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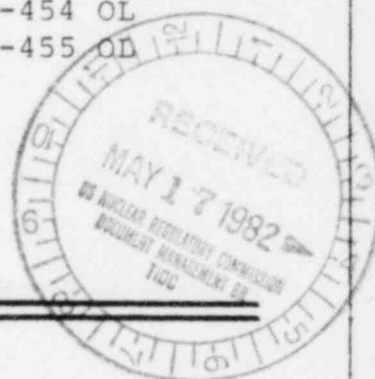
ORIGINAL

ATOMIC SAFETY AND LICENSING BOARD APPEAL BOARD

In the Matter of:

CONSOLIDATED EDISON COMPANY
(Byron Nuclear Power Plant)

DOCKET NOS. 50-454 OL
50-455 OD



DATE: May 13, 1982

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AT: Bethesda, Maryland

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REPORTING

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1 UNITED STATES OF AMERICA
 2 NUCLEAR REGULATORY COMMISSION

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 4 ATOMIC SAFETY AND LICENSING BOARD APPEAL BOARD

5 - - - - - x
 6 In the Matter of: :
 7 CONSOLIDATED EDISON COMPANY : Docket Numbers
 8 (BYRON NUCLEAR POWER PLANT) : 50-454 OL
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10 Fifth Floor Hearing Room
 11 4350 East-West Highway
 12 Bethesda, Maryland
 Thursday, May 13, 1982

13 Oral argument in the above-entitled matter was
 14 convened, pursuant to notice, at 10:00 a.m.

15 BEFORE:

16 JUDGE STEPHEN EILPERIN, Chairman
 17 JUDGE CHRISTINE KOHL, Member
 JUDGE REGINALD GOTCHY, Member

18 APPEARANCES:

19 On behalf of the Applicant, Consolidated
 Edison Company:

20 MICHAEL I. MILLER, Esq.
 21 PAUL M. MURPHY, Esq.
 22 Isham, Lincoln & Beal
 3 First National Plaza
 Chicago, Illinois

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3 of Women Voters:

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C O N T E N T S

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2	<u>ORAL ARGUMENT BY:</u>	<u>PAGE</u>
3	Myron Cherry	4
4	on behalf of Intervenor,	
5	Rockford League of Women Voters	
6	Michael J. Miller	40
7	on behalf of Applicant,	
8	Commonwealth Edison	
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1 P_R_O_C_E_E_D_I_N_G_S

2 JUDGE EILPERIN: Good morning, ladies and
3 gentlemen. My name is Stephen Eilperin. I am Chairman
4 of the Appeal Board in this case. With me today are Dr.
5 Reginald Gotchy and Ms. Christine Kohl.

6 We will be hearing oral argument today on the
7 consolidated appeals taken by the Rockford League of
8 Women Voters from the October 27, 1981 and January 27,
9 1982, orders of the Licensing Board in this case.

10 The first of those two orders struck all of
11 the League's contentions and dismissed the League as a
12 party. The second of the two orders adhered on
13 reconsideration for that decision.

14 The argument today is governed by our May 6th
15 order. 50 minutes has been allotted to each side. The
16 League may, of course, reserve a portion of its time for
17 rebuttal.

18 I will now call on counsel to formally
19 identify themselves for the record. I will begin with
20 Mr. Cherry.

21 MR. CHERRY: Myron M. Cherry, Cherry & Flynn,
22 Three First National Plaza, Chicago, Illinois; on behalf
23 of the Rockford League of Women Voters.

24 JUDGE EILPERIN: Thank you, Mr. Cherry. Do
25 you wish to reserve a portion of your time for

1 rebuttal?

2 MR. CHERRY: Yes. I do not think I am going
3 to take anywhere near the full 50 minutes, subject to
4 the Board inquiry. And I cannot imagine I would need
5 more than five or six minutes for rebuttal. I do not
6 think my whole presentation will take more than a couple
7 of minutes. So within that framework, I would like to
8 reserve some time.

9 JUDGE EILPERIN: Fine.

10 Mr. Miller?

11 MR. MILLER: Thank you. My name is Michael I.
12 Miller, with the firm of Isham, Lincoln & Beal, Three
13 First National Plaza, Chicago, Illinois. With me at the
14 counsel table is my partner, Paul M. Murphy with the
15 same law firm.

16 JUDGE EILPERIN: Thank you, Mr. Miller.

17 We can proceed with the argument. Mr.
18 Cherry.

19 ORAL ARGUMENT BY MYRON CHERRY ON BEHALF OF
20 INTERVENOR, ROCKFORD LEAGUE OF WOMEN VOTERS

21 MR. CHERRY: Good morning. With the
22 permission of the panel, I shall begin:

23 I appreciate the courtesy of the panel in
24 setting the argument today on a day when I have another
25 one, to avoid a double trip. As I indicated earlier,

1 subject to the questioning of the panel, I shall not
2 take very long. Our position is amply stated in our
3 brief and in the petition for reconsideration. Perhaps
4 I will have 20 minutes to chat with your this morning.

5 George Freeman, my gentleman friend from
6 Virginia, always starts oral argument, to my
7 observation, with a pleasant joke. Sometimes he quotes
8 from the Bible. Following that path, I would like to
9 make two observations which I think are relevant to at
10 least our version of what is going on here.

11 When I rode down from my hotel this morning,
12 or up to Bethesda, I came down Mass. Avenue. I looked
13 at all of the embassies and the British consulate and
14 the Argentine Chancellory, and I opined that there was
15 no war because everything was quiet. The trees were
16 green, and people were dressed in suits, and there was
17 no fighting.

18 This morning when I arrived at this building,
19 three separate guards sent me to three separate places
20 when I asked for the Appeal Board hearing. And
21 eventually I came to the fifth floor.

22 Now in both of those cases, two things are
23 apparent. I do not know what is going on in the
24 Falklands from an observation of a ride down
25 Massachusetts Avenue. And certainly the guards who sent

1 me to three and then six and then two had never been to
2 the NRC Appeal Board public hearing room.

3 So it is here: The Licensing Board and its
4 chairman, Mr. Miller, made no effort to investigate the
5 Illinois Commerce Commission proceeding, a proceeding
6 which everyone believed was relevant. I when I tried
7 and attempted to form a consolidated discovery, the ICC
8 chairman when I asked for information about this
9 hearing, my worthy opponents when they wanted to have
10 the ICC hearing halted pending this proceeding, and
11 Director Denton when he denied our 2.20 request on the
12 basis of an affidavit that was submitted to the ICC,
13 saying that the issues would be dealt with in this
14 proceeding. Mr. Miller made no effort to find those
15 facts out, but opined that the two instances were not
16 relevant. He concluded no war in the Falklands based on
17 a ride down Mass. Avenue.

18 He made no --

19 JUDGE KOHL: Mr. Cherry, do you really expect
20 the NRC to schedule its hearings based on allegedly
21 parallel proceedings in another forum when the
22 proceedings have not been formally jointly
23 consolidated?

24 MR. CHERRY: Ms. Kohl, I think that there are
25 two questions here. Let me answer them both. Number

1 one, I do not believe that they are allegedly
2 intertwined proceedings. They are in fact the very same
3 issues and it does not take any scholar to look at the
4 allegations that were made in the affidavit prepared by
5 the three gentleman from California, which was identical
6 to the one which that was filed before the NRC, to note
7 that the unresolved safety issues, the core of this
8 presentation by the Rockford League of Women Voters from
9 a safety standpoint, was in fact the same thing urged
10 before the Illinois Commerce Commission from an economic
11 standpoint.

12 I did not ask that there be joint hearings. I
13 do not think we were at that pint yet, although I
14 observed in my appeal briefs here that the NRC has at
15 least on two occasions I have observed had joint
16 hearings.

17 What I objected to was the total ignoring of
18 the possibilities of joint discovery, of avoiding
19 depositions, and having a consolidated approach toward
20 the very same documents, the very same deponents, and
21 the very same information. That is what I avoided.

22 JUDGE KOHL: Mr. Cherry, assuming that
23 everything that you say is in fact true, that there is
24 this overlap of issues, you are not suggesting are you
25 that there would have been a mandatory merging of the

1 proceedings, or that it was mandatory for the Licensing
2 Board to take account of that? You apprised the Board
3 of the existence of the hearing, the Board was aware of
4 it and, it seems to me, acted in its discretion to
5 schedule discovery and other proceedings in this case as
6 it saw fit.

7 MR. CHERRY: Well, Ms. Kohl, Mr. Miller did
8 not act in anyone's discretion. He acted, I grant you
9 that, but he did not act at anyone's discretion. My
10 argument is not with --

11 JUDGE KOHL: Well, if he does not have the
12 discretion to schedule discovery in other proceedings
13 within the context of this NRC case as he sees fit, then
14 you are saying that he is required by some other law or
15 regulation or principle to take account of your
16 supposedly parallel proceedings before the Illinois
17 Commerce Commission.

18 MR. CHERRY: No, I did not ask Mr. Miller to
19 take account of the ICC proceeding until those
20 irrational decisions came out. What Mr. Miller did, he
21 never called a meeting, he never talked to counsel about
22 what was going on in discovery, and he in effect said,
23 "Counsel, meet." And I met.

24 JUDGE KOHL: What has this got to do with your
25 failure to respond to the interrogatories on two

1 separate occasions?

2 MR. CHERRY: Because that failure is not an
3 absolute failure. Mr. Miller did not ask that I
4 respond.

5 JUDGE KOHL: Have you ever responded to the
6 interrogatories?

7 MR. CHERRY: Have I ever responded to the
8 interrogatories?

9 JUDGE KOHL: Yes. You said it was not an
10 absolute failure.

11 MR. CHERRY: Well, because he never ordered
12 the interrogatories to be answered. What he did was
13 say: I grant the motion to compel, and with respect to
14 the time limit, you sit down with counsel and work it
15 out.

16 I then sat down with counsel, and because I
17 believed that the cases required a consolidated effort
18 based upon my some 20 years of practice at trial law, it
19 did not make any sense to do things twice. I thought I
20 had worked something out. And then when I was told that
21 all of my obligations by my opponents were to be
22 observed, but theirs were not, I asked the Licensing
23 Board for help.

24 JUDGE KOHL: But you did not ask the Licensing
25 Board for help until when?

1 MR. CHERRY: When the deal fell apart.

2 JUDGE KOHL: Well, there is a letter attached
3 to the Licensing Board's opinion that is dated December
4 15th, 1981. In that it states, rightly or wrongly, that
5 you had agreed to an October 1st deadline for the
6 response to the interrogatories.

7 MR. CHERRY: Yes.

8 JUDGE KOHL: At that point, if you disagreed
9 with the substance of that letter, why did you not then
10 go to the Licensing Board as it had instructed earlier
11 in its August 18th order, I believe it is dated: If for
12 some reason the parties cannot get together, it is up to
13 the objecting party to seek a protective order or other
14 relief. Why did you not act at that time?

