NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

POLICY BOARD COMPANY and
CLEVELAND ELECTRIC ILLUMINATING CO. Docket Nos.

(Perry Nuclear Power Station, 50-346A
Units 1, 2 and 3) 50-[illegible]
And 50-[illegible]

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

Place - [illegible], Maryland

Date - Wednesday, 26 November 1975 Pages 1159 - 1503

Telephone:
(Code 202) 547-6222

ACE - FEDERAL REPORTERS, INC.

Official Reporters

415 Second Street, N.E.
Washington, D. C. 20002

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of:		
		Docket Nos.
TOLEDO EDISON COMPANY and CLEVELAND ELECTRIC ILLUMINATING CO.		50-346A
		50-500A
(Davis-Besse Nuclear Power Station, Units 1, 2 and 3)		50-501A
and		
CLEVELAND ELECTRIC ILLUMINATING CO. et al.,		
		50-440A
(Perry Nuclear Power Plant, Units 1 and 2)		50-441A

NRC Hearing Room, Fifth Floor
East-West Towers
4350 East-West Highway
Bethesda, Maryland

Wednesday, 26 November 1975

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

BEFORE:

MR. DOUGLAS RIGLER, Chairman

MR. JOHN FRYSIAK, Esq., Member

MR. IVAN SMITH, Member

APPEARANCES:

STEVEN M. CHARNO and JANET URBAN, Esqs., Antitrust Division, United States Department of Justice, Washington, D. C. 20530; on behalf of the Department of Justice.

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APPEARANCES: (continued)

ROY P. LESSY, JR. and JACK GOLDBERG, Esqs., Nuclear Regulatory Commission, Office of the Executive Legal Director, Washington, D. C.; on behalf of the Nuclear Regulatory Staff.

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

DAVID HJELMFELT, Esq., Suite 550, 1700 Pennsylvania Avenue, N. W., Washington, D. C.; and
ROBERT D. HART, Esq., First Assistant of the Department of Law of the City of Cleveland, City Hall, Cleveland, Ohio 44013; on behalf of the City of Cleveland.

TERENCE H. BENBOW, STEVEN A. BERGER, and THOMAS A. KAYUHA, Esqs., Winthrop, Stimson, Putnam & Roberts, 40 Wall Street, New York, New York 10005; on behalf of Ohio Edison and Pennsylvania Power Company.

MICHAEL M. BRILEY, Esq., Fuller, Henry, Hodge & Snyder, 300 Madison Avenue, Toledo, Ohio 43604; on behalf of the Toledo Edison Company.

DONALD H. HAUSER, Esq., Corporate Solicitor, The Cleveland Electric Illuminating Company, Illuminating Building, Public Square, Cleveland, Ohio 44113; and
JOHN LANSDALE, Esq., Cox, Langford & Brown, 21 DuPont Circle, N. W., Washington, D. C.; on behalf of the Cleveland Electric Illuminating Company.

THOMAS J. MUNSCH, JR., Esq., General Counsel, Duquesne Light Company; and
WILLIAM S. LERACH and JOSEPH RIESER, Esqs., Reed, Smith, Shaw & McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania 15230; on behalf of Duquesne Light Company.

PROCEEDINGS

CHAIRMAN RIGLER: Good morning everyone.

We will convene the prehearing conference in the Davis-Besse Pair Consolidated Proceeding.

I see a lot of new faces this morning. The Board would like to meet all of you. Why don't we go around the room and find out who is here, starting with Mr. Lessy and all counsel who have entered an appearance in this proceeding, please introduce themselves.

MR. LESSY: Roy P. Lessy, Jr., on behalf of the Staff. With me is Mr. Jack Goldberg.

MR. CHARNO: Steve Charno with the Department of Justice, and my colleague, Janet Urban.

MR.HJELMFELT: David Hjelmfelt for the City of Cleveland. And I expect to be joined later by Robert Hart.

MR. LERACH: William S. Lerach. With me, Joseph Rieser and Thomas Munsch of Duquesne Lighting Company.

MR. REYNOLDS: Bradford Reynolds with Shaw, Pittman, Potts & Trowbridge, on behalf of all the Applicants. With me is Mr. Gerald Charnoff.

MR. BENBOW: Terrence Benbow. With me is Steven Berger and Mr. Thomas Kayuha from the Ohio Edison Company. We, of course, represent Ohio Edison and Pennsylvania Power Company.

MR. BRILEY: Michael M. Briley of Fuller, Henry,

Hodge & Snyder in Toledo, representing the Toledo Edison Company.

MR. HAUSER: Donald Hauser, general attorney, Cleveland Electric.

MR. LANSDALE: John Lansdale, Cleveland Electric Illuminating Company

CHAIRMAN RIGLER: The first item on the agenda this morning will be the Department of Justice motion to amend its interrogatory answers.

Mr. Charno, you may proceed.

MR. CHARNO: The Board has requested we direct ourselves further to the relationship between the requested amendment and the matters in controversy 4, 5 and 6.

Matters of controversy 4 and 5 and 6 deal with first, whether Applicants have acquired dominance, although it is couched in terms of a stipulation.

Number 5 deals with their ability to use that dominance in transmission, to preclude any other electric entity from obtaining sources of bulk power, from electric entities outside the combined capital service areas.

Matter of controversy number 6 goes to the question of whether Applicants have used that dominance to prevent other electric entities from achieving the benefit of coordinated operations and basically the benefits of coordinated development, including access.

The amendment to the Department's interrogatory answers deals with a territorial allocation agreement between one of the Applicants, and a company outside the MICAPCO area.

When assessing the question of dominance, it is sometimes necessary to go beyond the physical facilities possessed by the Applicants. To the extent that that is true, a territorial location agreement prevents another utility from building transmission facilities, which would tend to erode a position of dominance or monopoly power within the combined CAPCO service area.

While it is not necessary to show such an agreement to show dominance, certainly, it shows an intent on the part of an Applicant, in this case Ohio Edison, to entrench its monopoly position and to prevent access of electric utilities inside its service area to the benefits of coordinated development, and coordinated operation with utilities outside its service area.

For this reason, the fact that the agreement is between an Applicant to this proceeding, and a nonapplicant is totally meaningless if it indeed does further the dominance, entrench the dominance of one of the Applicants, and constitutes a misuse of that dominance by virtue of foreclosing access of affected utilities wihtin that Applicant service area to coordinated operation and dealt with utilities

outside that Applicant's service area.

Are there any questions on that relationship from the Board?

CHAIRMAN RIGLER: The Board has no questions.

MR. BENBOW: Mr. Chairman, I would like to briefly address the linguistic aspect of this, if I may, and Mr. Berger would like to respond with respect to 4, 5, and 6 in the broader context in which it arises.

My understanding of how we come to be talking about this this morning is that the Department offered nothing by way of an allegation as to where this language -- and I think we ought to look at the language of what this proposed amendment is and I would like to read it at this time.

Beginning at sometime prior to March 1965, and continuing thereafter, Ohio Edison and Ohio Power Company engaged in a territorial allocation agreement, thereby foreclosing competition in supplying electric power.

Now, the question before the house, as I understand it, is whether that allegation -- and I noted a moment ago, or started to note a moment ago, no claim was made when this paper was put in that it fit within 4, 5 and 6. The only reason we are talking about 4, 5 and 6 this morning, as I understand it, is the Chairman at the argument last time, when we were demonstrating that no good cause had been shown for this amendment, and we were showing the severe prejudice to Ohio Edison and to

Pennsylvania Power, both of which I think have been established on this record, the Chairman asked in an interpretation of what he understood Mr. Reynolds to have said, he directed to the Department the question as to Mr. Charno in particular, the question of within what issues, if any, this falls?

I think grabbing for something, frankly, Mr. Charno focused on 4, 5 and 6 and gave an interpretation that 1307, 1308 of the transcript, that I can't understand, nor do I understand this morning what he is saying, because it is clear to me that the language that I have just quoted does not fit within the language of 4, 5 and 6; vague as the language of 4, 5 and 6 frankly is, gentlemen, as we see it.

This is very broad langauge, but even so, it seems to me that the language of their proposed amendment does not fit within it, and having quoted their proposed amendment, let me quote at least 4. And I think that the contrast between the two becomes apparent, and Mr. Charno did not cover it this morning in his interepretation of 4, 5 and 6.

The focus of 4, 5 and 6, as I see it is, whether or not there is a hindrance or preclusion of competition primarily in the language of 4 and 5 and 6, in the transmission of bulk power.

In other words, the issue isn't dominance as Mr. Charno would have you believe. Dominance for this purpose, at least in this specialized sense, is stipulated. Whether

the Applicants stipulated dominance, it says stipulated. Stipulated dominance of bulk power transmission facilities in the CCT, that is in the combined CAPCO companies' territory, gives them the ability to hinder or preclude competition in the transmission of bulk power.

Now, where is there in the amendment, any reference to the transmission of bulk power?

All we are told about is some so-called territorial allegation agreement. And from his example last time, at page 1307, and from my brief glance at the brief that I have just received, page 107 of that brief, I get the impression he is talking about some retail allocation agreement that he is asserting.

What has that got to do with the transmission of bulk power, if anything?

Mr. Chairman, since I wanted to give Mr. Berger an opportunity to comment further, I will stop at this point with the assertion that it is clear that the amendment does not fall within the language of 4, 5 and 6.

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MR. BERGER: Mr. Chairman, other members of the Board, if you will give me at least the special privilege of remaining seated during this -- there are several pieces of paper I would like to refer to during my presentation.

I think particularly in light of the fact that the Board has asked for further oral argument in relation to matters 4, 5, and 6, it is particularly appropriate again, at the last prehearing conference, the Board wanted Applicants, Ohio Edison and Pennsylvania Power, to speak to the question of possible prejudice.

I would like to go back to July 25, 1974, the issuance of prehearing conference order No. 2, what preceded it, what limitations were really contemplated by that order, and I think the reason for this will become eminently clear as the argument proceeds, if you permit me the opportunity.

CHAIRMAN RIGLER: In our order requesting argument on this question, we had indicated that you had lost on the point of prejudice.

It is not provable now truthful now to reargue that question.

MR. BERGER: Notwithstanding that comment, your Honor, I would appreciate it, and I think it becomes particularly important today, I want to put 4, 5, and 6 in context for the Board, so that it can properly assess the relationship between the proposed amendment offered by Mr. Charno to issues 4, 5,

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and 6.

The story goes back to really whit it is we are here.

How it is we come to be here.

How it is at all the hearing get to be heard before this Commission.

It really starts with, of course, the transmission by this application to the Department of Justice, their rendition of the device.

Traditionally, consistently, uniformly, the approach taken by the Department of Justice has been as follows: After the 20 questions to the Applicant --

CHAIRMAN RIGLER: Mr. Berger, I don't want to cut you off but I am not prepared to hear this line of argument, because that is not the question which the Board decided to hear.

MR. BERGER: Let me try and refer specifically to what immediately preceded the prehearing conference on order No. 2 and the matters in controversy and the limitations that were agreed to by Staff and the Department at that time.

In a filing dated June 14, 1974, entitled Joint Review of AEC Regulatory Staff, Department of Justice and Intervenors, to Applicant's Response to Joint Statement Regarding the Contentions and Matters of Controversy, the following statement appears on page 6:

First full paragraph. Applicants are in effect that

the proceeding be dismissed as to Applicants other than CEI.

As a reason they contend that the parties' allegations only involve CEI.

Applicants ignore the face made apparent in Cleveland's petitions that it is the cooperation of the other Applicants through CAPCO which make it possible for CEI to engage in nuclear generation.

It is the CAPCO coordinated operations and development from which other electric entities that are excluded that create a situation inconsistent with the antitrust laws.

Applicants further ignore the fact that Duquesne Light Company also refused to permit the City of Cleveland to joing CAPCO and to participate in the Davis-Besse, Beaver Valley and Perry applications.

Prior to discovery, it has not been possible to determine whether these refusals by two of the five Applicants are in fact integral parts of overall concerted course by all the Applicants.

Then at the prehearing conference held on June 25, 1974, the following colloquy took place between then Chairman Farmakides, I believe it particularly important because this Board as presently constituted is entirely different than the Board that was constituted at the time that prehearing order No. 2 came out.

This limitation upon the matters in controversy

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becomes particularly important.

Chairman Farmakides inquired: "Do you have anything else then, Mr. Popper? Mr. Lessy presented CESSAR to the Staff herein."

Mr. Popper: "I did have one other point. Hopefully I can made it very briefly. That is when I initially delineated our bifurcated approach to discovery, breaking it down into two sets of relationship, I did want to indicate there is a caveat. The caveat is, if in the second level of discovery, not necessarily in time were we are investigating or looking for information regarding the CAPCO entities as they exist and their relationship to CEI, the CAPCO entities as they now exist and their relationship to the City of Cleveland, that in the event discovery reveals a course of concerted action between the CAPCO members, which would be an additional consistency, that not been a specific allegation at this point, then we would have to have a more broad-based discovery to see what the extent of that concerted action was."

Then, skipping the next paragraph, it is really not germane to the point.

The paragraph after that, aside from that point, our analysis of the other CAPCO entities not including CEI would not be related to any allegations of conduct, of practices in their service areas, because we have made no such allegations.

It is primarily their relationship to CEI, their

relationship to the City of Cleveland that is the statement of limitations.

The Beaver Valley advice letter as to all of the CAPCO companies, gave a clean letter of advice.

CHAIRMAN RIGLER: Mr. Berger, we appreciate that, and that is why at the last prehearing conference we put the burden on the Department to show good cause and we listened to you with respect to any prejudice that would arise by expanding the acope of the Department's allegations, but we have passed that point now.

We are aware of the factors you have just cited.

That is why we asked Mr. Charno specifically to tell us what good cause existed, to permit the amendment that he proposed to make.

MR. BERGER: In Mr. Charno's remarks this morning he is referring his justification for inclusion in the amendment the fact of Ohio Edison and its relation with the other entities in the areas within which it serves.

The matters in controversy were clearly limited in such a way as to not include such considerations.

The Perry advice letter adhered to the Beaver Valley letter and were it notfor the joint nature of the application, couple with the Beaver Valley letter, the Perry letter, the absence of any petitions to intervene by the entities other than Ohio Edison and Pennsylvania Power serving in those areas, the

absence of any request for access to these units, there would never have been a hearing at all as to Ohio Edison or Pennsylvania Power. That is clear.

And when their recommendation in Perry was, let's have a hearing, it was, let's have a hearing on the application, because based upon our review, the Department of Justice can only conclude that a failure by CEI to grant the request by Painesville and Cleveland would create a situation inconsistent with the antitrust laws.

CEI's refusal to wheel power for AMCO appears to be another indication of this inconsistency.

Construction and operation of the Perry unit --

CHAIRMAN RIGLER: All right. All right.

MR. BERGER: That's the point, your Honor.

The point is, the matters in controversy set down in prehearing order No. 2 have no relationship whatsover to the regulations between the individual Applicants other than CEI and the other entities serving in their area.

CHAIRMAN RIGLER: This is the estoppel argument that I believe Mr. Benbow presented the last time.

He is saying, there is in essence a statute of limitations.

If one of the opposition parties fails to disclose a situation by the time the issues in controversy are framed, they are stuck with it.

He cannot then expand the issues in controversy and

cover the situation they recently have discovered.

Now, from the applications point of view, from the public's point of view, from the public interest point of view, this Board has found that at any time prior to the license that a situation comes to its attention, it may be incumbent upon us to investigate whether that situation, as a requisite effect upon activities under the license, require that some conditions be placed on the license.

Prior to doing that, we had to have good cause established, as to why that was not brought to the parties' attention at some reasonable time.

We put that burden on Mr. Charno.

His advice, as I recall, was he was not aware of this prior to discovery and the territorial allegations which may or may not exist came to his attention through outside sources at the end of the discovery process.

That is correct, Mr. Charno?

MR. CHARNO: That is corect.

MR. BERGER: The issue is the relationship to broad issues 4, 5, and 6 and they are terribly broad.

There is no question in order to establish those broad issues you needed allegations, building blocks, in order to establish those broad issues.

