

1 ORIGINAL

2 UNITED STATES OF AMERICA

3 NUCLEAR REGULATORY COMMISSION

4 ORIGINAL

5
6 In the Matter of:

7 BYRON STATION
8 (Conference Call)

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3
4 BEFORE THE ATOMIC SAFETY & LICENSING BOARD

5
6 In the Matter of:
7 BYRON STATION

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12 Conference Call
13 4350 East West Highway
14 Bethesda, Maryland

15 July 5, 1984

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18 Hearing in the above-entitled matter reconvened
19 at 2:00 p.m., pursuant to adjournment.
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PARTICIPANTS

JUDGE IVAN SMITH
JUDGE DIXON CALLIHAN
JUDGE RICHARD COLE
M. MILLER
D. CASSELL
J. LEVIN
B. BECKER
S. LEWIS
- MORRISON

*Exhibit
Grandcase
1-1-10*

P R O C E E D I N G S

1
2 JUDGE SMITH: We had a Mr. Crockett in setting up
3 this telephone conference call this morning, told Mr.
4 Miller that he may, and he request that he summarize last
5 Tuesday's conference call at the beginning of this one,
6 so that we can elimiante that rather akward memorandum
7 and approval business. So, Mr. Miller, if you don't mind,
8 are you prepared to do that?

9 MR. MILLER: I am prepared to do so, Judge Smith.
10 I have not had an opportunity to discuss this with Mr.
11 Cassell or Mr. Lewis and I tried to be faithful to my
12 notes and my recollection of what transpired, but perhaps
13 each of them could keep track of what I was saying, and
14 if they disagree, perhpas they could put their version
15 on the record as well.

16 JUDGE SMITH: Right. I recognize that you would
17 not have time to get that approved. I recognize that we
18 would have the opportunity to correct your notes.

19 MR. CASSELL: Mr. Smith, I wonder if I could suggest
20 in the interest of expedition, a simpler procedure than
21 that. I presume that I will be in substantial agreement
22 with Mike's summary. Since we are now on the record with
23 all three judges, I'm going to be basically stating my
24 case in a summarized form. I wonder whether we really
25 need to go back and go all over everything that we said

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1 Tuesday, why not just, on the basis of a more efficient
2 preparation, just go ahead and state the case now, and
3 after that is done, if we still think that we need to
4 have the supplements of Tuesday's discussion, I wouldn't
5 object at that point.

6 MR. LEWIS: We're having trouble hearing you Doug,
7 could you please speak up. We could hear that much but.

8 MR. CASSELL: I will try to speak up. Judge Smith,
9 did you hear what I said?

10 JUDGE SMITH: Yes, but you are much weaker than
11 Mr. Miller and Mr. Lewis.

12 MR. CASSELL: Well. If you want to reconnect the
13 phone call. Right now, I am speaking in a fairly loud
14 voice. Can anyone hear me?

15 JUDGE SMITH: Yes. I can hear you, but with some
16 difficulty. Lets see if we can't get a better connection
17 for you. I think everyone else is alright. Can I be
18 heard alright?

19 MR. LEWIS: Yes.

20 JUDGE SMITH: Alright. Lets see if we can't get
21 the operator to connect you better.

22 MR. CASSELL: Do you want me to hang up the phone
23 then?

24 JUDGE SMITH: Hang on a minute till we make sure
25 we can even get an operator here.

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1 (Brief Recess.)

2 JUDGE SMITH: Mr. Cassell.

3 MR. CASSELL: Yes sir.

4 JUDGE SMITH: We have not been on the record. You
5 are suggesting that rather than have Mr. Miller summarize
6 the entire conference of Tuesday, that you summarize and
7 restate your position. I think that is satisfactory, and
8 then any important omissions perceived by others can be
9 added.

10 MR. CASSELL: Very well.

11 JUDGE SMITH: Alright. Why don't you begin then.

12 MR. CASSELL: Alright. Can everybody hear me?

13 JUDGE SMITH: yes. We hear alright. Proceed.

14 MR. CASSELL: Alright. Let me briefly state the
15 facts as I understand them, and then indicate five reasons
16 why I believe with all due respect that the licensing
17 board should grant a two-week extension of time for the
18 commencement of the hearing. The first fact of which we
19 are all aware is that Jean has been the sole attorney
20 Jean Whicher has been the sole attorney attending the
21 hearings and actually representing the interveners on the
22 issues of quality assurance now for at least the last
23 18 months.

24 Second, the hearing that is now scheduled for July
25 16th, was set May 31st on I think is fair to characterize

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1 was recognized by all as a time schedule that did not al-
2 low for a great deal of excess time. Indeed, it was a
3 tight schedule. Moreover, I think a fair reading of the
4 transcript of May 31st, which I have reviewed this mor-
5 ning indicates that the hearing schedule was one which
6 interveners put the board on notice would be difficult
7 for us to meet.

8 In particular, I refer to page 8268 of the May 31
9 transcript in which Judge Smith raised the question of
10 scheduling and I'm quoting Ms. Whicher. "I do not ques-
11 tion the applicants' right to an expeditious hearing. My
12 point is that that hearing ought not to be backed up
13 against Edison's September 15th Full load date. We have
14 an equal right to expeditious and fair and well-meaning
15 presentation. The more time that you give us, the better
16 chance is that is what you will get from us."

17 Quoting further, from page 8269, Judge Smith,
18 "Alright, your point is that you are asking for more time.
19 More time for whatever purpose, I don't know.

20 Ms. Whicher, "To prepare for this hearing your
21 honor."

22 It was only following that change when the board
23 made clear that it would not grant more time than July
24 16th that Ms. Whicher indicated that the staff propose
25 a July 16th date was preferable to the applicants propos-

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1 ed date, which was somewhat earlier. On Saturday, June 23,
2 before I was aware, or Jane was aware that she was ill, she
3 and I had a couple of hours in which we discussed the var-
4 ious efforts that she had been making to prepare this cas
5 for hearing on July 16th. She and I, after discussing the
6 situation at that time, agreed that immediately in the
7 following week she would seek a conference call for the
8 purpose of requesting a postponement on the basic grounds
9 that the time allowed was simply not enough with which
10 to complete the work. She reviewed with me the vigorous
11 and diligent efforts that she had made to identify and
12 recruit experts to work on the case, and the difficulty
13 we had found finding experts who were willing to make
14 themselves available for relatively little, if any compen-
15 sation on such short notice. In particular, Mr. Charles
16 Stokes, who is the interveners engineering witness, as you
17 know, was first contacted by Ms. Whicher in late April or
18 early May. She advised at that time that she would not
19 be available because of commitments in other cases to re-
20 view any documents in this case until the week of June
21 25th. We were told by Ishon, Lincoln, and Dia, that the
22 documents would be ready for review during the week of
23 June 5th. On or about June 25th was the earliest that
24 Mr. Stokes was ready to begin reviewing what the
25 and documents from Edison that are relevant to the

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1 reman. On Monday, June 25th, Jane visited her doctor be-
2 cause she was feeling ill and extremely fatigued. He sent
3 her home, gave her a preliminary indication that she might
4 have a serious illness that would require her to be
5 bed ridden for a period of weeks or more, and that diagno-
6 sis as we know is subsequently confirmed a week later by
7 the attending physician. Jane has under physicians orders
8 to remain at home in bed for a period of weeks after
9 which her recovery must be partial and gradual at best.
10 On June 26th, we had a conference call with the licensing
11 board to ask for an extension of time on a hearing in a
12 situation when we were somewhat uncertain as to whether
13 she would be back in the saddle for, back and able to
14 prepare the case a week later or whether she would be out
15 for an extended period.

16 At that time, the board declined to extend the date
17 for the hearing, but did grant a two-week extension for
18 the time of the filing of the interveners pre-filed tes-
19 timony from July 2nd to July 16th. That was acceptable
20 to the interveners at the time, because we weren't sure
21 whether Ms. Whicher would be back in time to prepare the
22 case. However, because of the possibility that she might
23 be unable to recover in time to prepare for the case,
24 during June 22nd through July 2nd, EPI conducted literally
25 a nationwide search for a qualified search to join our

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1 staff to be paid by DPI on an additional salary or re-
2 tainer basis in addition to our existing budget to handle
3 the preparation of the hearing, in this case. We did
4 serve, because the other six attorneys in this office all
5 were heavily committed to on-going matters, and were not
6 in a position, whatever, to prepare this case for a hear-
7 ing on July 16th.

8 We had serious discussions with approximately a doz-
9 en attorneys around the nation. Since approximately June
10 28th, we have been in serious negotiations with a parti-
11 cular attorney with whom we are still in negotiations.
12 This attorney is a highly qualified lawyer with extensive
13 litigation experience. His expert or implicit credentials
14 and would be an able applicant for the interveners, if
15 this attorney is able to do it.

16 Because of schedulign matters within her office,
17 she has an ongoing practice involving other matters in
18 which proceedings may be set. Her final decision on whe-
19 ther she will be available to claim representation of
20 interveners in this case will not be possible before
21 Monday, July 9th. Her availability to interveners in this
22 case will not be prior to Monday July 16th. So, that she
23 would be able to come on board July 16th and begin to
24 prepare the case at that point, but if she were to begin
25 attending the hearing at that day, it would be on the

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1 basis of no preparation and no more familiarity with this
2 case that she might obtain from perhaps reading the de-
3 cisions the weekend before. This is a case, as you know,
4 in which Commonwealth Edison is represented by numerous
5 very able attorneys. This is not a case in which the is-
6 sue is due interveners have a right to counsel. Inter-
7 veners have had counsel for a year and a half. Interven-
8 ers continue to have counsel. There is simply approxima-
9 tely a two-week hiatus during which the interveners
10 counsel because one human being has fallen ill, and it is
11 impossible to replace that human being without at least a
12 brief period of finding someone to replace her.

13 We will have a person, but we do not have that per-
14 son on board yet, and we will not have a person on board
15 in time to prepare for the hearing, if the hearing begining
16 July 2nd. We do expect to have counsel on or about July
17 2nd. It is for that reason that we have asked for a two-
18 week extension of the commencement of the hearing. Now.

19 JUDGE SMITH: I think you misspoke on Mr. Cassell.

20 MR. CASSELL: I did not intend to do so sir, so
21 please correct me. July 2nd. You meant July 9?

22 JUDGE SMITH: You said that you would have counsel
23 on July 2nd, you meant July 9?

24 MR. CASSELL: I mean July 16th, sir.

25 JUDGE SMITH: July 16th.

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1 MR. CASSELL: Right. The problem is, we won't have
2 anybody who will be able to prepare for the hearing. We
3 do expect to have counsel available by July 16, but not
4 before then so there would be no time to prepare for a
5 hearing. Now, there are basically five reasons why we
6 submit to the board that you should seriously consider
7 despite all the considerations that you might be aware of
8 counseling against an extension of the hearings, and de-
9 spite whatever inconvenience it might present for the
10 judges in the case, and I am sensitive to that concern as
11 well. Five reasons why we believe a two-week extension of
12 the hearings is reasonable and minimal. The best reasons
13 is simple fairness. As you will hear from Mr. Miller,
14 shortly, one of the alternatives presented by Commonwealth
15 Edison usually represented by numerous highly qualified
16 attorneys is that interveners have to have their case
17 presented by a law student who has had no trial experience
18 whatever, has never even taken a deposition let alone
19 attended a hearing, or to have their case presented by
20 some experts who the interveners who are not quali-
21 fied as interrogators, except to the extent that their
22 technical background would give them information.