15 MR. CHERRY: Because subsequent to the
16 September 16th letter, we scheduled the depositions of
17 Minor and Hubbard on the 24th and the 25th, and Mr.
18 Murphy agreed that he would await answers to
19 interrogatories until he took the depositions of those
20 two people. And I fully believe not only would he get
21 the information he wanted from those interrogatories,
22 from the depositions, but they might not even have
23 occurred. That is set forth --

24 JUDGE EILPERIN: Mr. Cherry, that is a
25 disputed factual question.

1 MR. CHERRY: Which was found against me
2 without a hearing.

3 JUDGE EILPERIN: All right.

4 MR. CHERRY: But I have answered the
5 question.

6 JUDGE EILPERIN: As of, if I recollect the
7 undisputed facts, as of September 18th, the arrangement
8 for taking depositions of Messrs. Minor and Hubbard fell
9 through. Is that correct?

10 MR. CHERRY: I do not know if the exact date
11 is the 18th. It fell through at some point when
12 Commonwealth Edison refused to pay expenses and I gave
13 them my judgment based upon that. I would add one other
14 thing --

15 JUDGE EILPERIN: I believe that was the 18th.
16 Now you were at that point under an order issued by the
17 Licensing Board on August 18th to promptly answer the
18 interrogatories subject to conference. You had your
19 conference. The conference could not resolve things.
20 The arrangements fell through. What obligation do you
21 think you were under as of September 18th to answer
22 those interrogatories?

23 MR. CHERRY: On September 18th?

24 JUDGE EILPERIN: As of September 18th when the
25 parties had conferred a number of times, arrangements

1 had been unavailing to take the depositions of Messrs.
2 Minor and Hubbard and, as Judge Kohl mentioned, there
3 was indeed a letter dated September 16th from Mr.
4 Murphy, I believe, saying that you had promised the
5 answers to the interrogatories by October 1st.

6 What do you think your obligation was at that
7 point to comply with the Licensing Board's August 18th
8 order?

9 MR. CHERRY: Well, let me restate the question
10 so that I understand it. Are you asking me what my
11 obligation is to answer interrogatories in a
12 circumstance which ignores the agreements with counsel?
13 Or are you asking me --

14 JUDGE EILPERIN: I am asking you --

15 MR. CHERRY: -- what my obligation is to
16 answer interrogatories in the context of the very
17 meeting I had with counsel as directed by the Board?
18 Because those are two different questions.

19 JUDGE EILPERIN: I am asking you how you
20 interpret the August 18th order of the Licensing Board?

21 MR. CHERRY: I interpret --

22 JUDGE EILPERIN: Let me give it a bit more
23 context. The Licensing Board, as of September 9th, had
24 issued a scheduling order, and we are talking now about
25 events September 18th and beyond is what I am interested

1 in.

2 MR. CHERRY: It issued a unilateral order;
3 that is right.

4 JUDGE EILPERIN: It issued a scheduling order
5 September 9th which set discovery to conclude by
6 November 1, not simply answers to interrogatories but
7 depositions and all discovery which had been pending
8 before the Licensing Board as of August 18th, the
9 Licensing Board said was to be concluded by November 1.

10 Now what do you think was your obligation
11 under that August 18th order?

12 MR. CHERRY: Well, my obligation under the
13 August 18th order in light of the meetings that I had
14 with counsel was not to answer the interrogatories.

15 JUDGE EILPERIN: Why not?

16 MR. CHERRY: Because the interrogatories were
17 subject to a meeting of counsel, and I have averred
18 below, which was rejected by the Licensing Board, that
19 my opponent said that he was going to take two
20 depositions and then he was going to determine whether
21 he wanted the interrogatories. I had every right under
22 a direction to meet with counsel to consider those
23 interrogatories in that context as, if not withdrawn,
24 then temporarily put aside.

25 JUDGE EILPERIN: But if the meeting below had

1 failed, if there had been a disagreement, how could you
2 still hold Edison to what you say is the promise that
3 they disagreed with?

4 MR. CHERRY: Well, I am having a little
5 trouble, Judge Eilperin, following that. If I make a
6 deal with someone -- a lawyer's deal that has been
7 accorded the right to enforcement since I can remember
8 in the history of justice because if lawyers do not make
9 discovery deals and keep them this system, you know very
10 well sir, does not work -- if I make a deal with
11 somebody and he says A for B, and then my deal partner
12 pulls away his A, do I then give him B? Of course not.
13 Now, maybe I was at --

14 JUDGE EILPERIN: You do not think you had an
15 obligation to go to the Licensing Board and say:
16 Lookit, I have to answer these interrogatories and you
17 told me I had to answer them promptly, Edison now has
18 reneged on a deal; I want a protective order. You do
19 not think you were under any obligation to go back to
20 the Licensing Board seeking a protective order at that
21 point?

22 JUDGE KOHL: Since the Board was not a party
23 to the so-called lawyer's deal, but certainly an
24 interested observer?

25 MR. CHERRY: Well, the Board should have been

1 a party. The Board ignored, in my judgment, its
2 responsibilities. But let me deal with that directly.

3 It is possible, I will admit in hindsight,
4 that perhaps after that meeting fell down I should have
5 moved for a protective order. I cannot give you any
6 solid reason why I did not. I can give you perhaps my
7 best in-hindsight estimate. I was in the middle of a
8 protracted litigation which did not conclude until
9 September which resulted in a settlement agreement over
10 an injunction. Shortly after the deal fell apart, I
11 believe that Edison moved, and I then told my position
12 in response to Edison.

13 JUDGE EILPERIN: October 2nd.

14 MR. CHERRY: Okay, which is approximately
15 three weeks. I believe my --

16 JUDGE KOHL: And it is after the alleged
17 deadline.

18 MR. CHERRY: There was no deadline.

19 JUDGE KOHL: Presumably, if you want a relief
20 from a discovery order, you should seek that relief
21 prior to the expiration of the time.

22 MR. CHERRY: There was in my judgment, Judge
23 Kohl, no deadline. The Licensing Board had not set a
24 deadline for the answering of interrogatories. I had
25 agreed in good faith to answer interrogatories by a date

1 certain. Mr. Murphy then told the Board that that was
2 true without telling the Board that he had agreed to
3 take the depositions on the 23rd and 24th and that he
4 had agreed to await those depositions for his
5 interrogatories.

6 So technically, the advice of September 30th
7 to the Licensing Board was a misrepresentation because
8 it was not a date. I did not violate any date. Tell me
9 where there is a date that I violated. At best, I am a
10 fool for having relied on a man I went to law school
11 with. That is what I am at fault for.

12 JUDGE KOHL: Would it not have been a prudent
13 course for a person who has practiced for 20 years, as
14 you have just stated, under the circumstances to take
15 the first step in bringing this dispute to the Licensing
16 Board and apprise it? Certainly, the Licensing Board
17 has said in a number of orders at different times that
18 discovery was to proceed expeditiously and promptly.
19 Given that statement of the Board and its obvious
20 involvement here, it seems to me a prudent individual
21 would have acted in that instance, notwithstanding other
22 obligations that you may have had.

23 MR. CHERRY: Judge Kohl, I am not perfect, and
24 I am not always prudent. I am here being accused of a
25 wilfull pattern of delay. Of that I am unjustly

1 accused.

2 It may have been appropriate for me in late
3 September to have first advised the Licensing Board, but
4 that failure to have advised the Licensing Board when
5 the Licensing Board itself was not involved in counsel
6 and when I have -- and rejected below in the most
7 unsatisfactory application of due process I have ever
8 seen to take one person's word from another -- the issue
9 here is the finding of fact of the Licensing Board that
10 Mr. Cherry on behalf of the Rockford League of Women
11 Voters exercised a wilfull pattern of continued delay of
12 orders.

13 That finding of fact is nonsense on this
14 record. Perhaps my judgment was wrong in believing that
15 I could rely on co-counsel in a hotly litigated case
16 without papering every agreement. Perhaps my judgment
17 was wrong in not going to Mr. Miller and moving forward
18 promptly to tell him of things that had fallen apart.
19 Perhaps I had the poor judgment in expecting that Isham,
20 Lincoln & Beal would live up to the payment of Minor and
21 Hubbard expenses when we had agreed to take a joint
22 deposition when they had done so in an order before.
23 Perhaps I am guilty of bad judgment, but I do not know
24 that if that bad judgment is not tantamount to some
25 wilfull violation of the rules that I and my client get

1 tossed out.

2 A word about that scheduling order. This
3 Licensing Appeal Board has observed on not one occasion,
4 and the Commission has a series of rules, that Licensing
5 Board chairmen are to hold meetings to discuss discovery
6 schedules. What did Mr. Miller do? He waited 18 months
7 to decide a petition of contentions. So much for his
8 desire to get this case moving forward.

9 He ignored my discovery request for 18 months,
10 and then said that I am using it as a bootstrap when I
11 had a motion pending to enforce them for over nine
12 months. I am supposed to remind him every week of his
13 duties. And then he set a discovery schedule that was
14 so unrealistic it was almost foolish to impose a
15 November 1 schedule.

16 JUDGE EILPERIN: Mr. Cherry, let me ask you
17 another question about the asserted agreement among
18 counsel. As I understand it, it is your contention that
19 the agreement was that if Edison supplied certain
20 information to you, you would then by October 1st answer
21 the interrogatories?

22 MR. CHERRY: No, it was not quite that, Mr.
23 Eilperin -- excuse me, Judge Eilperin. I did not in
24 effect say that if you do this I will do this. The
25 agreement, as I observed it, was I am going to do this

1 in this time frame and you are going to do this in this
2 time frame.

3 In other words it was not, I would say,
4 necessarily a tit-for-tat; it was two people who were
5 building a house. And I am expecting that foundation to
6 go forward while I make my foundation.

7 JUDGE EILPERIN: Your agreement was to answer
8 the interrogatories by October 1st; is that right?

9 MR. CHERRY: To cooperate in good faith in the
10 discovery, and I set October 1st as the date I believed
11 I could make. That is correct.

12 JUDGE EILPERIN: To answer any
13 interrogatories.

14 MR. CHERRY: That is correct.

15 JUDGE EILPERIN: Now what was Edison supposed
16 to do, and when were they supposed to do it, according
17 to your version?

18 MR. CHERRY: Okay. Edison was to answer
19 interrogatories, and Edison asked for a delay of those
20 interrogatories which I gave them. I never got those
21 answer. Edison was then going to take the deposition--

22 JUDGE EILPERIN: Excuse me for one moment.
23 They were going to answer your interrogatories, if I
24 recollect, by September 28th?