This Board has taken particular care to note in its orders that it has issued that although the matters in contr

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versy are similar to other matters in controversy, set down in other proceedings, it was particularly setting those matters down in controversy, relating to the issues in controversy in this case.

Well, there having been no allegations with respect to relationships between Ohio Edison and Pennsylvania Power and the other entities serving in their area, I submit to you that broad issues 4, 5, and 6 cannot be the basis for the inclusion of the amendment by Mr. Carno.

CHAIRMAN RIGLER: We had a question about that.

That is why we asked Mr. Charno to address himself to that point today.

Now, we are talking the same language, Mr. Berger.

MR. BENBOW: I think it should be clear, too, Mr. Chairman, if I may add a word, that the whole scope of matters in controversy, 4, 5, and 6, if the language there should be stretched to include this amendment is going to change fundamentally the nature of this proceeding.

I mean, we are bring, as I think even Mr. Charno had to ackowledge in his presentation this morning, we are bringing in another entity as to which against serious antitrust allegations are being made Here, that is Ohio Power Company, part of the American Electric Power System, and we are inviting in effect, by permitting this amendment, we would be inviting complete metamorphosis, I think, in the character, na-

scope of the proceeding that we are dealing with.

I think the Board ought to bear that in mind in an appropriate interpretation of 4, 5, and 6.

CHAIRMAN RIGLER: It doesn't seem that dramatic a change to me, Mr. Benow, but when you argued prejudice last week or whenever it was, October 31st, we did take your argument into account and we did indicate if we were to permit this amendment we would do it in a fashion which would not prejudice your company.

In other words, if additional discovery were required, we could accommodate that, without disrupting the hearing schedule.

MR. BENBOW: I was going to get another point, Mr. Chairman.

That is, thus far the focus of the issues, as I understood them, and that includes 1, 2, 3, as well as 4, 5, and 6, the focus was on, and apparently the Department was then urging that the appropriate geographic market for analyzing this whole thing was the CCT.

All I am advising the Board or reminding the Board about, glad to hear you have it in mind, is, now we are proposing to open it out to Ohio Power Company. If we open it out to Ohio Power Company, why shouldn't we open it out to TVA and all of the entities which are on the periphery of the CCT area? That is what we are inviting when we begin this process.

MR. CHARNO: I would like to replsy very briefly to Mr. Berger's statement.

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CHAIRMAN RIGLER: Just a minute. Before you do that, could I disrupt you a little bit and ask you to reply to Mr. Benbow's last point?

MR. CHARNO: I think matter of controversy number 2 also deals with relevant geographic submarkets. The point we are going to, is that, as our brief, which is filed today, states the relevant geographic submarkets for certain product markets that we allege are significant, are the separate service areas of the independent CAPCO Merit members, is that basically there are two relevant geographic markets. One, the combined CAPCO service and geographic submarket, comprised of the individual service areas of the individual CAPCO members.

CHAIRMAN RIGLER: I am not sure I am tracking you. Are you saying the market which would be relevant for your proposed amendment would be the Ohio Edison market within the CCT territory, as a separate --

MR. CHARNO: I think it would be relevant to both markets. For purposes of answering Mr. Benbow's questions or Mr. Benbow's statement, we are unconcerned for purposes of this proceeding with the impact that such a territorial agreement may have outside the combined CAPCO service area or outside Ohio Edison's service area. I don't think it is material to any of the issues before this borad. The extent that it entrenches dominance within a relevant geographic

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market, it is of relevance to this proceeding.

CHAIRMAN RIGLER: So that you would not be looking at the American Electric Power Company market, outside the Ohio Edison territory then?

MR. CHARNO: No. We would not.

CHAIRMAN RIGLER: At least in connection with this proceeding?

MR. CHARNO: Yes, sir. Addressing myself to Mr. Berger's comments, whatever the merits of his interpretation of the background of prehearing conference orders number 2 in the prior proceeding, certainly similar restrictions can't be argued to exist when that was readopted in the Davis-Besse 2 and 3 proceeding. At that time, all of the Applicants were on notice of at least some individual conduct, going to each of their individual service areas, through the Davis-Besse 2 and 3 advisory letter.

MR. BENBOW: I don't think Mr. Charno responded to my point at least. That is, he can't define it and say I am going to open up the issue for this purpose and that is all that the Board is going to be called upon to ask, because the response to this irresponsible charge or proposed amendment is going to necessarily involve us in the matters which go beyond the CCT area and the fact he also refers to a relevant submarket under matter in controversy number 2 only further demonstrates that the real controversy

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ought to be within the CCT area and not go into areas like this which necessarily take us beyond it.

MR. CHARNO: Could I reply to that very briefly?

If we go to matter incontroversy number 5, I think I best quote it at this point: "Assuming the answer to 4," which I characterize as dominance in transmission, "is yes, whether the Applicants have, do or could use their ability to preclude any other electrical entities within the CCT, from obtaining sources of bulk power from other electrical entities outside the CCT."

I don't think there is any question it was contemplated, that sources of power would be available outside the combined CAPCO service area and to show a foreclosure of access to those sources is certainly within the matters of controversy.

MR. BENBOW: The amendment doesn't even specify that.

MR. SMITH: Mr. Charno, do you intend to prove in relation to this amendment that the Ohio Power Comapny would have been a potential supplier of power within the service area of Ohio Edison?

MR. CHARNO: Well, I think tht the potential competitive nature of a utility is properly inferred from the fact that they have an agreement not to compete.

MR. SMITH: That is the thrust of your position?

MR. CHARNO: That would be.

MR. SMITH: Without this agreement, Ohio Power possibly could have been a supplier of power within the CAPCO area and the Ohio Edison service area?

MR. CHARNO: We have developed that at some length in our expert testimony on brief. The extent to which potential competition does, in fact, exist, and the extent to which it might exist.

Certainly, they are a logical potential competitor to serve at wholesale and to an extent at retail.

MR. BENBOW: I think that is a very basic response, if I may say so. I didn't see that in the expert testimony. I thought this was a proposed amendment Mr. Charno was offering at this time. I don't find it reflected in the testimony. The only thing I find it reflected on, the one statement in the brief I referred to a moment ago.

It seems to me what he is doing, he is inferring a conspiracy for which there is no proof. Then he is saying but for that, it might have happened.

I think Mr. Smith's question went too, was there any indication that it would have happened otherwise?

On that it seems to me the real answer is no.

MR. REYNOLDS: Could I ask Mr. Charno to specify where in the expert testimony he seems to feel that has been developed. I have read the expert testimony and I

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haven;t seen it mentioned anywhere. If he is going to allege broadly to this Board, this is a matter that has been covered in the expert testimony, he ought to alert the Board exactly where it is and also the other parties.

MR, CHARNO: I can attempt to respond to that. It is in Dr. Wein's testimony, where he discussed the nature of competition, which is possible, at both wholesale and retail.

Now, if I have given the impression that I said there was a specific reference to this agreement, I certainly did not mean to do so. But as to the nature of potential competition, we have developed that and that is what I was trying to anser.

MR. BENBOW: Dr. Wein is not the kind of appropriate expert witness to speak to this subject. He is an economist. He talks in general. He can talk about the potential competition in Hawaii for that matter, but he is not purporting to bring before this Board, what might have happened, what could have happened, or what is going to happen, all he does is take facts given to him and relate them to certain economic principles as he sees them and relate them to this area, so if that is the purported expert testimony, I don't think it serves your purpose, Mr. Smith.

CHAIRMAN RIGLER: All right. Thank you, gentlemen. The next item on the agenda is one where we advise

the parties to be prepared for argument. We decided we would like to hear a little bit from you. This would be on the Ohio Edison motion for additional discovery.

MR. BENBOW: Mr. Chairman, I think I offered you some thoughts last time on that subject. It seems to mee that it is clear that we are entitled to that discovery. It is extraordinary to me that there should even be a question about anything other than perhaps the timing of when we are to receive it, but I would like to give Mr. Berger the opportunity to offer the reasons that we think in specific it is justified.

MR. BERGER: First,let me refer specifically to the Staff's response to our motion for additional discovery, which suggest that on the basis of the half a million documents that we tendered to the proposition here, we were supposed to glean from that and surmise and with conjecture, determine what specific allegations would be forthcoming from them on September 5, 1975, after the period of discovery had been completed.

In addition, as I was attempting to try to do earlier, it was clear at the time of the Davis-Besse advisory letter that the kind of allegations with regard to the relationship between Ohio Edison, Pennsylvania Power and the other entities in their respective service areas, was not going to be a matter that was going to be the subject of

discovery and/or hearing, before this Board.

With reference to Mr. Charno referring to the Davis-Besse 2 and 3 letter in February of this year, after discovery had already very much been going forward, the only specific charge against Ohio Edison dealt with alleged unreasonable demands with regard to the establishment of new delivery points under the Buckeye agreement, some, if not all of which the department had earlier concluded in their Beaver Valley letter to have been really of such a nature as not to have any anti-competitive effect and they were satisfied with the way the company was responding.

That, coupled with the Pitcairn allegation was all we got in the Davis-Besse letter. Discovery was completed in August and on September 5, 1975, we find ourselves confronted with over 20 specific allegations of anti-competitive conduct, alleged agains Ohio Edison and Pennsylvania Power, vis-a-vis their relationships with the other electric entities in their areas.

Now, without an opportunity -- withou any opportunity to inquire into the underlying basis fo those charges, perhaps, after we find out the underlying basis who they spoke to, who made the allegations to them, what documents they were going to rely upon, further depositions would have been had.

But for us to go forward at this point in time on those allegations is nothing less, we suggest, and as we

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have suggested, than a deprivation of our due process rights of notice and rights to be heard on those charges. We had no reason to believe that Ohio Power and Pennsylvania Power on the basis of all the advisory letters, all the pleadings filed in this case prior to February, '75, would ever lead to a conclusion that Ohio Edison and Pennsylvania Power were going to be significant targets of this hearing.

CHAIRMAN RIGLER: Where did the department obtain the information it used to answer those interrogatories on September 5?

MR. BERGER: Excuse me. Where --

CHAIRMAN RIGLER: Where did the department obtain the information they included in these allegations of September 5?

MR. BERGER: That is what I want to find out, your Honor.

MR. BENBOW: We think they are imagination, Mr. Chairman, largely.

MR. BERGER: Yes. If they kept from our files as Mr. Lessy suggest in his filing, are we to understand from that that we are supposed to look through 500 thousand pieces of paper and determine what at the end, rather than at the beginning, when a complaint is normally the kind of thing, an advisory letter where you normally find allegations, we are supposed to surmise on that basis, what specific allegations

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are going to be alleged agains us?

CHAIRMAN RIGLER: Are yousaying none of these topics came up during the deposition?

MR. REYNOLDS: That is correct. I will state that. These are not matters that came up, matters that came up that were discussed at deposition.

CHAIRMAN RIGLER: None of these, Mr. Reynolds?

MR. REYNOLDS: I have got to go through all 20. I did not focus on the deposition testimony in connection with the present question, as to this interrogatory question.

I think that there may well have been some questions during some of the depositions of the Ohio Edison witnesses, which, had we known at that time or had an occasion, would have suggested some of the allegations. I think the large majority of the allegations came as a complete surprise, certainly as to Pennsylvania Power. Where there were no depositions taken of Pennsylvania Power witnesses.

And as to the Ohio Edison, I think that they are largely ones that were not flagged in the deposition interrogation and certainly the way the depositions were handled, there would have been no way for them -- from the kind of interrogation on those depositions that we could have surmised from those questions that there was any reason to anticipate these kinds of allegations.

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MR. BERGER: One more point, if I may, Mr. Chairman. It is the very unique kind of proceeding we are in that I think has given rise to some of the difficulties we are having.

It is a joint application involving 5 companies. It is not a joint -- it is not an application by CAPCO. It is an application by 5 companies who are jointly constructing and building some of these units.

The problem with that, of course, is that in all of the earlier advice letters, which is really analogous to the kind of complaint one expects to find with at least some specificity of charges, that the Department has issued heretofore when they have one applicant before them, they go through the kind of charges in a letter of advice that we found in a September 5 filing after discovery had been completed.

And if they had in a letter of advice, vis-a-vis Ohio Edison and Pennsylvania Power, at the present time set forth these kind of allegations, I can assure you that we would have been able to take the kinds of depositions, make the kinds of document requests, and have served interrogatories too, as to really adequately prepare ourselves to defend against these charges.

But it was the joint nature of the application and the way in which the Department saw fit to go forward in this

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proceeding, that really has created the dilemma. There is no way in the world that they would have issued a separate letter of advice, even on Davis-Besse 2 and 3 as to Ohio Edison, solely on the basis of the Pitcarin situation and the unreasonable delay -- unreasonable demands alleged with regard to the establishment of new delivery points under the Buckeye arrangement.

They just threw it all in a hopper and said as to Davis-Besse 2 and 3, we believe a hearing should be held as to each of the applicants. In Perry they said a hearing should be held on the application. But the Perry advice letter clearly, without any petition to intervene thereafter, would have given rise, were it not for the joint nature of the application, to no hearing as to Ohio Edison and Pennsylvania Power, other than as it may have related to CEI and the CAPCO relationship as it affected the City of Cleveland.

In this regard also, the Board's most recent reconsideration of its petition, its position vis-a-vis the city's right to allege and proffer into evidence with regard to the other companies and their relations with the entities serving in their area, I think highlights the fact that neither that petition to intervene nor the letter of advice in Perry, could have in any way raised as a matter for controversy or put the parties on notice that the relationships between Ohio Edison and Pennsylvania Power and the area,

in the areas where they serve, and with the other electric entities serving in that area was going to be a matter for hearing.

It wasn't until, really, September 5 that we got notice of that and we have had no discovery on it.

CHAIRMAN RIGLER: Who wants to respond first?

MR. HJELMFELT: Mr. Chairman, I recognize this doesn't particularly affect the City of Cleveland.

CHAIRMAN RIGLER: I will hear you.

MR. HJELMFELT: I do want to respond to this question about whether or not the activities of Ohio Edison with respect to entities in its service area came up during depositions and discovery. Certainly it came up during the discovery of the documents that these kinds of documents were requested and produced and when we copied them we flagged which ones we copied so applicants knew which ones we were interested in.

CHAIRMAN RIGLER: How many Ohio Edison documents were copied by all of the opposition parties?

MR. HJELMFELT: I don't know. But I think total it was less than a hundred thousand from all of them so certainly their wasn't any 500,000.

CHAIRMAN RIGLER: From Ohio Edison alone?

MR. HJELMFELT: I mean total. From Ohio Edison I don't have a break out.

CHAIRMAN RIGLER: Of the hundred thousand, you figure 90,000 were used previously. Aren't the bulk of those CEI documents?

MR. HJELMFELT: I believe they are. I would also like to respond.

CHAIRMAN RIGLER: Wait a minute. Maybe Mr. Reynolds can respond.

MR. REYNOLDS: I don't have the numbers at my fingers, but I can supply that information to the Board. I do have it back at the office. My recollection is that the Ohio Edison and Pennsylvania Power documents that were brought to Washington and reviewed here, which I think are the ones we are talking about, we are well in excess of a hundred thousand. Those 2 companies alone.

MR. HJELMFELT: We are talking about the ones actually copied by the Intervenors and Staff. We certainly didn't copy everything that was brought.

MR. REYNOLDS: Well, I can't control what they copy. The ones that they reviewed and they seemed to feel are relevant.

MR. HJELMFELT: I would also like to comment that these questions did come up in the deposition of Mr. Keckla, Mr. Frederickson and Mr. Firestone and Mr. Berger attended Mr. Firestone's deposition.

CHAIRMAN RIGLER: First name, please?

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MR. HJELMFELT: Keckla. I believe K-e-c-k-l-a.

MR. LESSY: Mr. Chairman, just a few points, mostly going to the timing of this discovery, in light of the fact we are 10 days away from hearing right now.

First of all, the September 5th pleadings were filed on the 5th of September, and we know of no explicable reasons why counsel for Ohio Edison and Pennsylvania Power waited until approximately 2 months thereafter to say, "We need discovery. We need to know the basis."