23 It is simply unfair to require interveners, when the
24 issue is a two-week delay, to go to trial with that kind
25 of limited representation, when the staff and Edison and

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1 cares about the outcome of this hearing would not under
2 any circumstances commit itself to be represented by some-
3 one who is not capable of practicing law, interrogating
4 witnesses, cross-examining witnesses, presenting arguments,
5 presenting rebuttal testimony, and otherwise performing
6 the appropriate functions of counsel in a case of this
7 magnitude.

8 The second consideration of the five should lead you
9 in our view, to grant this request for an extension, is the
10 need for an adequate and fully developed record in this
11 case. The staff's position, as we understand it, is in
12 many respects, largely on the side of Edison's case. It
13 certainly is not an adverse to Edison's case as a position
14 of interveners. The only way there is going to be a full
15 and fair adversary presentation of the issues in this
16 case, in a fully developed way, the interveners are able
17 to be adequately represented at the proceeding. You are
18 not going to have a full adversary presentation if the matter
19 is left to the staff and Edison. Because, they largely
20 agree, that is my understanding.

21 Thirdly, there is a public interest in this case.
22 This, as you know, is the first time in the history of
23 Nuclear Regulation in this country when an operating li-
24 cense for a nuclear power plant has been denied. This is
25 a remand in which there is a tremendous public interest

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1 of what the outcome of that case will be. It is important
2 to all parties, to the commissions of the industry, and
3 the public that we all be assured that the issues are
4 heard fairly and fully. That will not happen if we have
5 to be represented by a law student, or someone who has
6 never practiced law, or doesn't know how to.

7 The fourth reason why you should consider granting
8 this delay is that the wall, it seems to me support have
9 request for an extension. I cite you first to the case
10 of Northern Indiana Public Service Company, Bailey Gen-
11 erating Station, Alab 249, decision of December 24, 1974
12 by the Atomic Safety and Licensing Appeal Board. That was
13 a case in which a request for a one-week extension of time
14 was made because counsel for interveners in that case was
15 simultaneously having to prepare the evidentiary case for
16 trial before the licensing board on a remand, including
17 a remand in which the appeal board had said we wanted
18 an extradited hearing, at the same time were having to
19 prepare their brief in the court of appeals on an issue
20 in the case. And the appeal board in that case held, on
21 pages 984-985 that it had not in its remand order expe-
22 diting the case, have not "desired expedition at the cost
23 of buying participation of those parties questioning the
24 effectiveness of the wall process. This, unfor-
25 tunately was precisely the result of the licensing board's

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1 refusal to postpone the proceeding." Furthermore, "In
2 these circumstances, a one-week postponement of the trial
3 because of the scheduling conflict was not an unreasonable
4 request and should have been allowed." "In our view, the
5 commissions overriding desire was to see that new technique
6 explored fully at the hearing to be certain that the
7 National Lake Shore will continue to be protected."

8 "To achieve that end in which participation (be it with-
9 out undue delay) by this interested party, in addition to
10 its own staff so that there would be not question that the
11 result was fully tested in adversary hearings. Scheduling
12 the proceedings so that the joint interveners in the state
13 of Illinois could not participate, except at the cost
14 of work on their briefs in the court of Appeals, frus-
15 trated what we perceive to have been the central purpose
16 of the new hearing."

17 Page 986. "In short, we believe the board alone
18 misapprehended the relevant orders and attempted to compress
19 the hearing into an impossibly short space of time. If
20 which so, at the expense of essentially precluding the
21 full participation of parties we believe the commission
22 contemplated would be heard. The remedy we directed is
23 necessary to correct the situation."

24 I think those words at the Court of Appeal, if you
25 substitute the illness of counsel for the obligation of

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1 counsel to prepare a brief in the related matter fits this
2 case to a tee. And that the primary intention of the
3 remand in this case is to permit a full and fair develop-
4 ment of the important issues raised in connection with the
5 reinspection program including an adversary presentation
6 by disinterested parties would be precisely frustrated
7 by the kind of schedule that this board was asking inter-
8 veners to meet if it required us to commence the hearing
9 on July 16th.

10 In addition to that NRC precedent in the A-lab rul-
11 ing, I also cite you the case of Florida economic advis-
12 ory counsel versus Federal Power Commission's 251 Federal
13 643 on page 648, a decision of the United States Court of
14 Appeals for the District of Columbia Circuit in 1958, in
15 which the question was with respect to a legendary period
16 to submit to breaks following the hearing and arguments
17 in the case. The court there indicated that in that case
18 the time was not too short. Therefore, there was no
19 denial of substantial rights. It added on page 648,
20 "There is now showing that due to the speed, petition
21 has overlooked any important points which otherwise was
22 adversely affected."

23 In this case, I can assure you that if we are
24 force to go to trial on July 16th with no preparation
25 time permitted to us with counsel, that we will be certain

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1 to overlook important points, and we will no doubt be
2 adversely affected by that kind of compressed time
3 schedule, so that we would be denied substantial rights
4 in violation of constitutional due process, in addition
5 to violating the clear intention of the spirit in the
6 letter of the NRC ruling, which I quoted to you previously.

7 The fifth and final reason why I urge you to grant
8 this extension is that there is no good reason not to.
9 The only reason which we have heard for not granting an
10 extension is that Commonwealth Edison thinks at the pre-
11 sent timing that its fuel load date will be September
12 15th. The first problem with that is that we don't know
13 in fact that it will be September 15th. You all know the
14 history in this case and other cases of postponements of
15 fuel load dates. But, even if the fuel load date takes
16 place on September 15th, it might possibly be delayed by
17 these hearings. That does not go along with a request for
18 a two-week extension which is essential to a fair oppor-
19 tunity to present a case on the part of interveners.

20 JUDGE CALLIHAN: Who was that just speaking, this is
21 Callihan here?

22 JUDGE SMITH: Mr. Cassel just a moment please.

23 JUDGE CALLIHAN: This is Callihan, who is now speak-
24 ing?

25 MR. CASSELL: This is Cassell.

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1 JUDGE CALLIHAN: Cassel still, alright. Your volume
2 goes up and down. When it went down, I thought it was
3 somebody else. I apologize.

4 JUDGE SMITH: Mr. Cassell, apparently there is some-
5 thing that you can do to control the clarity and volume
6 of your speech there. It goes from quite distinct and
7 quite adequate to barely hearable.

8 MR. CASSELL: Well, I'll keep blasting away as best
9 I can Judge. I'm not sure, it may have to do with the
10 position of my body or something. I'm not fiddling with
11 file.

12 JUDGE CALLIHAN: This is Callihan again, maybe you
13 could speak a little slower, Mr. Cassell.

14 MR. CASSEL: Yes sir.

15 JUDGE CALLIHAN: Please.

16 MR. CASSELL: Let me quote to the board from its
17 memorandum in order on interveners motion for discovery on
18 date. This is the ruling of this board issued
19 November 15, 1983. I quote the board's ruling on page
20 2. "The success for such discovery assumes that the board
21 might so far fail of its duty that it would allow itself
22 to be rushed to judgement by a contingent fuel load case."
23 Furthermore, on page 3, "Apparently they are worried that
24 the board may feel compelled to issue an initial decision
25 on all issues before the applicants' latest estimated fuel

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1 load dates, and that the board, therefore, will not wait
2 for what may prove to be useful information from the
3 Byron Reinspection program and the NRC inspections and
4 investigations due to allegations against Hatfield."

5 Page 4, and I quote, "However, we are not treating
6 the applicants' estimated fuel load date as if it were
7 a deadline for our initial decision."

8 JUDGE SMITH: That's enough Mr. Cassell. We are
9 familiar with the memorandum. It is part of the record.
10 I can assure you that we are not treating the projected
11 fuel load date now as a deadline for our initial decision.
12 You may get on with other arguments.

13 MR. CASSELL: Finally, and related to that fifth
14 point is that here we are asking for a two-week extension
15 in a situation where a hearing has been on-going since
16 approximately March of 1983, if my memory serves me cor-
17 rectly, in terms of the evidentiary hearing. We are talk-
18 ing only about a brief additional time that would add only
19 two weeks to a year and a half hearing in return for
20 a dividend in quality of presentation on fairness in a
21 case of great public importance that would give you the
22 opportunity to be fairly and effectively represented at
23 the hearing. In these circumstances, for the five reasons
24 that I just suggested. We would urge the board to grant
25 a two-week extension in the hearing. Thank you very much

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1 for your patience. I understnad that's been long, but I
2 wanted to get it on the record.

3 JUDGE SMITH: Mr. Miller.

4 MR. MILLER: Judge Smith, I really kind of object
5 to the procedure which Mr. Cassell has followed, which I
6 think takes advantage of certainly my clients and myself
7 and I think of the board too. We had a conference call
8 on Tuesday, which discussed all of these matters. We
9 spent, I think, approximately two hours on the telephone,
10 and I think at the end of it, since there was no reporter
11 you asked me to prepare a memorandum, and that was modi-
12 fied this morning to state what the substance of the con-
13 versations were on the record. What we now have is Mr.
14 Cassell making a obviously well-rehearsed and well-
15 researched presentation on his reason for a continuance
16 which are hardly a restatement of what he presented to
17 the board on Tuesday.

18 I think it only fiar to submit in writing the memo-
19 randum that we were going to present orally. I don't want
20 to take the time of the parties of the board to discuss
21 again what happened on Tuesday. I think that the record
22 ought to be complete, so that it does not appear as if
23 we are now in the situation where Mr. Cassell is present-
24 ing these arguments as if they were the same arguments
25 he had presented to us on Tuesday. I would like to make

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1 a couple of observations. First of all, I don't think
2 outside of the citations to legal authorities and some
3 references to the board's order that you heard anything
4 new beyond what was heard in the conference call on Tues-
5 day. What notably lacking from Mr. Cassell's presenta-
6 tion is any discussion of why any of the procedural steps
7 that I offered in the conference call on Tuesday are not
8 a satisfactory substitute or a continuance.

9 The interveners position appears to be that legal
10 counsel, and legal counsel only are what is essential to
11 the full and fair presentation of their case. I would
12 like to observe, I haven't had a chance to go and obviously
13 read the cases that Mr. Cassell cited, but I did get a
14 chance to look at the transcript references that he cited
15 to you, where according to him that Ms. Whicher put the
16 board on notice that the July 16th hearing date was ques-
17 tionalbe in her terms of her ability to achieve it. That
18 discussion and the quotations that Mr. Cassell read to you
19 arose in the context of an interchange between you, Judge
20 Smith and Ms. Whicher, in which the right of the interven-
21 ers to raise issues beyond those that were in the scope
22 of the remanded hearing, was being discussed.

