whoever they were, who produced them?

9 MR. REYNOLDS: I am not sure the extent of the
10 screening from company to company. I know that there was a
11 screening -- I don't know whether the coordinating lawyer
12 screened or the lawyer on his staff did, but I believe one or
13 the other screened --

14 MR. BREBBIA: My question is, were they screened by
15 a lawyer once they were --

16 MR. REYNOLDS: There was a general screen. There
17 was not a specific, more careful screening.

18 MR. BREBBIA: Nobody looked at each document?

19 MR. REYNOLDS: Nobody looked at each document.

20 MR. BREBBIA: They looked at file headings?

21 MR. REYNOLDS: At the files and generally what was
22 in the files. There is a problem here of the confidential
23 documents, and again, there is an indication that --

24 MR. BREBBIA: Let's leave that aside for the moment.

25 MR. REYNOLDS: But in order to do that you have to

kms 6

1 have a screening by the lawyers to determine what is confi-
2 dential and that required a general screening, and those
3 documents were segregated and put in a separate file drawer
4 or two file drawers in the company as in accordance with the
5 Board's order, and are available for inspection.

6 MR. BREBBIA: You mean segregated out of an
7 envelope that was examined for contents, if there was one
8 document out of the envelope which you felt contained trade
9 secrets --

10 MR. REYNOLDS: Or file, whatever.

11 MR. BREBBIA: If you talk about legal documents,
12 presumably you go to the legal files. When you talk about the
13 client privilege, those would be segregated already.

14 MR. REYNOLDS: That is why I differentiate. I
15 am talking about proprietary information.

16 MR. BREBBIA: So somebody went through a general
17 screening.

18 MR. REYNOLDS: Yes, but not document by document.

19 MR. RIGLER: What sort of screening was made after
20 November 27, or the date on or about which you became
21 aware of the volume problem?

22 MR. REYNOLDS: I don't believe there has been a
23 screening, sir.

24 MR. RIGLER: Of these five general counsel who were
25 operating in coordination with you, none of them advised you

kms 7

1 that he was encountering a volume problem until on or about
2 November 27th?

3 MR. REYNOLDS: No, they did not advise me. I am
4 not -- I don't think that is -- one of the problems is just
5 what my schedule was at the time, but another problem is --

6 MR. RIGLER: I mean your office, not you, neces-
7 sarily.

8 MR. REYNOLDS: But coming to that counsel action
9 it is not surprising that they didn't come up with it. With
10 the number of people engaged in that search, I am not surprised
11 that I didn't hear until that time.

12 CHAIRMAN FARMAKIDES: Mr. Reynolds, you indicated
13 at some point in time you switched from a decision to
14 produce the documents in Washington, D.C., to a decision to
15 produce the documents at the Applicants' offices.

16 MR. REYNOLDS: That is correct.

17 CHAIRMAN FARMAKIDES: Sir, what were the factors
18 that you considered in reaching that decision?

19 MR. REYNOLDS: The factors were basically the
20 size of the discovery production, the costs involved, one, in
21 transportation, and two, in necessarily duplicating a large
22 proportion but not all of the produced documents, because
23 they were pulled from active files and needed on a daily basis
24 at the company; and also, the decision that I -- a factor too
25 that I plugged in, that is my understanding of document

kms 8

1 production in antitrust procedures is that normally this is
2 the way you produce documents when you run into a volume of
3 documents this way.

4 CHAIRMAN FARMAKIDES: How did you consider the fac-
5 tor of time delay?

6 MR. REYNOLDS: I considered it would be to the
7 advantage of everybody to have them inspect the documents
8 on location as opposed to going through an additional process
9 of reviewing all the files, pulling out the ones that have --
10 because they are active files, have to be reproduced, packag-
11 ing, transporting them, bringing them here, unpacking them
12 and sending everything back.

13 That as opposed to traveling to each of the
14 Applicants' offices to examine documents which were already
15 segregated and were coordinated with a particular document
16 request in files separated, it seemed to me it would be a
17 distinct time advantage to take the latter course.