My recollection is at the prehearing conference at which those figures were discussed, that Mr. Benbow and Mr. Berger or Mr. Charnoff -- and why 2 months thereafter, now they claim a need for discovery, it is a problem to us in light of resources in going to hearing in 10 days.

As the Commission's rules of practice require, there has been no good cause shown for the delay. The question, I think, is back on their laps. Why did they wait 2 months? Did they not read the pleadings? Were they not able to formulate questions?

We are 10 days away from presenting witnesses and have no answer to that.

Secondly and obviously, Pennsylvania Power and Ohio Edison were represented throughout these proceedings, including discovery, by counsel. The statements of the September 5th pleading, the allegations contained therein,

were -- the requirement that that pleading be filed, was at applicant's request.

There was no objection at the time of the orders setting forth the requirement for that filing, that September 5th filing, and that was, of course, a post-discovery filing. Now, it was the first post-discovery filing when we had the benefit of a documentary discovery, the depositions and certain leads with respect thereto, so therefore, the case had developed in terms of the information since July of '74.

I would like to cite from Pick and Fischer Administrative Law, page 386, "As the case unfolded, there was a 'reasonable' opportunity to know the claims of the opposing party and to meet them. So that the fundamental requirements of due process were met."

Citing Morgan versus United States, 304 U. S. 1, at page 18, in J. B. Williams Company versus FTC, 381 Federal Second, 884. Obviously we could not have specified with a degree of particularity which we obviously did in the September the 5th proceeding the charges we had, once we had the benefit of discovery. We gave them to them on September 5th.

They were discussed at a prehearing conference. 2 months later everyone claims prejudice.

CHAIRMAN RIGLER: They also are claiming surprise.

MR. LESSY: And surprise.

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CHAIRMAN RIGLER: And it would be helpful to the Board if you and Mr. Charnoff could address yourselves to the same question I put to Ohio Edison, namely, was there anything in the discovery process that covered these points, or where they should have become aware of the fact you were asking questions in these particular areas?

MR. LESSY: Okay. I will go to that in a second.

Lastly, or fourthly, we find as precedent the Board's October 17th, '75 orders on Cleveland's motion to reopen discovery, and we find again that with our factual case, to go into evidence in 10 days, to sit down and write answers to interrogatories within the 38-day allotted time limit under Commission rules, would be problematical at this point.

So again, just summarizing, I think the question that I would like to know the answer to is why they waited 5 months before they popped up with new discovery.

As to your question as to the sources for these charges, a good deal of the sources was the nature of the contracts that Ohio Edison exacted of some of its wholesale consumers. When you take a look at some of those contracts, they raise a lot of antitrust problems which the witnesses will address, and this was the basis for most of the charges contained in at least the Staff's pleading.

Now, once you take a look at the contract, and

they appear to be somewhat the same, then you start looking for entities who have lived under the practices which appear to be required under those contracts.

Customer allocation agreements, the so-called banking of customers' practices, trading of customers' practices, that is one source. Another source, the related FPC proceeding, involving the wholesale consumer of Ohio Edison and their opportunities to request joint participant agreements with Ohio Edison.

Ohio Edison produced on discovery a letter written in August of '72 from Mr. Stout on behalf of the wholesale consumers, asking 4 questions. Would Ohio Edison be willing to wheel? Would Ohio Edison consider joint partnership shipments? Would Ohio Edison give access, things of this nature.

Looking at that, our answer was to the writer of that document, what are the answers to these questions?

In tracking the answers to the questions set forth in the first page of that document, led us to really almost the bulk of the rest of the contentions set forth in the September 5 filing.

CHAIRMAN RIGLER: Was the writer of that document proposed?

MR. LESSY: No. The writer of that document is listed as a Staff witness. He was not deposed by applicants.

MR. BERGER: For a very good reason, I might add.

MR. LESSY: He was not deposed by Applicant and having produced those documents, I don't think it was the Staff's duty to instruct them as to who they should or should not depose.

I hope I answered the Board's questions. As I say, if this were not 10 days before we are ready to go to hearing, we would be in a much better position, but there is no excuse, I feel, for the delay. I think the ball is back on their court.

Mr. Benbow, Mr. Berger, why did you wait 2 months to seek discovery? I feel it is harassment.

CHAIRMAN RIGLER: Mr. Lessy, the letter from the gentlemen from Ohio consumers, did you say --

MR. LESSY: Right. He was the Chairman, I believe, I believe he was from the Wholesale Consumers of Ohio Edison. Also, Superintendent of Power of one of those members.

CHAIRMAN RIGLER: This letter came to your attention because Ohio Edison produced it in response to a document?

MR. LESSY: It was produced on discovery, yes, sir.

CHAIRMAN RIGLER: Mr. Charno.

MR. CHARNO: I don't have the discovery from Davis-Besse 2 and 3 in front of me, but I am quite sure that at that point there was documentary discovery requested of Ohio Edison and others concerning territorial customer

allocation agreements. I know that Mr. Frederickson of Ohio Edison, when he was deposed by the Department on June 5, 1975, was asked about an agreement to allocate rural electric cooperatives as customers between Ohio Power and Ohio Edison.

We found about the existence of that agreement through documents produced in response to our document discovery in Perry, as one example of territorial allocation.

At this point, the Applicants know the scope of the documents, exhibits on which the Staff and the Department intend to rely. They know the witnesses on which we intend to rely.

I have not seen Staff's brief, but our brief is very specific as to witnesses, deponents and documentary exhibits. I suggest that much of the specificity they seek, or allegedly seek, they already have.

CHAIRMAN RIGLER: What would be the burden on you then to answer their interrogatories, if the Board decided that?

MR. CHARNO: I think it is a very time-consuming process. That would be the burden upon us. If you look at the many part interrogatories that they have set forth, crossing every T dotting every I, to make sure they have the full extent of the information which is in their files which they produced for us, and when we copied, they took down the specific list of everything we copied, so we have known not

just since our document list, but sometime back, in I believe, what, June? Or was it prior to that?

Certainly not later than June, exactly which documents have been taken by the Department and Staff and regarded as relevant to the proceeding.

Certainly the vast majority of the charges come out of the depositions and the documents, the extent that that is not true, they are identified on brief as to what our source is and we would make complete discovery with no qualms whatsoever as to everything that isn't -- or pardon me, everything that wasn't discovered from the Applicant's initially.

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MR. BENBOW: Mr. Chairman, I would like to have Mr. Reynolds respond on the discovery aspect, where we were not substantially involved. But I would like to comment before he does.

It seems to me these arguments are so specious they are almost insulting, including Mr. Lessy, about the times aspect, which is just a repeat of what he presented to the Board on brief.

In response to mass of documents and discovery on their side, we, the implications they are going to draw out of any one of these mills, then boil down to tens and hundreds of thousands of documents, when there was no specific discovery by them of these witnesses, it is really incredible.

When Mr. Lessy at page 2 says the only good cause asserted by Toledo Edison and Pennsylvania Power, however, is that because they were not specifically informed of the allegations against them until September 5, 1975, we weren't informed at all until September 5, 1975 of these charges.

And even heon that same pages says inasmuch as Staff's present case against Ohio Edison and Pennsylvania Power is based primarily on the issues and matters and so forth.

Well, he isn't saying that they were entirely

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covered by the issues and matters that were there.

We were for the first time informed of this on September 5th, and on September 18th all that I indicated to you, and I did speak for Ohio Edison and Pennsylvania Power on this subject, was only to indicate that we would cooperate with the Board in going forward as quickly as the Board felt that it could go forward, under great duress to me and Mr. Berger personally, as well as other parties.

We did not by that indicate that we were going to waive any of the proper rights to which we think we areentitled and we are certainly entitled to discovery on these new charges here.

MR. REYNOLDS: Mr. Chairman, I was very directly involved in all the discovery and I believe I am the only person in the room that attended every single one of the depositions.

I will first state categorically there is absolutely no way that the Applicants could have determined from the depositions what position the Staff was going to take because the Staff didn't attend depositions, but for two instances, and neither one involved the Ohio Edison people, I believe. I can't remember. I don't think it did.

There was no way we determine from the Staff's

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quote, deposition participation, which was nill, what they would have been alleging in their September 5 statements as against Ohio Edison.

Now, to explain what went on in the depositions, we had the dubious honor of being subjected to the interrogation of Applicant's witnesses by Mr. Brand who tended to take an inordinately long time to get no point at all, after which the Department then spent a cryptic half-hour to perhaps an hour in most cases on a follow-up, as to those matters that they thought Mr. Brand did not touch upon.

In that context it is very telling that the Department's deposition questions -- and if you read the transcripts you will be able to determine it for us -- the Department's deposition questions really related very little to what we suddenly got presented with on September 5.

That goes as to all the Applicants, not just Ohio Edison and Pennsylvania Power.

I have been handed what the specific allegations of September 5 were, wthat have been raised, and going down that list, there is the allegation that Ohio Edison repeatedly refused to wheel power for its wholesale municipal customers.

That was never discussed on deposition at all,

by the Department of Justice. Or by Mr Brand, surprisingly.

Also, there was an allegation, "Setting its industrial power rates equal or lower than wholesale municipal power rates." Never discussed.

"Refusing since at least 19760 the requests of Niles and Cuyahoga Falls that Ohio Edison file rates for 138 KV service." Never discussed.

1965. Ohio Edison refused to sell to Newton Falls Municipal Electric power for resale. Never discussed.

Ohio Edison refused to bid for the Norwalk electric generation facilities. Never discussed.

Ohio Edison refused to wheel power from Buckeye to Norwalk. Never discussed.

1971. Ohio Edison refused to wheel power to Norwalk. Never discussed.

In '71. At least prior to 77 Ohio Edison had a territorial allocation agreement. Never discussed.

In '66 Ohio Edison attempted to foreclose competition with Buckeye for bulk power by offering Firelands Cooperative a new delivery point. Never discussed.

In '69 Ohio Edison entered into agreement with Ohio Power to restrict the sale of power by rural

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electric cooperatives to municipal wholesale customers. Never discussed.

Ohio Edison emliminated through acquisition competing electrical systems including Norwalk, Hiram and East Palestine. Never discussed.

As to the other ones I didn't mention, they weren't really discussed or covered either.

There was some reference if we go back through the transcripts that the department can pull out and point to and say, see, we mentioned that, but let me remind you we were sitting through depositions five and six days a week, with an awful lot of interrogation.

CHAIRMAN RIGLER: I thought we cut you back at three days at your request for a substantial portion of that time.

MR. REYNOLDS: No, sir. Three days for two weeks and as it turned out we never got a week of three days. Because of schedule juggling we wound up going no less than four days and I think it was five and six.

In the course of that there was a tremendous amount of interrogation and a tremendous amount of responding and an awful lot of deposition testimony.

We had no way of knowing whether that was a fishing expedition -- which we tend to think it was -- whether it was going to anything specific or not.

Our view is that whole exercise was a fishing expedition.

For them to come in now and suggest we should in the course of discovery and everything else read through all the documents we produced to them, try to glean to that through some magic what possible allegations may be made against these entities on a specific basis, in the framework -- and I will repeat, because Mr. Berger has made the point -- but in the framework of the advise letters and petitions, which all were directed, at least as to companies other than CEI, to their participation in CAPCO as being the only basis for their involvement. To suggest in that context we should have been going through that material -- and it was voluminous -- and trying to search out what might be alleged as a possible allegation, on some other wholly different context is to me not a fair assumption to make.

I don't think we would have been able to do it in any event. Nor is there any indication that I know of yet that their allegations are even based on that documentary material or to what extent it is based on it, or how they are reading those documents.

It may well be they are misreading documents that when we look at we will show the Board and when the

Board looks at it it won't have any relevance at all.

MR. BERGER: Mr. Chairman, I would appreciate it if I could make one more point.

With regard to the wholesale customers of Ohio Edision, we know that the Department of Justice's modus operandi and the way they go about issuing papers to other companies operating in the area, that the inquiries as to the Applicant might in any way adversely affect these other entities.

In the 180 days the Department had with regard to Beaver Valley, in the 180 days that the Department had with regard to Perry, and the 180 days they had with regard to the Davis-Bessie 2 and 3, and throughout all of the discovery period, part of the interrogatories that we are serving in determining the underlying basis and the timing of this, is to determine when they first became aware of this because when they first became aware of it we should have become aware that they were going to make it a part of this case.

I submit, really what the scenario is, when the time came for them to put in their September 5 filing, they said let's take out the shotgun and shoot them all and they changed the focus and nature of this proceeding from one which was the City of Cleveland, the only petitioner to intervene, the only one requesting access,

and now they are here alleging separate identifiable cases with regard to all of the Applicant on which none of these other Applicants have had discovery as to the underlying allegations in the September 5 filings.

CHAIRMAN RIGLER: But all of the Applicants were aware of what the issues in controversy were at the time discovery commenced.

MR. BERGER: And those matters in controversy were certainly limited by those limitations I said earlier and specifically Mr. Popper's statement with regard to no allegations are made with regard to the activities of any Applicant other than CEI with regard to the activities in their service area.

CHAIRMAN RIGLER: Mr. Popper's remarks were made before or after the issues in controversy were framed?

MR. BERGER: His remarks were made at the prehearing conference which gave rise to Prehearing Order Number 2 and to which I might add Mr. Charno was present and expressly agreed to that limitation.

I quote -- I think it is transcript page 385 --

MR. LESSY: If I might respond just for a minute, sir?

First of all, I haven't heard anything going

to the question of good cause that is required in 10 CFR with respect to the delay up tot he brink of trial for discovery and that is vulnerable I think clearly under Zion, the Appeal Board decision therein.

Secondly, in terms of why the Staff didn't participate in the deposition junket, I am of the belief personally that documents speak for themselves and when the Board sees the hearing, the type of documents that Ohio Edison produced which are obvious in terms of restricting competition for industrial loads, which are obvious in terms of trading of customers, which are obvious in terms of long-term capacity restrictions and restrictions on resale, the fact that there is no notice of documents they produced is surprising to me.

In addition to the fact --

CHAIRMAN RIGLER: Are all of these documents identified in your list of documents?

MR. LESSY: Yes, sir.

If I could have the pleading for a second I could identify them for you by number.

The other thing there was no Davis-Bessie 2 and 3 discovery for the Staff at all.

Ten days before hearing I think it is a substantial burden on us to have to sit down and respond

to interrogatories which should have properly been framed and been delivered sometime after Mr. Benbow's initial appearance in the case.

No good cause shown that I have heard.

The only thing Mr. Benbow has said -- well, we told the Board we would try to cooperate and not impact on the schedule. We appreciate that. But the point is, now, ten days before hearing it really is a problem.

MR. HJELMFELT: Mr. Chairman, two things. One, first, in light of the issue as to who caused delay, seems to be playing, I just want to state that I certainly do not agree that any delay was occasioned by the manner in which Mr. Brand conducted depositions and that a reading of those deposition records, particualrly if one compares it to the depositions taken by Mr. Houser when he asked the same question on successive days, if compared, you will find there was no delay occasioned by Mr. Brand.

If it was a dubious experience for Applicants it was because Mr. Brand was extremely effective.

With respect to the matter of whether or not the matters in controversy should have put Applicants on notice, I would just note after the matters in controversy were established, framed, the parties then went into discovery and it was at hat point that the

discovery requests specifically from the other parties were argued and further spelled out the sorts of things we were looking for under those matters in controversy.

MR. BERGER: Just one further comment, if I may, Mr. Chairman.

With regard to what Mr. Lessy said, as far as our wholesale contract and our relations with our wholesale customers, sure, we know about those contracts.

When the provisions of such contracts, or the underlying relationships with wholesale custopmers and Applicant, in any proceeding that has come before tihs Commission has been called into question, it has been done so in a letter of advice, giving the Applicant the right to go and make inquiry of its wholesale customers during the discovery period, what is your problem.

We didn't get that opportunity. They knew about the contracts. We didn't yet know that they were going to call those contracts into question or our relations with our wholesale customers into question until September 5, after the discovery period was over.

CHAIRMAN RIGLER: All right. We will go on to the next item on the agenda.