23 That is, Ms. Whicher was again asserting what she
24 believes the right, her right, and the right of her client
25 to raise any new issue that had arisen since the close of

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1 the hearing. It was in that context that the statement
2 that Mr. Cassell quoted you pages 8268 and 8269 of the
3 transcript were made. I don't know quite how to put this
4 except very bluntly. It appears to me that Mr. Cassell
5 hasn't called me since the last conference call, that in-
6 stead of giving any thought at all to my suggestions, in-
7 stead of calling me and discussing with me whether there
8 was some other procedural step that perhaps I had over-
9 looked that would authoritate the start of the hearings
10 on July 16th and give the interveners access to the infor-
11 mation that they needed so that they could conduct a
12 cross-examination and participate meaningfully in the
13 hearings that would begin on that date. He spent his time
14 rooting around in the log books to come up with a bunch
15 of cases as to why it's a deprivation of their right to
16 not have this two week extension.

17 I take it as just contrary to the way in which I put
18 forward, the spirit in which I put forward my proposal,
19 and I again repeat, I do not believe that legal counsel
20 in a case where the issues are primarily technical where
21 we are dealing with a licensing board that has been quite
22 discriminating in its appraisal of the evidence that is
23 presented to us by all parties and which has shown itself
24 to be, if you will forgive me, utterly insensitive to the
25 questions on impact on fuel load date by its initial

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1 fuel load date. What could be disrespectful of a fuel
2 load date than a denial of an application for operating
3 license. So, I don't believe that there is any substance
4 to the interveners claim that it is the evidence of a
5 fuel load date that is driving the board. It is rather,
6 as I understand it, an appreciation that the interveners
7 by their insistence on a continuous simply to hire a
8 lawyer, are not likely to add very much to the substance
9 of the issues that are going to be before the board for
10 decision. I believe that that remains unimpaired by any-
11 thing that Mr. Cassell has said. I remain willing to make
12 available to him, his clients and consultants whatever
13 cooperation I can consistent with the fair representation
14 of my client, so that there will be meaningful partici-
15 pation by the interveners.

16 But, we are just being stonewalled on all of that,
17 and instead you are being asked to continue the matter for
18 two weeks. I persist in our position that that request
19 ought to be turned down.

20 MR. LEWIS: This is Steve Lewis. Let me just brief-
21 ly repeat, to the best of my recollection the position the
22 staff took in the conference call Tuesday, which was that
23 we felt that the scheduling suggestions, or that the sug-
24 gestions that the applicant made as to ways to facilitate
25 the interveners development of the knowledge on the issues

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1 we didn't endorse each and everyone of them, but we
2 thought they were constructive, and it wasn't clear to us
3 that the interveners had addressed in any great particular-
4 ity, the ways in which these kinds of suggestions would
5 not allow them to, in fact, break this gap they have
6 right now of bringing in counsel. Additionally, we com-
7 mented that the fuel load date that the applicant had
8 presently indicated, namely September 15, 1983 had been
9 discussed with counsel in Region 3 responsible actors and
10 it is considered to be a realistic date by Region 3. I
11 would note that that basically is what we said. I would
12 note that one thing that is still very troubling to the
13 staff is that even as of today, there is no certainty at
14 all that counsel has been retained by interveners. What
15 I heard is that a decision won't be known until Monday
16 It strikes me that there is a distinct possibility that
17 counsel will not have been retained by Monday. I don't
18 know the facts. It seems like that is still leaving the
19 matter in a very open ended state. I think I would rest
20 what we have to say for the moment with that.

21 MR. CASSELL: Let me, Judge Smith, correct some
22 of Mr. Miller's speculation about what I have been doing
23 with my time since we had that two-hour conference call
24 on Tuesday. I have not called Mr. Miller because I have
25 not had time to call Mr. Miller. Nor, have I researched

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1 the law reflected in the two cases that I cited to you.
2 I have not had the time to do so, because I am fully
3 occupied with other cases, including an emergency hearing
4 tomorrow. Instead, I asked one of our summer law stu-
5 dents to see if she could find some case law on some
6 points. That summer law student, who I would not delegate
7 the task of addressing Mr. Miller's proposed alternative
8 with Mr. Miller was able to spend some hours researching
9 that law. But, I have not spent any of my time researching
10 it, because I haven't had it. As far as the fairness and
11 adequacy of Mr. Miller's alternatives, they are worth
12 discussing only as a supplement, not as a substitute to
13 having a counsel in a case in which interveners have been
14 represented by counsel now for two years. It is just I
15 think ironic, I think, to have one of the many lawyers
16 that Commonwealth Edison has retained to represent it
17 suggest to the board that the issues in this case are
18 such that the interveners should not need a lawyer. If
19 that were truly the case, then I would submit to Common-
20 wealth Edison should prepare its case without assistance of
21 counsel.

22 Let them take the best law student that they have
23 and let him prepare the case against our best law student.
24 I suggest to you that is an entirely comical notion. It
25 would ill-serve the company, it would ill-serve the public

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1 It would ill-serve the board, because we all know it
2 would not be a fair an effective presentation of Edison's
3 case without lawyers. The same is equally true in fair-
4 ness of interveners case. As far as the other alterna-
5 tives that Mr. Miller mentioned, the alternative of
6 having a technical expert, who has never interrogated a
7 witness in his life, perform the smae function is at the
8 best questionalbe, and is certainly out of the question
9 because our technical expert has his hands full at this
10 point and time simply reviewing the documents, volumi-
11 nous documents that he was not able to begin reviewing
12 until June 25, and even now has other cases in which
13 he must work. With respect to the suggestion that we
14 somehow sit down with Commonwealth Edison between now
15 and July 16th and receive from them a lot of information
16 on the basis of which the issues are disspeled, the
17 simple answer is, we don't have time to sit down with
18 him. We don't have a person available who is capable of
19 sitting down and discussing the issues with them. The
20 time is simply not there. In terms of Mr. Lewis's com-
21 ment about the indefiniteness of counsel being available
22 on July 16th, the representation that I am making is that
23 we do not have counsel available to prepare this case
24 for trial on July 16th. BPI's attorneys are all fully
25 booked through next week, and indeed beyond. But, by

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1 July 16th by one means or another, we will have a lawyer
2 available to provide representation to the interveners.
3 But, that lawyer will not have had any time to prepare
4 for the case because we do not have time to prepare for
5 the case.

6 Excuse me, I have a call on another case.
7 Could you hold on just for a moment.

8 Judge Smith, that Pat Morrison calling my
9 office and apparently wants to be plugged into the con-
10 ference call. Is there a way to have the operator plug
11 her in. She is, as you know, the president of the Region
12 1 operation.

13 JUDGE SMITH: The operator told me that she was
14 unable to reach Mrs. Morrison. I told her to proceed
15 without her. If she is available now, we will ask that
16 she be plugged in.

17 MR. CASSELL: Alright. I will take off a mom-
18 ent just to tell her to hang up her line and that she will
19 receive a call.

20 JUDGE SMITH: Alright.

21 (Brief recess.)

22 MR. CASSELL: It is my understanding that ther
23 is a journalist marooned with Mr. Campbell in Rockford and
24 able to listen in on the telephone conference. I simply
25 wanted the board to be aware of it. I was just informed

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1 of it myself.

2 MS. MORRISON: Ms. Morrison.

3 JUDGE SMITH: Good afternoon, Mrs. Morrison.

4 MS. MORRISON: Thank you.

5 MR. CASSELL: Judge, there is one final comment
6 that I would like to make to Mr. Lewis's argument. He
7 argued and I must admit, it sounds persuasive to me that
8 the board is not constrained by the fuel load date. It
9 is not now, and has not been. I applaud that. I must
10 ask the question that if the board had not concerned
11 about meeting the fuel load date, what possible reason
12 could there be, given all the reasons we had to ask for
13 a two week extension, not to extend the hearings for two
14 weeks. Short of the fuel load date, I just am not aware
15 of why the hearing shouldn't be put over for two weeks.

16 JUDGE SMITH: Mr. Cassell, we have discussed
17 many times, and I hope we come to the end of the series
18 of discussions in which we have acknowledge that the li-
19 censee, or the applicant in this case, and in every
20 case is entitled to a prompt resolution of their rights
21 and that looking at the fuel load date is not inapprop-
22 riate in scheduling matters, and particularly when board
23 members and components of the NRC have to make selections
24 between the cases that they go to hearing on. We have
25 priority problems. We do not ignore the fuel load date

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1 looking at what type of schedule would be fair to the
2 parties. However, I again assure you, and I won't talk
3 about it any more, because it has been discussed again
4 that we will not in our due process, we will not overlook
5 safety issues or do a shoddy job because of fuel load
6 dates. Now, I think there should be an end to it. This
7 is raised virtually every session by Ms. Whicher, now it
8 is being raised by you. I'd like you to bring something
9 new in line. I wish you would just accept it or tell
10 us where you disagree. Once and for all.

11 MR. CASSELL: Having heard your explanation
12 Judge, I don't disagree that the fuel load date should
13 be taken into account. Indeed, we have made every effort
14 to accommodate the fuel load date.

15 JUDGE SMITH: Haven't you then answered your
16 own question?

17 MR. CASSELL: No. Then my question remains,
18 is there some reason other than the fuel load date, or
19 is the sole reason why we are not being allowed a two-
20 week extension in order to be prepresented by counsel
21 and to present an effective case simply because of the
22 fact that Edison's fuel load date is now scheduled for
23 September 15th.

24 JUDGE SMITH: That is certainly not the sole
25 reason.

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1 MR. CASSELL: Is there any other reason for
2 not granting a delay? In other words, at this count I'd
3 be in favor of a delay, but in terms of the reasons for
4 not granting a delay, are there any other reasons other
5 than the fuel load date?

6 JUDGE SMITH: Yes. We had a discussion of the
7 potential reasons. We begin with the primacy that we will
8 have a hearing with as little delay as possible consistent
9 with what we regard as a fair hearing. You have asked
10 for a two-week extension, and now we have to look at sev-
11 eral factors. First, the resources alone of a particular
12 intervener cannot be the sole-pacing factor in a licensing
13 procedure. With that the case, an intervener with no
14 resources could block a license if you carry it to the
15 extreme exerted. Second, we had tried to look at the
16 interveners preparation and to see what the interveners
17 needs are in the prehearing procedures. And, to this
18 date we don't know what your needs are, because we do not
19 know what you are doing. We have to look at what the
20 interveners, and to what extent the intervener will be
21 making a contribution to the record at the hearing.

22 We will have to make our judgements based on
23 what contribution the intervener made in the past as com-
24 pared to what the board did on its own in arriving at
25 decisions and developing the records. All of these

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1 are not easily quantifiable, but they have to be consider-
2 ed in some fashion by the board. Then, there is addition-
3 al problems. You speak solely of a two-week delay and
4 nothing else. But, I can see by the way that you call
5 for telephone conference calls, and the way you would
6 postpone for another date or another hour, and from the
7 way that you would have us turn the hearing on and off,
8 that you do not have a full appreciation for the fact that
9 this is a large complex process. That the licensing
10 board and this proceeding can not be turned on and off
11 like a light switch. There are many witnesses who are
12 involved. Many of them. It takes a long time to prepare
13 for them. As you know yourself, you are having difficulty
14 This board itself is having conflicts. We have, Dr. Cole
15 and I are sitting on more than one case, which has so-
16 called impact, and that is that the hearing is the pacing
17 item. We have other parties and other people who are
18 entitled to due process.

19 So, this is not our only case. But on balance,
20 the point is that we are looking at this case and its
21 your contribution that your intervention and into the
22 information that you have given us, and the lack of in-
23 formation that you have given us, and tried to decide what
24 is fair. We can't quantify it, and I doubt if you can.
25 Incidentally, may I ask. What is the nature, of what in

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1 my experience is an unusual illness that requires four
2 weeks bed rest?