25 MR. CHERRY: That is correct.

1 JUDGE EILPERIN: Were they supposed to do
2 anything else?

3 MR. CHERRY: Yes. They were supposed to take
4 the depositions of Minor and Hubbard on the 24th and
5 25th. And they were then to tell me when that
6 deposition was concluded, what information that they now
7 had with all of the other documents that we had given
8 them as well as the petition, whether or not the
9 interrogatories which they asked were still meaningful.

10 JUDGE EILPERIN: They had the right to stand
11 on their claim that you asked the interrogatories as
12 given by October 1st?

13 MR. CHERRY: No. Under my understanding, when
14 the depositions of Minor and Hubbard were set, it was my
15 understanding that the depositions would go forward and
16 Edison would determine, for very good and sufficient
17 reasons. Do you know what my activity was in answering
18 the interrogatories? To give them to Minor and
19 Hubbard.

20 The process of education was going on. Edison
21 would have gotten the same, if not better, deposition
22 information in the depositions. And do not forget, the
23 Licensing Board, in its famous August 18th order, has
24 said a well-timed deposition is better than --

25 JUDGE EILPERIN: I am just trying to find out

1 what you say is the agreement between you and Edison.

2 MR. CHERRY: Yes.

3 JUDGE EILPERIN: Your version --

4 MR. CHERRY: My version of the truth was -- I
5 say my version of the truth because I do not believe
6 that you three can opine on a contradicted --

7 JUDGE EILPERIN: I have asked you for your
8 version. So why don't you give it to me?

9 MR. CHERRY: My version of the truth is that
10 there was an agreement to move forward with joint
11 discovery. I will admit that that agreement was more de
12 facto than de jure, in the sense that we did not sit
13 down and make a written agreement that we will
14 consolidate for discovery. Edison admits it in their
15 brief.

16 JUDGE EILPERIN: You do not think that Edison
17 under your version of the events, Edison did not have a
18 right to stand on your answering the interrogatories by
19 October 1st?

20 MR. CHERRY: They withdrew the request, Judge
21 Eilperin.

22 JUDGE EILPERIN: They withdrew the request for
23 you to answer the interrogatories?

24 MR. CHERRY: That is correct. They scheduled
25 depositions on the 23rd and 24th of the two principal

1 people who would be necessary to answer the
2 interrogatories. I could not have answered those
3 interrogatories myself.

4 JUDGE EILPERIN: Why did you then not go back
5 to the Licensing Board and explain it to them?

6 MR. CHERRY: Well, I did not go back -- Well,
7 because I did not believe that Edison would thereupon on
8 October 2nd take advantage of an agreement that was
9 breached by them. That is why I did not go to the
10 Licensing Board.

11 JUDGE EILPERIN: Is there any way, do you
12 think, that you could have answered interrogatories
13 of -- let me put it this way: You said in your brief
14 that the interrogatories, to answer the interrogatories
15 would take you five or six weeks. Is that an accurate
16 statement?

17 MR. CHERRY: To answer those
18 interrogatories --

19 JUDGE EILPERIN: To answer those
20 interrogatories.

21 MR. CHERRY: -- I conservatively estimated to
22 be fully answered would take five or six weeks;
23 correct.

24 JUDGE EILPERIN: And nevertheless, around
25 September 18th or thereabouts, or September 15th you

1 reached an agreement, you say, with Edison whereby
2 October 1st you would have answered those
3 interrogatories if they gave you certain information?

4 MR. CHERRY: Sure. But I also --

5 JUDGE EILPERIN: Why is that a credible
6 explanation?

7 MR. CHERRY: Well, have you looked at the
8 interrogatories? It first asks me to list every witness
9 I am going to have in the hearing. -

10 JUDGE EILPERIN: Why is that credible --

11 MR. CHERRY: I am going to answer that
12 question.

13 JUDGE EILPERIN: -- that within two weeks you
14 would have been able to answer the interrogatories?

15 MR. CHERRY: I am going to answer that
16 question.

17 JUDGE EILPERIN: Fine.

18 MR. CHERRY: It first asked me to list every
19 witness I am going to put in the hearing. September
20 18th, the only witnesses I knew were Minor and Hubbard.
21 I would not have had a great difficulty in answering
22 those questions.

23 The way I was going to answer those
24 interrogatories was to use a version of Rule 37, I
25 think, of the Federal Rules of Civil Procedure, which I

1 think is adopted in the Appellate Court Practice Act by
2 directly if not by observation, is that if people ask
3 you interrogatories and they have information which
4 answered the interrogatories or there is a body of
5 information which exists that is applicable to both
6 parties with respect to it, you are permitted in
7 answering interrogatories to refer them to the
8 information.

9 What Edison would have received on October 1st
10 was not an answer to each and every interrogatory
11 because that was impossible under the circumstances. We
12 would have had a sparring of words, the kind of sparring
13 over interrogatories that lawyers deal with.

14 That is why I was delighted when I thought I
15 reached an agreement that they would take Minor and
16 Hubbard's deposition. I had given them all the
17 documentary information, and I said, let us see where
18 you are after the depositions.

19 Certainly, a short time after I am told by the
20 Licensing Board that my contentions are approved -- you
21 do not think I worked on this case from March 1980 until
22 I got an Appeal Board ruling, I mean a Licensing Board
23 ruling on contentions? I did not run up time for my
24 client. The case as of September 1 was in no different
25 shape than if I walked out tomorrow and filed a

1 complaint and 20 days later there was an answer. Viewed
2 in that context, the discovery schedule set by the
3 Licensing Board, plus its castigating me for not having
4 promptly entered a date which it had nothing to do with
5 as a result of a counsel meeting which it ordered, but
6 then did not find out what was going on, made my mind
7 almost bizarre.

8 JUDGE EILPERIN: It seems to me, if I can
9 understand what you have been saying, you have just been
10 saying that it would not have taken you six weeks to
11 answer the interrogatories because you would not have
12 answered the interrogatories.

13 MR. CHERRY: I would have answered --

14 JUDGE EILPERIN: That it would have taken you
15 a couple of days--

16 MR. CHERRY: No.

17 JUDGE EILPERIN: -- and essentially you would
18 have just said, Minor, Hubbard, and Bridenbaugh have
19 this information.

20 MR. CHERRY: No, I do not think that that
21 would have been a responsible response.

22 JUDGE EILPERIN: What would have been a
23 responsible response?

24 MR. CHERRY: I do not have at my fingertips
25 all the information, but I did in early September talk

1 to -- when I say "early September," in the context of
2 the meeting of counsel I had a communication with Minor
3 and Hubbard and had set up a schedule for going through
4 information. It became apparent as a result of that
5 that Bridenbaugh and Hubbard would be better able to
6 give information to Commonwealth Edison of what they had
7 in a process other than interrogatories, which is why I
8 suggested that procedure.

9 JUDGE EILPERIN: The counsel for Commonwealth
10 Edison has a right, as I understand it -- it is not an
11 absolute right -- but they do have the right to proceed
12 with discovery if they wish, and if they want to ask
13 interrogatories they can as interrogatories.

14 Now what would have -- if we would order you
15 right now to come up with the answers to
16 interrogatories, those interrogatories that have been
17 outstanding since last July, what sort of answers would
18 Edison get?

19 MR. CHERRY: I would think answers that were
20 appropriate under the rules. But I do not believe
21 that--

22 JUDGE EILPERIN: What is that?

23 JUDGE KOHL: And how soon would they get
24 them?

25 MR. CHERRY: I have not focused on how soon

1 they would get them. I want to make it clear that we
2 have not said that we have not said we would not answer
3 interrogatories. Everybody has accused us of saying we
4 would not answer interrogatories. That is not true. I
5 mean --

6 JUDGE EILPERIN: Well, you have not answered
7 interrogatories.

8 MR. CHERRY: For a reason which I have
9 suggested.

10 JUDGE EILPERIN: What I am suggesting is:
11 What if the Appeal Board decides that we will let you
12 back in subject to your answering the interrogatories
13 within two days or three days after we issue our
14 decision? What sort of response would Edison get?

15 MR. CHERRY: Well, I think that before I could
16 assert that I could answer interrogatories within two or
17 three days after a decision, I would have to know what
18 kind of time frame we are talking about, what is the
19 availability of Minor and Hubbard--

20 JUDGE EILPERIN: If these interrogatories have
21 been outstanding since last July--

22 MR. CHERRY: As mine have been outstanding for
23 two years, Judge Eilperin.

24 JUDGE EILPERIN: That is a separate question.
25 These have been outstanding since last July. Do you

1 think it is unreasonable as a condition to being allowed
2 back in the proceeding to answer these interrogatories
3 which have been outstanding for that length of time,
4 within approximately three weeks from now, within no
5 more than three weeks?

6 MR. CHERRY: I think it is unreasonable for
7 this Appeal Board to condition my getting in a case that
8 I was unfairly tossed out of by ordering me to answer
9 interrogatories in the context of a time frame that
10 suggests that these interrogatories were outstanding
11 since July, because that presumes that these
12 interrogatories were not withdrawn pending the
13 depositions as I have asserted, and therefore makes the
14 same judgment without a record that Mr. Miller made
15 below.

16 Do I think it is improper for you to order me
17 to answer interrogatories in the context of a litigated
18 case? Absolutely not. Do I think it is improper for
19 you to order me to answer interrogatories as a condition
20 or punishment of being in a case I was unfairly thrown
21 out of? Heck, yes, I think that is unreasonable.

22 JUDGE EILPERIN: Do you really think it is
23 unreasonable for the Appeal Board to say that you must
24 answer these interrogatories within three weeks of
25 today? Do you think that is an unreasonable order?

1 MR. CHERRY: It is an unreasonable order if
2 the reason you are doing so is you view my conduct since
3 July as improper. It is not unreasonable if that
4 judgment is a result of you three gentleman or your--

5 JUDGE KOHL: Excuse me?

6 MR. CHERRY: -- and lady, I am sorry-- or your
7 delegates, the Licensing Board, making a discovery
8 schedule.

9 I will tell you what I would do in this case,
10 what my result would be if I would stand back: I would
11 not get involved in what is essentially a lawyers
12 squabble, because I think that lawyers have an
13 obligation not to squabble, but sometimes the stakes are
14 such that they do squabble for a whole lot of reasons
15 and they take a whole lot of positions and advantages.

16 I would say to myself that not three weeks
17 from now but on a very short date I would order the
18 Licensing Board to hold the first meeting of counsel. I
19 would have each lawyer come to that meeting with some
20 rational idea of what he or she wants to do with
21 discovery. And then I would have a schedule made that
22 makes sense. And then if someone violates that
23 schedule, I would cut his head off.