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MR. HART: The only reason I am standing now, I have a 2:55 plane back to Cleveland this afternoon. There is not any other plane I can get on after that. I had written to the Board on November 20th, and I had requested at that time that a particular item be put on the agenda, and I wondered if the Board has seen fit to do that?

CHAIRMAN RIGLER: Yes. I have your letter, althought apparently you did not circulate a copy to the other two members of the Board. They don't have it. You are talking about your motion to disqualify counsel, Squire, Sanders and Dempsey?

MR. HART: Yes. That is true.

CHAIRMAN RIGLER: It would be our thought we could not hear argument on that motion today. If we hear it, we want to hear it on a full week schedule. However, we have a preliminary question. In your correspondence, at one point you indicated that Squire, Sanders and Dempsey has never entered an appearance in these proceedings and you indicated that you or Mr. Hjelmfelt, in a search of the Commission's file had not detected any notice of hearing appearance. If that is correct, I don't understand the purpose of the motion in the first place. I would like to have that cleared up before we proceed.

MR. HART: I believe Squire, Sanders and Dempsey entered an appearance in 440-A, 441-A, 500-A and

501-A. We did search all the records, I searched my records, Mr. Hjelmfelt sent a man from his office over to the Nuclear Regulatory Commission. They searched the records, and they did not fine the particular document that we are aware of at this time. There has not been a notice of appearance, we are aware of in the Docket Number 346-A, that I am aware of. I know there are some members from Squire, Sanders and Dempsey in this room. Perhaps they would want to,no doubt --

MR. LANSDALE: Let me, so that there will be no delay -- Squire, Sanders and Dempsey, which practices under the name of Cox, Langford and Brown in Washington, has entered an appearance in these proceedings and will remain in them, subsequent to any orders that may be issued.

MR. HART: In my legal research of this matter, this is a matter of gravity, this is a reversible error on its face, should the Board allow this, and an interlocutory appeal can be taken on this matter. That is a very serious issue.

CHAIRMAN RIGLER: Mr. Hart, I had another question. The only thing I received from you was a one-page motion with no additional briefs or pleadings.

MR. HART: That is true, sir. I wonder if at all or whatever time you wish, or refer to a special master,

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whatever needs to be done.

CHAIRMAN RIGLER: I think the Board should hear this, without reference to a special master.

Did you contemplate filing a brief with your motion?

MR. HART: We are in the process of preparing a brief at this time.

CHAIRMAN RIGLER: Which will be filed when?

MR. HART: Just as soon as you tell us it has to be filed. Ten days?

CHAIRMAN RIGLER: I think we would like to get this resolved prior to the commencement of the hearing itself. Mr. Lansdale, you will want what? About five days after you receive their brief?

MR. LANSDALE: If your Honor please, I don't know precisely what the City of Cleveland is going to claim. We have been threatened with the possibility of this, in this proceeding, and another one. For 70 years our firm had been general counsel outside for the Cleveland Electric Illuminating Company and for a like period of time --

CHAIRMAN RIGLER: Let's not argue that.

MR. LANSDALE: Just a minute, if your Honor please. A like period of time for the city. My point in mentioning this, this is not a matter if the city is

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serious about this, can be disposed of merely upon briefs. If there is any evidence that we have a composition or conflict requiring our dismissal from this case, then it must be upon evidence, and we are prepared and have employed counsel to be represented in such a hearing, but this is not a matter that can simply be disposed of upon brief. I don't want your Honor to get the idea that I intend to represent myself. I do not. We have employed counsel for this purpose who is not here today.

CHAIRMAN RIGLER: Have you talked to your associate counsel on this, to find out what briefing schedule he might have in mind?

MR. LANSDALE: No, sir. I have not. I have no problem, but I submit to your Honor that is nothing that can be disposed of on brief. I don't know whether your Honor would wish to appoint a master to hear this or what, but knowing some of the facts myself, well, I will refrain from characterizing this effort. I am flattered that the city is so anxious to get us out of this case in the other proceedings, but we do not intend to get out unless forced.

MR. CHARNOFF: If the Board please, while it is considering this matter, I am reminded of the fact, the noises from Mr. Hart with respect to this allegation, have been coming since July of this year. We find Mr. Hart telling us this matter is of such primary importance that

bw5 it is acceptable to interlocutory relief and it is reversible error. I am disturbed that it comes up at this late date, but I am impressed by the urgency Mr. Hart says this should be resolved at the outset. I would urge, in light of that, this Board in setting its hearing for consideration of this, do it on an expedited basis. Mr. Hart has been developing his brief for some time, having the matter of the City of Cleveland making statements about this matter for several months and comes now with a letter dated September 20th, to raise the question, without a brief, for November 26th or whatever today's date, and in Mr. Lessy's vernacular, only ten days away from the hearing, I would urge the Board to dismiss this thing at this particular time, because it is totally out of time, or I would urge the Board to demand that Mr. Hart file his brief before this Friday, so we know what this is all about, before we start the proceeding in this matter.

MR. HART: Whether there would be a delay in this proceeding or not, since they are represented by CAPCO counsel, and I suppose competent counsel are going to try this case, that there would be that much delay in the case.

Nunber 2, as the evidence will show, there has been a trading of information within this large law firm, then I

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think that we do have a very serious issue here, and I think that the Board should hear it as soon as possible.

CHAIRMAN RIGLER: Mr. Hart, how do you respond to Mr. Charnoff's suggestion that you get your brief in on Friday?

MR. HART: Sir, if I may, this is Wednesday, Thursday is Thanksgiving and Friday is the day after that.

CHAIRMAN RIGLER: Monday?

MR. HART: We can certainly proceed with all deliberate haste it to get it in.

CHAIRMAN RIGLER: Monday? You are the one that urges that time counts on this.

MR. HART: Correct. If you insist, obviously, of course, it will be in.

CHAIRMAN RIGLER: Well, I must say, I was impressed with Mr. Charnoff's point on the timeliness of this motion, because the Board has been receiving correspondence for weeks, if not months.

MR. HART: It has been a period of weeks we have been corresponding with each other trying to determine whether an appearance has or has not been made here. It is only within the past two or three days that we have finally decided, that, yes, there was an appearance made here and now within two days' time, we have proceeded to act.

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CHAIRMAN RIGLER: All right. If you can get your brief in on Monday, which is December 1st.

MR. CHARNOFF: I assume that will be by hand delivery, Mr. Chairman, to move things along?

CHAIRMAN RIGLER: Yes.

MR. LANSDALE: I assume it will be to the counsel in Ohio. The name is Michael Gallagher, Buckley Building, Cleveland, Ohio.

MR. HART: What would be the response for opposing counsel?

CHAIRMAN RIGLER: I was going to get to that.

MR. LANSDALE: I have no idea what my counsel's problems are, if your Honor please. He is a busy trial lawyer and we will do the best we can. I assure your Honor this matter cannot be disposed of on briefs, unless your Honor finds that the allegations made are subject to what we used to think of a demurrer or motion to dismiss or what have you. But if thre are any factual issues presented, I am sure there will be, I don't see how it can be disposed of on briefs.

MR. HART: If I may beg your Honor's indulgence, the brief will have exhibits attached to it, I think that will confirm everything that we are alleging.

CHAIRMAN RIGLER: Were either of you planning to call witnesses?

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MR. LANSDALE: I don't know, if your Honor please. How do I know until I find out what the claim is.

MR. HART: If I may respond to that, any time you are in a conflict of interest situation and the client, Squire,Sanders -- and the attorney Squire, Sanders and Dempsey has not made full disclosure to the client, which I would like to have to have, there is a possibility here for just what you are requesting.

CHAIRMAN RIGLER: Mr. Lansdale, we are going to ask you to have your brief in on the 4th, December 4th.

MR. LANSDALE: I hear what your Honor says, and will, of course, do our best, but I submit that when I am confronted with unknown charges, the only charge I know of is one which I can only characterize as libelous, because I know the facts concerning it made on the record by Mr. Hjelmfelt back in September, August or September, as to which I filed, as to which I filed a paper, and as to which we would be prepared to respond promptly. But, if your Honor please, how in the world -- I don't know what their claim is, except we are in a conflict position, that I can be expected to commit myself now to have somebody else respond in four days to a charge of this kind.

I will do my best, but I submit to your Honor, that the pressure of, I do not understand, how there can be reversible error for a notice first coming to your Honor,

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how many days it is before hearing, to eliminate counsel who have had, to the knowledge of the City of Clevelan,d an advisory position in this matter only, not,if your Honor please, for these few days, he is talking about, but I attended conferences two years ago in which the City of Cleveland participated, and in which we were discussing the issues in this case. I participated in this matter actively not in the hearing room, but in the conferences and in correspondence, for how many years has it been? Two and a half years, something like that. I attended meetings in the Department of Justice concerning this matter.

I submit to your Honors this is a ridiculous situation. To try to force me into a matter involving the integrity of my firm on four days notice to dispose of this thing, I submit is unreasonable.

CHAIRMAN RIGLER: What would be reasonable?

MR. LANSDALE: I don't know, your Honor. I have to see what the charge is. If the charge is what I think it is, on the one matter only, it is going to require testimony by certain legislators of the City of Cleveland. What their schedule is, I do not know. But I do not think that a charge of this seriousness is properly made against counsel that I must respond to this on penalty of being eliminated from the case in four days. I want to make that point on the record. And I submit to your Honor that

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to suggest that a failure to do this before the hearing begins is ridiculous. To suggest that that is reversible error for your Honor to fail to take action on this in a certain period of tims is nothing short of ludicrous.

MR. HART: If I may respond to that, your Honors, by his own admission, he has admitted he is counsel for EI and counsel for the City of Cleveland. He has tried to impress on everybody the fact that he has the right here, he has a right to waive this, and I submit to your Honors, he does not have that right.

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MR. LANSDALE: If your Honor please, Mr. Charnoff suggests that I say to you that as soon as I can get in touch with Mr. Gallagher and we get the city's brief on Monday, we will get in touch with your Honor with some information as to what kind of a problem we seem to be confronted with.

MR. HART: If I may --

CHAIRMAN RIGLER: Mr. Lansdale, we are going to give you the response time contemplated under the rules, which I believe will be 5 days. We will eliminate the mail service.

We will keep our hand delivery requirement in effect.

MR. CHARNOFF: Just for purposes of the record, Mr. Chairman, I would like to make it clear that while the rules apply, we may within that period of time ask for an extension after we see that brief.

CHAIRMAN RIGLER: Yes. I am hoping that it won't be necessary.

MR. CHARNOFF: We hope so, too.

CHAIRMAN RIGLER: We do not want to delay the hearing for the resolution of this matter. It may be we will take off a short period during the first week of hearing -- we may take one afternoon -- if the parties wish to make argument or present witnesses on this matter.

The hearing will proceed. There will be no

disqualification as of December 8th, because we won't have resolved it by then.

Mr. Lessy, you wanted to make some comments with respect to the burden of proof.

MR. BENBOW: Before we do that, Mr. Chairman, can I mention one other slight matter of appearance which seems to be causing the department some confusion? They don't seem to be sure whether or not we are in this case.

Mr. Reynolds was handed a paper today called "Corrections to Tentative Witness List of the Department of Justice," which states that both Mr. Reynolds, counsel, and Mr. Berger to my right, for Ohio Edison and Pennsylvania Power Company, were notified by telephone of such and such.

Yet on the service list there is someone who is blocked out — I don't know who it is — the firm of Winthrop, Simon and Roberts (?), counsel for Ohio Edison and Pennsylvania Power Company.

Mr. Berger and myself do not appear, and Mr. Charno, when I discussed with him, seems to be in some doubt whether we have appeared.

We would appreciate receiving a communication from the Department. We have yet to receive their list of documents, the list that Mr. Charno was saying on the record that we already have, plus these other papers, and I only have these because I borrowed them from Mr. Charnoff.

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MR. CHARNO: If I may respond to that statement, I think you will find you do have the documents you said you didn't have. They are sitting next to Mr. Berger. They were delivered and we have not been serving you because we did not receive a notice of appearance and that is the basis on which the mailing list is changed, and you will be placed on the mailing list as I stated you would.

CHAIRMAN RIGLER: Mr. Lessy.

MR. LESSY: Thank you, sir.

In a few of the recent Board orders, the phrase burden of proof has been used, and the staff would just like to suggest a distinction between the use of the phrase "burden of proof" and the use of the phrase "burden of going forward with the evidence" in the context of this proceeding.

Burden of proof is traditionally divided into 3 areas, without any specific orders, the burden of persuasion. Two, the task of initiating the presentation of evidence on a particular issue, usually called the burden of going forward with the evidence, and third, the burden of pleading the facts to be proven, which we do not concern ourselves with at this time.

To consider the use of the phrase burden of proof in this proceeding, we shall look at it from the two alternatives, as I just mentioned.

With respect to the new federal rules of evidence,

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Rule 301, entitled "Presumptions in General in Civil Actions and Proceedings," and it provides, if I might quote: "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion which remains throughout the trial upon the party upon whom it was originally cast."

The subject of the burden of proof was considered by the Appeal Board in Indian Point Station Unit 2, ALAB-188, a report of that 7 AEC 3231, 1974. In that proceeding, the Applicant --

MR. BENBOW: Is that an antitrust case, sir?

MR. CHARNOFF: It was not.

MR. LESSY: If I might continue, in that proceeding the Applicant challenged the application of burden of proof and quality of evidence which had been placed on the Applicant by the Licensing Board.

The Staff had advanced the position that the Applicant had to show not the absence of wrongful conduct, but the presence of proper conduct designed to comply with various environmental standards.

The Board held as follows: The ultimate burden of proof on whether a license should be issued remains on the

Applicant. But whereas here, one of the other parties advances a contention that that party has -- that that party has the burden of going forward with evidence to buttress that contention.

As a general proposition, once that party has introduced sufficient evidence to establish a prima facie case, the burden then shifts to the Applicant who was part of its overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention advanced by the particular party.

There are numerous NRC and federal court citations.

In conclusion, applying the above principle to this antitrust proceeding, the staff would suggest that once the staff, Justice and Intervenors sustain their initial burden of going forward with the evidence by introducing prima facie evidence of a situation inconsistent with the antitrust laws, the burden of proof returns to the Applicant to rebut the prima facie case as established.

The burden is then on the Applicant to prove by a preponderance of evidence that the issuance of the license would not create or maintain a situation inconsistent with the antitrust laws. We would like the Board to consider the Indian Point distinction with respect to the ultimate use of the phrase "burden of proof" and "burden of going forward."

We are not doing this in the form of a motion. We are just pointing out the distinction of that decision and its potential applicability to this proceeding.

CHAIRMAN RIGLER: We are about to break for lunch.

Before we do, I would like to distribute for your consideration a form the Board contemplates using with respect to documentary evidence to be introduced during the hearing.

Perhaps you will have an opportunity to review it during the lunch hour and give us any comments or suggestions you may have.

MR. BENBOW: Mr. Chairman, could we make clear that we disagree with the positions stated? We don't necessarily want to argue it now, if you don't want to hear it, but we thing it is fundamentally wrong and we would like the opportunity to point that out.

MR. REYNOLDS: I think we are entitled to, if the Board has agreed to listen to Mr. Lessy, we have addressed it in our brief. Butsince he gave his views to the Board, I think the Board should hear also the Applicant's side, at least as to the comments Mr. Lessy made.

CHAIRMAN RIGLER: I agree with you, Mr. Reynolds.

We will do that first thing after lunch. Or would you prefer to do it now? How long would your presentation be?

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MR. REYNOLDS: About three minutes.

CHAIRMAN RIGLER: Proceed.

MR. CHARNOFF: I will be very brief, Mr. Chairman, because we will rely on what is in the brief on this matter. We might point out at the outset, this matter does not require resolution by the Board at this time. It seems to me that is a matter you can decide at the conclusion of the case.

But I would like to sharpen up the distinction between the environmental and radiological safety cases, and the antitrust case. Notwithstanding the particular Appeal Board case, because it was referenced by Mr. Lessy, which was not an antitrust case, the fact is in environmental and radiological cases, the Applicant does have the burden of proof and even has the burden of going forward.