18 CHAIRMAN FARMAKIDES: Undoubtedly you balanced
19 advantages and disadvantages to yourself. We all do that.

20 One of the disadvantages to yourself is the delay
21 in time, assuming that you would have produced all the
22 documents in Washington on the last day of the Board's order.
23 You chose not to do that. You chose to instead state that
24 the documents were available at the various offices.

25 Is that correct as I understand it?

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MR. REYNOLDS: I did choose to state that they were

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available at the various offices.

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1 CHAIRMAN FARMAKIDES: You obviously, to me, then did
2 not consider that the time delay was as material a consideration
3 to you, as the costs that you articulated earlier; is that
4 correct?

5 MR. REYNOLDS: No, I say, I think it's much quicker
6 to do it the way we intended to do it. I think there was a
7 savings in time by doing it that way. In fact, as far as the
8 Applicants were concerned, my view and understanding of the
9 law is that a cost factor for copying and transporting in that
10 situation would have to be borne by the other side, so the time
11 factor was a --

12 CHAIRMAN FARMAKIDES: I don't understand that at all,
13 because if these documents had in fact been produced on a given
14 day, December 2, here in Washington, D. C., it would have been
15 much less time for all the other parties to look at them here
16 in that period of time.

17 MR. REYNOLDS: If the parties had started as the
18 City of Cleveland did on day 1 or December 2 to go to the
19 Cities and conduct their document examination, it would have
20 been done -- I don't see there would have been any difference
21 in time.

22 CHAIRMAN FARMAKIDES: You are begging the question,
23 sir.

24 The order of the Board was very clear, the request
25 of the Staff and Justice was clear, the documents were to be

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1 produced here in Washington, D. C.

2 MR. REYNOLDS: I don't believe the order of the
3 Board said that.

4 CHAIRMAN FARMAKIDES: Well, the two requests were
5 clear. You made no objection to that.

6 MR. REYNOLDS: I understand.

7 CHAIRMAN FARMAKIDES: My assumption is that the
8 documents were produced in Washington, D. C. If that were
9 the case, these parties would have been able to screen those
10 documents, review them, far quicker than going to each of the
11 Applicants' sites; isn't that correct?

12 MR. REYNOLDS: At the time I learned of the volume
13 of document production, it would have been impossible to do
14 the task that had to be done and get them here by the December
15 2 date.

16 CHAIRMAN FARMAKIDES: Now, we get back to the critical
17 point, and that is where you learned of the volume of documents,
18 which was the last of November.

19 MR. REYNOLDS: Critical to what? Critical because
20 it's a matter of documents. But it's critical to what?

21 CHAIRMAN FARMAKIDES: It's critical to my decision,
22 frankly.

23 MR. REYNOLDS: That is -- I did learn of it within
24 that last week. I think that, in terms of why we did not
25 object at the outset, I have stated our view was at that time

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1 that it would have been at best a frivolous objection.

2 CHAIRMAN FARMAKIDES: All right, sir.

3 MR. REYNOLDS: I think the motion for protective
4 order can be appropriately considered when good cause has
5 been shown and when circumstances arise that were unforeseen,
6 that would impose the burden that we are talking about here
7 on the Applicants, especially when you are talking about the
8 discovery of requesting parties.

9 It is their discovery, they chose to go this route,
10 they drafted the request for documents. It is the first time
11 in any AEC proceeding -- environmental or antitrust -- where
12 an applicant has been faulted for too much compliance or pro-
13 ducing too many documents.

14 CHAIRMAN FARMAKIDES: Let's assume for the moment that
15 your motion was filed on December 10th; is that timely?

16 Wasn't the Staff's motion to compel filed December 5th?

17 MR. REYNOLDS: It was filed December 5th.

18 CHAIRMAN FARMAKIDES: Are you suggesting that your
19 motion of December 20th was timely?

20 MR. CHARNO: January 2, sir.

21 CHAIRMAN FARMAKIDES: January 2, I beg your pardon.

22 MR. REYNOLDS: We initially objected and the
23 court gave leave to file additional papers, and in response
24 to that, we did file. We filed timely, objecting to the
25 motion to compel and the court gave leave to file additional

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1 papers on the leave, and we filed our motion for protective
2 order.