3 MR. CASSELL: Judge, I have not discussed with
4 Ms. Whicher the confidentiality issue involved with that.
5 I don't feel free, without checking first with her to
6 disclose it to you if she has no objection, I'll have no
7 objection. Suffice it to say that it is an illness with
8 which I am quite familiar. It is a common debilitating
9 illness. I have known a number of people who have had
10 it, and when they have had it they have been out of com-
11 mission for periods of at least many weeks and at some
12 times months. It is not any unusual or exotic illness.

13 JUDGE SMITH: I asked the question not to in-
14 quire into Ms. Whicher's condition specifically, but to
15 ascertain our previous unstated record that she probably
16 will not be back on this case on a full time basis.

17 MR. CASSELL: There is no question about that
18 Judge. She is not going to be available on a full time
19 basis on any case for probably a period of months.

20 JUDGE SMITH: you are aware that one of the more
21 important things that we look at in assessing an inter-
22 veners participating is an interveners ability to make
23 a contribution to the record.

24 MR. CASSELL: Judge you have asked me what we
25 have that we think will make a contribution to the record

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1 on this reman. I listed, summarized that briefly for the
2 record too, because the record should be full, this isn't
3 any review. We have an engineer, a nuclear engineering
4 expert who has reviewed Edison's reinspection program and
5 who is in the process of reviewing voluminous documenta-
6 tion connected therewith. That is Mr. Charles Stokes.

7 We expect his review not to be completed in time for
8 testimony to be prepared on July 16th. His review is
9 ongoing. He has indicated to us that he has a number
10 of serious issues that he would raise. I would not at
11 this point be able to identify for you what those issues
12 are because I have not had the time to sit down with Mr.
13 Stokes and go over them at length. I would be safe to
14 say that he is spending a great deal of his time review-
15 ing a number of issues with what he regards as extremely
16 serious, and he is a highly qualified person. Whether
17 you credit his testimony or now, I don't know.

18 JUDGE SMITH: That's not the issue.

19 MR. CASSELL: Well. You asked us what we have
20 that will make a contribution to this hearing.

21 JUDGE SMITH: Yes. And I'm still waiting to
22 find out, and I have some clarifying questions.

23 MR. CASSELL: That's one clarifying witness.

24 JUDGE SMITH: Wait. Just wait. So, you say that
25 Mr. Stokes has evaluated a lot of reinspection program

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1 records.

2 MR. CASSELL: No. I did not say that judge. I
3 said that he has reviewed the reinspection program report,
4 he has conducted an intial review of voluminous documents
5 from either Edison, Sargeant, and Lanier. Both, in con-
6 nection with the reinspection program, that he spent sev-
7 eral days conducting an initial review of those volumi-
8 nous documents. In this review he identified a large
9 number of documents which he wanted us to send to his
10 office in California for further study by him, that he
11 sees a number of issues which he regards as serious in
12 connection with engineering issues related to the
13 reinspection program and that we need more time, the two
14 weeks that I have indicated in order to enable Mr. Stokes
15 to complete his preparations and to enable counsel to
16 work with him in completing those preparations.

17 I will add, as I added earlier, that the more
18 time he has to prepare, and the more time we have to pre-
19 pare, the less time it will take us to present a case, and
20 the more focus to the presentation that we make, then the
21 less likelihood will be that we will raise any issues that
22 couldn't have been resolved ahead of time if we had time
23 to prepare.

24 JUDGE SMITH: One hopes that that would be the
case, but it isn't necessarily always the case.

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1 MR. CASSELL: I'm representing to you, Judge
2 that we will make every effort to do that in this rematch.

3 JUDGE SMITH: Yes sir. But, you are not able to
4 tell us, by your own admission, that you do not know the
5 nature of this concern. One of our concerns has been
6 all along that you have had a largely unfocused inter-
7 vention on this issue. We have no assurance, or do we,
8 that Mr. Stokes himself has focused his reievew.

9 MR. CASSELL: Judge, he is a qualified nuclear
10 engineer with a great deal of experience. He begian to
11 review.

12 JUDGE SMITH: Does he know the issues in this
13 case?

14 MR. CASSELL: Excuse me.

15 JUDGE SMITH: Dees he know the issues in this
16 case?

17 MR. CASSELL: He knows the issues in this case.

18 JUDGE SMITH: How do you know?

19 MR. CASSELL: I know because I know that both
20 Josh Levein and Jane Richards have had discussions with
21 him telling him what the issues on remand were, providng
22 him with a copy of the reinspection program.

23 JUDGE SMITH: Well, since I have had difficulty
24 in coming to any agreement with Ms. Whicher about the is-
25 sues in the case, I have some reservations as to whether

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1 they have been properly communicated to Mr. Stokes.

2 MR. CASSELL: All of that certainly would be
3 something you could take a look at at the time Mr. Stokes
4 offered his proposed testimony.

5 JUDGE SMITH: By that time the delay would have
6 been granted, if you were to prevail in your argument.

7 MR. CASSELL: That's right.

8 JUDGE SMITH: And any damage unfairly caused,
9 would be irremediable.

10 MR. CASSELL: It would not be unfairly caused,
11 where all we are talking about is a lawyer and a highly
12 qualified expert to review the docuemnts and define the
13 issues and present them. By that same time, we will not
14 have had an opportunity to present those issues, and as
15 the appeal board said in the Bailey case, we will have
16 been denied an opportunity to present our case effectively
17 if you deny these continuants.

18 JUDGE SMITH: We can conclude our discussion
19 with Mr. Stokes by saying that I at least remain unassured
20 that he has been given the proper direction and understand
21 the proper scope of the issues on remand.

22 MR. CASSELL: Judge, if you like to have me put
23 Mr. Stokes on the next conference call as soon as we can
24 get ahold of him, and have you yourself explain to him
25 what you view to be the proper scope on.

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1 JUDGE SMITH: No. I'm not going to do that.

2 MR. CASSELL: Certainly, I've made to you a
3 good faith effort to do so ourselves.

4 JUDGE SMITH: Yes. But you simply are not able
5 to state. You don't know the facts, you stated yourself.

6 MR. CASSELL: Of course I don't know the facts
7 because our witness has not had time to finish his evalu-
8 ation of the docuements.

9 JUDGE SMITH: Move into your next. You cannot
10 represent to me that Mr. Stokes has a full appreciation of
11 the narrow scope of this proceeding.

12 MR. CASSELL: I can represent to you that we
13 have made a good faith effort to describe to him what we
14 believe to be the good faith, the scope of this proceeding.
15 More than that, neither I nor anyone else could assure
16 you, I have offered you the opportunity to yourself
17 discuss with Mr. Scope, on the record, the scope of this
18 proceeding.

19 JUDGE SMITH: Alright. Move on to your next
20 witness.

21 MR. MILLER: Judge Smith, this is Mike Miller.
22 If I could just break in for a second. I think this dis-
23 cussion about Mr. Stokes is really quite instructive.
24 It seems to me, based on what Mr. Cassell has said, it
25 wouldn't make any difference if Jane Whicher were well and

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1 paying full attention to this case since the time that
2 she fell ill. What the real hangup is that Mr. Stokes
3 is busily reviewing documentat that were available to
4 him a long time ago. It is not a question of a lawyer
5 now, it is a question of the expert witness. This is
6 a witness they looked for earlier, and who they perceived
7 had documents available to them as early as June 5th, I
8 think it was somewhat earlier than that. But, they did
9 get around to looking at them for whatever reason, until
10 June 25th. Now, that, it seems to me is totally, it
11 doesn't provide any basis for the continuance that is
12 asked for.

13 MR. CASSELL: The continuance is asked for on
14 the basis of the lawyer. What I have indicated is that
15 the schedule itself is so tight, that it would have been
16 difficult under the best of circumstances and that even
17 before Jane's illness was know, she and I were prepared
18 to request a continuance. As far as Mr. Stokes is avail-
19 ability, he was simply not available to us to look at the
20 documents on June 25th. In a situation with experts who
21 are committed in other cases, just as this board is com-
22 mitted in other cases, we are simply not able to tell an
23 expert, well, I'm sorry sir, you'll have to make yourself
24 available sooner. His answer would be, sorry I'm already
25 committed in other cases and we would have no expert.

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1 June 25th, was the result of a dilligent, vigorous effor
2 by us to retain an expert on a very short hearing sched-
3 ule. We found one, he's in the process of doing the work
4 now. The time that it takes him to review those docu-
5 ments properly, is simply an additional reason, beyond
6 the principal reason, which is the need to have counsel
7 available to prepare this case. If Ms. Whicher had been
8 available last week, which she was not, if she had been
9 available for the first three days of this week, which
10 she has not been, I'm sure we would be much further along
11 in our preparations with Mr. Stokes. She would have
12 an oppportunity for extended discussions with Mr. Stokes,
13 to focus with him on the particular documents concerning,
14 etc. But, she has not been available, neither has any
15 other lawyer been available, and so that did not occur.
16 Therefore, we need an additional two-week extension. We
17 are certainly not just sitting back and sitting on docu-
18 ments and doing nothing with them. We haved moved dili-
19 gently to prepare as rapidly as we can.

20 JUDGE SMITH: Alright Mr. Cassell. I'm some-
21 what confused now. I understand that you earlier assured
22 that Ms. Whicher has thoroughly counseled Mr. Stokes as
23 to the scope of the remanded hearing and focused him, but
24 I seem to be hearing you say no, she has not had time to
25 do that.

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1 MR. CASSELL: No. I did not say that. I said
2 that she has counseled him with respect to the scope of
3 the hearing, and she has done so. She has not had time
4 to go through with him, the results of his initial re-
5 view of the documents and the numerous engineering ques-
6 tions which he raised as a result of those reviews and
7 discussed with him at length what is the basis for his
8 concern on this or that point, what further information
9 does he need to resolve this concern, what is the safety
10 significance of each of those concerns. Is it level 3,
11 is it level 4, is it level whatever, if I'm even speak-
12 ing the correct technology there. As you know, I'm not
13 an experienced NRC attorney. All of the kinds of the
14 things that she would do, or that any decent attorney
15 would do in preparing this case for trial.

16 The first thing that you do with a witness is
17 you tell them what the trial is about. That is what
18 you've got.

19 JUDGE SMITH: Don't forget, I raised this
20 subissue up about Mr. Stokes in the context of the inter-
21 veners ability to make a contribution to the hearing.
22 Not in the context of scheduling.

23 MR. CASSELL: That's correct, but you have in-
24 dicated that the ability of the intervener to make a case
25 at the trial is relevant to your assessment for a request

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1 for an extension of time.

2 JUDGE SMITH: Alright. Stop for a moment while
3 we change the cassette please.

4 (Brief recess.)