24

25

1 JUDGE EILPERIN: Let me ask you something
2 else.

3 MR. CHERRY: And I am sorry, Ms. Kohl, I
4 didn't mean any selection process in my remark. It was
5 simply spontaneous.

6 JUDGE EILPERIN: The Licensing Board held a
7 prehearing conference, if I recall, August of -- when
8 was it, August of '79?

9 MR. CHERRY: Yes. I was no involved.

10 JUDGE EILPERIN: You were not involved. You
11 later did become involved in a conference in mid to late
12 September, did you not?

13 MR. CHERRY: No, I was never in a conference
14 with the Licensing Board.

15 JUDGE EILPERIN: No, no, no. I did not say
16 that. Excuse me if I led you to believe I meant with
17 the Licensing Board. The conference among counsel was
18 in September of 1979? Does that ring a bell?

19 MR. CHERRY: Yes. I had a meeting in my
20 office prior to my becoming involved with the case in
21 September of 1979.

22 JUDGE EILPERIN: Okay. Now the Licensing
23 Board had asked for counsel to discuss and attempt to
24 agree upon a set of contentions by October 15, 1979. Is
25 that accurate?

1 MR. CHERRY: Not quite accurate. The
2 Licensing Board had asked the Rockford League of Women
3 Voters, unrepresented by counsel, and Commonwealth
4 Edison to get together on 13 framed contentions to see
5 if they could agree on language. I got involved in the
6 case because Mr. Nader called me and said: Would you
7 help them negotiate with Commonwealth Edison? That is
8 how I got involved.

9 JUDGE EILPERIN: Okay. As I understand it,
10 sometime by the end of October, I believe, both the NRC
11 Staff and Edison had given you their version of what
12 they thought acceptable contentions would be.

13 MR. CHERRY: With respect to what the League
14 had then raised, yes.

15 JUDGE EILPERIN: That's right. And I recall
16 seeing -- is it accurate that you had said you would
17 come up with your set of contentions by November 2nd? I
18 saw that in one of the letters.

19 MR. CHERRY: If I could be apprised of the
20 letter, I think I have it. I was not, and I made it
21 very clear to everybody, representing the Rockford
22 League of Women Voters in any process except for that
23 single meeting.

24 JUDGE EILPERIN: For the contentions.

25 MR. CHERRY: No, no, except to meet with them

1 to make certain that I could translate for them. I will
2 be very candid with you what happened after that
3 meeting. The Rockford League of Women Voters is not
4 known, as part of a League of Women Voters, as a
5 hard-hitting public interest agency. I did not want to
6 get involved in a case in opposing a nuclear power plant
7 with people who did not share my views. It took a while
8 before I agreed to take that case, and I didn't want it,
9 and I wasn't asked to take it in the beginning, but
10 later I was.

11 JUDGE EILPERIN: When was that?

12 MR. CHERRY: Oh, I think that it was within
13 three or four weeks before I filed the revised
14 contentions in March that I had made an arrangement with
15 the Rockford League of Women Voters that I would control
16 the legal part of the case without having to be
17 overviewed by people on legal decisions, and that there
18 were sufficient funds available in connection with the
19 reduced fee arrangement that I had worked out for them.

20 When we left the meeting in 1979, I had not
21 only not agreed to represent the Rockford League of
22 Women Voters, but had rejected that representation.

23 JUDGE EILPERIN: Well, why were you asking
24 Edison and the NRC Staff to give you their set of
25 acceptable contentions?

1 MR. CHERRY: I don't know that I asked
2 Edison. I can tell you what happened at the meeting. I
3 told Commonwealth Edison that the only interest I had in
4 an NRC proceeding these days was the unresolved safety
5 issues, in a sense, and their economic implications;
6 that if the League would focus on those and I could
7 raise some money for expenses, I would be very
8 interested in raising that issue. Just to go in an NRC
9 proceeding and talk about radon X-2, I have got better
10 things to do with my life and my sense.

11 I said to Commonwealth Edison that these would
12 be the kinds of issues with which I got involved. There
13 was to my knowledge no agreement that they would give us
14 their contention by a certain date.

15 JUDGE EILPERIN: You don't recollect ever
16 having stated that you would have your set of
17 contentions available by November 2nd?

18 MR. CHERRY: It may be that the Rockford
19 League of Women Voters in the context of that agreed
20 that they would respond to Edison's letter with respect
21 to the 13 or 14 existing contentions that the Rockford
22 League had, which bore little similarity to the ultimate
23 petition to intervene. I had nothing to do with the
24 matter after September 1979.

25 There is nobody who could have left that room

1 believing that they could rely on anything I said as a
2 lawyer. I didn't do anything in the case for another
3 month. I discouraged Betty Johnson and the other people
4 who came to me and said: You are not ready for this
5 battle; it's going to be too bloody for the Rockford
6 League of Women Voters. You are going after a billion
7 dollar facility that is somewhat built. You are playing
8 in a different ballgame. If you want me to be involved,
9 these are my criteria. You accept them or I will go
10 away.

11 It took me a while before I was able to get
12 that worked out. I did not have any responsibility in
13 September of 1979 to do anything. I met with these
14 people as a courtesy to Mr. Nader so that they at least
15 felt that they had someone there at that meeting, and I
16 made it absolutely clear to everyone involved.

17 JUDGE EILPERIN: Who now represents the
18 League? Is it you and your partner, Mr. Flynn?

19 MR. CHERRY: In this case?

20 JUDGE EILPERIN: Yes.

21 MR. CHERRY: Yes. And I must say, Judge
22 Eilperin, for whatever it is worth, because it is a
23 representation and we are bound by a record, I never
24 delayed, either willfully or negligently, in this case.
25 There is no reason in the world that I went into a case

1 simply to get tossed out. I have been around the NRC
2 very long in positions, and I guess in some circles I
3 represent fair game. Sometimes I don't mind it. I
4 prefer if it is done with a little more skill than Mr.
5 Miller did, just for professional reasons.

6 But there is no reason in the world that this
7 Board can believe that if the Rockford League of Women
8 Voters are properly placed back in this case with Cherry
9 and Flynn as their counsel, that this case will not be
10 treated with first priority and with all discovery
11 obligations being honored, for my own protection.

12 JUDGE EILPERIN: You are saying that that
13 November 2nd date was not a date that you gave, you
14 think maybe it is a date the League of Women Voters
15 gave?

16 MR. CHERRY: If we took a moment, I might be
17 able to look at my record. I do not know of an
18 obligation that I as an attorney took. It may be that
19 the Rockford League of Women Voters promised with
20 respect to that meeting that they would have their
21 revised contentions on November 2nd.

22 I remember after the meeting with Commonwealth
23 Edison Ms. Johnson asking me what I would do, and I gave
24 them my criteria. Those criteria were not even
25 considered, let alone met, until sometime in January or

1 February. If the Rockford League of Women Voters missed
2 some representation or some deadline in November, I am
3 merely suggesting --

4 JUDGE EILPERIN: When did you agree to
5 represent them? January or February?

6 MR. CHERRY: I would say a period of three to
7 four weeks prior to the filing of the revised
8 contentions, because those revised contentions had to be
9 approved by a variety of hierarchy in the League and I
10 knew that took some time.

11 JUDGE EILPERIN: So the revised contentions
12 were filed March 10th. You are saying that --

13 MR. CHERRY: So I would guesstimate. I don't
14 have the exact date at my fingertips, but I know that in
15 1979 I had not agreed to represent the Rockford League.
16 As a matter of fact, I remember by Christmas-time having
17 a conversation with a friend of mine saying that I am
18 somewhat depressed because here is a lady who would like
19 to challenge the Byron Nuclear Power Plant. I am not
20 sure she really knows what she is getting involved in.
21 She came to me, I would like to help here, but I am not
22 going to get involved in another case where it boils
23 down to, as I said before, discussing radon X. I happen
24 to think that is the highest style for my personality or
25 my intellectual efforts. I wanted to get involved with

1 the unresolved safety issues and I still do.

2 JUDGE EILPERIN: You have used up 40 minutes.
3 You have 10 minutes left to use as you see fit. You can
4 reserve your time for rebuttal, or complete your
5 argument now.

6 MR. CHERRY: I do not believe that in this
7 case the Licensing Board made any effort to run a
8 lawsuit in any way at all as the Rules of the Commission
9 contemplate. It unilaterally set discovery schedules
10 and then unilaterally amended that.

11 As for what I regard as intemperate and
12 vitriolic language against me, I don't understand it. I
13 have never met Mr. Miller. I have observed how he has
14 handled Isham, Lincoln & Beal in the Midland decision
15 which I am arguing today, by excusing conduct which he
16 found to be of a character far more serious than I am
17 excused, yet I get treatment somewhat differently. It
18 makes me wonder. It makes me also concerned that if we
19 do get reversed, whether or not Mr. Miller is
20 appropriate to handle this case. But I do not
21 understand that attack.

22 Our version of the facts -- and I emphasize
23 that it is a version -- is nothing you can take except
24 by way of a future representation because I do not
25 believe that the facts of this case, as disputed as they

1 are, are before this Board or were ever considered by
2 the Licensing Board or could fruitfully obtain anywhere
3 if we had a hearing, because I am sure that each lawyer
4 would obtain and observe the same representations he
5 made here.

6 While I am disappointed in my co-counsel's
7 efforts, I come here not in anger but in sorrow. I want
8 to try this lawsuit. I believe that there are important
9 issues in this case. I believe that I am experienced
10 and skilled enough to do it. I will work with my
11 opponent's counsel. I am going to do it in writing this
12 time. But I will not let this effort interfere with
13 smoothly moving this forward. And if I am obligated to
14 report to Mr. Miller each time there is a disagreement,
15 I will call him on an hourly basis, if necessary. I
16 will involve the Licensing Board, and I will do what I
17 believe is fair under the circumstances. Both here and
18 before the Licensing Board we have pledged our
19 cooperation in discovery, including the
20 interrogatories.

21 What do I think the --

22 JUDGE EILPERIN: Are you reserving any time
23 for rebuttal?

24 MR. CHERRY: If I do not, then I do not. I
25 have one more sentence to finish.

1 In this case it is a model of inefficiency.
2 There is no one I can complain to that I waited 18
3 months for a decision by the Licensing Board. I
4 complained about my interrogatories outstanding to the
5 Staff and the Nuclear Regulatory Commission, and when I
6 said the same thing to the Licensing Board, everybody
7 forgot about my interrogatories.

8 I believe that this case represents a unique
9 vehicle not for attacking me but for laying down
10 standards as to how Licensing Boards should involve
11 themselves in discovery. I think this case cries out
12 for reversal, and I would like to get back to the
13 business of trying it.