We have to go forward in those cases by putting in our application. We do that even if there were no intervenor. If there is an intervenor as to his particular contentions, we hope that Appeal Board directive means they have to go forward at least before we have to pick up the burden in reply to that.

But in an antitrust case, there is nothing of the sort here. There wouldn't even be a hearing in this case if it weren't for the recommendation by the Department of Justice that there be another here or if an intervenor had

not requested.

We have nothing to put before you, we have no burden to put to you because what you are doing is responding solely to the allegations being made by the other side. The finding that has to be made by this Commission in radiological and environmental cases is that there is a negative finding, that there is no health and safety ensuing from the activities or threat to the environment resulting from the authorized activities.

Here the Commission has to make an affirmative finding at the outset that there is a situation created or maintained by the licensing activities, then it may under the statutory structure proceed to imposing conditions.

This is a very different element. We don't have any burden of proving there is no such situation created or maintained.

The statutory framework is that there be an affirmative finding on that issue. The people who have to take that burden are the people who are advancing it.

So in our situation there is no analogy whatsoever.

As a matter of fact, the distinction is so sharp that the result is almost automatic as far as we are concerned.

CHAIRMAN RIGLER: Thank you.

MR. CHARNOFF: I might also point out the one other licensing board decision that has been rendered in the

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antitrust framework has clearly sustained the position we have taken.

MR. LESSY: I have one sentence of rebuttal.

That decision is the consumer's decision which I personally feel is in great jeopardy on that and on other matters.

With respect to what they are seeking, applicants are seeking an unconditioned license. That is the basis for our position.

I hope that our comments are instructive.

CHAIRMAN RIGLER: We will recess for lunch until 1:30.

(Whereupon, at 12 noon the hearing was recessed for lunch, to reconvene at 1:30 p.m., the same day.)

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AFTERNOON SESSION

(1:30 p. m.)

CHAIRMAN RIGLER: All right. The Applicants had asked to address the Board with respect to designations of witness by individual Applicants, designations of documents by Applicant.

MR. REYNOLDS: Yes, sir. The Board had asked for some clarification of Applicant's position on this matter at the last prehearing. I am sorry.At the last conference call. And the Applicants have submitted a statement or procedural matters to be considered, which was --

CHAIRMAN RIGLER: I thoughtit was the Applicants who asked the Board for an opportunity to clarify this.

MR. REYNOLDS: Well, I guess --

CHAIRMAN RIGLER: Be that as it may, we are prepared to hear you.

MR. REYNOLDS: The Board has asked the Applicants quite correctly to clarify it, Applicants' counsel, I was on the call and the Chairman said it was still not too clear, and would I please submit in writing what it was we intended to address with respect to procedural matters today.

In compliance with that request we submitted the Applicants' statement of procedural matters to be considered under date of November 25, 1975. I might indicate at the outset our position is that, for example, with respect

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to the Board's chart that was passed out as to the document introduction, we would feel that there ought to be added to this another column which would be headed something to the effect: "Parties against whom the document is to introduced." It would be the party, I think, the party against whom it is to be introduced. Basically, our position on that is that we have some suggestions, certainly in the belief that was handed me this morning, and in some earlier statements, that this case has overtones of conspiracy, that the Applicants' have somehow been involved in some sort of conspiracy. We don't yet know the nature of it, the time when it might have begun, or when it ended, if it has ended, or any of the other essential factors or ingredients that are usually necessary for conspiracy.

The law seems to clearly provide that you cannot impute actions and acts of one alleged co-conspirator before youestablish the conspiracy. Our position with respect to designation is, if this case does have overtones of conspiracy, the way that it is going to be proved from the September 5th statements and certainly from the brief we got this morning, is through circumstantial evidence. In order for that circumstantial evidence to come in, it should be properly introduced by indicating which Applicant the evidence goes against, introduce the evidence, whether it be testimony or documentary, as against that Applicant with

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a condition that in the event a conspiracy is shown at some point, that then the evidence that has been introduced as to one Applicant can be connected up at that point to the conspiracy.

We have discussed the relevant cases that address this point and the feeling is, if you don't do that, there is no imaginable way to make any kind of determination of conspiracy in this case. We recognize that the allegations that have been set forth are the ones that the other side intends to rely on for one purpose or another.

Therefore, that that kind of evidence will come in. We think, clearly, this Board ought to lay down ground rules that it comes in as to a particular Applicant, until such time there is proof of a conspiracy. If that is proved, then at that point, once these factors that are essential to conspiracy are made out, there can be a connection up, if you will, with the evidence that has come in against a particular Applicant as against all Applicants.

Now, at that particular point in time, the other Applicants would, I submit, have the opportunity to cross-examine those witnesses who originally were only introducing evidence as against one Applicant. But certainly, the procedure we suggest is going to be far more expeditious than if we are to start out in this proceeding and have all five of the Applicants cross-examining all of the witnesses on

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a matter of some, as yet, ill-defined, unspecific conspiracy claim throughout this proceeding. We think that clearly the quickest way to get this hearing moving and have it move in an expeditious fashion throughout, is to have whatever evidence that is coming in designated as evidence against particular Applicants.

If the other parties wish to designate evidence as going to their conspiracy, then that would enable the Applicants at that point to have everybody present to cross-examine with respect to that particular evidence. And appropriately so. We do have, I think, five out-of-town counsel and one thing that we would like to avoid is having them in Washington for the next six or eight months involved in a hearing where they have to stand in attendance on a daily basis.

CHAIRMAN RIGLER: Why would they have to do that, Mr. Reynolds, if you and Mr. Charnoff are going to be here?

MR. REYNOLDS: Because each one of these Applicants are representing the interests of their particular company and each one, with regard to certain evidentiary matters, have different interests at play. For example, if there is a witness that is going to put in evidence directed only at CEI, Mr. Hauser will, for the most part, be conducting the cross-examination of that witness. The Ohio Edison interests may be something different than the

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Toledo Edison interest or the CEI interest or the Duquesne Light interest with respect to that witness. I personally am in no position to stand up and conduct cross-examination on behalf of each of those interests. That is the real problem you have in a case with conspiracy overtones, each of the Applicants, each of the utilities is entitled to have its own defense and each has its own lawyer on board and is prepared to carry that defense.

Also the allegations as against CAPCO generally and the expert witnesses and testimony, that is primarily the responsibility that I will carry.

But each of these Applicants has their own defense that they are going to put in in this case.

CHAIRMAN RIGLER: Doesn't this run contrary to the original intent, that only one counsel for Applicants corss-examine or examine each witness?

I thought you got into that about the second prehearing conference, by Mr. Charnoff.

MR. REYNOLDS: At that time we had a much different case than we have now for one thing, as evidenced by the September 5 filing, by the Davis-Besse 2 and 3 advice letter and consolidation of that matter, which is another whole situation that has come in. We also have a whole different type case. I mean, basically to the extent that the memorandum or the position you are

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talking about contemplated that we would be able to proceed with one counsel, it was at that time, within the framework that everybody was talking, which was, this was a joint applicant. That we were only concerned here with the CAPCO nuclear plant and the interest of these Applicants in putting up the nuclear plant. We now have a situation where you have got different specific allegations as against each of these companies, vis-a-vis activities that they carried out in the particular service area, with their particular municipalities.

CHAIRMAN RIGLER: Let's back up a minute. Didn't you have particular charges against CEI?

MR. REYNOLDS: That is correct. Even at that stage when Mr. Charnoff, I believe it was the second prehearing conference, I have not had an opportunity to review the transcripts lately, I believe Mr. Charnoff indicated he contemplated only one counsel for examination.

MR. CHARNOFF: But all we had were allegations against CEI and its relationship with the City of Cleveland, and I believe agianst Painesville. Dut at that time no allegation was made with respect to the other Applicants with respect to the entities with their territories. That is a totally new development that came along in this case.

As we saw the case then, as we understood it, it was against CEI and the other fellows happened to be

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along, because they wereporposed co-owners of the plant. Period. There was a very narrow type of case. In that type of context we were proceeding with the idea that we would be able to take care of this matter without any conflicting responsibilities of the various companies amongst themselves. It is a very different animal than what we now have today.

CHAIRMAN RIGLER: I am not sure right off-hand I agree with you. Wasn't dominance of transmission within the CCCT area a position in the very beginning?

MR. REYNOLDS: Only in the context of the CEI and City dispute that was raised.

MR. CHARNOFF: I don't want to debate at this time, I think we will have to continue that debate about the Board as to the significance of those contentions. I think we understand what the Board is saying. We sincerely disagree with that position of the Board, and I will take issue with it. But at that time the understanding of this case, to the extent we had any kind of specific allegations, was as I have indicated, as Mr. Berger has indicated and as Mr. Reynolds has indicated, and there is no way to dispute that by examining the kinds of documents we had before us at the time we were talking about the procedural approaches toward this particular proceeding.

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MR. REYNOLDS: When you examine the statements that the other parties were making as to how they envisioned this case at that time. Our feeling very strongly is, in view of the new developments you cannot have evidence comoing in as to a particular activity, for example, by Ohio Edison in its territory, which is going to somehow impact or be imputed over on to CEI or any of the other applicants and similarly, whichever one I pick, until such time as this Board is able to find evidence of a conspiracy.

We are prepared to have the particular evidence come in as against the particular applicant and it will be coming in subject to whatever kind of connection up as to a conspiracy might be able to be proved at a later date.

But otherwise we have no alternative but to have every Applicant come in and cross-examine every witness, because there is the danger that that particular testimony of that particular witness, although it be directed toward one witness, is ultimately going to be the link or pen point for some broad general conspiracy of an amorphous nature that nobody now knows about. We don't even know when it began.

CHAIRMAN RIGLER: Who alleged -- is there an allegation of a conspiracy?

MR. REYNOLDS: In the brief we received this morning, there certainly is. I think you are hardpressed to find any specific reference to conspiracy before that,

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but certainly there have been comments by other parties that generally allude to that context.

CHAIRMAN RIGLER: Is there a distinction in the law between a combination and a conspiracy? If so, how would your answer to the previous set of questions relating to conspiracies differ? Do you distinguish between a combination and a conspiracy?

MR. REYNOLDS: For purporses of the evidentiary point we are making I do not make any distinctionbut I think there is a distinction with respect to elements of proof, in terms of what it is that they have to come in and show before you can link -- before you get a connection subject to it that comes into effect. What elements are required to be shown before you have a conspiracy versus a combination. But as far as the point that we are making, it seems to me that if their case is, there is a combination in restraint of trade as opposed to a conspiracy in restraint of trade, the same precedural requirement should be set down. That is, if they have evidence that goes strictly to that point, let us know and we will have everybody come in here and we will cross-examine on that evidence.

If their evidence is going just to the point of somebody's isolated activity over here, that evidence can come in on that isolated basis, subject to whatever connection up they can establish.

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CHAIRMAN RIGLER: Okay. Let me ask you another question. I want you to understand that these are purely for purposes of argument. The Board is not taking a position.

All right. Assume it is alleged or somehow prima facie introduced that the formation of CAPCO and the setting of membership qualifications therein constitute a combination, suppose that is the allegation these other people make, at that point are all the members of CAPCO charged with each other's acts?

MR. REYNOLDS: No. No. They are not. I think one thing is, the fact that you -- the combination we are talking about to the extent it fits within the definition combination, it is a pool arrangement that has unique characteristics which are someting that are far different from some other combinations that some one might have in mind.

That is important. I think the other thing that is important is, we are talking here about a statute which only prescribes combinations in restraint of trade. We are not talking about a statute that says there is anything offensive to either the policy or letter of the antitrust laws by a combination.

CHAIRMAN RIGLER: You are saying the CAPCO agreement may be a perfectly valid and legal instrument and presents no inconsistency, but they might allege otherwise. My question is, if they make that allegation and base that

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allegation ont he CAPCO agreement, then at that point do you still contend each applicant is entitled to designation of particular pieces of evidence, theoretically usable against it, as an individual Applicant?

MR. REYNOLDS: If they are coming in with a combination in restraint of trade theory, then we are not talking about a situation where your acts of CEI are going to impact as to Ohio Edison. Unless you can show that there is some concerted activity, and that is really the touchstone of it, whatever label you put on it, whether combination or conspiracy, if they can come in and say they have evidence going to some concerted activity in restraint of trade.

At that point, if they can do it and they meet their burden,as I believe it is, of proof on the point of conspiracy, then it seems to me that they would have a situation where you can have the evidence coming in and everybody will have a shot at cross-examining.

But, until they satisfy the legal requirements for showing this concerted activity in restraint of trade, then I think it is inappropriate, it is going to drag this hearing out, it is going to be totally unmanageable to say that we are going to have every piece of evidence, documentary and testamentary, all come in against every Applicant under all circumstances.

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CHAIRMAN RIGLER: Let me ask you another question. You said you don't draw any distinction between a conspiracy and a combination for purposes of the relief you now seek. Do you draw any distinction between a conspiracy or combination and monopolization? Suppose the idea the Applicants are monopolizing transmission or monopolizing generation within the CCCT territory?

MR. REYNOLDS: I would assume if it is monopolization we are talking about section 2, not section 1 and that would be against the individual Applicant in any event.

CHAIRMAN RIGLER: Why if they are charging these companies combined to monopolize transmission or generation within the CCCT territory?

MR. REYNOLDS: I guess I have two problems with that. If you are talking about that, then it would be hard for me to understand how you have a monopoly because you have five of them doing that in that territory. That is contrary to the defintion of monopoly and you would be under section 1, which would be again, a combination, the combination of which may be, if you want to carry it monopoly but conceptually it is hard to say you have a monopoly situation in the CCCT if you are pointing to five Applicants who have dominance in that area in transmission. You might have something that smacks of a coalition that dominates but you don't have a combination under section 2. If you can show some

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concerted action, then you have a conspiracy in restraint of trade. But the monopoly concept goes to a single entity, which in a given relevant market is dominant, has monopoly power.

CHAIRMAN RIGLER: You are saying there can't be 2 companies engaged in monopoly jointly;

MR. REYNOLDS: There may be, but in that instance you wouldn't go after them under section 2. You would go under section 1, restraint of trade. You may go after each one individually, as 2 offenses. You may be able to say, this fellow has monopoly power and therefore under the Sherman Act monopoly provisions he had got a problem, but you might also be making the statement that under the concerted action, conspiracy, restraint of trade, that that is a separate violation.

I think in terms of -- I don't -- What I am not too clear on, I don't think that an act, for example, by Ohio Edison or CEI, let's take CEI -- enacted by CEI against the City of Cleveland, would be a factor relevant to whatever your case was of monopoly power,vis-a-vis Ohio Edison.

Now, it may well impact if you have a conspiracy case or combination case, but I think in your monopoly cases you would be looking to evidence as to each company and its "monopoly power," if that can be shown.

I think otherwise you are talking about in the

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CCCT area, you have five companies that have, on a segmented basis, have stipulated there is dominance. I don't think that you could say that all five of them, for example, or any one of the five, if you are going to take that area, is a monopoly. You would be hardpressed to ever show that. I think they all have dominancce within segmented submarkets or subareas of that CCCT area.

But if you take that area as a whole, I don't think -- I haven't even heard an allegation that there is any one of these utilities that is a monopoly in that market, if that is a market.

MR. BERGER: Chairman Rigler, let me amplify one thing as to a question you said before as to an allegation in the case specifically as to conspiracy, I point to the statement of the City of Cleveland, of September 5, page 11, three lines down from the top.

"Cleveland will present documents and testimony which show not only that both Cleveland and Pitcairn were denied membership from CAPCO but that in both instances the CAPCO companies conspired to exclude those cities from CAPCO."

Now, aside from that, let me just amplify on one point that Mr. Reynolds is trying to make. That is, with really the status of the case, as it existed at the time that Mr. --

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CHAIRMAN RIGLER: Let me interrupt right there. As I read your pleading, admittedly hastily this morning, you are telling us that the law is that you are entitled to know when you join in a conspiracy and how the conspiracy was formed and what you read to me tells you exactly that. At least that is the allegation of Cleveland.