5 JUDGE SMITH: Alright. Would you proceed Mr.
6 Cassell.

7 MR. CASSELL: Yes sir. Our second witness,
8 as we have indicated is Professor Dennis Cohard who is
9 in the Operations and Engineering Department of the
10 University of Michigan. He has reviewed the reinspection
11 program. He is an expert in the methodology of this
12 sort of thing. He has identified a number of methodo-
13 logical objections which he hears as serious flaws in
14 the methodology utilized. He is in the course of pre-
15 paring his direct testimony that neither I or any of the
16 other lawyers for the interveners has been able to have
17 any discussion with Mr. Cochard in the last ten days be-
18 cause there has been no lawyer available to have the dis-
19 cussion with him. His testimony was, in the course of
20 preparation, I am hopeful that it would be ready, cer-
21 tainly by July 16th and he would be available to testify
22 for the interveners. I would not put him or any other
23 witness on the stand until at least some counsel could
24 for the interveners have had a chance to have a further
25 discussion with him, since the initial discussions that
Ms. Whicher had with them, in which she identified for

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1 him, the scope of the results of his initial review of
2 Edison's reinspection program report.

3 JUDGE SMITH: Mr. Cassell, what is your view as
4 to whether you are going to be able to take advantage of
5 the offers made to you by Mr. Miller, which some of them
6 I thought that you believed were constructive, which would
7 help your people focus in on the issues of real concern.

8 MR. CASSELL: I think they are all constructive
9 within the context of having a lawyer available to first
10 of all discuss them with Mr. Miller, second of all, work
11 them out and do them.

12 JUDGE SMITH: You can't even start on that, you
13 couldn't even start on working on Mr. Miller's offer
14 until the 16th.

15 MR. CASSELL: Well if you look at each offer.
16 One offer is to have a law student, Josh Levin present
17 the case at trial.

18 JUDGE SMITH: Well, skip that one.

19 MR. CASSELL: Alright. The next offer is to
20 have presumably Mr. Stokes or Mr. Cochar present our case
21 at trial and cross-examine Edison's witness. I don't
22 have any reason to believe that either one of them is
23 capable of doing that, has ever conducted any kind of an
24 interrogation, nor do I have any reason to believe that I
25 will have time to sit down and work that out with him

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1 nor do I have any reason to believe that at this point
2 that they would be willing or able to do that within the
3 confines of their schedule even if it made sense.
4 The first proposal that Mr. Miller has made, as I recall,
5 is to agree to fly our experts into Chicago and have them
6 sit down with Edison's experts and try to discuss what
7 their concerns are and work out what the issues are.

8 JUDGE SMITH: I think that is a good.

9 MR. CASSELL: So do I. I think it is an excel-
10 lent suggestion, once we have an attorney who is able to
11 discuss with Mr. Miller, that proposal, work out the
12 arrangements, discuss with our experts ahead of time, what
13 the issues they think they have are, sit in that meeting
14 and make sure that it is done correctly.

15 JUDGE SMITH: I disagree with you there. I think
16 that, I think that one thing that you can do, and that is
17 take time, visit with Ms. Whicher, I understand that she
18 is available for some advise, take time to counsel your
19 experts so they know what the issues are. you can't have
20 it both ways. If they don't know what the issues are,
21 then they are going to have a hard time making a contri-
22 bution to the hearing.

23 MR. CASSELL: Judge, they know what the issues
24 are.

25 JUDGE SMITH: Then, they can come in and talk

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1 about those issues with applicants' technical people.

2 MR. CASSELL: They know what the general issues
3 are.

4 JUDGE SMITH: They know precisely enough to do
5 a productive job, but not quite enough to come in and
6 talk about it. That is a very exact amount of competency
7 on the issues.

8 MR. CASSELL: Judge, it is a very differnt thing
9 to know that the remand had to do with the methodological
10 and the engineering validity of the reinspection program
11 on the one hand would say no, and on the other hand, its
12 complete one's review lists 42 engineering questions in
13 objections to be prepared to sit down with Edison and go
14 over those 42 objections. Mr. Stokes has not completed
15 doing that. He won't be prepared to do that. He won't
16 be prepared to do that, the earlies that he is physically
17 even able to come to Chicago would be at the very end of
18 next week. I would not under any circumstances, and I
19 don't think you would if you were representing a client
20 in this case, advise our expert witness to sit down with
21 the other side and their experts before you at least had
22 an oppportunity to discuss with your own expert what his
23 concerns are. I haven't had that time. I don't have that
24 time.

25 JUDGE SMITH: I think there is an oppportunity

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1 here for some leverage. A relatively small amount of
2 time spent counseling your experts can produce, it seems
3 to me, a very large benefit in making your experts more
4 focused and preparing them for hearing.

5 MR. CASSELL: Somebody would have to have the
6 time to counsel those experts and to sit down with them
7 once they have completed their review of the documents.
8 As I indicated, there is no such person available, nor
9 have the experts completed their review of the documents.

10 JUDGE SMITH: I don't think that you are trying
11 hard enough on this, Mr. Cassell. I'm concerned, really
12 about your ultimate readiness. I just don't think you are
13 being imaginative enough. You are not being resourceful
14 enough.

15 MR. CASSELL: I am perfectly prepared to sit
16 down and pursue that procedure as soon as we are ready.
17 What I am telling you is we can't possibly be ready to
18 do that thing, given the situation that we have with no
19 lawyer who is even sufficiently versed in the case, to
20 sit down with the experts and go through that with them
21 until the week of the 16th. Even if we had a lawyer, Mr.
22 Stokes is not available to come to Chicago and sit down
23 with that lawyer, who I have no time to prepare, until
24 late next week, which is a working day or two prior to
25 the commencement of the hearing. That doesn't even deal

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1 Mr. Cochar, and that doesn't deal with the other witnesses
2 whose name we have provided or will provide to Edison's
3 lawyers under protective order, which we haven't disclosed
4 publicly at the moment, and with the fourth witness that
5 we mentioned on Tuesday. I haven't even had a chance to
6 talk with Josh about the status of that fourth witness.

7 JUDGE SMITH: Ok. You haven't really said any-
8 thing that is new to us except that maybe the case that is
9 referred to, and as a matter of fact, we have been check-
10 ing them while this conference has been going on. So,
11 I feel that it is possible then, to tell you what the
12 board has consulted, decided among ourselves as to what
13 we believe will be the approach based upon what we know
14 now. Number one, we believe that it is necessary, or say
15 at least, highly desirable to delay the hearing for one
16 week. That is not a quotient week. That is not half a
17 pie. We have looked at the direct testimony that has
18 come in and we have looked at the direct testimony that
19 has yet to come in.

20 We are very mindful of the applicants' distress
21 when the perceived that the board raising points after the
22 hearing in the decision rather than during the hearing,
23 and we have determined this time around to be thoroughly
24 familiar with the direct testimony before the hearing. As
25 matters turned out, because of the quantity of the testi-
mony, and of the need to spend time, for example, the

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1 afternoon, and Tuesday afternoon, and requirements in
2 other cases. We see that if we were to begin by July 16th
3 we would not be as well prepared to begin the hearing as
4 well as we would like to. Therefore, we do recognize also
5 that you do have a problem, that the interveners do have
6 a problem, and that you are coming forward with expert
7 witnesses and probably, if properly structured, can make
8 a contribution to the record. Therefore, for that reason
9 it is our tentative ruling, at least, until persuaded to
10 the contrary that we will not begin the hearing until
11 July 23rd. At that time, however, we will proceed with
12 the direct testimony of the applicant and the staff. We
13 will proceed for two weeks.

14 MR. CASSELL: How many weeks Judge?

15 JUDGE SMITH: Two weeks. The two weeks may even
16 include a Saturday hearing. I recognize, Mr. Miller, that
17 that creates problems for you. But, I don't know if we
18 can have a Saturday hearing, because I don't know if we
19 can get the space for it. But, in any event, we would have
20 hearing beginning mid-day on the 23rd going through a
21 very long day, at least of Friday the 27th. It is to be
22 hoped on Saturday the 28th we could have a hearing and
23 beginning first thing Monday morning, including Friday
24 afternoon. That would be approximately 10 full hearing
25 days. Rather long ones. That would be exclusively de-

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1 voted to interveners cross-examination and answering
2 board questions. Looking at the testimony, as we have
3 the summaries of it, knowing what the issues are, I be-
4 lieve that that is probably by a comfortable margin,
5 enough time for interveners to cross-examine, as far is
6 time, that is enough time to cross examine those witnesses.
7 It is perfectly appropriate to set time limits, and
8 we think that that would be reasonable.

9 Next, we expect to draw some protests from per-
10 haps the applicant. That is, the direct case would be
11 followed by a hiatus of two weeks. In the two weeks are
12 occassion one by a need to give interveners some relief
13 to get their people ready to testify, and also of conflict
14 that board members have induly draft to perform on other
15 cases. Then, the two weeks would be followed by the
16 interveners direct case.

17 MR. CASSELL: What would be the date of that
18 Judge?

19 JUDGE SMITH: I didn't figure out the date, that
20 would be a hiatus beginning August 5th and returning to
21 hearing August 20th for interveners direct case. Now,
22 I don't believe that the two week hiatus should be re-
23 garded as a full two-week delay in the case. It is not.
24 I would expect during those two weeks that the applicant
25 and staff for that matter, could begin preparing their

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1 proposed findings. And, I see no real reason why in
2 addition to preparing the direct testimony of the inter-
3 veners that they could not be preparing theirs, direct
4 testimony, I mean their proposed findings. So, some
5 of that time would be recaptured by shortening the time
6 for proposed findings. In any event, we believe that
7 the time is needed, the time is obvious that the parties
8 themselves, including the applicant and the staff, for
9 one reason or another, have had a hard time making our
10 deadlines themselves, and we have had, believe me, a
11 great deal of difficulty getting ready for this hearing
12 ourselves. So, for those comments and tentative ruling
13 we will listen to comments and objections from the
14 parties.

15 MR. LEWIS: Chairman, this is Steve Lewis.
16 What would be the date within that two-week period for
17 the filing of the interveners direct case?

18 JUDGE SMITH: I would expect the filing that
19 they would have no more, they would have to have their
20 direct testimony. We will have to discuss that further.
21 That direct testimony would be prepared no later than
22 August 3rd or 6th. I would anticipate a week to prepare
23 their testimony and a week in advance for the open hear-
24 ing for the parties to have their cross examination.

25 MR. LEWIS: You mean August 15th?

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1 JUDGE SMITH: Excuse me, right. I was look-
2 ing at the wrong month. Right. So, they would have
3 their direct testimony in either the 10th or the 13th.

4 MR. MILLER: Judge Smith.

5 JUDGE SMITH: Was that Mr. Miller?

6 MR. MILLER: Yes it was. On behalf of
7 Commonwealth Edison Company and speaking in terms of
8 to use Mr. Cassell's terms of basic fairness, it seems
9 to me that the applicant and his witnesses are really
10 not coming out very well with this proposed schedule.
11 I will tell you why. What we have is a situation in
12 which the interveners have asked for two weeks before
13 the commencement of hearing, and they wind up essential-
14 ly with much more than that in terms of the preparation
15 of their own case. Furthermore, what results is that
16 the interveners have the direct testimony of our wit-
17 nesses. They have their chance at examination, and
18 it is only approximately a week after the conclusion of
19 that cross-examination that they even have to tell us
20 what their direct case is. I am confident that depo-
21 sitions between now and August 13th would elicit
22 answers from intervener witnesses that they were
23 still busily, as Mr. Stokes currently is looking at
24 documents and really aren't able to say, precisely what
25 their concerns are. So, what we are looking at is

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1 somethingwhere it has kind of gotten topsy turvy from
2 the usual situation in which applicants and interveners
3 file their testimony simultaneously and then the staff
4 ordinarily is given additional time to prepare its
5 testimony so that it can evaluate the other parties'
6 testimony and present perhaps a more dispassionate view
7 of the issues, having in mind the position taken by the
8 applicant and the interveners. But, in this situation
9 the party that had absolutely no responsibility in terms
10 of obligations to the public for either a prompt and
11 fair and well reason decision, or a responsibility to
12 the public in bearing its proof so that a facility can
13 get an application for a license decided is going to be
14 the one that has the advantage of sitting back and know-
15 ing precisely what the other parties positions are
16 having subjected them to cross-examination and then
17 be able to tailor its position after it sees what every-
18 body else has done. That, I'm sure is an unintended
19 consequence of the schedule that you propose. I said
20 before that we had no objection to deferring the time
21 for interveners to file their direct testimony. I
22 stand by that .