14 Thank you.

15 JUDGE EILPERIN: You will have six minutes
16 left for rebuttal.

17 Mr. Miller.

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1 ORAL ARGUMENT BY MICHAEL J. MILLER ON BEHALF OF
2 APPLICANT COMMONWEALTH EDISON

3 MR. MILLER: May it please the panel:

4 I would like to start, if I may, by responding
5 to two factual issues which were discussed with Mr.
6 Cherry during his portion of the argument. The first,
7 and in my judgment the critical one, is whether or not
8 there was an agreement between both the Rockford League
9 of Women Voters and Commonwealth Edison Company with
10 respect to discovery.

11 Mr. Cherry in his remarks states that he
12 believes that such an agreement in fact existed. And
13 yet, when one looks at the very document upon which he
14 relies to support his version of the agreement, one
15 finds that the key paragraph demonstrates that as of the
16 date he says an agreement existed there was an
17 irreconcilable difference between counsel for the League
18 and counsel for the Commonwealth Edison Company.

19 That document is identified as Exhibit 13 to
20 the League's petition for reconsideration. By way of
21 background, I should state that the discovery
22 differences between the parties, both in the Illinois
23 Commerce Commission proceeding and in the proceeding
24 before this Board, were not dealt with orally. The
25 correspondence files of our firm, and I am sure of Mr.

1 Cherry's firm as well, are literally papered with
2 letters that went out virtually on a daily basis
3 reflecting the status of negotiations regarding
4 discovery and other matters, so that there could be
5 truly no misunderstanding as to what the obligations of
6 each side were.

7 In the September 16th, 1981, letter which
8 bears the caption, but not the Illinois Commerce
9 Commission Docket number, Rockford League of Women
10 Voters vs. Commonwealth Edison Company, which is how
11 that proceeding is styled at the Illinois Commerce
12 Commission, and which shows a copy to the Illinois
13 Commerce Commission Hearing Examiner, there is a
14 paragraph 2, numbered paragraph 2, which reads as
15 follows:

16 "We have agreed that the scientists of MHB,
17 Messrs. Hubbard and Minor, will be deposed at your
18 offices September 25th, and that you will endeavor to
19 take their depositions simultaneously and conclude them
20 within one day."

21 It then goes on to say: "You have agreed to
22 pay their air fare and hotel accommodations, but you
23 have not agreed to pay their expert witness fees, even
24 though the pertinent federal, Illinois, and NRC
25 precedents require that you do so."

1 It goes on to talk about some what we believe
2 to be inapplicable NRC and federal court precedents, and
3 it states in the concluding portion of that numbered
4 paragraph 2:

5 "Accordingly, unless you provide a written
6 commitment to pay their expert witness fees as well as
7 or expenses, we will not produce Messrs. Hubbard and
8 minor."

9 As of September 16th, just on this document
10 alone, there was no agreement on discovery at the
11 Illinois Commerce Commission, let alone any supposed
12 agreement that goes to the relationship of that
13 discovery with discovery that was pending with the NRC.

14 JUDGE EILPERIN: Had you intended to use the
15 depositions of Hubbard and Minor to cover this case, as
16 well as the Illinois Commerce Commission case?

17 MR. MILLER: If the question was, were the
18 depositions going to be taken with an eye towards the
19 contentions in this case, the answer is no. There were
20 specific factual assertions made in affidavits that were
21 filed in support of the petition at the Illinois
22 Commerce Commission which were going to be the subject
23 matter of that deposition.

24 In fact, when we couldn't get Mr. Hubbard and
25 Mr. Minor and when we found that Mr. Cherry and the

1 League would not answer interrogatories in the NRC
2 proceeding, we caused subpoenas to be issued by Chairman
3 Miller, which were served on Messrs. Hubbard,
4 Bridenbaugh and Minor in the NRC proceeding. We were
5 simply running out of time. We had a discovery cutoff
6 schedule and we had had absolutely no response to what I
7 regard as the most basic of discovery to which we were
8 entitled.

9 JUDGE EILPERIN: Well, if you were running out
10 of time, why wouldn't you have wanted to have just used
11 Hubbard and Minor to take their deposition one time to
12 cover both proceedings?

13 MR. MILLER: Well, that might have been
14 appropriate, but we had a dispute with the League and
15 its counsel with respect to paying their expert witness
16 fees at the Illinois Commerce Commission. That was a
17 dispute which the League's counsel points out. We had
18 fought it out at the NRC and lost on it.

19 JUDGE EILPERIN: Is there any doubt, generally
20 speaking, that if one side wants to depose another
21 party's experts that you have to pay the time of that
22 expert.

23 MR. MILLER: There is no doubt at the NRC,
24 there is no doubt at the federal court, and now there is
25 no doubt at the Illinois Commerce Commission. However,

1 the Illinois Commerce Commission has come out just the
2 opposite way from the NRC and the federal courts have,
3 and a party does not have to pay the expert witness
4 fee. That was decided in this very situation.

5 JUDGE EILPERIN: But you wanted to take the
6 deposition of Minor and Hubbard for purposes of the NRC
7 proceeding.

8 MR. MILLER: Yes, sir, I agree. And indeed,
9 we made arrangements, or attempted to make arrangements
10 with them when we caused the subpoenas to issue in this
11 proceeding, that we would in fact pay their fees for
12 attendance at a deposition that was going to take place,
13 scheduled to take place at their offices in Palo Alto or
14 Stanford, California.

15 JUDGE EILPERIN: Is that when you sent them a
16 check for \$30?

17 MR. MILLER: Yes, because we then had -- but
18 we had telephone communications with them in which we
19 said we would pay your fees. It would depend upon how
20 much time was spent, obviously. There was never any
21 understanding we would pay the fees in advance, and I
22 think that Messrs. Hubbard and Minor understood that.

23 JUDGE EILPERIN: So you're saying when you
24 sought subpoenas from the NRC for their deposition that
25 you had agreed to pay their expert witness fees?

1 MR. MILLER: Yes, sir, that was made clear.

2 Now on the same date, just finishing up on
3 this September 16th letter, Mr. Murphy sent the letter
4 to Mr. Cherry regarding the answers to interrogatories.
5 It bears the caption of the NRC proceeding. It shows
6 copies on all the parties to the NRC proceeding. And in
7 it there is stated our understanding that there was an
8 unconditional obligation on the part of the League to
9 respond to the interrogatories by October 1st, 1981.

10 JUDGE EILPERIN: That is a disputed question
11 of fact, though, because Mr. Cherry has a verified
12 pleading which says it wasn't unconditional.

13 MR. MILLER: Well, that may very well be. I
14 don't doubt that he has a verified pleading that states
15 that it was not unconditional. I guess this really goes
16 to the question of whether or not there is a hearing
17 that is required to resolve the issue of whether there
18 was an agreement or not.

19 There are two observations I'd like to make
20 about that. First of all, the hearing that is referred
21 to in many of the cases that are cited, both in the
22 League's brief and our brief, are really, if you look at
23 the case, nothing more than the type of hearing that
24 takes place at a motion call in a district court, where
25 there is an opportunity for counsel to present the court

1 with whatever affidavits and factual support he has for
2 his position and to make argument, and the court rules.

3 There is no suggestion that an evidentiary
4 hearing is required or indeed appropriate on these sorts
5 of collateral matters. I think the standard really is
6 the one that is analogous to that in ruling on motions
7 for summary judgment or summary disposition at the NRC:
8 Is there a genuine dispute as to a material fact?

9 On the basis of the papers that were before
10 the Licensing Board, the papers that are before you, it
11 is abundantly clear that there never was any such
12 agreement as is alleged in the verified pleading filed
13 by the League. The notion that we have to have a
14 hearing I think will just introduce yet another
15 extraneous factor into this proceeding.

16 JUDGE EILPERIN: Other than the claim that Mr.
17 Cherry and the League, his client, did not respond to
18 the interrogatories, as was reported by Mr. Miller, is
19 there anything else in the proceeding that you think the
20 Licensing Board relied upon to come to a conclusion that
21 there has been some sort of a pattern of recalcitrance?

22 MR. MILLER: Yes, and it really relates to the
23 second factual matter that I would like to bring to the
24 Board's attention, Judge Eilperin. You inquired of Mr.
25 Cherry what the representations were made by the League

1 with respect to negotiating on these contentions. These
2 documents are in the form of status reports.

3 Two of them are from counsel for the NRC
4 staff, who at that time was participating in the
5 negotiation. One of them is from Mr. Murphy. We agreed
6 with the staff that we would not file duplicate
7 reports. They are found as Exhibits 11, 12, and 13 to
8 Commonwealth Edison Company's opposition to the League's
9 petition for reconsideration.

10 Your recollection was really accurate, because
11 it is the first of those exhibits which refers to the
12 November 2nd, 1979, date. It states -- this is a report
13 to the Board. It says that there was a meeting between
14 counsel for the Applicant and the Staff with Mr.
15 Cherry. The Applicant was to submit to the Intervenor
16 and Staff a detailed statement of position on
17 Intervenor's present proposed contentions. Then the
18 Staff was to furnish its statement, and thereafter
19 Intervenor will submit a revised statement of proposed
20 contentions to Applicant and Staff which is expected no
21 later than November 2nd, 1979.

22 JUDGE EILPERIN: That refers to the meeting,
23 when? In September?

24 MR. MILLER: On September 26th; yes, sir.

25 The next status report is again from counsel

1 for the Staff.

2 JUDGE EILPERIN: Is it your recollection then
3 that Mr. Cherry at that September 26th meeting agreed to
4 submit revised contentions by November 2nd?

5 MR. MILLER: I cannot state that that was the
6 fact. I believe that Mr. Cherry's characterization of
7 the representation is accurate, that it was
8 representatives of the League, not necessarily Mr.
9 Cherry, who informed us that he had really been retained
10 simply for the purpose of negotiating contentions.

11 JUDGE EILPERIN: For negotiating contentions?
12 Or for that one meeting? Mr. Cherry seemed to say this
13 morning that it was just that one meeting.

14 MR. MILLER: If I might consult with Mr.
15 Murphy.

16 (Pause.)

17 It really was for, I think, for that one
18 meeting, although we were to direct our correspondence
19 with respect to the contentions to Mr. Cherry as well.

20 The next status report is Exhibit 12 to our
21 opposition to the petition for reconsideration. It is
22 dated November 27th. It says in pertinent part: "On
23 November 26th and November 27th, 1979, Staff counsel
24 spoke with Mr. Myron Cherry, who advised that he will be
25 filing a notice of appearance on behalf of the League of

1 Women Voters of Rockford within the next few days. He
2 also indicated that he will file revised contentions for
3 the Applicant and Staff to examine shortly after the 1st
4 of January, 1980."