MR. BERGER: I think what we are trying to tell you is this: until such time as a conspiracy or combination is established by independent evidence that acts and statements made by individuals alleged to be part of that conspiracy or combination, evidence thereof cannot be admitted agains all until such time as that conspiracy and combination established by independent evidence. That is clear basic "horn-book law."

The point I was trying to make before, with regard to single counsel it was pretty clear at the time that Mr. Charnofff made the statement as to single representation, that what we had here was really a case where the finding the Board was being called upon to make under 105 (c) 5 was whether the activities underthe license would create or maintain a situation inconsistent with the antitrust laws in the area served in the City of Cleveland. That is really what was involved. There was no suggestion that the activities of Ohio Edison under the license would create or maintain a situation inconsistent with the antitrust

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laws in the areas in which they served.

CHAIRMAN RIGLER: That simply doesn't square with my reading of the issues in controversy here.

MR. BERGER: But as I said to you before, there were no allegations --

CHAIRMAN RIGLER: The clear language is contained right here.

MR. BERGER: But we get back to what we started to talk about earlier today, as to what the limitations were as to those matters in controversy and the fact that the staff and Justice has agreed that because no allegations have been made with regard tothe activities of anybody other than CEI, vis-a-vis the others operating in their area, that the matters in controversy would be limited to CEI and not their relationships with the other entities and the areas in which they serve.

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MR. BENBOW: Mr. Chairman, I don't think it matters really in answering this question whether you read the issues as they were stated the way you do or the way Mr. Berger and I understand Mr. Reynolds and Mr. Charnoff read them.

I think you can read them either way and still come out seeing the necessity and perhaps above all from the Board's point of view the practicality of going in the direction that we suggest.

A case, however those issues were stated, that was essentially a case against CEI and a group of peripheral defendants as of July or June of 1974, as of September 5, 1975, as reflected among other things in the Justice Department's brief handed to us this morning.

It is clearly five separate cases agianst five separate companies. That is the way they set out the material here.

Included in those allegations are not only the basic combination or conspiracy that you have been exploring with respect to CAPCO, but various other alleged conspiratorial or combination aspect that goes to questions like restraints on allegations, group boycotts, price squeezes and other maters, so we are not just talking about a single alleged combination or conspiracy related to CAPCO.

WE are apparently talking about a number of others in the eyes of Justice and they assert them under Section 1 in particular of the Sherman Act which, as you know, necessarily involves combination or conspiracy.

To restrain trade absent combination or conspiracy does not violate Section 1. That is what they assert.

So clearly to those allegations, the allegations of conspiracy or combination is essential.

What we are saying, the rights you expect to accord us, if allegations are made against Ohio Edison for example, our clients, my client, Mr. Berger and my client, that we would like the opportunity, unless there has been established by independent evidence and the existence of such a combination or conspiracy we would like the opportunity to save the Board's time if the evidence is being offered against CEI because we are willing largely to rest on their ability to defend themselves as to their actions.

But if evidence is offered against Ohio Edison or which relates to Ohio Edison or Pennsylvnia Power, we want the opportunity to contest with respect to the documents and to cross-examine the witnesses.

Now, I say a saving of time because we intend to exercise that discretion and I am sure the Board will

tend to hold us to it. Not to cross-examine with respect to material that does not affect us. But if the indication that we have had thusar, that all evidence is going to be, and each witness is going to be offered against everyone, we can't afford in the interest of our individual client or clients to let anything pass.

It doesn't matter if it is solely, seemingly related to CEI, I have got to contest it because later on this Board and possibly other forums relying on any findings made in this Board may say, hey, look, you have been shown to be part of a combination or conspiracy, not on the basis of what you did, what your client did, but on the basis of what some other company did at some other place about which we had no knowledge or information.

So what a rule contrary to what we are suggesting would invite is, each counsel for each company would necessarily feel it within his interests to contest and must contest each item offered.

We hope we won't get to that stage, Mr. Chairman.

One other brief, if I may, while I am on my feet.

It seems to me that comes down clearly when

you get to the stage of making findings in this case.

It seems to me you will indeed want to take the companies one by one, and we don't think you are going to find anything wrong wtih what any of them did individually or collectively.

But it is certainly possible you might find something wrong with one of them individually and in those circumstances I presume you would want to prescribe appropriate remedies as to it. Not as to all.

The procedure we are suggesting lays a logical and natural foundation upon which that could be most expeditiously and effectively done.

Thank you.

CHAIRMAN RIGLER: Does anyone want to respond on the other side?

MR. LESSY: On behalf of Staff, Mr. Chairman, we, too, have just recently received this pleading entitled Applicant's Statement of Procedural Matters to be Considered.

Our basic position would be that the evidence speaks for itself and we view this as a last minute attempt to prospectively exclude evidence based on a specification which has not been required and in my view is inapplicable in an administrative as opposed to a criminal proceeding where a determination is a

position inconsistent, and I use that word advisedly, with the antitrust laws.

I would like to respond in writing since we just received it and for those purposes would it be appropriate to treat this as a motion?

MR. CHARNOFF: We would have no objection to Mr. Lessy or anyone else filing a response to that with one caveat.

We would hope and expect we would get a ruling on this before we begin the evidentiary hearing.

MR. LESSY: That again emphasizes the timeliness of this at this stage.

There was a rejected request that the list of documents -- I believe by Mr. Berger -- designate to which Applicant that particular document was to be used against.

During that conference call the Chairman indicated that was not the Board's intention.

So that therefore, receiving this on the evening before or the day of a prehearing, we can't take the position we would like the opportunity to respond.

MR. BERGER: Excuse mefor one second.

It was that to which the Chairman gave us leave to argue at this prehearing conference, as I recall.

CHAIRMAN RIGLER: That's correct.

MR. LESSY: But we haven't been subsequently acquainted with the details of the argument as just presented.

We would like the opportunity to respond.

This particular pleading does not move the Board for anything. It is merely a statement.

In essence they are asking for a ruling, so we would propose to treat it like a motion.

Lastly, as I listened to Mr. Benbow's comments, in essence giving the Board a choice, the first side is either a designation or exclusion of all five counsel cross-examine ad infinitum.

We would propose in our response to address that also, those comments, and also the comments of Mr. Reynolds concerning his understanding of Sections 1 and 2 of the Sherman Act and also the impact of Section 5 of the Federal Trade Commission Act with respect to this question also.

MR. CHARNO: Mr. Chairman, we also received this brief this morning and would like a chance to reply in writing.

I would also like to go back over the brief and see if I can find the overtones of conspiracy referred to in our brief.

Section 1 of the Sherman Act refers to a

combination or conspiracy in restraint of trade.

The restraints are on the Applicant's individual customers and we don't allege them to be a part of a conspiracy or conspiratorial relationship but it may well be that we have an overall conspiracy in which all of the parties are united for all purposes.

I am unaware of that, if that is the case. Certainly our brief doesn't say that.

We are alleging a CAPCO conspiracy and each of the conspiracies is an attempt to monopolize, which is under Section 1.

MR. HJELMFELT: I would echo the fact I just recieved the pleading this morning and would like the opportunity to respond in writing.

I would like to question the agreement that cross-examination should be limited to one attorney from the Applicant.

In that regard I would like to hand up now the statement on consolidation procedures signed by the parties on March 29, 1974, which contains a provision dealing with that.

MR. BERGER: That is 1974; is that right?

MR. HJELMFELT: Yes. That agreement was made, Mr. Chairman, at a time when Applicants have for a year been telling us they didn't know what the issues

in the case were but at the time they were saying they didn't know what the issues in the case were, they were perfectly willing to make that agreement.

Now all of a sudden they want out of the agreement. And in arguing they want out of the agreement they are telling us that back then they knew what the issues of the case were and are not the issues that are in now.

I don't think they can have it both ways. They either did or did not know what the issues were.

They made it very clear they felt they were in the dark as to what the issues were and even without knowing it they were willing to limit cross-examination to one attorney for the Applicant.

CHAIRMAN RIGLER: Mr. Hjelmfelt, while you are on your feet would you care to respond to the comments on page 11 of your September 5 filing?

You referred to a conspiracy to exclude others from membership in CAPCO.

MR. HJELMFELT: Yes. It is our contention, and we believe the evidence will amply demonstrate that the CAPCO companies from the very start -- when the very start was is difficult for us to ascertain in that we haven't had complete discovery on the formation of CAPCO and the formation of ECAR -- but from the very start the CAPCO

companies were very interested in excluding municipalities and public power groups from membership in CAPCO, that they acted jointly to exclude public power groups, that before responding to Pitcairn's request for admissions that they conferred among themselves and they coordinated their response, including sending drafts of the letters which the individual companies were going to respond to Pitcairn, to DuQuesne for review before they were sent, a similar coordination of response was engaged in in responding to the City of Cleveland, and the response given to the City of Cleveland was not a CEI response or a DuQuesne response, but was a CAPCO response.

CHAIRMAN RIGLER: Mr. Reynolds, before you speak I have another question for you.

As we were discussing in Section 1 of the Sherman Act, I asked if you could distinguish between a conspiracy and combination.

I should have asked if your answer would be the same with respect to an agreement of restraint of trade.

It is your contention the evidence has to be identified as to each party once an agreement on restraint of trade is introduced in evidence?

MR. REYNOLDS: The fact there is an agreement in restraint of trade in this case, if you can show the agreement was one which all the parties were a party to, it doesn't seem to me that should open the door to allow all the rest of the evidence to come in against all of the applicants.

It is similar with a conspiracy, if you can show which applicants were compatriots of the conspiracy, so to speak, then the evidence would come in as to those.

If you can only show that you have a conspiracy, for example, vis a vis two of the five applicants here, then it would not be appropriate to open the door, to have all the evidence come in as to all five applicants.

I think the same thing works whether you are talking about conspiracy or combination or contract. Once you have independently established either the combination, the contract or the conspiracy and the parties thereto, that then is a permissible basis for looking at the evidence of those co-conspirators on a collective basis, vis a vis all of them and giving all of them an opportunity at that time to cross-examine, but short of that, it is not appropriate to come in and to have the evidence all put in against all people without any indication at all what the nature of the conspiracy is.

I would, if I may just briefly -- I think the

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Applicant would be more than willing if the other parties would agree to go back to what the Applicants conceive the issues to be on March 29, 1974. We would be more than willing to go back to our agreement of March 29, 1974, and adhere to that both as to briefing and as to cross-examination of witnesses.

I would submit that the prehearing order we followed, hearing order 2 -- and there has been so much discussion about it I don't want to get to it again -- but I would submit at that time, if we go back and review the transcript, it will become evident at that time the Board's concern was with drafting as broad issues as possible for discovery purposes, with the understanding that this was to be for that purpose.

Now, what we are hearing from the Board and the other parties is because we did broad issues for discovery we now are going to lock you into those broad issues somehow for purposes of defining what the issues are and the matters in controversy are in this case.

My understanding was that was the purpose of the September 5 filings. To the extent that those September 5 filings embraced material that we had no notice of before, we have already made our position clear.

To the extent that it has allegations in there which carve out what might be an area under your broad issues

for discovery purposes, those areas are now out of this case.

And I think the Board itself made that clear, that it was having -- that the September 5 filings were being put in in order to frame the issues for litigation. That is a lot different than when we are talking about issues for discovery.

The whole tone and context of those broad issues, which I believe the point was made by the then Board chairman at the time in the transcript in the prehearing conference, was for purposes of discovery, and was purposely broad. That is why when Applicants asked for more of a specification, the Board said they were reluctant at that time to require more of a specification.

But it seems to me that it is taking out of context the broad issue approach for discovery when you are now talking about what the issues are in this case. I don't think that this March 29, 1974 paper as to an agreement as to what we would be willing to do, given our understanding based on -- and I will note Mr. Popper (?) signed this and Mr. Charno, Mr. Vogler, Mr. Goldberg -- based on statements by Mr. Popper, confirmed at the hearing -- in the prehearing transcript by Mr. Charno, what their concept was of this case.

Given that, and that particular framework, it seems

to me that if you are talking about any solemn agreement that it has to be thought out and reviewed in those terms.

Our point is, this is a much different case than anybody, anybody, including the then Board chairman, the members of the board at that time, the other parties and the applicants, conceived at the time, that somebody issued broad issues and the matters in controversy for purposes of discovery only.

The prehearing order 2 says issues for purposes of discovery.

One last point is, if the Justice Department is indeed taking the position that there are no conspiracy overtones in their particular case, then I would assume they have no problem with our procedural approach here and would certainly agree to go along with it.

MR. CHARNO: May I respond briefly?

CHAIRMAN RIGLER: Yes.

MR. CHARNO: I think counsel has Mr. Charnoff and Mr. Charno mixed up. We were not mixed up.

MR. REYNOLDS: I said Mr. Charnoff.

MR. CHARNO: The problem with the pleading as I understand it, not with what applicants are putting forward so much as what they would characterize as a conspiracy and seek to link up. That would be the Department's problem.

MR. SMITH: Mr. Charno, I wonder if you would

address yourself again to the point that is made about your position in relation to the parties acting in concert and denying Pitcairn and Cleveland access to Capco.

MR. CHARNO: As I said, we do not consider that a conspiracy to monopolize, but rather a group boycott.

In other words, it would be a Section 1 violation rather than a Section 2 violation. There are separate aspects of monopolization that each of them engage in, which we don't believe should be carried over and above any impact upon the other members.

MR. BENBOW: If I may comment, Mr. Smith — I thought you were finished.

MR. CHARNO: I am worried that we are going to find that everything has to be tied to everybody else to be usable anyway.

I admit I have not read their pleading through, and I have not read certainly the cases that are referred to therein, so I am really not sure what their position is.

MR. BENBOW: If we could find out as to which ones he makes the assertions and which ones not, it would be necessary in order for us to understand his position.

He just cited group boycott, and that appears -- the law with respect to it appears at page 54 of his brief and he cites consumer's power for being correctly applied in the holding of the Klors case in the electrical industry

when it stated if two utilities reached into agreement and thereby reaping the benefits of such arrangement and further conspire to prevent other utilities from entering the arrangement with the intent to injure then, such conspiracy falls squarely within the prohibition of Section 1 of the Sherman Act.

He cites consumers power as correctly interpreting Klors in that regard.

Now, is he saying at the same time that this is group boycott, that he is relying on that authority that somehow the way he uses it isn't conspiracy? We need guidance because the plain language doesn't seem to mean what it says.

MR. CHARNO: Quite obviously, if we are talking about a group boycott, each of the parties has to be a party before you can show there was an agreement by all the parties.

I don't think we are talking about carrying any evidence of that to anything else.

MR. CHARNOFF: Perhaps we need the delineation Mr. Benbow asked for.

Mr. Charno can go through his September 5 filings and find out those which are intended to be imputed to all, and pick out which ones go to the others, and so forth.

But what we do not have now is that kind of delineation.

MR. SMITH: Before we go into any more on the conspiracy issue, I believe that one of the counsel for applicants suggested that if the evidence should establish that one of the applicants did not participate in any active practice contributing to the situation, then there should be no license condition applied to that applicant.

MR. BENBOW: I took that position.

MR. REYNOLDS: That is in the paper, too, that there is ample authority and there is ample precedent for this licensing board, should it determine there is an application inconsistent vis a vis one or more of the applicants, attach license conditions only as to that particular applicant, and not as to any others in the event that there is a finding of no situation or participation in a situation inconsistent with it.

Kansas City, I think, is the most ready example of where there were different sets of license conditions that were attached in order to meet what at that point were thought to be different situations.

That was by the Department of Justice.

MR. SMITH: What would be our situation then if we found it necessary to apply those conditions to all applicants to avoid a situation inconsistent with the antitrust laws, since we have joint application and joint facilities?

MR. REYNOLDS: If you find it necessary, it would

have to be on the basis of finding that all the applicants were participants in a scheme or conspiracy, which to be associated with activities under the laws and which would create or maintain or create a situation inconsistent with the antitrust laws.

MR. SMITH: This isn't a punitive situation.

We are trying to avoid a situation inconsistent without regard to guilt or culpability.

MR. REYNOLDS: Wait a minute.