3 Our objection on the 16th was timely and within the
4 response to the motion to compel and, by order of this Board
5 for leave to file additional papers on this particular point,
6 we filed our motion for protective order.

7 CHAIRMAN FARMAKIDES: Mr. Reynolds, continue
8 then, if you would, please.

9 MR. REYNOLDS: I want to get to the point again
10 that: I think what we are talking about, this whole issue, what
11 it turns on is the convenience to the government to discover
12 or to inspect documents that they have asked to be produced.
13 They state that geographically it's inconvenient and that
14 they wanted it moved here, because they have other commit-
15 ments, and they would rather conduct their discovery, or
16 work it around other commitments, and that do it on that
17 basis is much more convenient to them.

18 I don't think that is an appropriate basis to
19 require Applicants to bear this kind of burden, however.

20 MR. RIGLER: What sort of screening do you -- and
21 by you, I mean your office or your firm -- intend to do with
22 respect to these documents?

23 MR. REYNOLDS: At what point?

24 MR. RIGLER: Well, in preparation for a
25 deposition program.

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1 MR. REYNOLDS: We would do reviewing of documents.
2 We don't intend to do additional screening of the documents
3 in connection with the Applicants' inspection.

4 MR. RIGLER: If we did not require the documents to
5 be brought to Washington, would Applicants' counsel go and
6 visit the individual sites and screen the documents or look
7 to see what they considered relevant or what they intended
8 to use in the deposition program?

9 MR. REYNOLDS: Well, it probably would be to some
10 extent shortened, because we would have our officials look
11 obviously at the documents that were selected by the re-
12 questing parties at the time that they inspect and ask for
13 copies, and then we would certainly -- that would shorten
14 to some extent our preparation for depositions, but there
15 would be additional screening of the other materials, as
16 well.

17 MR. RIGLER: So that in considering costs and
18 conveniences, we would have not only the government and
19 Staff visits to the five sites, but we would contemplate
20 visits from your office here in Washington?

21 MR. REYNOLDS: We have people at each individual
22 site, who are competent to screen the material.

23 The Applicants have their own counsel at each
24 site, which is staffed and is able to do a review of the
25 material in a preliminary screening.

bw6

1 We obviously would be required to do some additional
2 screening, but that's not an expense or cost factor for us.

3 It would seem to me that the Applicants would have
4 that burden either way that the Board resolved this under
5 the Department of Justice's proposal, because they are pro-
6 posing to bring the documents in here fifteen drawers a week
7 and send them back.

8 The Applicants' screening would still necessitate
9 trips by Washington counsel to the Applicants' counsel office
10 under either .

11 MR. RIGLER: What is the cost of bringing 500
12 file drawers of material to Washington?

13 MR. REYNOLDS: I don't know the dollar and cents
14 specific transportation costs. There is a transportation
15 cost which, I believe -- well, I just don't know what that
16 figure is. There is, in addition, the costs that would be
17 the overhead costs incurred by requiring a review of the
18 material produced, to determine which of the active file
19 materials had to be copied, in order to make sure that that
20 was retained in the office, when the information was released.

21 MR. RIGLER: How is the active file material now
22 segregated?

23 MR. REYNOLDS: It's not. I am sorry, it's not
24 segregated --

25 MR. RIGLER: Within the 500 drawers that has been

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pulled?

MR. REYNOLDS: It's in there, but it's not segregated, active versus inactive.

MR. RIGLER: I am having a credibility problem, all at once, because here you represent that these are active materials that you need day-to-day, and yet you say they are in the 500 drawers somewhere.

It doesn't sound to me as though you're using these day-to-day, if they are within the 500.

MR. REYNOLDS: I have checked that very thoroughly, we know where the drawers are, and they are all segregated, and we know where the files are in those drawers, and people have had to parade back and forth continuously to those file drawers to get documents they have need on a daily basis.

I have checked that with each of the companies, and it's causing a considerable disruption.