5 The last status report on these negotiations
6 regarding contentions is Exhibit 13 to that opposition
7 document. It is dated January 22nd, 1980. It is over
8 Mr. Murphy's signature, and numbered paragraph 2 of that
9 letter states:

10 "With respect to the intervention by the
11 League of Women Voters, the status of negotiation
12 remains as stated in Mr. Carmen's letter of November
13 7th. That is, the parties are awaiting receipt from the
14 League of Women Voters of draft revised contentions to
15 examine. I was informed today by Mrs. Betty Johnson
16 that Myron Cherry has been retained to act as counsel
17 for the League of Women Voters in this proceeding and
18 would be filing shortly a notice of appearance and
19 revised statement of contentions."

20 JUDGE EILPERIN: That letter is dated when?

21 MR. MILLER: January 22nd, 1980. I was unable
22 to reach Mr. Cherry to learn when this filing would take
23 place.

24 JUDGE EILPERIN: So you think that that was
25 tantamount to an unreasonable delay?

1 MR. MILLER: Well, Judge Eilperin, there is a
2 finite amount of time within which, from the notice of
3 hearing to the hearing process, the parties have to
4 discharge their obligations. The first step in that
5 clearly is to know what the contentions are that are
6 going to be litigated. And it took us from October until
7 March just to find out what the position of the League
8 of Women Voters was after they had been admitted as a
9 party.

10 JUDGE EILPERIN: But you did not seek an order
11 until some time in late February from the Licensing
12 Board.

13 MR. MILLER: No, sir, we did not. I was
14 really dismayed and disturbed to hear Mr. Cherry refer
15 to misrepresentations by me and my partners. I too have
16 spent my entire professional career litigating cases
17 before this agency and in courtrooms, and I agree with
18 him, lawyers have to work with one another, they have to
19 make agreements and stick by them, and they have to
20 accommodate one another where it is at all possible.

21 We were at the early stages of dealing with
22 the League. It was uncertain that they were going to be
23 represented by Mr. Cherry at all until January, and it
24 seemed to us more appropriate, more in accordance with
25 the Licensee's obligations to the Board and to the

1 process itself not to immediately seek assistance from
2 the Board, but instead to work with the League itself in
3 the first instance and then with its counsel in an
4 effort to see if we could not arrive at some sort of
5 accommodation with respect to an agreed set of
6 contentions on which we could go forward. That never
7 happened. That never happened here.

8 JUDGE EILPERIN: So what is the part of the
9 pattern, other than the August refusal to answer the
10 August 18th interrogatories ordered by the Board?

11 MR. MILLER: What we have is a stretching, if
12 you will, a pushing of deadlines off, of refusal to
13 identify first the substance of the contentions and then
14 to provide even the most minimal information to the
15 Applicant so that it can be prepared to meet the burden
16 of proof that it bears in these proceedings.

17 JUDGE EILPERIN: Well, let me ask this: In
18 December of 1980, the Licensing Board ruled upon the
19 contentions in this proceeding?

20 MR. MILLER: Yes, sir.

21 JUDGE EILPERIN: And said that discovery
22 should begin promptly, or words to that effect. Edison
23 did not file any discovery until July, some seven months
24 after that. Why did it take Edison that long to start
25 up the discovery process?

1 MR. MILLER: Well, on the basis of the Board's
2 order in December, we believed that there had been a
3 misapprehension, if you will, of the pleading
4 requirements for contentions by the Licensing Board. We
5 had two choices. We could attempt to go forward, as we
6 ultimately did, and litigate those 114 contentions, or
7 we could seek some further relief from the Licensing
8 Board before plunging in.

9 Again, perhaps we were imprudent in not moving
10 promptly right after that order to begin the discovery
11 process. But we had some expectation, which ultimately
12 proved to be groundless, that our petition for
13 reconsideration would lead to a further winnowing out of
14 contentions that we felt were ill-founded and not in
15 accord with the Commission's requirements.

16 JUDGE EILPERIN: What would have happened if
17 you did both at the same time, you started up discovery
18 and sought reconsideration? Do you think Mr. Cherry
19 would have opposed answering interrogatories until the
20 petition for reconsideration had been ruled upon?

21 MR. MILLER: He may have, I don't know. Given
22 what happened when we ultimately knew that the Licensing
23 Board was standing firm, I doubt that we would have
24 gotten any significant information in that interim
25 between December of 1980 and the ultimate ruling on the

1 petition for reconsideration in July of 1981.

2 JUDGE EILPERIN: You didn't seek
3 reconsideration --

4 MR. MILLER: Until February.

5 JUDGE EILPERIN: -- of the admission of all of
6 the contentions.

7 MR. MILLER: No, sir. That's correct.

8 JUDGE EILPERIN: Why didn't you start up
9 discovery as to the ones that you were not seeking
10 reconsideration on?

11 MR. MILLER: Well, it was a judgment our part
12 that until we had the decision on reconsideration from
13 the Licensing Board that discovery should wait. I must
14 say --

15 JUDGE KOHL: But your interrogatories were not
16 contention-specific, as I understand.

17 MR. MILLER: No, they were --

18 JUDGE KOHL: They were boilerplate and applied
19 to all of them. Wouldn't it have been more of a
20 judgment for the League to make as to which ones they
21 thought it was prudent to respond to at that point?

22 MR. MILLER: No doubt, and we would have had a
23 dispute about that. I must say that I anticipated a
24 ruling on the petition for reconsideration at a somewhat
25 earlier date than we actually received it, and perhaps

1 was remiss in not going forward with the initial phases
2 of discovery even while that petition for
3 reconsideration was pending.

4 I must say that, although it is certainly
5 accurate to say that what this Board is reviewing is two
6 orders of the Licensing Board, these orders were really
7 entered at our initiative. That is, it was we who filed
8 the interrogatories, it was we who filed the motion to
9 compel, it was we who filed the motion to impose
10 sanctions.

11 But I do not believe that we simply had any
12 choice at any stage of the proceeding not to go forward
13 in an attempt to flesh out these 114 contentions. I
14 think the Licensing Board in the opinion in which it
15 admitted the contentions analogized them to notice
16 pleading. They were certainly that. They give us
17 notice of what is involved, but very little more.

18 Some of them are skeletal. A lot of them are
19 quite vague. Some of them are apparently lifted
20 verbatim from contentions that are filed in the
21 operating license proceeding for the Midland plant. And
22 we used all of the techniques, or attempted to use all
23 of the techniques, that are available under the WRC's
24 Rules of Practice and that are identified in the
25 Commission's statement of policy to try to determine

1 what the facts underlying these contentions are.

2 We attempted to negotiate with respect to the
3 language of the contentions. We filed the
4 interrogatories. There was a blanket objection
5 interposed to it. We moved to compel and were
6 successful in receiving an order from the Licensing
7 Board ordering that the interrogatories be answered.

8 JUDGE EILPERIN: What do you think was open
9 for discussion as a result of that August 18th order?

10 MR. MILLER: I confess it was a bit of a
11 puzzle to us as well, as to what we were to confer on
12 with respect to the League. That is, there had been in
13 our judgment an unequivocal direction, we believe, to
14 answer the interrogatories and to do so promptly. The
15 one thing that was missing from that order was a date
16 certain by which the League was to respond.

17 JUDGE EILPERIN: Don't you think that the
18 Licensing Board's order could also have been read as
19 encouraging the parties to confer about the possibility
20 of depositions instead of interrogatories, as the first
21 step?

22 MR. MILLER: No, sir, I don't believe so.

23 JUDGE KOHL: How do you interpret guideline
24 9?

25 MR. MILLER: Well, what guideline 9 says is

1 that interrogatories are not the sole discovery method
2 established by our Rules of Practice, and by reminding
3 us that it's not the sole discovery method I do not
4 think that it was suggesting that the interrogatories,
5 which had then been pending for approximately a month,
6 were not appropriate or should be replaced by a
7 deposition.

8 JUDGE KOHL: But when you continued to
9 encounter difficulties in getting responses to those
10 interrogatories, did it occur to you that perhaps
11 pursuing it -- withdrawing them, as Mr. Cherry alleges
12 that you did do on September 28th, and instead pursuing
13 it through depositions, would that seem to be --

14 MR. MILLER: Ultimately, that was the step we
15 took, when it became apparent that we were not going to
16 get any information, including the names of witnesses to
17 depose.

18 JUDGE KOHL: When you say ultimately that was
19 the step that you took, is it true then that you did
20 effectively withdraw the interrogatories?

21 JUDGE MILLER: No, ma'am. No, ma'am. And I
22 would really like to be directed to the -- to any
23 representation by Commonwealth Edison Company that it
24 was withdrawing interrogatories pending at the NRC.
25 There were also interrogatories and requests for

1 documents that were pending at the Illinois Commerce
2 Commission.

3 JUDGE KOHL: And were those withdrawn? Did
4 you withdraw some of those?

5 JUDGE MILLER: I do not believe that they were
6 withdrawn. But in any event, there was no withdrawal of
7 interrogatories at the NRC.

8 JUDGE KOHL: So any discussion about
9 depositions related to discovery over and above what you
10 still expected to get from interrogatories?

11 MR. MILLER: That was my interpretation,
12 because the interrogatories -- I believe one of the
13 panel members referred to them as boilerplate. Perhaps
14 that's an accurate description, but they really are the
15 most basic sorts of questions, which are, do you have
16 any witnesses? And if so, tell us their names so that
17 we can go take their depositions.

18 JUDGE KOHL: They are basic questions, but
19 they ask for broad answers or fairly comprehensive
20 answers, do they not?

21 MR. MILLER: Well, they ask for an
22 identification of the facts which underlie the
23 contentions. And if those facts were known to the
24 League at the time it drafted these contentions, it
25 would clearly be an extensive undertaking. It also asks

1 for the names of any witnesses that might be called. It
2 also asks for identification of documents. Those are
3 the normal, at least in my experience, first steps to a
4 discovery program, which then leads to a request for the
5 documents and for depositions.

6 I would not have anticipated written
7 interrogatories which would have continued to go.
8 Again, in my experience those kinds of interrogatories
9 turn into lawyers' exercises. Lawyers draft the
10 interrogatories, parsing words very carefully, and
11 lawyers prepare the responses parsing their words
12 equally carefully, and nothing is accomplished.

13 I might point out that the parallel experience
14 we have had with the remaining Intervenor in the Byron
15 proceeding has been instructive. The same type of
16 interrogatories were posed to them. They are not
17 represented by counsel. After some delay, they answered
18 the interrogatories, and the discovery process has gone
19 forward in a way that I believe is clearly contemplated
20 by the Commission's Rules of Practice and by its
21 policies. We've had our depositions and we have
22 determined that some of the contentions filed by
23 DAARE/SAFE, some of which overlap, I might add, the
24 League's contentions, are suitable for summary
25 disposition and we will be filing those in accordance

1 with a schedule that is established by the Licensing
2 Board, and some are not, and we're going to have a
3 hearing on them.