I think we better ask you to read the statute. The statute says license conditions or a finding by this Board which would warrant license conditions is only justifiable in the event that this Board determines that activities under the license will create or will maintain a situation inconsistent with the antitrust laws.

Now, if this Board should find that as to any one or all of these applicants there is no activity under the license which would create or maintain a situation inconsistent, then there are no license conditions.

If it should find, for example, that a monopolization case has been made out against one applicant, but all the other applicants had nothing to do with it and were not part of any conspiracy or scheme, it may well be that this Board feels it is appropriate to attach license conditions to rectify, remedy or cure the inconsistent situation which

it found, because all it has found in that instance is that those activities will create or maintain a situation in that particular applicant's area.

If it finds there are licensed activities that are engaged in by one but not all of the applicants and it will recreate and maintain a situation inconsistent and the bounds of that situation inconsistent are defined in terms of that particular applicant service area, then the license conditions would attach as to entities in that applicant's service area.

But there is no authority in the statute and no reason on earth under the statute or the legislative history why this Board would then turn around and also impose similar license conditions on all the other applicants with respect to which no inconsistent situation had been shown, no bad activity had been shown and no complicity in whatever was going on in the other territory had been shown.

I think it has been done in other cases, and it can be done under the statute. There is ample thought that what you are going to cure under the statute, if you can make the affirmative finding, is whatever the inconsistent situation is that you find.

If that inconsistent situation adheres only as to one applicant in its particular service area and you find that everybody else has been doing exactly what they

ought to do under the antitrust laws, then your licensing conditions would necessarily attach only as to that applicant.

I would add only the caveat, which I have repeated here time and again, that before it can attach to that applicant, you have to show that his activities that you found offensive in the antitrust laws are going to be created or maintained by activities under the license, because there is that nexus required.

But just because you might find it, for example, in a monopolization case, as Mr. Charno suggested, does not give license as to anybody else insofar as what their activities are in their service area or whatever their situation may be, that is not inconsistent with the antitrust laws.

MR. SMITH: Aren't we likely to end up by conditioning, I mean if the evidence supports it, isn't it possible that a facility will be conditioned in which an innocent applicant is a participant?

Say, for example, we issued an order conditioning or we recommend the conditioning of one of the facilities in which an innocent applicant, a joint order, upon granting access to Cleveland or Pitcairn? Would you not be affected by that, even though --

MR. REYNOLDS: The access will come out of the

share of the unit of that particular applicant. That is what we have offered in our proposed license condition.

For example, if you found it as to the city of Cleveland or Pitcairn -- take either one -- if it was the City of Cleveland and you were to attach a license condition, the access would be out of the share that CEI has in the joint unit, but it would not be out of anybody else's share nor would anybody else have to adhere to a license condition.

The finding would be that CEI, by virtue of activities under the license would create or maintain a situation vis a vis CEI and its competitors, that this Board could find inconsistent with the antitrust laws. But it would not require anybody else, and the fact that you attach that license would have no impact on anybody else, nor should it.

Congress didn't intend for it to do. The Act doesn't permit it.

Going back to the burden of proof that we were talking about before lunch, that is exactly the point that is so critical. That is not a situation where we have to come in and prove a negative. This is a situation where the proof is on the party that comes in and says there is something wrong. Just because we file a license application doesn't require any antitrust review.

If we file an application for a license and the Department says no antitrust review and no intervenors come

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in, this Board never looks at antitrust considerations. You issue your license. The only reason we are in an antitrust case is because the Department says they have some charges they want to air, and an intervenor in Davis-Besse 1, and the Department says it has charges it wants to air.

The intent of this Board is to make a finding as to any one of these applicants as to all or any combination, the evidence shows that their activities under the license will create or maintain a situation inconsistent with the antitrust laws.

That burden is on the other side. If they meet this burden, this Board then would be in a position to condition the license appropriately, but not any standard conditions, and not conditions that aren't addressed or tailored to the specific problem that they feel needs to be cured on the basis of the evidence.

I think that the statute is very clear and the legislative history is very clear, and certainly case law supports that approach.

CHAIRMAN RIGLER: We are going to take a break for about 5 minutes.

(Recess.)

CHAIRMAN RIGLER: Mr. Reynolds, other than your suggestion or comment with respect to our document list, that it should specifically refer to specific applicants, do you have any other comments?

MR. REYNOLDS: Just a misspelling.

The word party's is p-a-r-t-y-'-s, I believe.

CHAIRMAN RIGLER: It was our idea that each party to the proceeding, counting Applicants as essential parties, would maintain a separate list so we would have a list marked Applicants, we would have a list marked Staff, a list marked Justice.

Mr. Hjelmfelt, did you have any comments on it?

MR. HJELMFELT: No, sir.

CHAIRMAN RIGLER: Mr. Charno?

MR. CHARNO: No, sir.

CHAIRMAN RIGLER: Mr. Lessy?

MR. LESSY: No, sir.

MR. REYNOLDS: Each of the Applicants would maintain a separate list, is that correct?

CHAIRMAN RIGLER: No.

MR. REYNOLDS: I think we may run into a problem on exhibit numbers.

MR. BENBOW: Let me give a practical example.

I have a document in my files, or the files of Ohio Edison, and I want to offer it because, as far as I am

concerned it shows an absence of competitive motive on the part of Ohio Edison, one or more of the Applicants may feel it is detrimental to its case to show that particular document. And may, in fact, object to it. And the Board may have to waive that fact.

But, it seems to me my obligation in this case is not to defend these parties generally, but to defend Ohio Edison and Pennsylvania Power.

CHAIRMAN RIGLER: Mr. Benbow, even if that is so, I don't understand how that would affect this list which is just to help us identify the document and find it in the record.

This is a document log and I don't understand that affect any of your substantive rights.

MR. BENBOW: I just want to indicate, it seems to me -- I don't really care that much how you do this, but I want to make it clear we intend to offer Ohio Edison documents, which may not be Applicants considered as one. It will be the document of one Applicant, and possibly objected to by other Applicants.

MR. LESSY: But it would still be admitted or rejected and it would be shown on the form and, it was objected to by counsel for Toledo interests would be shown on the record.

MR. BENBOW: In trying to do this, which we have tried to show the Board does not exist, we should not persist

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in confusing this record which this only tends to do. We are separate Applicants, separately represented.

MR. CHARNOFF: What prejudice would there be to have each company have their own listing of numbers?

CHAIRMAN RIGLER: It would make it more confusing, I think, but I will tell you what we will do.

We will use one form for the Applicants with the material listing of exhibit numbers, but under the column that says party document identificaiton number, you may put OE-1,2 3 if you wish, and similarly, CEI, if you wish.

So there will be a listing in this second column as to which particular Applicant put the identification number on it.

MR. CHARNOFF: That is in the heading p-a-r-t-y-'-s?

CHAIRMAN RIGLER: Yes.

Okay. You are aware of the requirements that there be three copies of the documents you propose to introduce.

Another bookkeeping item. I would like the revised service list, which may not longer reflect the interest of the parties, that is prior to the 8th. I want each party to give us, those parties represented by them which should be included on the service list and then we will use that to revise the master list.

MR. CHARNOFF: On the three copies, I know the regulations do provide for three copies of each exhibit, and

no problem.

What has been unclear in some other proceeding, as to whether each Board member will use one of those three for himself, or whether the Board members would wish their own copies in addition to the three that go in the official file.

CHAIRMAN RIGLER: Okay.

Of the three that are filed, one goes automatically to the Board. Only two go into the official file. I think the Board can probably get by with just the single copy.

MR. CHARNOFF: We will do whatever you wish.

CHAIRMAN RIGLER: Could you give us one extra copy, because Mr. Smith reminded me one of the Board members is not in the physical location as the others, for when we come to the decisionwriting stage.

MR. CHARNOFF: Why don't we just agree then that there will be four copies served on the reporter.

CHAIRMAN RIGLER: Fine.

MR. LESSY: We had requested a timeframe in which to respond, the Department and Staff, and I guess the City also, to the Applicant in writing.

CHAIRMAN RIGLER: Okay.

Initially, anyway, we are not going to require that witnesses be designated with respect to particular parties nor documents. I want to read the pleadings, I want to think about it a little more and the Board wants to discuss it, so we

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will defer that ruling.

At the outset of the hearings you must assume that a witness or a document may be used against all parties. I will give you seven days, Mr. Lessy, in order to respond; same for Justice; same for Cleveland.

MR. CHARNOFF: Mr. Chairman, we may wish to have that ruling certified. I guess I am curious as to whether or not we can get this ruling, apart from what you just made now, made clear to us before we start the evidentiary proceeding.

CHAIRMAN RIGLER: Probably not, but I don't see that is going to prejudice you because I think you have been advised the initial witnesses, all three of them, are CAPCO witnesses who will relate to all Applicants.

MR. CHARNOFF: We are still waiting to hear what they are, and when they will come in.

MR. CHARNO: Before we get off on that, am I correct in assuming our response date was December 3rd, since this was served today, although it is dated yesterday?

CHAIRMAN RIGLER: Right.

MR. CHARNO: Okay.

CHAIRMAN RIGLER: Okay, Mr. Lessy?

MR. LESSY: Yes, sir. Thank you.

CHAIRMAN RIGLER: I want you to respond to their comment that you have not indicated that the first three

witnesses would be CAPCO witnesses.

MR. LESSY: Okay.

MR. REYNOLDS: Nor has he indicated who the first three witnesses are going to be.

MR. LESSY: We indicated in a telephone conference call, although it wasn't required by the Board order that the first NRC Staff witness was to be, as we considered to be, a CAPCO witness. Therefore, in terms of scheduling the presence of counsel for each and every company, if that would be desirable or indicated from that witness. Since we have had to change some of the dates, the interflows between who is second, third, and fourth, remains modified as these dates change.

I think we can say with certainty, or relative certainty, that the first witness is a CAPCO witness, and that the second witness is not a CAPCO witness, and that we would be -- that would entail probably the first full week of the hearing, the full hearing week.

MR. CHARNOFF: Are we going to be told who these witnesses are, or is that the only designation to be given?

MR. LESSY: We have filed, pursuant to the Board order, a mention of who the witnesses are and there is no requirement as of now to list the name of that witness.

MR. CHARNOFF: I think we have asked for --

MR. LESSY: May I complete my statment, sir?

The relevant language in paragraph 4 of this Board's Sixth Prehearing Conference Order states:

"Each party shall file a list of intended fact witnesses with a general statement of the subject area of the testimony of each."

NRC Staff filed that. We were not required to designate an order of witnesses, because it is very difficult to do when you are in the holiday season and changing dates, and in fact, we had a prospective change yesterday that would impact on what I said earlier. However, we hve said voluntarily the first witness will be a CAPCO witness, and the second will not be.

MR. CHARNOFF: We are not charging Mr. Lessy with violating a Board order. We are, however, asking the Board now to please ask Mr. Lessy to inform the Board and the other parties who the witnesses are going to be, at least at the outset, so that we stop playing the child's game of guessing and it makes it reasonable for us to prepare our cross on some reasonable basis.

We don't have to go through his list of 7, 8 or 10 witnesses and say, is this a CAPCO witness, or is this not a CAPCO witness, and then go from there.

We don't think it is asking too much to ask this Regulatory Staff to tell us at this point, since Mr. Lessy told us earlier we are on the brink of the hearing, tell us who it

is he is bringing in on the first day of the hearing. I don't think that is asking too much from a party in any kind of proceeding, much less an administrative proceeding.

MR. REYNOLDS: I might add, Mr. Chairman, you, yourself, have emphasized we are not trying to litigate this case on the basis of surprise. I think that pertains to all parties.

Applicant should have some opportunity to prepare cross-examination. To walk into a hearing just one week away, not having any idea who the witnesses are, or what order they are going to be in, especially when we are now told that the first two witnesses are going to be on and off in a week, if there is any way that the can accomplish it, to accommodate schedules is a little unrealistic.

CHAIRMAN RIGLER: What is the objection to telling them the names of the witnesses, the first two?

MR. LESSY: Well, we haven't been required to. If the Boards asks us to, we will be happy to.

CHAIRMAN RIGLER: All right. We are asking.

MR. LESSY: I want to add that, as these dates — sincerely, as these dates change, our order has changed and we have been reluctant to set forth a list at any earlier time of the first two witnesses, because if the one we came up with was not in fact the first, we all know the kinds of problems we are going to have. Therefore, as of today, with reasonable

certainty the first witness on behalf of NRC Staff will be Mr. McCabe, as on our list, Pitcarin situation; involves refusals by each and every Applicant.

That is why we designated him as CAPCO witness.

The second witness will be a Mr. Lyren. Mr. Lyren also appears on the list.

Now we can't say with certainty who the third, fourth and fifth are going to be, because depending upon the nature of the cross-examination, the scheduled third witness has other commitments and we may have to juggle.

This takes us through the first whole week of telling.

MR. CHARNOFF: Can we ask Mr. Lessy to tell us his intended list, and we recognize that changes come about and he can tell us on timely notice there is going to be a change in schedule.

That would make the planning fair and reasonable. We are not going to lock him in unless he comes in the last minute and says there will be a change. All we ask is that be given to us.

CHAIRMAN RIGLER: I will give you two weeks lead time, but I think it is unreasonable to lock him in earlier than that.

You have a reasonable list and I think we can go with that now. At the start of the hearing, I expect you to

have a third and fourth witness lined up so you can keep ahead of him all the time.

MR. REYNOLDS: I believe with two weeks lead time we can get it the first of next week for the third and fourth witness.

MR. LESSY: We won't have a third or fourth witness by the beginning of next week. The Chairman said by the beginning of the hearing, and we will strive for that.

MR. REYNOLDS: If we have the first two witnesses, CAPCO witnesses, and we are required by virtue of that to have all counsel present for purposes of cross-examination --

CHAIRMAN RIGLER: Wait a minute.

You are not required by that to have all counsel present, beause I think that you and Mr. Charnoff are perfectly capable of representing all CAPCO Applicants.

MR. REYNOLDS: That is the Board's opinion.

The clients say it is required that each of the companies are represented.

CHAIRMAN RIGLER: If they make that election, then they can be here throughout the entire proceedings, Mr. Reynolds.

MR. REYNOLDS: Right.

But I am saying it certainly is the client's election to make. If they do make that election and it is therefore required that they be here, it leaves no opportunity

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for preparation for cross-examination as to any other witnesses if we are not advised before the hearing at all as to what the next two witnesses are going to be.

I mean, even on a provisional basis, what you have told us is we are coming in here on the 11th and we are here for that week and if the two witnesses that week, we get through them, that you then turn around and you are immediately in hearing the next week, on the next two witnesses, providing no opportunity for preparing cross-examination.

I really feel that is unrealistic.

MR. LESSY: There is only eight witnesses on the list.

MR. REYNOLDS: I think to prepare for cross-examination for each one, whether you have one, two, five or eight, it doesn't make any difference. The argument is the same.

MR. CHARNOFF: In every AEC proceeding I know of, the parties provided a list and it is subject to change based on all kinds of circumstances.

We have never had a hearing that I know of, where the game is played on the basis of mystery. All we are asking for, give us your provisional sequence. If it changes, we will accept that. We are not going to grill anybody for that possibility, but put in the provisional list so we know at

this time, barring change.

CHAIRMAN RIGLER: I have not had the feeling that the Staff is trying to play the game of mystery with you.

MR. CHARNOFF: I have that feeling, Mr. Chairman.

MR. LESSY: That is another charge, and the record ought to show that the Staff denies that and it should be added to the list of irresponsible statements by the Applicant.

If you are charging that the record ought to reflect it.

MR. CHARNOFF: I am.

Let's go on and see whether the Board will modify its ruling to have the Staff tell us now, or at the latest, the early part of next week, to tell us what the sequence of witnesses is from the Staff.

I make that as a motion, Mr. Chairman.

MR. BENBOW: Mr. Chairman, could we be recorded as joining in that motion?

We, as you know, are out-of-town counsel. It means we are going to have to bring documents and other material back and forth. It would certainly aid us greatly if we had Mr. Lessy's tentative list of the order of his witnesses beyond the first two. Particularly as to second of the first two, as I understand it, is a witness he is offering primarily against Ohio Edison.