CHAIRMAN FARMAKIDES: Perhaps this might be a good opportunity to ask, would you be amenable to the request made by Justice to transport 15 file drawers a week to Washington, D. C.?

MR. REYNOLDS: We would not.

CHAIRMAN FARMAKIDES: It would certainly alleviate some of the disruption that you just mentioned.

MR. REYNOLDS: Well, I have a question with respect to that, and I am not sure I really understand their proposal.

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But, first, in terms of transporting 15 file drawers, there would be incurred, as I just indicated, a cost of copying at the company those documents needed to be retained at the company.

I am not sure whether Justice has proposed that they assume 99 percent of that cost or whether they are saying Applicants assume that cost, and we bring it down and Applicants then assume an additional one percent for copying the first 20,000 sheets they want to have produced.

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1 MR. BREBBIA: I think what they are saying is
2 fairly clear. They are saying they are proposing you bring
3 the active files here, 15 files a week, and that you don't
4 reproduce the active files, you don't reproduce anything.

5 You bring the active, all the files here, 15
6 drawers at a time per week, and that they will review the
7 files, reproduce whatever ones they want.

8 They want you to bear the burden of the first
9 10 thousand pages, leaving that aside now, but the bulk of
10 the request is that you not have to reproduce anything be-
11 cause you bring files, active or whatever, at the rate of
12 15 file drawers a week, to Washington to be reviewed.

13 Then they will be returned to Cleveland or where-
14 ever they come from.

15 In that way, because you only have the loss of
16 the use of them for one week, as I understand that proposi-
17 tion, their suggestion is that therefore you are not repro-
18 ducing any.

19 MR. REYNOLDS: We have two problems with that.

20 One, we can't allow certain of those documents
21 to go out for a week without being at the company.

22 MR. BREBBIA: What percentage of the documents
23 are active?

24 MR. REYNOLDS: It varies from company to company,
25 and --

blt 2

1 MR. BREBBIA: Take CEI.

2 MR. REYNOLDS: In CEI's case, it is about 80 per-
3 cent, as I understand.

4 CHAIRMAN FARIAKIDES: 80 percent of the documents
5 segregated out --

6 MR. REYNOLDS: Of the 5 thousand -- of the 500
7 thousand sheets of paper -- and I am not sure how many docu-
8 ments that is; we have not been able to determine that.
9 It is difficult to determine that.

10 But of that bulk approximately 80 percent is
11 involved with active daily, day-to-day operations, I am told.

12 For Ohio Edison, they say it is something in the
13 neighborhood of 35 percent.

14 MR. RIGLER: You mean you are dealing with 400
15 thousand pieces of paper a week, CEI is?

16 MR. REYNOLDS: Well, obviously you don't have
17 to look at 400 thousand pieces of paper a week. You don't
18 know which of those you are going to need on a given day at
19 a given time, but they are all pages relevant to daily ope-
20 rations, any one of which could be necessary.

21 The Cleveland situation, because it involves a
22 tremendous amount of document production relative to the City
23 of Cleveland, I think explains the higher percentage there,
24 the high percentage there where you do have certain material
25 that has been requested that relates to the very specific

blt 3 1 operations that CEI conducts and conducts every day on an
2 ongoing basis.

3 MR. RIGLER: Aren't there already multiple copies
4 of ongoing documents?

5 MR. REYNOLDS: I don't think there are.

6 MR. RIGLER: Certainly, those documents would be
7 copied in the engineer's office, for example.

8 MR. REYNOLDS: As to a proportion of them, they
9 are clearly not available otherwise. But as to others, I
10 am not sure.

11 I have another problem, Mr. Brebbia, with the
12 proposal of Justice, and that is that I think that that pro-
13 posal is going to substantially delay the whole discovery
14 process.

15 MR. BREBBIA: Justice takes the position -- I am
16 not arguing with you, agree or disagree -- but they take
17 the position that that method of compliance would expedite
18 this hearing.

19 Now, we have heard them take the position that
20 if they have to do it on site, if I understand it, we are
21 talking 8 to 9 months.