23 JUDGE SMITH: Yes. It was somewhat upon that
24 offer, Mr. Miller, that the board was relying in con-
25 triving this schedule

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1 MR. MILLER: I appreciate that, but I did not
2 intend by that, and indeed I did not know that the board
3 contemplated the a two-week gap in the hearing-schedule.
4 It seems to me it was also predicated on some under-
5 standing that if I understood Mr. Cassell, even with
6 his two week extension, he was prepared to have his
7 attorney on board and his testimony filed and be ready
8 to go by the 30th of July. So, if you will forgive me,
9 you have given him an additional week beyond what he
10 even asked for in terms of preparation of his direct
11 testimony. I think it works to the prejudice of my
12 client. I would like to inquire as to whether or not
13 it would be possible to cut that two-week gap to one
14 week, so that there would be. We are really, all of
15 us in the dark as to what the interveners case actually
16 is going to be. Mr. Cassell, I think, has very adroitly
17 avoided giving any indication, perhaps he just doesn't
18 know of just what the specific concerns are that the
19 interveners have. We could all be faced with a testi-
20 monial submission on August 13th that would, or might
21 contemplate two to three more weeks of hearings. Then,
22 of course, it is possible that rebuttal testimony
23 would be required. SO, I am afraid that it is our
24 perception that this schedule that you have proposed
25 really results in a much greater opportunity for an

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1 unfocused hearing than anything we have really been
2 talking about up to now. What I understood Mr. Cassells
3 position to be is that he wouldn't even be in a posi-
4 tion to talk about the informal meeting until July 16th
5 when his new attorney was available, and I must say,
6 that the schedule that has been proposed has given lit-
7 tle incentive to want to narrow the issues at this stage
8 in the proceedings.

9 Representing the interveners, I guess it would
10 be my position that you may as well see how the cross
11 examination goes before I really decide whether or not
12 any of my issues are going to strike a response and
13 note with the board. Those will be the ones that I
14 will concentrate on.

15 JUDGE SMITH: That might very well be a
16 acceptable results.

17 MR. CASSELL: Judge, I wonder if I could com-
18 ment on that. I agree with firstly, the point that you
19 made. I think the schedule that you have proposed, and
20 I too thought that Mr. Miller had suggested something
21 along those lines was more likely to result in focused
22 hearings than not. It certainly doesn't give us any
23 more time to prepare our case, because while the date is
24 later, what Mr. Miller overlooked is while the lawyer is
25 out there cross-examining for ten days straight in

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1 Rockford, that same lawyer is obviously not going to
2 have any significant time to be preparing his or her
3 case, and you have only given us a one week extension
4 at the beginning of the hearings and then our direct
5 testimony is due the following the cross. That being
6 around a full week before the testimony is to resume,
7 for Mr. Miller to review our direct testimony, take
8 depositions if he wants, and be ready with a motion to
9 present at the commencement on August 20th, saying that
10 the interveners to bring six issues one of them ir-
11 relevant and ought to be stricken. I think the
12 of a focused hearing resulting from this schedul are
13 much greater than if we do not have that kind of a pro-
14 cedure set up.

15 On the other hand, when I first raised the
16 proposal myself, two weeks ago, or ten days ago, I do
17 not want to be unfair to Edison, or to the staff. I
18 certainly would not object to if Mr. Edison thought
19 that we had taken him unfairly, or by surprise or some-
20 thing to their having their opportunity to present
21 rebuttal testimony. I think that would be only fair.

22 JUDGES SMITH: I don't want to get to rebuttal
23 yet, that is premature. Although, I recognize that a
24 careful boy like Mr. Miller has to look down that road.
25 I might say that the two weeks hiatus suggested or

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1 agreed upon by the board was not arrived at as a, direc-
2 tly as a response to Mr. Cassell's motion. It was pre-
3 dicated upon problems that the board has in getting on
4 top of this case and other committments. In other
5 words, the two weeks benefits our needs, and then recog-
6 nizing that, we recognized also that the two weeks
7 can go pretty far to afford the relief requested by the
8 interveners. We have not considered at all the possi-
9 bility that the two weeks hiatus and the sequence would
10 give an unfair litigation advantage to the interveners.
11 That may seem like a naive oversight, because obviously
12 in an adversary proceeding, such an arrangement could
13 do just exactly what you say, Mr. Miller. But, we were
14 thinking more along the admonition that we had given
15 the intervener, and that is the board was very much
16 distressed, more than the decision shows, when the in-
17 terveners made proposed findings, and the proposed
18 findings are on the quality assurance issue, which
19 proposed findings I don't believe that they any longer
20 believed in. Time and time again, the intervener's
21 proposed findings on this issue urge findings that simply
22 were not true, because they had been flatly and uncon-
23 trovertibly rebutted in the hearing. Nevertheless,
24 they stuck with those positions all the way through to
25 the very end. As we stated up in Rockford this last time

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1 we will not tolerate that this time. We will require
2 the interveners to give us their assurance in each in-
3 stance that they truly believe in the issue that they
4 are advancing. That, this matter of not vouching for
5 witnesses is not going to work this time. That is a
6 very limited evidentiary consideration. We will insist
7 that the interveners at all times present cases that they
8 believe in and that their witnesses believe in. Now,
9 our hope was then with that in mind and assuming, per-
10 haps naively that we could enforce that, or that it
11 would be voluntarily complied with, we felt that a two-
12 week hiatus would allow the intervener to do exactly
13 that, to come back fairly and with their witnesses and
14 say, our concerns have been narrowed down to this area.
15 We have listened to the testimony, we have consulted
16 with applicants' experts and the staff's experts and
17 we are no longer concerned about most of the matters,
18 or many of the matters that we have these providing
19 concerns. If that is not a realistic expectation, if
20 that's naive, then I don't think that we are being fair
21 with the applicant on the schedule, at least for the
22 filing of the interveners testimony.

23 MR. CASSELL: Judge really you, unintention-
24 ally, of course have me at a disadvantage since I do
25 not know what the proposed findings are to which you are

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1 referring. and I must note that I do not believe that
2 Ms. Whicher would have filed the proposed findings that
3 she believed to not be true.

4 JUDGE SMITH: Ms. Whicher aluded to the time
5 pressure that she was under.

6 MR. CASSELL: There may have been some of that
7 Judge. I don't mean to dwell on that situation, because
8 as you know, I am not familiar with the facts, because
9 I wasn't involved. I do want to say this. As I assured
10 you in the conference call nearly 10 days ago, we are
11 certainly not going to put any expert witnesses on the
12 stand unless we believe in this case that they are
13 raising serious issues that the board should hear.

14 JUDGE SMITH: I'm going behond that, Mr.
15 Cassell. We are going beyond what the experts believe
16 now. We are considering what the experts believe as the
17 case unfolds.

18 MR. CASSELL: I mean that Judge. In other
19 words, we would not present testimony or raise issues
20 unless at the time we presented the testimony, and at
21 the time we raised the issues, we believed in good faith
22 that these were meritorious questions for the board to
23 consider. I made that representation 10 days ago, and
24 I make it again today.

25 JUDGE SMITH: And that they continue to be.

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1 MR. CASSELL: And that they continue to be.
2 I agree with you absolutely.

3 JUDGE SMITH: This is something that we are
4 going to try very hard to control. But, unfortunately,
5 Mr. Cassell, that every time that I have raised the
6 issue of focusing the interveners case, I have been un-
7 successful. It does not work. The last time, it was
8 turned right on its head, and the inference was by Ms.
9 Whicher was that I was attacking her personally rather
10 than giving them advise rather than focusing her case.
11 So, I don't have any assurance. We don't have any as-
12 surance that this, your client really wish to focus
13 the issues and address their genuine concerns.

14 MR. CASSELL: Judge you have the final concerns
15 Our clients are represented by us. I am general counsel
16 of this office. I will make absolutely clear that which-
17 ever attorney is ultimately presenting this case, have
18 heard your instructions clearly and will comply with
19 them. We do not believe in presenting testimony from
20 expert witnesses unless we believe that it deserves to
21 be heard by the decision making body at the time we
22 present it.

23 JUDGE SMITH: What can we do to satisfy Mr.
24 Miller's traditional and careful concerns about sand-
25 bagging.?

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1 MR. CASSELL: We can number one, he will be
2 receiving our direct testimony on August 13, a week
3 before the hearings are scheduled to gin. Witnesses
4 will be available for deposition. I have to check with
5 their schedule. We will have the direct testimony so
6 that he will be able to file a motion for strike, mo-
7 tion to exclude prior to the 20th, and you will have the
8 testimony on the 13th and the aid of the considerates
9 that you would be prepared to rule on the 20th to ex-
10 clude any testimony that you thought to be beyond the
11 scope of the remand, or otherwise irrelevant.

12 JUDGE SMITH: When can they be deposed?

13 MR. MILLER: I just wanted to say that I really
14 think that in an effort to anticipate cross examination,
15 we simply must have the depositions of both witnesses
16 prior to the time that the hearings are now scheduled
17 to begin. It may very well be that after their written
18 testimony is served, that we will want to take their
19 depositions again. And, I say that, not out of any
20 sense of wanting to waste time or anything like that,
21 but I think that it is the only way that I can both
22 prepare my case in terms of anticipating cross-exami-
23 nation and then be prepared to effectively cross-examine
24 myself given the interval that the board has proposed.
25 In an ordinary situation, only one set of depositions

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1 would be necessary because we would be able to do it
2 in advance of the hearing when their direct testimony
3 was available to us. But, because of this, essentially
4 I guess it is almost a full week, three week delay,
5 I think we are going to be at least, at least we must be
6 assured that if we want to do so, we can take deposi-
7 tion twice. I will state to the board and the parties
8 that I intend to notice the deposition of Mr. Stokes
9 and Professor Coshar for Thursday and Friday, the 19th
10 and 20th of July.

11 JUDGE SMITH: I was expecting that the week
12 delay would also afford counsel an opportunity to come
13 in, and be available to resolve the issues with their
14 experts and have them ready for their depositions.

15 MR. CASSELL: Judge, I was just about to com-
16 ment, I think Mr. Miller's point is a fair one. Subject
17 to the schedules of Mr. Stokes and Mr. Coshar, we will
18 certainly endeavor to make them available for deposition
19 on the 19th and the 20th. I think that is a situation
20 we can work out with Mr. Miller.

21 JUDGE CALLIHAN: Judge Callihan here. Mr.
22 Miller, you have made reference in your last remark to
23 expecting or desiring interveners testimony before
24 "beginning f hearing". Put a date on that, would you
25 please.