4 JUDGE EILPERIN: Has there been a motion for
5 sanctions filed as to DAARE/SAFE?

6 MR. MILLER: No, there was not because there
7 was a commitment by them to file answers to the
8 interrogatories, and they kept the commitment. They did
9 what they said they were going to do.

10 JUDGE EILPERIN: How much documentary
11 information did you get from the League on an informal
12 basis? I think at one point I've seen --

13 MR. MILLER: Yes, there's a representation,
14 and I must say I was puzzled by that. I do not believe
15 that we have received any documentation in the form of a
16 submission of documents other than perhaps
17 identification of certain NUREG reports from the League,
18 certainly none that I am aware of.

19 JUDGE KOHL: I am concerned about a --

20 MR. MILLER: Excuse me. If I might just
21 consult again with Mr. Murphy.

22 (Pause.)

23

24

25

1 (Pause.)

2 MR. MILLER: Mr. Murphy, who I just consulted
3 with, tells me we have received documents from the
4 League in the Illinois Commerce Commission proceeding.
5 Some of them were from the files of Messrs. Minor and
6 Hubbard.

7 JUDGE EILPERIN: Had you received all of the
8 documentary support to their affidavit that was
9 submitted in the Illinois Commerce Commission
10 proceeding? Is that what you are saying?

11 MR. MILLER: I can't -- I don't know whether
12 we-- It was represented to us as being the complete
13 documentary support for their affidavits, yes, sir.

14 JUDGE KOHL: I am concerned about a possible
15 inconsistency, then, in your letter of September 16th to
16 Mr. Cherry. You state there that "Yesterday
17 you" -- referring to Mr. Cherry -- "agreed to provide
18 answers on behalf of the League and on behalf of
19 DAARE/SAFE by October 1st."

20 MR. MILLER: Yes, sir -- Yes ma'am. I just
21 did the same thing.

22 JUDGE KOHL: You all are having a little
23 problem with that this morning.

24 MR. MILLER: Yes. I apologize.

25 MR. CHERRY: I apologize on behalf of both of

1 us.

2 JUDGE KOHL: I am sure the League of Women
3 Voters will like this.

4 (Laughter.)

5 MR. MILLER: At that point in time Mr. Cherry
6 was, I believe, negotiating with DAARE/SAFE to represent
7 them. DAARE/SAFE is a group of professors from Northern
8 Illinois University and local residents of the Rockford
9 area. At various times they have had representation by
10 a lawyer -- not Mr. Cherry. He has withdrawn his
11 appearance. This occurred in the summer of 1981. We
12 had difficulty in knowing to whom to address papers.

13 As you can see from the transcript of the
14 October 2nd conference call, there was some confusion on
15 the part of DAAPE/SAFE as to just what the status of
16 their legal representation was. In any event, I do not
17 believe that Mr. Cherry in fact represented DAARE/SAFE.
18 He certainly never filed a notice of appearance on their
19 behalf.

20 JUDGE KOHL: So at what point did you get the
21 answers from them to your interrogatories? Were they
22 filed timely? From this it sounds like they had the
23 same "obligation" by October 1st to respond.

24 MR. MILLER: Yes. It was not by October 1st,
25 but there was a promise, something we never received

1 from the League, but a promise that they would be
2 answered by a date certain and reasons were given why
3 they could not be answered by October 1st. We accepted
4 that and went forward with the process.

5 There are some other techniques that have been
6 identified by the Commission as ways of narrowing the
7 scope of contentions and determining what facts are in
8 issue. We tried those too. We conferred with counsel
9 for the League after the August 18th order, again to
10 determine what the date would be when the League would
11 respond.

12 When that fell apart -- that is, when October
13 1st came and went and we knew we were not going to
14 receive answers -- we tried the next step, one which Mr.
15 Cherry says should have been done. That is, we wanted a
16 telephone conference call with the Board and the parties
17 so that this matter could be dealt with effectively and
18 in a timely fashion.

19 There had been a lot of paper filed at that
20 point in time, and it seemed to us that it was
21 appropriate to get the Board involved. I participated
22 personally in setting up the arrangements for that
23 conference call and believed that I had Mr. Cherry's
24 agreement to participate. Some 45 minutes before the
25 call was set to take place we were informed that he

1 could not or would not participate. So that went for
2 naught.

3 At any stage in this whole progression from
4 interrogatory to imposition of the sanction of
5 dismissal, the League could probably have purged itself
6 of the default and gone forward in the proceeding by
7 simply answering the interrogatories. All lawyers have
8 to play by the rules. All parties to these proceedings
9 have to play by the rules. If there is an order that
10 says you will answer interrogatories and you are under
11 pain of dismissal from the proceeding, answer the
12 interrogatories.

13 JUDGE KOHL: Mr. Cherry argues that the order
14 was not specific enough, that the Licensing Board never
15 got involved so directly as to announce a date certain
16 by which he had to respond to your particular
17 interrogatories. And for that reason he felt that it
18 was an open question subject to negotiations.

19 MR. MILLER: Well, there is a paragraph which
20 I believe is written in very straightforward terms which
21 deals with the objections that were then presented to
22 the Licensing Board by the League to justify its failure
23 to answer the interrogatories.

24 It says: "The League's objections, based
25 largely upon the argument that the four interrogatories

1 are premature, are denied. Movant is entitled to full
2 and responsive answers based upon the presently known
3 status of these matters and to additional information
4 when it becomes available."

5 Then it goes on and says: "The parties will
6 be allowed a reasonable period of time to confer."
7 Still dealing with the interrogatories. "However,
8 responsive answers shall be filed to these and other
9 interrogatories promptly and discovery shall be
10 conducted expeditiously."

11 I am at a loss to understand how those words,
12 given the procedural context in which this dispute
13 arose, could be interpreted as somehow excusing the
14 League from answering the interrogatories.

15 JUDGE EILPERIN: If we found that there has
16 been a willful disobedience to that one Licensing Board
17 order, do you think that is sufficient to justify the
18 sanction of dismissal?

19 MR. MILLER: Yes, sir, given the fact that the
20 League has persisted from the time that the motion to
21 compel was filed until, including Mr. Cherry's
22 appearance here today, to assert that there is a right
23 that it has not to respond to orders of the Licensing
24 Board validly issued after full argument and simply to
25 impose its own view of a consolidated proceeding or

1 whatever, not only on the parties but on the Licensing
2 Board.

3 This sort of conduct, in my judgment, has two
4 serious consequences. First, I think the whole process
5 is in jeopardy if Licensing Board orders can be flouted,
6 if the League can simply thumb its nose at orders, and
7 then on the basis of assertions of some agreement that
8 are directly contradicted by the papers and get back
9 into the proceeding, then the whole orderly process
10 which is contemplated of getting from a notice of
11 hearing to an initial decision by the Licensing Boards
12 is in jeopardy.

13 Secondly, I believe that the hearings on the
14 Byron Station in particular will be absolute chaos. We
15 are now at a stage where there has been an ACRS
16 letter. There has been a Safety Evaluation Report
17 issued, and we are still where we were ten months ago in
18 terms of knowing what the League has in mind, and
19 hearings are scheduled in August of this year.

20 JUDGE EILPERIN: When is a realistic date for
21 fuel loading of the plant? Does the end of '83 sound
22 right?

23 MR. MILLER: Yes, sir. That is the present
24 schedule. I trust the Board received copies of my March
25 26th letter. It was served on the Appeal Board as well

1 as directed to the Licensing Board members, with respect
2 to the most recent schedule adjustment in the fuel load
3 date.

4 But I will repeat what was said in that
5 letter. While the fuel load date has slipped
6 approximately six to eight months from the April 1983
7 date previously contemplated, the company is still
8 planning on commercial operation of the units in 1984,
9 the summer of 1984.

10 JUDGE EILPERIN: So the end of '83 is what you
11 think is a realistic date for fuel load?

12 MR. MILLER: At this point in time, yes, sir.

13 JUDGE KOHL: Has the Licensing Board estimated
14 a time when they believe the hearing would be completed?

15 MR. MILLER: I do not believe they have.
16 Certainly nothing has been disclosed to us. My belief
17 is that the schedule for the Byron hearings may have
18 been governed by the so-called Bevel Committee
19 guidelines, which measures a time period from when the
20 Safety Evaluation Report is issued to a Commission
21 decision. I believe it may be 300 days or something
22 like that.

23 JUDGE EILPERIN: Do you have any feel how long
24 the hearing will take solely with the current
25 Intervenorrs involved?

1 MR. MILLER: My guess is that we are probably
2 looking at a three to four week hearing. The
3 Intervenor DAARE/SAFE have been quite diligent in
4 locating and identifying witnesses to support the
5 Contentions that they have put forward; and they have
6 also identified some matters arising out of the Safety
7 Evaluation Report which they believe give rise to
8 further Contentions -- three additional Contentions.

9 That matter is currently pending before the
10 Licensing Board for decision. So we are looking at I
11 believe nine numbered contentions, one of which dealing
12 with generic unresolved safety issues has six or seven
13 subparts. So there is a significant number of issues to
14 be addressed in the hearing.

15 JUDGE EILPERIN: And you think sometime by
16 early October that hearing would be finished?

17 MR. MILLER: Yes.

18 JUDGE GOTCHY: What is the status? You
19 mentioned that there had been a motion for summary
20 disposition on a number of the DAARE/SAFE contentions.

21 MR. MILLER: No. If I said that, I misspoke
22 myself.

23 JUDGE GOTCHY: That is what I thought you
24 said.

25 MR. MILLER: No. I said the date for filing

1 motions for summary dispositions is June 7th. We
2 anticipate being able to file such motions on a number
3 of contentions.

4 JUDGE GOTCHY: I see. And you are filing
5 motions on how many of those nine Contentions, do you
6 recall? I am curious because there is a lot of overlap,
7 as you said, between some of the DAARE/SAFE Contentions
8 and some of the League's Contentions.

9 MR. MILLER: Dr. Gotchy, I am just not
10 prepared at this point to say. I would guess that it is
11 going to be at least three or four, but some of the
12 unresolved -- I know that we will not be in a position
13 to file summary disposition motions with respect to many
14 of the unresolved safety issue Contentions.

15 JUDGE GOTCHY: Since last fall, when the Board
16 order was issued, there have been changes as you know in
17 the Commission's rules regarding some of the subjects
18 which are present in the 114 Contentions that were
19 accepted by the Board.