22 If we talk about shipping the documents to Wash-
23 ington, we are talking about half that time.

24 That is the ambition there.

25 MR. REYNOLDS: But it is a big operation. Justice

blt 4

1 has taken on AT&T, the sugar refineries. They have a big
2 staff.

3 We are not talking about --

4 MR. BREBBIA: Whatever it is, they say they will
5 provide the manpower that will keep these documents, 15
6 file drawers, from remaining in Washington longer than 1 week
7 regardless.

8 They say, "You bring them here 15 at a time; we
9 will review them in a week. If we don't review them in a
10 week, you get them back anyway."

11 That is what they are saying.

12 MR. REYNOLDS: You avoid the whole time of ship-
13 ping if they take that same time and fly out there in the
14 morning, look at the documents, stay a week, and come back.

15 You are asking me a shorter time period, I think.

16 MR. BREBBIA: No, I am simply stating their
17 position is that it is quicker to do it by shipping them
18 here at that rate.

19 One of the reasons they advance that is because
20 they have available, they state, here people who are trained
21 in the electrical power industry who can review them here,
22 whereas they don't have those people available in the field
23 offices, among other reasons.

24 MR. REYNOLDS: I understand that, understand it
25 is a joint responsibility that is engaged in by AEC and

blt 5

1 Justice, and I just have a difficult time believing that
2 they can't send people to the sites and conduct their dis-
3 covery in the way that I would have to say that document
4 discovery in antitrust cases is normally conducted by the
5 Justice Department and other people.

6 I think if you do it on a concentrated basis of
7 one week at the time, which they say the Department requires,
8 that with several people out there it is going to be a lot
9 quicker than if we talk about bringing in 15 files one week
10 and coordinating that and bringing in another 15 and so on
11 back and forth.

12 CHAIRMAN FARMAKIDES: Anything further, Mr.
13 Reynolds?

14 MR. REYNOLDS: Yes, I would like to address a
15 few things, and I will do it in series and we can be more
16 specific in a reply memo, but I will address the cases cited
17 in the two briefs of Justice and the AEC.

18 CHAIRMAN FARMAKIDES: If you are going to pre-
19 sent this in your reply memo, you don't have to put it on
20 the record.

21 MR. REYNOLDS: I understand, but if I could make
22 a few general comments, under two general headings, I would
23 like to do that.

24 The first point is that as to the notion of will-
25 ful failure, I have already discussed that and I don't

blt 6

1 think it is appropriate at all.

2 I would point out that those cases are all con-
3 cerned with a situation where there is total ignorance of
4 the discovery request; there is no effort to comply; no
5 production has been made such as we have here. And even
6 in those cases the courts have been reluctant to impose
7 sanctions but have instead remanded and required that there
8 be answers to interrogatories or appearance at depositions.

9 But certainly the cases on their facts don't
10 indicate that we are talking about a willful failure in
11 this situation under any stretch of it.

12 Also, I would point out that willful failure
13 cases involve rule 37 under Federal rules and there is no
14 counterpart rule under the Commission's rules. That's an
15 interpretation of special language in that rule, and we
16 don't have under the Commission's rule a counterpart to
17 rule 37. And I think that that is certainly a factor in
18 assessing whether those cases are relevant in our situation.

19 The other point, and it was made by Mr. Brebbia
20 or raised by Mr. Brebbia, goes to the cases that they cite
21 on production.

22 All but one of their cases concerns the burden
23 and expense involved with the assembling, file searching,
24 and collating documents, and we have already undergone
25 that expense and burden; and none of those cases talked to

blt 7

1 the matter of delivery or involve directions for delivery.
2 In fact, in two of them, and I will explain it in the
3 reply brief, in two of them where there is a discussion
4 of delivery the delivery is in conformance with the request
5 made by the party asked to produce.

6 The one case that even begins to support what
7 the requesting party's position seems to be is a case in-
8 volving a subpoena duces tecum, TYCO Industries, and in
9 that case -- I believe that was the one, no, I am sorry;
10 it is U.S. versus American Optical Company. In that case
11 the court carefully looked at the burden involved and con-
12 cluded that there was not a sufficient burden to say
13 that the documents didn't need to be brought. Twenty other
14 competitors had been notified for deposition and appeared
15 and had brought the same documents and the objection was
16 being raised by the twenty-first competitor, and they said
17 he could certainly assume the same burden and the same
18 number of documents.