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1 MR. MILLER: Judge Callihan, Set the board
2 order that Judge Smith has discussed, we would not re-
3 ceive their direct testimony until August 13th.

4 JUDGE CALIHAN: So your date is August 20?

5 MR.MILLER: That is what I understood the board
6 to be suggesting.

7 JUDGE CALLIHAN: The hearing is contemplated to
8 start on July 23rd.

9 MR. MILLER: Yes sir. I need discovery for
10 the interveners experts both in advance of the July 23rd
11 hearing and in advance of the August 20th hearing.

12 MR. CASSELL: I must say that hearing Mr. Miller
13 argue only two days ago that interveners don't really
14 need any depositons at all, that it is somewhat surprising
15 now to hear him say that Edison will need two sets of
16 depositions. But, nonetheless, having made that pertui-
17 tive observation, we will certainly endeavor to make Mr.
18 Stokes and Mr. Cochar available for two rounds of depo-
19 sitions if Mr. Miller wants them.

20 MR. MILLER: Judge Smith, I don't want to be
21 pushed around by scheduling problems, and I would like
22 the board to order Mr. Stokes and Mr. Cochar to be avail-
23 able for deposition on Thursday and Friday the 19th an
24 20th. I don't care which order they come in, and if there
25 are any other witnesses who are identified, and the

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1 order in which they are to be deposed because I don't want
2 to have to call you up on Monday, the 16th and say, well
3 we've been negotiating for 10 days and we can't fix a
4 date because Mr. Stokes has a prior committments else-
5 where. I think that the board is determined to adheres
6 to the schedule is proposed that an order ought to be
7 entered. If people need relief from it, they make some
8 sort of a formal notion.

9 JUDGE SMITH: No. Mr. Miller. If we have to
10 go through this, the board won't be ready for even long-
11 er. Again, we can't get bogged down on these papers.
12 These orders take a lot of time. These conferences take
13 a lot of time. The struggle that this board has to get
14 above the freeze and the apperwork and the arguments and
15 the maneuvering is absorbing our energies and our at-
16 tention, we can't get to the substance of the issues.

17 MR. MILLER: Judge Smith, I don't know that I
18 am really requesting anything extraordinary. You tell
19 Mr. Cassell in this telephone conversation that he has
20 an order to produce Mr. Stokes and Mr. Coshar for depo-
21 sition at the end of the week of July 16th. Should there
22 be any additonal witnesses identified, let those indivi-
23 duals be deposed.

24 JUDGE SMITH: Certainly. In some order of the
25 nature of your request is appropriate, whether it be the

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1 19th or 20th, I don't know. We hav to hear from Mr.
2 Cassell. Mr. Cassell also has to bear in mind that whe-
3 ther he even is allowed to put on witnesses at all,
4 even whether we will hear from them, whether they are
5 identified timely and whether there is a reasonable
6 opportunity to depose them and be prepared for them.

7 MR. CASSELL: I understand that Judge and I
8 certainly will make every good-faith effort to have our
9 witnesses available for depositions on or about the
10 19th or 20th.

11 JUDGE SMITH: No. I don't think Mr. Miller
12 wants that. I think that you should agree upon a date
13 with him, perhaps you might want to call Stokes and
14 Cochar.

15 MR. CASSELL: That is my intention Judge.

16 JUDGE SMITH: However, I don't want you to call
17 them and find out whether those dates are convenient. I
18 think we are up against a case, up against a deadline and
19 the question is, with a slight amount of latitude, which
20 dates can they commit that they will be available for
21 depositions. I'm talking about the 18th and 19th except
22 perhaps the 19th and 20th.

23 MR. CASSELL: I agree with you absolutely,
24 Judge. I think the ruling that the board has proposed in
25 this discussion has been a fair and reasonable one and I

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1 the only reason why I am not prepared to committ right
2 now is I haven't asked either witness whether they are
3 available on those dates. But, I understand that this
4 is a high priority matter, and that nothing short of
5 unavoidable conflict involving a matter that they simply
6 cannot avoid would preclude their being available for Mr.
7 Miller to depose at a date about the end of that week.
8 I represent to you in good faith that I will assure that
9 happens that as soon as this conversation is over, I will
10 check with them on their schedules and try to agree with
11 Mr. Miller tomorrow on a deposition schedule. But, I'm
12 certainly not going to be, to use Mr. Miller's words,
13 horsing around on discovery in this case. We will proceed
14 to prepare our case and to enable him to prepare his in
15 good faith.

16 MR. MILLER: Judge Smith, this is Mike Miller
17 one more time. But, do you contemplate that the applicant
18 and staff's case will be concluded by Friday August 3rd.

19 JUDGE SMITH: It must be.

20 MR. LEWIS: That's not totally, this is Steve
21 Lewis, that's not totally within our control.

22 JUDGE SMITH: It is within ours, Mr. Lewis.
23 I'm talking about your direct case. Yes, I think that, as
24 I said, we haven't had a chance to study all of the testi-
25 mony, but we looked at it. We have an idea of what it

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1 was about. We are familiar with the issues. The issues
2 have been long known, there is no surprise about the
3 issues. In fact, the remand order was highly predictable
4 as far as the scope of the remand. They are well known,
5 I think that the issues can be covered in cross examina-
6 tion quite comfortably within 10 days of trial time. I
7 would hope that it would be actually less. We will be
8 watching the cross-examination very carefully to be as-
9 sured that it is constructive. Give me a moment here to
10 consult, please.

11 You know about our ruling for cross examination
12 plans Mr. Cassell?

13 MR. CASSELL: No, I do not Judge Smith. What is
14 that?

15 JUDGE SMITH: Well. You better. Have you no
16 access to Ms. Wnicher? She can't bring you up to date on
17 anything?

18 MR. CASSELL: I can reach Ms. Whicher by tele-
19 phone, yes sir, on a limited basis.

20 JUDGE SMITH: Well, I think you better spend
21 some time with her, maybe Mr. Levein knows something
22 about it. He's probably prepared some of them. We re-
23 quire cross-examination plans and that is the cross-
24 examination plans shall be sufficient enought for us to
25 understand the purpose of the cross examination, what you

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1 achieve by it, and to follow its course, to follow to see
2 whether you have.

3 MR. CASSELL: I do recall that Judge on the
4 first set of hearings. I know what you are talking about.

5 JUDGE SMITH: That's right they will insist
6 upon it. Not only that, we will from time to time in-
7 quiring during the cross examination of those witnesses
8 whether issues remain. That is, whether the interveners
9 still pursue a particular point of view.

10 MR. CASSELL: I understand that Judge and we
11 will proceed with that expectation.

12 JUDGE SMITH: I want to say again to the inter-
13 veners through you, Mr. Cassell, that we have spent a
14 lot of time on this case. We have watched the presen-
15 taion. We think we know it pretty well. The best con-
16 tribution, and the best way you can convince this board
17 of your points of view is to very carefully select an
18 issue and make sure they are issues that you think are
19 important and that are important.

20 MR. CASSELL: Judge, I would say in any case,
21 and certainly in any case that that would certainly be
22 our philosophy.

23 JUDGE SMITH: Alright. I would like to, well
24 there is one other thing too. The schedule that we had
25 talked about is conceivable dependent upon what happens

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1 in the main case, the direct case, is conceivably adjust-
2 able. I want you to keep open the possibility of getting
3 your experts in in the two weeks of the direct case.

4 MR. CASSELL: In other words, if we have tes-
5 timony ready, you wouldn't object to us presenting it dur-
6 ing the direct testimony by the applicant on the stand.

7 JUDGE SMITH: You have sufficient opportunity to
8 discover their position, yes. We want you keep that pos-
9 sibility open. What we are seeking here, I don't want to
10 bore you on repetition, we are shooting for not only
11 knowing the issues at the outset, but having them in-
12 creasingly narrowed as the case unfolds. If it turns out
13 toward the end fo the first two weeks that the issues have
14 been narrowed, that those experts can come in and express
15 their concerns just leave that option open.

16 MR. CASSELL: Yes sir.

17 MR. LEWIS: Judge Smith, this is Steve Lewis.
18 Perhaps this indicates that I have not totally reviewed
19 the earlier portions of the proceeding before I became
20 counsel, but if you will briefly tell me by what date
21 prior to an examination you require the submission of the
22 cross examination plans.

23 JUDGE SMITH: You can hand it to us at the be-
24 ginning at the cross examination.

25 MR. LEWIS: I assume that we file it with the

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1 board only?

2 JUDGE SMITH: That's right. Then it is up to
3 each party to request from the examining party, a copy of
4 the cross examination plan at the end of the testimony.
5 We also urge the parties to exchange the cross examination
6 plan where it is possible to do it in advance, so that
7 everyone in the hearing room will know exactly where you
8 are going, including the witnesses, unless it is neces-
9 sary as a matter of tactics to withhold it, we recommend
10 that you do that exchange.

11 MR. CASSELL: What was the practice on that in
12 the first set of hearings, do you know?

13 JUDGE SMITH: Well. As a matter of fact, it
14 went along so smoothly that once the cross examination
15 plan was given to us, we did not have to follow through
16 to determine whether they were exchanged up to the tes-
17 timony. That was up to the parties, and we never heard
18 of any problem to assume that they were not. As far as
19 exchanging them in advance, I don't think that was often
20 done, if ever. I think that there was, I think it could
21 have been done much more often. I think the examinations
22 would have gone much better. The written testimony shall
23 be covered by an outline. Give me a moment.

24 (Brief recess.)

25 JUDGE SMITH: Where were we. We were about the

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1 direct written testimony has to have an outline.

2 MR. CASSELL: You had indicated a written tes-
3 timony be required.

4 JUDGE SMITH: Yes. What is needed now is the
5 depositions of the witnesses. I, what we still have
6 dangling now is the deposition. I will make an order
7 tomorrow, I will be available tomorrow to make an order.
8 But, you have to make your people available sometime
9 during that week, otherwise there will be serious ques-
10 tions about whether they will even be allowed to testify.
11 They have to be available.

12 MR. CASSELL: I understand that Judge. If there
13 is any problem, we'll let you know. But, I don't antici-
14 pate any.

15 JUDGE SMITH: Is that satisfactory, Mr. Miller?

16 MR. MILLER: Yes it is. Judge Smith, jsut sit-
17 ting here, one other thing that occured to me is a possible
18 alternative which would be to have the first two week
19 period be devoted to the reinspection program and the
20 last week that you have got with respect to after the
21 two-week break, be devoted to System Control Corporation,
22 and what I would call kind of miscellaneous issues. The
23 overtensioning of the cables, and so on. It occurred to
24 me that, except in terms of presentation to the board
25 thatif all the testimony on one issue were presented and

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1 available to the board in one hearing session it might be
2 more reasonable in terms of the way the evidence comes in
3 for your consideration.

4 MR. CASSELL: Judge, that would not be likely
5 to result in a focused or as efficient a proceeding as
6 the schedule that you have proposed. That would mean
7 that our lawyer coming on board July 15th would be look-
8 ing at depositions probably for the better part of Thurs-
9 day and Friday of that week, and in the mean time, would
10 somehow add to our direct testimony prepared during the
11 same week, and during the same week learn what the case
12 is about. I think a new lawyer coming in then, together
13 with the additional systems we can provide will be
14 ready to meet your schedule, but I don't think such a
15 lawyer, no matter how good he or she might be, could pos-
16 sibly be ready to meet the schedule that Mr. Miller has
17 just proposed.