CHAIRMAN RIGLER: Mr. Lessy, we would like you to give it to them 10 days in advance, which means your witness for the second week of hearing, that would be the week beginning the 15th, those two witness' names would be due about December 5th, and keep 10 days ahead of them that way.

MR. BERGER: Mr. Chairman, the second witness designated by Mr. Lessy tentatively to come on is Mr. Lyren.

The statement of area which his testimony is to cover states it is intended that Mr. Lyren will primarily address matters relating to the relationship between wholesale consumers of Ohio Edison with Ohio Edison, and the relationship of Wadsworth Ohio and Ohio Edison Company.

The testimony will include, but is not limited to the following: Restriction of wholesale contracts of Ohio Edison, other restrictive matters. Competition for industrial load between Ohio Edison and certain wholesale consumers. Power supply studies and the need for relief for the wholesaler.

My request is really an expedited determination as we can get from the Board with regard to our need for additional discovery which we need for purposes of cross-examination. If Mr. Lyren is to come on, I would like to have whatever I can have in the way of discovery on the basis of our motion to help and facilitate our ability to

cross-examine Mr. Lyren.

If it is the Board's disposition to grant that, I would like an early determination of it.

If it is not, I think then we have to determine what it is we are going to do in there.

CHAIRMAN RIGLER: Okay.

The next item on the agenda is the single pretrial brief. That is your motion, Mr. Hjelmfelt.

MR. HJELMFELT: Yes.

I think everything I have to say on that I have said previously this afternoon, with respect to single counsel for cross-examination. I think the same principles would apply.

CHAIRMAN RIGLER: Okay.

If you want my tentative thoughts, Mr. Hjelmfelt, I think you had a good point under the agreement. It looks to me as if they did make that agreement at one time

My problem is, if I tell them to file a single pretrial brief, Mr. Reynolds, and written, and you will get 75 pages, and from Mr. Benbow you will get the same thing.

MR. HJELMFELT: I have already been informed by Mr. Reynolds that that is what will happen. Only it will be 150 pages.

MR. REYNOLDS: 150 from Mr. Reynolds, 75 from Mr. Benbow, 35 to 40 from Mr. Hauser, 40 pages from Mr. Lerach,

and Mr. Briley, 35 to 40 pages.

CHAIRMAN RIGLER: You can do it that way if you want, Mr. Hjelmfelt. I don't know how it helps you.

MR. REYNOLDS: If he would like it that way, we would have to request an extension of two or three days in order to put the briefs together in that way.

Logistically it would be difficult since we have geared up and are planning to put them together in separate binders.

MR. LESSY: Is there any intention to avoid duplicate briefing material?

MR. REYNOLDS: Yes.

I would say there is virtually no duplication of briefing materials. They are independent. They rely one off against the other, where appropriate, but there is no duplicative brief material.

MR. LESSY: Thank you.

CHAIRMAN RIGLER: Mr. Charno, you wanted to raise a question relating to deposition transcripts?

MR. CHARNO: I would like to find out if there is going to be any problem in this proceeding in introducing as exhibits as has been done in other antitrust proceedings, deposition transcripts of the deposition taken and avoid the need of repeating testimony that took over 4 or 5 months.

MR. REYNOLDS: Applicants are not amenable to using the deposition transcripts in this proceeding for any purpose other than the obvious purpose of impeachment, where it is appropriate to do so.

They were discovery depositions. There have been a number of questions that are improperly addressed and answered over objections, and it seems to me that they are unusable in this proceeding and we will resist that.

MR. HJELMFELT: I would like to state the City of Cleveland is preparing to offer a considerable amount of material from these depositions, and if we are going to be precluded from that, we are going to be asking for subpoenas for maybe 20 to 30 witnesses.

There is no basis I am aware of for not permitting the introduction of these depositions as exhibits in this proceeding.

MR. REYNOLDS: I think one very real reason is, when you take discovery depositions, the witnesses are not

cross-examined or required to be cross-examined. They are for purposes of discovery and discovery alone.

The other side has had that discovery. If it sees fit to issue subpoenas, it will have to issue subpoenas. We will not agree to have the deposition transcripts used. The witnesses were not subject to cross-examination and they were not required to be and they were very purposefully not. That is not the purpose of the deposition.

MR. LESSY: What about the depositions in which there was cross-examination? My recollection is there were a good number where there was. If counsel for Applicant was present and did choose to cross-examine, that he has had his opportunity, and secondly, with respect to objections of questions to which there was their answer, the Board would have before it a complete record and there could be argument with respect to motions and objections.

Since we didn't really anticipate in the deposition program for reasons stated this morning, but I think for for purposes of expediting the antitrust hearing process, if portions of these depositions could be used where there was cross-examination and there were rulings on motions, it certainly would move forward in that direction.

I can't see how it would be denied. I think the new federal rules, I think 106, contemplates the use of discovery depositions for evidentiary purposes under certain

circumstances so it is not clear that they should or shouldn't be used. It is simply a matter of discretion.

One of the considerations being the witness being over a hundred miles away from the place of trial and things of that nature. I think just in terms of timing, since we didn't participate too much, it can be an important matter. It is a matter for discretion up to the Board.

MR. CHARNO: Mr. Chairman, I certainly agree with Mr. Lessy's statements about the federal rules. I think these are usable under the federal rules.

With respect to the depositions taken by the Applicants, there was extensive cross-examination in which the Department participated. It is my recollection with respect to the depositions taken by the Department, upon occasion the Applicants cross-examined and upon occasion didn't and throughout, entered objections.

At times questions were answered over objection and at times the witness was instructed not to answer. The idea there was no protection of the rights of the Applicant I find somewhat difficult to understand at this point.

MR. REYNOLDS: Mr. Chairman, the federal rules pertain to those depositions taken when at the outset it is clear they were going to be used in evidence. This clearly was not the case. In fact, the other parties made a pretty strong pitch to that effect when we started out on the

deposition schedule. There was very limited cross-examination. It was merely confined to those areas where there needed to be some clarification in the record.

There was no attempt to cross-examine otherwise because it was neither our obligation or responsibility at that time to do that. The depositions were being taken for th purpose of discovery.

We will resist any effort to use these depositions. If they want to subpoena anybody and bring them in in order to have them testify, that is their prerogative and they certainly can proceed that way. The federal rules don't require it under these circumstances. It is clearly inappropriate to bootstrap the present depositions under the federal rules that were just, I think that just became effective in July of '75, for that matter.

MR. LERACH: Unlike a civil trial where you have a complainant at the beginning of the case and therefore know the accusations against you during discovery, this situation is different. These discovery depositions took place prior to the time that Duquesne was made aware of t accusations being levelled against it.

It is fundamentally unfair for those depositions now to be used against us when we did not have an opportunity to cross-examine at that time in light of the accusations made against us.

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MR. LESSY: I think of value here might be the use of depositions in other NRC proceedings. I know that we -- we hate to refer to the Alabama case for a lot of reasons, but I know that that question has arisen there and I wonder if either Mr. Hjelmfelt or Mr. Benbow could address the question as to the disposition of the Board with respect to the use of discovery depositions.

MR. BENBOW: If the Board would like that, I would be glad to respond to the best of my recollection and also mentioned by Mr. Hjelmfelt.

There has been no feeling that the depositions taken in the Farley case should be received in that proceeding. On the contrary, the Board felt there is great benefit in having live testimony whenever possible and the deposition testimony is far inferior when witnesses are available as they are here.

There has been, I think, a limited offer of a single deposition that occurs to me, that the Department, I believe, offered in that case, and the Board has apparently been having some trouble with it, because they are yet to rule on it.

MR. HJELMFELT: There hasn't been any large reliance on depositions in the Farley case, as Mr. Benbow states. I do believe that the Alabama Electric Cooperative also offered a portion of the deposition and Applicants

offer another portion of the deposition, and I believe that the entire deposition is now offered.

CHAIRMAN RIGLER: We might as well proceed. You did not raise your question in the form of a motion, Mr. Charno?

MR. CHARNO: Not at this time, sir.

CHAIRMAN RIGLER: All right. So the Board has no ruling to make. If you put it in the form of a motion, you did not do too well, if that is any guidance.

On the list of documents which were filed, which are very substantial, particularly the Department of Justice, these lists seem formidable. The Board does not intend to read, let's say we are looking at a FPC agreement or contract of a hundred pages, we are not going to read the entire document to find out what paragraph you find is relevent, so we are going to require the parties introducing documents into evidence take a red pencil, and in the margin draw a line opposite the paragraph that they want us to look at, because otherwise, there is no point in our wasting our time looking at page after page of schedules that have no bearing on this proceeding.

Regrettably, that means you will have to do it on all 4 copies unless you have a Xerox machine that copies color.

Okay. Anything else?

MR. REYNOLDS: Just one question for clarification. Do you want another color pencil when somebody feels that statement is out of context and therefore you ought to read other portions of the document, or how do you want to work that?

CHAIRMAN RIGLER: Once it is introduced and a pertinent paragraph is pointed out by the introducing party, we will give the other parties an opportunity to direct us to that portion in the margin where they want to call our attention to.

MR. BENBOW: Mr. Chairman, with respect to those document lists, having seen only the City of Cleveland's list, we have found in trying to interpret it, that we were unable to identify many of the documents pointed to there.

We had documents identified, for example, Mr. John White to FPC, undated. Now, that is not a sufficient identification for us to know which document is being referred to and I haven't had access to the Department's list or the Staff's list, but if we get no better identification from them than we did from the City, we are going to need to see what the documents are in order to know which documents are being talked about.

CHAIRMAN RIGLER: I am sure you can work that out cooperatively with the other parties. In other words, before you bring that problem to us, you go back to Mr. Hjelmfelt

and say I can't identify these particular documents. Help me find them. I am sure he will cooperate with you.

MR. BENBOW: Our past relations have not always been encouraging in that regard. That is why I want to alert the Board to the problem at the present time, otherwise . Mr. Lessy might suggest we are raising it at the eve of trail or something.

MR. HJELMFELT: I am sure when Mr. Benbow refers to past relationships, I am sure he is not referring to past relationships with me or my firm. If Mr. Benbow does approach us, we will be happy to attempt to identify documents, and there may be some we will have to show him a copy of, because there are some that are difficult to identify.

CHAIRMAN RIGLER: Mr. Smith, remind me to inform you that the hearing space will be open December 1st in the event any of you want to start bringing the files in, or getting prepared for hearings in the actual space.

MR. LERACH: Mr. Chairman, I hate to bring up such a matter as Christmas vacations, but some of us have travel plans and it's so difficult to make plane reservations at that time of the year, and I don't mean to hold the Board to any date, but can you give us some general dates as to what you might tend to do Christmas week?

CHAIRMAN RIGLER: Mr. Charnoff, I thought you wanted to work on Christmas Day.

MR. LERACH: I disagree.

CHAIRMAN RIGLER: The record should reflect I said that with levity.

MR. CHARNOFF: Thank you.

Having done CP on Christmas Day once or twice in my life, I find that is not really an appealing chore.

CHAIRMAN RIGLER: I don't know what will happen that week.

The first week we go we will probably go five days.

It looks as if we will have to take some afternoon of that week to here the argument with respect to the possible disqualification of one of the law firms.

That will cut into that first week's hearing time.

The week of the 15th I would anticipate that we would go at least the three days, perhaps four days.

Does that create a problem, Mr. Vogler?

MR. VOGLER: Just the scheduling.

We keep changing the dates.

We have the same problem bringing a witness in and getting him out as the gentleman from New Canaan mentioned.

I would like to know how many days we are going to meet so we can schedule the witnesses.

We are already on about the third arrangement.

CHAIRMAN RIGLER: The week of the 15th we would go about three days.

The week of the 22nd I would anticipate we wouldn't start at all.

MR. CHARNOFF: Does the week of the 15th start on Monday?

CHAIRMAN RIGLER: Yes.

For your plans, Mr. Benbow, why don't we go off the record on this?

(Discussion off the record.)

CHAIRMAN RIGLER: Back on the record.

Does anyone have anything else?

MR. REYNOLDS: Just a small item. We have received the request for some, as I understood, the Board order it was supposed to be for backup testimony or backup studies that were

relied on by the experts in connection with the filed testimony.

We have gotten the Staff's request and I believe we have got a Monday -- have we got one from Justice, too?

Just the Staff, which we are supposed to file a response to, either objecting or agreeing to provide the materials by Friday --

MR. CHARNO: Mr. Reynolds, I believe that is on behalf of all three parties from the Staff.

MR. REYNOLDS: There is no indication it is from anybody other than the Staff, so I have no way of knowing.

MR. CHARNO: It's from all three parties.

MR. REYNOLDS: All right. In any event, my problem is, I am unable to get in town with my expert witnesses.

They are out of pocket and I am not going to be in a position to respond one way or another on Friday and would like to ask the Board's indulgence until December 3rd, so that I can have an opportunity to discuss this with my expert witnesses and find out what it is.

MR. CHARNOFF: We have no intention here of changing the delivery date.

MR. REYNOLDS: The December 9 date, which was the date for production, we are not now speaking in terms of that.

In terms of responding to this, we would like to have a couple of extra days so we can coordinate with out expert witnesses.

MR. CHARNOFF: I might also say, it's our intention to try to deliver as much of that material as we possibly can, but we really have to talk to the witnesses to see what they have.

We have telecopied this out to as many people as we can, to all of them, but we haven't been able to get them on the other end of the telecopier to receive it, so we would appreciate having until Monday to file it.

CHAIRMAN RIGLER: I don't hear any objections to that request.

MR. REYNOLDS: Also, as this is written, it asks for all study, memoranda, analysis, studies, there are a number of statements that appear as the testimony in the particular files, the piece that we have submitted to the Board.

My own feeling is that that is something far differen from what the Board intended.

We will be talking to the witnesses about information that they used and relied on in connection with preparing their testimony.

CHAIRMAN RIGLER: Why don't you talk to the parties, to the counsel for the other parties at the same time, Mr. Reynolds?

MR. REYNOLDS: I just wanted to alert the Board, that this does seem broader than I would read your order.

CHAIRMAN RIGLER: On these problems I wish each

side would talk with counsel before they come to the Board on it.

It seems to me many of these problems can be worked out.

They should be worked out.

MR. REYNOLDS: There is one other matter.

CHAIRMAN RIGLER: All right.

MR. REYNOLDS: There are witnesses that appear on more than one list, and that raises the question whether the intention is ot have those witnesses appear and then be recalled at a later date.

CHAIRMAN RIGLER: No.

MR. REYNOLDS: All right. Then the witness that appears and appears for the NRC, if that witness is on anybody else's list, then that party would be requied to conduct the examination of that witness at that time?

CHAIRMAN RIGLER: Right.

MR. REYNOLDS: All right.

MR. BENBOW: Mr. Chairman, that emphasizes, I think, our need for response -- for a ruling on our discovery request, response to that discovery, in time that we are going to be able to cross-examine these witnesses, because it seems to me otherwise we may have to ask for the recall of some of them if we are not going to receive the discovery materials prior to their appearing.

CHAIRMAN RIGLER: Well, I don't know how we will rule on that, Mr. Benbow.

We will talk about that. But assuming we rule favorably to you, in whole or in part, I am still under the impression from some of the comments I received earlier this morning that the pretrial briefs have now given you much of the material that you claim you need.

MR. BENBOW: We seem to get two answers. One, it was going to be terrifically onerous to give us and on the other hand it was already there.

I really didn't understand Mr. Charno.

CHAIRMAN RIGLER: Let's not reargue it.

You may get some assistance by reading the briefs coming in even today. So you will be well prepared to cross-examine.

MR. BENBOW: Just so the Board is clear. We think our discovery goes well beyond what I have seen thus far in Mr. Charno's brief and I think we are entitled to it and we need it to cross-examine these witnesses who are going to be jointly sponsored by him and the Staff.

There is a considerable overlap between the Staff's list and the Department's list.

CHAIRMAN RIGLER: Okay. Hearing nothing else, we will adjourn. Thank you very much.

(Whereupon, at 3:30 p.m., the hearing was adjourned.)