19 So I don't find any authority at all to support
20 this notion of delivery.

21 One final point is that all the cases cited by
22 the AEC on the waiver argument regarding protective order
23 are pre-1970 but one, which is a Maryland case. That case
24 doesn't even speak in terms of protective orders. It is
25 a case of willful failure where the Board imposed sanctions

blt 0 1 because there was absolutely no compliance whatsoever by
2 the party to a court order, I mean where he was in contempt
3 of a court order.

4 I might say that the footnote references on page
5 14 of the Justice's brief to the proposition that you can
6 award expenses where there is noncompliance on a willful
7 failure basis, those cases both involved a contempt of
8 court situation where the court had specifically ordered ap-
9 pearance at depositions and answers to interrogatories, and
10 in the case of that order there was total silence.

11 We'll elaborate on that in our reply brief.

12 CHAIRMAN FARRIAKIDES: Thank you, sir.

13 MR. REYNOLDS: One point, if I may.

End 13 14 CHAIRMAN FARRIAKIDES: Yes.

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1 MR. REYNOLDS: One comment might be made on
2 schedule.

3 We propose 30 days from the time of the Board
4 Order, which I think is consistent with the contemplation
5 concerning discovery here, and if the parties go to the
6 locations and staff it properly, I think it can be done in
7 30 days.

8 I think that what we are talking about here in
9 terms of delay, works only to the prejudice of the
10 Applicants. The Department has not indicated any basis for
11 prejudice for this whole situation at all. The fact that
12 there is not -- that we have had a six-month delay in com-
13 mencing discovery works to no one's prejudice but the
14 Applicants. They are the ones prejudiced.

15 The Department having gone out to examine
16 the documents on a peripheral basis --

17 CHAIRMAN FARMAKIDES: That was your choice, though,
18 wasn't it?

19 If you had delivered the documents in response
20 to the request made by the Justice Department and the Staff,
21 there would have been no such delay.

22 MR. REYNOLDS: Well, I think if they had --

23 CHAIRMAN FARMAKIDES: You have articulated reasons
24 for doing so, but if you had in fact complied with their
25 initial request, which you have never objected to, there

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1 would have been no delay.

2 MR. REYNOLDS: We think if they had requested
3 to come out as anticipated, we would have come through.

4 We do feel it is an important issue, and
5 important enough if necessary to take to the Commission.

6 CHAIRMAN FARMAKIDES: Anything further?

7 MR. GOLDBERG: I would just like to be sure that
8 we all understand that when we talk about two million-plus
9 documents --

10 CHAIRMAN FARMAKIDES: No, sheets.

11 MR. GOLDBERG: But it has been used interchange-
12 ably.

13 CHAIRMAN FARMAKIDES: No, Mr. Reynolds made that
14 point very clear.

15 MR. GOLDBERG: Under the present schedule, I
16 understand a statement of ultimate issues to be heard is
17 due February 8.

18 I wonder if we can have an understanding today.

19 CHAIRMAN FARMAKIDES: The schedule will have to be
20 held in abeyance.

21 The depositions are held in abeyance and that
22 schedule will have to be held in abeyance.

23 MR. GOLDBERG: Thank you.

24 MR. CHARNO: I would like to state with
25 reference to that date of September 9th, that makes it clear

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1 they had calculated the burden and volume of documents
2 that were going to have to be produced in response to the
3 City of Cleveland's discovery request.

4 I think it is rather surprising they had not
5 made a similar computation for the Staff and Department of
6 Justice. As co-counsel pointed out in the September 16
7 argument, they again made specific references to the amount
8 of burden that was going to be placed upon them due to the
9 volume of production requested by the City of Cleveland
10 and finally, counsel for the Applicants' comments concerning
11 handling of documents and whether they would turn over the
12 keys or whether they would do an initial screening again
13 with respect to the City of Cleveland's request.