20 MR. MILLER: Right, there are about five of
21 them on financial qualifications and presumably would
22 be--

23 JUDGE GOTCHY: Need for power and alternative
24 energy. I was curious as to if we elected in the future
25 to allow Mr. Cherry to pursue his role in the hearing,

1 if considering that many of the 114 interrogatories
2 would now be removed by rule, some which are related to
3 the Contentions from DAARE/SAFE would possibly be
4 dismissed by summary disposition, if it would be
5 reasonable in your mind that assuming Mr. Cherry lived
6 up to his promise here today that if he were readmitted
7 that he would pursue everything very diligently, if
8 there would be any prospect of them completing all the
9 requirements to participate in a hearing beginning this
10 fall.

11 MR. MILLER: I do not see how it is possible
12 myself. First of all, I tried to listen very carefully
13 to Mr. Cherry's response to, I guess it was, Judge
14 Kohl's question, and I did not understand that there was
15 any wholehearted acquiescence in moving forward with
16 discovery.

17 Again, the League wants it on its terms. And
18 if the League is to be readmitted conditional on its
19 complying with the discovery request, I understood that
20 the League's position would be that that was not
21 acceptable to them. But perhaps I misunderstood.

22 In any event, I believe that at this stage
23 readmission of the League on any basis is going to be
24 extremely difficult for all the parties and the Board.
25 And I guess I am a little bit concerned that the

1 sanction of dismissal, although I can understand it,
2 that the sanction of dismissal is kind of a problem
3 perhaps for the Appeal Board.

4 It is obviously the most severe sanction that
5 can be imposed. When one looks at the alternatives that
6 were available to the Licensing Board, there was simply
7 nothing in its arsenal of sanctions that was not the
8 functional equivalent of dismissal, or which would have
9 had literally no effect in assuring future compliance.

10 The language of the Board's August 18th order
11 was sufficiently critical and condemnatory of the
12 League's approach with respect to the interrogatories
13 to, at least in my mind, constitute a reprimand or a
14 clear indication at the least that the conduct of the
15 League ought to change. Now that it had no effect.

16 In cases in which dismissal of parties has
17 taken place at the NRC, there have been, as the League
18 points out in its brief, multiple chances for
19 redemption. In each of those cases, though, there was a
20 pro se intervenor involved. Indeed, in the Susquehanna
21 case it was apparent I believe to the Licensing Board
22 and the Appeal Board that there may have been a
23 fundamental misunderstanding of what was required of
24 parties to NRC proceedings with respect to discovery
25 obligations. Mr. Cherry, by his own proclamation, is a

1 skilled practitioner. And to not impose sanctions in
2 this instance I believe would make a mockery of the
3 process.

4 If the Board has no further questions, I am
5 finished.

6 JUDGE EILPERIN: Mr. Cherry, you have about
7 six more minutes.

8 MR. CHERRY: Yes. I would like to, in light
9 of Mr. Miller's poignant closing, lift us up to say that
10 I have a motion for sanctions pending too, and the fuel
11 dates of '83 and the hearings in August and the
12 commercial operation of Commonwealth Edison are nice,
13 but I believe we ought to focus -- to me, that is
14 totally irrelevant to whether or not this process, which
15 was initiated by Commonwealth Edison, slows down their
16 hearing or their fuel date.

17 Mr. Miller, by his own admonition, was --

18 JUDGE EILPERIN: Even if you are found to have
19 been at fault?

20 MR. CHERRY: No. If I am found to have been
21 at fault, cut my head off. I just do not think that
22 there is a record to support that; and if it is done, I
23 would like it done as quickly as possible so that I can
24 deal with that.

25 JUDGE EILPERIN: I will say this, though, that

1 you are advised promptly that if we do admit you back
2 into the hearing I would certainly ask my colleagues to
3 impose a deadline far shorter than one week after our
4 decision to fully answer Edison's outstanding
5 interrogatories.

6 MR. CHERRY: If a decision comes down, Judge
7 Eilperin, I am not here simply to get back into the
8 Rockford League of Women Voters' hearing. That is my
9 right, and that was taken away. I am outraged by Mr.
10 Miller's decision, and I do not want in either this
11 community or this town to have a situation where a
12 Licensing Board Chairman can make irresponsible
13 statements that sound like judge and judicial
14 temperament but are far short of that.

15 And if you are going to order the Rockford
16 League of Women Voters to answer interrogatories within
17 one week, I would assume that you would find for Mr.
18 Miller on the factual circumstances and call me a
19 willful pattern of behavior, because I do not see how I
20 should bear the brunt of this decision unless this Board
21 is willing to make factual determinations.

22 I will go Mr. Miller one better. If the loser
23 in a hearing below between me and him gets tossed out of
24 this proceeding -- i.e., I am right and he gets tossed
25 out with Commonwealth Edison -- then I should like a

1 hearing. I am not afraid of what that hearing will
2 bring, but I do not believe under the circumstances when
3 there is no record I should apologize for my conduct.

4 I do not think a hearing is the appropriate
5 way to go, but I am not going to back off from one if I
6 am told that somehow I am remiss on representations that
7 were taken by the Licensing Board out of thin air.

8 JUDGE EILPERIN: I want you to be advised that
9 at least I, for one, take the failure to answer the
10 interrogatories rather seriously and, as I say, if under
11 any circumstances we come to a decision that would let
12 the League back in, again I for one would expect the
13 League's answers to those interrogatories to be full and
14 complete very, very soon after a decision is made.

15 MR. CHERRY: What about my interrogatories
16 pending against the Staff and Commonwealth Edison? Do I
17 get some direction to at least get an order out of the
18 Licensing Board telling me whether I am entitled to them
19 or not?

20 JUDGE KOHL: I will direct your attention at
21 least for the interim to 10 CFR 2.740.B.1.

22 MR. CHERRY: I appreciate that, but I made a
23 motion to the Regulatory Staff to ask for these
24 interrogatories to be answered. The Regulatory Staff's
25 answer said as soon as Contentions were given they would

1 promptly answer the interrogatories. Commonwealth
2 Edison went further. It said not only will we answer
3 the interrogatories when the Contentions are finalized,
4 but I will do the best I can to help out in the
5 interim. So this record does not reek of justice on one
6 side.

7 JUDGE KOHL: Your recourse for that it seems
8 is before the Licensing Board.

9 MR. CHERRY: But I made a motion, Judge Kohl,
10 and it has not been ruled on.

11 JUDGE KOHL: No longer. In terms of the
12 Licensing Board, at this point in time you are not a
13 party there, so there is no obligation on the Board.

14 MR. CHERRY: My motion, Judge Kohl, before the
15 Licensing Board was made probably six months before they
16 ever decided the petition for reconsideration. It has
17 been pending almost two years before the Licensing
18 Board. They have simply ignored it.

19 JUDGE EILPERIN: Let me ask you this, Mr.
20 Cherry. Is it your assertion that Edison made discovery
21 agreements to you which are not reflected in the letters
22 in this proceeding?

23 MR. CHERRY: Sure. I walked into a meeting
24 with Edison and they gave me -- which is Item 12 to my
25 petition for reconsideration -- 40 pages of revised

1 Contentions, and yet Mr. Miller stands up before you and
2 says my Contentions are vague. A story, to be
3 believeable, has got to make sense.

4 How does a lawyer revise my Contentions in 40
5 pages and ask me in the same time frame, mind you, to
6 consider revising that, and then you believe him that we
7 had agreed on interrogatories? It does not make any
8 sense.

9 JUDGE EILPERIN: Am I correct you are saying
10 that although it is not reflected in those letters as
11 far as I can read them, that Edison nevertheless agreed
12 to postpone or as you say withdraw its interrogatories
13 pending receipt of answers from -- pending your receipt
14 of answers from Edison and pending depositions of some
15 of your witnesses?

16 MR. CHERRY: Paul Murphy said to me in his
17 office in the First National Bank Building that he
18 wanted to take the depositions of Minor and Hubbard and
19 I said I hope we take them in both cases so we do not
20 have to do them over again, and it was at that juncture
21 that I said to him it does not make any sense for me to
22 answer interrogatories using the same people if you are
23 going to take your depositions. And in the context of
24 my giving him a continuance from his interrogatories,
25 those interrogatories were put on hold. Yes, sir.

1 JUDGE EILPERIN: What was his answer? There
2 are six affidavits that say there was no such
3 agreement.

4 MR. CHERRY: And the world has believed that
5 unresolved safety problems have been resolved for ten
6 years.

7 JUDGE EILPERIN: I am just asking --

8 MR. CHERRY: Those affidavits, if they
9 conflict with my position, have to be either of two
10 things: (a) they are false; (b) they are the observation
11 of a witness, which sometimes differs with the
12 observation of a different witness.

13 I make that observation because it is pretty
14 hard these days to be found guilty of perjury; one has
15 to be intentional. It is still possible, members of the
16 Appeal panel, possible -- I would like to hope
17 so -- that the lawyers had an ordinary, good faith
18 lawyers' disagreement, and Mr. Murphy and Mr. Miller
19 believe what they believe and I believe what I believe,
20 and the Licensing Board opines what it opines --

21 JUDGE EILPERIN: You have one minute.

22 MR. CHERRY: -- in its judgment.

23 I think it would be a mistake to order
24 interrogatories to be answered by a date certain,
25 although I am not, as Mr. Miller has suggested, telling

1 you I will not do so. I will not disobey any order of
2 any Board or court. But I think what you should
3 do -- and I ask you to do -- is to call an immediate
4 conference and have the Licensing Board meet and set a
5 schedule that is rational. You might even ask them to
6 do that before you decide the case, if you want to. But
7 do not make observations on Mass. Avenue about wars in
8 the Falklands. Let us go to the Falklands. Let us sit
9 in the room with the Licensing Board participant who
10 participates in the process.

11 Thank you for your attention.

12 JUDGE KOHL: I have one last question. I just
13 want to clarify this. If the Licensing Board sets a
14 date certain by which you are to respond to the
15 outstanding interrogatories of Edison, you will abide by
16 that and respond. Is that correct?

17 MR. CHERRY: Yes.

18 JUDGE KOHL: Thank you.

19 JUDGE EILPERIN: The case is submitted. Thank
20 you very much.

21 MR. CHERRY: It obviously depends on the kinds
22 of things that go on -- the availability of my
23 witnesses, where I am. If you said tomorrow, I could
24 not do that, for example.

25 JUDGE KOHL: Counsel, your answer was "yes."

1 You have had an opportunity to qualify it and you chose
2 not to.

3 JUDGE EILPERIN: The case is submitted. Thank
4 you very much.

5 (Whereupon, at 11:38 o'clock a.m., the case
6 was submitted.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

ATOMIC SAFETY AND LICENSING BOARD APPEAL BOARD

in the matter of: Consolidated Edison Company (Byron Nuclear Power Plant)

Date of Proceeding: May 13, 1982

Docket Number: 50-454-OL & 50-455 OL

Place of Proceeding: Bethesda, Maryland

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

Jane N. Beach

Official Reporter (Typed)

Jane N. Beach

Official Reporter (Signature)