18 JUDGE SMITH: Mr. Miller. When did you propose
19 that we take the miscellaneous issues?

20 MR. MILLER: There would be, well, they could
21 readily be followed in either of the hearing sessions but
22 the point I was trying to make was to differentiate be-
23 tween the reinspection program issues and the System Con-
24 trol Corporation issues which at least arguably would
25 involve two different matters, two different sets of wit-

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1 nesses and so on. And, perhaps, have all the parties
2 present for your consideration their direct case on the
3 reinspection program in that two-week period that would
4 begin July 23rd. I would, once again, be willing to
5 defer receiving the interveners' direct testimony until
6 July 30th, in order to give them additional time to pre-
7 pare it. I realize that that puts a big burden on the
8 board, but it is conceivable that there might even be a
9 day or two break during the week after the staff and the
10 applicants finish their testimony on reinspection pro-
11 grams, so that the board, the parties would have an op-
12 portunity to absorb the, prepare the direct testimony of
13 the interveners on that subject and then we could finish
14 out that second week with cross examination of the inter-
15 veners witness.

16 JUDGE SMITH: Do you understand that? I am
17 totally confused on that.

18 JUDGE COLE: Simply the inspection
19 program. If they get their order by the 16th, then he
20 can start preparing the cross with their witnesses on
21 the direct, and by the 23rd they start the cross exami-
22 nation of the applicant and the staff witnesses while
23 continuing to work with their direct case in which they
24 bring up on the 30th of July, or a week after the hearing
25 begins, two weeks after he has been on board.

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1 JUDGE SMITH: On the miscellaneous issues?

2 JUDGE COLE: No. On the reinspection. The
3 miscellaneous issues will come on August 13th, and then
4 the hearing on the miscellaneous issues for both appli-
5 cant, staff, and the interveners on August 20th. That is
6 what he is proposing.

7 JUDGE SMITH: I still don't understand. What
8 happens on the 23rd.

9 JUDGE COLE: On the 23rd?

10 JUDGE SMITH: Yes.

11 JUDGE COLE: We start the staff's direct case
12 on the reinspection program.

13 JUDGE SMITH: What happens on the 30th?

14 JUDGE COLE: On the 30th, the intervener brings
15 in his testimony on the inspection program.

16 JUDGE SMITH: That's the one that I didn't pick
17 up. I'm sorry, Dr. Cole had to explain that to me. As
18 I understnad, Mr. Miller, your idea would be to have a
19 direct case, the applicant the staff's direct case on
20 the reinspection program on the 23rd, the intervener's
21 direct case on the week of the 30th.

22 MR. MILLER: That's it.

23 MR. CASSELL: Judge, that allows three working
24 days for a brand new lawyer to prepare the direct testi-
25 mony of our witnesses. That is not likely to result in

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1 fairness to us or efficiency for the process. It is not
2 going to save any time on the overall schedule. All it
3 is going to do is rearrange the presentation of witnesses.
4 The schedule you initially proposed is one which I think
5 is reasonable in terms of a full-court best effort by
6 us to meet. This schedule just turns everything around
7 and has our direct testimony due two weeks earlier, after
8 a lawyer has spent a week cross examining and presumably
9 spending some time to cross examine Edison's and the
10 staff witnesses. This is just not enough time.

11 JUDGE SMITH: Also, one of the disadvantages is
12 that it eliminates any possibility of a considered retreat
13 of some issues by the interveners witnesses, which we hope
14 to accomplish and Mr. Miller, I think it is implicit in
15 Mr. Miller's recommendations that he doesn't believe that
16 the intervener will retreat from anything. I think that
17 is probably the case of your position isn't it?

18 MR. MILLER: I'll make an X with it Judge.

19 MR. LEWIS: Mr. Chairman, this is Steve Lewis.
20 It would seem like the proposal that Mr. Miller put for-
21 ward would not allow really any opportunity for anybody to
22 prepare with respect to the interveners direct case, and
23 you are talking in terms of want cross-examination plans
24 and all of those type of things. That certainly would
25 not allow any of that. In fact, I don't really see how

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1 we could go forward even if we were given one day. Well,
2 we could always go forward, but cross examination would be
3 very difficult to see if anybody's direct testimony while
4 we are at hearing and it may be a one day time out to
5 review it to prepare the kind of cross examination you
6 would like to. Even, if we had the opportunity for
7 deposition. I had thought initially that Mr. Miller
8 was simply saying that he wanted the reinspection pro-
9 gram witnesses of the applicants to go on and the staff
10 on the same subject and then go on to the next subject
11 with the applicants on the system's control and with the
12 staff on the systems control. That suggestion I would
13 agree with.

14 JUDGE SMITH: Yea. That's what I thought he was
15 talking about. I agree with Mr. Lewis that I don't see
16 how we can be prepared, I don't see how, other than Mr.
17 Miller's conviction that there will be no adjustments of
18 the interveners' case, I don't see how it would be an
19 advantage to anybody. Well, I'm reminded of another point
20 in that connection. That is, Mr. Cassell, are you able
21 to tell us now whether the interveners have an interest
22 in the so-called miscellaneous issues?

23 MR. CASSELL: Judge, I have to tell you, I don't
24 know. I could get an answer for you on that after con-
25 sulting with Jean. At this moment, I don't know. Our

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1 discussions haven't gotten to that level of detail.

2 JUDGE SMITH: I incurred from the nature of
3 your experts that that is not what they are working on.

4 MR. CASSELL: I don't know. The reason that
5 I say that I don't know, Judge is it is, I would agree
6 with you based on those two experts that I talked about.
7 I'm not sure whether the testimony of the third witness
8 whose name is identified in this public discussion were
9 if it were to be admitted, it would be considered to be
10 a miscellaneous issue or not, and I'm also not aware of
11 whether Mr. Stoke's review includes any of the miscellan-
12 eous issues other than the reinspection program. I simply
13 don't know. I can find that out for you by tomorrow.

14 JUDGES SMITH: Alright. We have to change
15 cassettes.

16 (Brief Recess.)

17 JUDGE SMITH: I think it would be helpful if
18 there were early advise on that point.

19 MR. CASSELL: We were advised that the staff and
20 Edison had asked tomorrow, Judge, and you wish to be in-
21 formed on that?

22 JUDGE SMITH: Yes, I would because that would
23 raise the possibility of more limited presentation of
24 that testimony. Perhaps, a paper presentation.

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1 JUDGE CALLIHAN: Callihan here. Does the in-
2 tervener propose to make a case on Systems Control?

3 MR. CASSELL: I don't know judge if it would be
4 permissible to advise you of that tomorrow.

5 JUDGE CALLIHAN: Alright. Fine.

6 JUDGE SMITH: Would it be worthwhile to set up
7 another telephone conference call for tomorrow afternoon?

8 MR. CASSELL: I don't know that that would be
9 necessary, Judge. We can certainly supply the information
10 that you have asked for to Edison from the board rather
11 than take all of our time for these calls, which, as you
12 know, have been going on for some time.

13 JUDGE SMITH: Yes. Does anybody see a need for
14 such a conference.

15 MR. MILLER: This is Mike Miller. I think not
16 at this point sir.

17 JUDGE SMITH: One thing that is missing from the
18 transcript of this afternoon is the report by Mr. Cassel
19 that Ms. Whicher is leaving BPI and will be joining the
20 American Civil Liberties Union as of September 1st as I
21 recall. Is that correct?

22 MR. CASSELL: It will be in September, Judge,
23 in light of her illness, I don't know what the date will
24 be.

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1 JUDGE SMITH: And, that was the basis for your
2 observation that she will not be rejoining this case, and
3 will not be of any assistance except from her home.

4 MR. CASSELL: That's correct. To clarify that
5 Judge, to the extent that she is able to do anything at
6 all, she will be doing it on this case. The whole reason
7 for her having arranged with the ACLU to set a September
8 date was in contemplating of being able to finish the
9 hearings. They apparently agreed on that date, prior to
10 her realizing that she was ill.

11 JUDGE SMITH: Will this one week extension for
12 the beginning, your people are going to be coming for the
13 depositions, but we also will inquire into what extent
14 did you and they take advantage of the applicants offer
15 to provide a knowledgeable individual to discuss the
16 issues with them.

17 MR. CASSELL: Judge, I think that is a good
18 proposal in the contest of an attorney to schedule you
19 are suggesting us to take advantage of it. I intend to
20 have someone discuss that matter with Mr. Miller jsut as
21 soon as we can and that that we addressed.

22 JUDGE SMITH: Alright. I think that is about
23 it, unless there is anything further.

24 JUDGE CALLIHAN: Callihan here, I have one ques-
25 tion, Mr. Cassell, please.

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1 MR. CASSELL: Yes sir.

2 JUDGE CALLIHAN: Parenthetically you have come
3 in at very low intensity and I missed much. Would you
4 identify your two witnesses that you can name at this
5 point, at least by spelling their names.

6 MR. CASSELL: Yes sir. The first witness is
7 Mr. Charles Stokes, whose expertise is in the field of
8 engineering and direct experience in nuclear facility.
9 Our second expert witness is Professor Dud

10 JUDGE CALLIHAN: Wait a minute, you're fading.
11 Professor, what comes after that?

12 MR. CASSELL: Dud is his first name, and his
13 second name is Kochhar, and he is a professor in the
14 operations engineering department at the University of
15 Michigan.

16 JUDGE CALLIHAN: Thank you very much.

17 JUDGE SMITH: Mr. Miller, does the applicant
18 still hold on its offer to bring those people to Chicago?

19 MR. MILLER: Certainly.

20 JUDGE SMITH: We hope that full advantage will
21 be taken of that, and we'll inquire about that to see how
22 well you did take advantage of that opportunity to inform
23 yourself of the issues and narrow them. I have nothing
24 further. That seems to be about it.

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1 JUDGE CALLIHAN: One thing, Mr. Callihan again,
2 Mr. Cassell, have you got an affiliation for Mr. Stokes
3 or an address?

4 MR. CASSELL: I do not. We could supply that
5 to the board with the advise we are going to provide
6 tomorrow. I am sure that we have it in the files. I
7 don't have it with me.

8 JUDGE CALLIHAN: Thank you.

9 JUDGE SMITH: Well, you'll have to identify
10 those people formally to the other parties, so we will
11 get a copy of the letter. Anything further? Ok, I'll
12 be available tomorrow for any rulings that you might need.
13 I don't expect any difficulty now in the depositions or
14 anything, I don't see any problems right now. Alright
15 that's it right now, we are adjourned.

16 JUDGE CALLIHAN: Thank you.

17 (Whereupon, at 4:20 p.m. on Thursday, July 5,
18 1984 the hearing adjourned.)
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CERTIFICATE OF PROCEEDINGS

1
2
3 This is to certify that the attached proceedings before
4 the NRC.

5 In the matter of:

6 BYRON STATION
(Conference Call)

7 Date of Proceeding: July 5, 1984

8 Place of Proceeding: Bethesda, MD

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

11
12
13
14 Lisa Peck
15 Official Reporter - Typed

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17 Lisa Peck /NSB
18 Official Reporter - Signature

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