14 Finally, I am not intimate with the details of --

15 MR. RIGLER: I missed that point. I am sorry.

16 You referred to his remarks about turning over the
17 keys --

18 MR. CHARNO: He had made reference in his argument,
19 or in his comments, that he had made it clear to the Board
20 on September 16th that he didn't know how he was going to
21 handle discovery, whether he was going to turn over the files
22 or whether he was going to screen them first.

23 I believe that is directly with reference to the
24 City of Cleveland's discovery and the City did not ask
25 for production of copies.

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1 Finally, there is some doubt, or I would like to
2 raise a question of whether antitrust is the pacing
3 consideration for the Perry license.

4 Thus far it is clear that there has been no
5 delay because of antitrust for the Perry license, and perhaps
6 the Applicants would care to speak to their future plans and
7 the effect of their plans upon health and safety licensing
8 and the amount of time that will further be required for new
9 or additional health and safety licensing that would
10 continue to eliminate any possibility of antitrust being
11 the pacing item before the Perry plant.

12 I think that is all I have.

13 CHAIRMAN FARMAKIDES: Mr. Goldberg?

14 MR. GOLDBERG: I am going to observe simply first,
15 that with respect to the 30 days that the Applicant suggests
16 is a reasonable time, that our experience, and I think we
17 are the only ones here able to talk about the experience of
18 looking at the documents, indicates that even with the most
19 prodigious effort 30 days is out of the question. You can't
20 just move in a mass of lawyers, even if that mass were
21 available to us, which it is not.

22 You have to have people working on the case who
23 know what they are looking at and what it is all about.

24 I just wonder, have we -- what about this visit
25 to the files?

1 CHAIRMAN FARMAKIDES: Oh, we are definitely going
2 to go. The Board is going to go.

3 But, look, the Board has been talking, too, in
4 the interim and we have perhaps something to offer on the
5 record, but let me finish now.

6 Is there anything else?

7 MR. LESSY: Just a couple of comments,
8 Mr. Chairman.

9 I just want to clarify that the first time that
10 Staff learned of Applicants' posture on discovery, that is
11 that they would not produce and deliver as requested, was
12 when we received their response to discovery on December 2
13 or 3, 1974.

14 That it is uncontroverted that they had had the
15 joint request since August '74.

16 Secondly, in response to Mr. Reynolds' time and
17 availability to send a slew of government lawyers out to
18 five cities in Ohio and western Pennsylvania, we have
19 tight schedules, too, and it would be very difficult to
20 block out eight weeks or whatever the agreed time is to go.
21 And it will cause a delay.

22 CHAIRMAN FARMAKIDES: All right.

23 Thank you.

24 Anything further?

25 MR. CHARNOFF: I would like to make two comments,

1 if I may.

2 CHAIRMAN FARMAKIDES: Mr. Charnoff?

3 MR. CHARNOFF: One is the reference of Mr. Charno,
4 is we would produce to MELP, is not my understanding -- the
5 transcript of September 16 -- is how many documents will
6 we have to search in order to produce documents.

7 We had no idea what we had. However, there was a
8 statement by Mr. Hauser, as I recall it, indicating there
9 were rooms full of material that we would have to go
10 through in order to find the numbers of documents that had
11 been requested.

12 So we had no idea what numbers we would have to
13 produce.

14 As to the 30-day item mentioned by Mr. Goldberg,
15 I would indicate he has had a pretty good head start on
16 Justice and AEC, and he knows better than I that you have
17 to have the staff to cope with looking at that material,
18 of course, and we have produced the materials that he has
19 requested and he has already gotten started and with enough
20 people I don't know why that cannot be done in any concen-
21 trated fashion in the schedule originally contemplated by
22 the Board and this party, namely 30 days plus two weeks for
23 depositions.

24 With respect to the construction permit
25 Mr. Charno asks about, if we don't have antitrust review by

mm8 1 office.

2 CHAIRMAN FARMAKIDES: Thank you.

3 Let's recess until 25 after by that clock,
4 gentlemen, on the wall.

5 (Recess.)

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1 CHAIRMAN FARMAKIDES: The Board has a preliminary
2 ruling which it will articulate at this point in time before
3 our final ruling.

4 Our final ruling will depend on the outcome of the
5 actions required by this preliminary ruling.

6 Before January 17, 1975, the parties will each re-
7 view and screen the documents including their methods of
8 organization at the respective offices of the Applicants in
9 order to see which of said documents the party may have an
10 interest in reviewing further. The parties will then report
11 to this Board as to the number of documents they have screened
12 out for further review.

13 The report will be made at a prehearing conference
14 in this room on January 17, 1975, commencing at 9:30 a.m.

15 We also want each party to present cost estimates
16 on the transportation of those documents chosen for further
17 review to include transportation of all the documents at one
18 time from their respective sites to counsel's office in
19 Washington, D.C.

20 Secondly, submit the cost of transporting 15
21 file drawers per week of those documents from their respective
22 sites to Applicants' counsel in Washington, D.C.

23 In essence the Board has decided that the suggestion
24 advised by the City of Cleveland makes sense, and before we
25 finally rule, however, we want to know how many documents are

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1 we really talking about that the parties have an interest in.
2 We also want to know the costs firmly, and we have given the
3 parties not five days, but roughly nine working days to eye-
4 ball, using the word that you all stated earlier, to eyeball
5 these documents to see how many of these you wish to review
6 further.

7 Also be aware that the more documents that you
8 people find that you want to review further, the greater the
9 cost and of course the Board has not determined yet who will
10 bear those costs; or whether or not as that matter is concerned,
11 whether or not the documents will be made available here. It
12 depends on how much of a burden is involved here.

13 Are there any questions?

14 MR. CHARNOFF: Yes, sir, two.

15 Does the word "parties" as you used it mean other
16 than the Applicant?

17 CHAIRMAN FARMAKIDES: Yes, except for the cost
18 estimates. I think the cost estimates of the Applicants would
19 be very much appreciated.

20 MR. CHARNOFF: Yes, we will do that.

21 The second question, the 17th is a conflict for
22 both Mr. Reynolds and myself. I could do it if I can get back
23 from St. Louis the night before. I have a prehearing the
24 day before that. Is it possible to manage it Monday the 20th?

25 MR. RIGLER: No.

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1 CHAIRMAN FARMAKIDES: The 20th is going to be diffi-
2 cult and we are getting into the next week. We would like to
3 rule on the 17th, very frankly, gentlemen.

4 MR. CHARNOFF: I will make it, then.

5 MR. RIGLER: 16th or 17th I could accommodate.

6 MR. CHARNOFF: Let's go for the 17th.

7 CHAIRMAN FARMAKIDES: Mr. Goldberg.

8 MR. GOLDBERG: On the matter of cost, I think
9 the Applicants will be in a better position because I think
10 the moving companies do it on a basis of weight.

11 CHAIRMAN FARMAKIDES: Sir, we would like to have
12 your estimates as well. If you can provide them, fine. If
13 you cannot, so state.

14 MR. GOLDBERG: We will need an estimate of what a
15 full drawer weighs, and I think we can provide it.

16 MR. CHARNOFF: I will stipulate that a full drawer
17 of CEI documents weighs about as much as a full drawer of MELP
18 documents.

19 MR. BERGER: I assume no one is going to Cleveland
20 this Tuesday, right?

21 CHAIRMAN FARMAKIDES: No, we are definitely going
22 to Cleveland. We will be at the offices of CEI at 10:00 a.m.
23 Tuesday morning, and we hope, if needed, to be in the offices
24 of Ohio Edison in Akron, Ohio, at around 12:30 or quarter to
25 1:00.

4 1 MR. BERGER: Are reply briefs due Tuesday?

2 CHAIRMAN FARMAKIDES: If you would like to submit
3 them, we would appreciate it.

4 Anything else?

5 If not, thank you very much, gentlemen.

6 (Whereupon, at 1:30 p.m., the hearing in the
7 above-entitled matter was closed.)

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