

ORIGINAL

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Agency: Nuclear Regulatory Commission
Atomic Safety and Licensing Board

Title: Ohio Edison Company (Perry Nuclear Power Plant,
Unit 1, Facility Operating License No.
NFP-58); The Cleveland Electric Illuminating
Company, The Toledo Edison Company (Perry
Nuclear Power Plant, Unit 1 Facility Operating
License No. NFP-58)

Docket No. 50-440-A and 50-346-A (Suspension of Antitrust
Conditions); ASLEP No. 91-644-01A

LOCATION: Bethesda, Maryland

DATE: Wednesday, June 10, 1992

PAGES: 237 - 447

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3 - - - - -

4 ATOMIC SAFETY AND LICENSING BOARD
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7 In the Matter of: : Docket Nos. 50-440-A
8 Ohio Edison Company : 50-346-A
9 (Perry Nuclear Power Plant, :
10 Unit 1, Facility Operating : (Suspension of
11 License No. NPF-58) : Antitrust Conditions)
12 :

13 The Cleveland Electric Illuminating:
14 Company, The Toledo Edison Company : ASLBP No. 91-644-01-A
15 (Perry Nuclear Power Plant, Unit 1 :
16 Facility Operating License :
17 No. NPF-58 :
18 - - - - -x

19 Nuclear Regulatory Commission
20 Fifth Floor Hearing Room
21 East-West Towers Building
22 4350 East-West Highway
23 Bethesda, Maryland
24 Wednesday, June 10, 1992
25

1 The above-entitled matter came on for oral
2 argument on parties' summary disposition filings, pursuant
3 to notice, at 9:29 a.m.

4 Before:

5 The Honorable Marshall E. Miller, Chairman
6 The Honorable Charles Bechhoefer, Member
7 The Honorable G. Paul Bollwerk III, Member
8 Atomic Safety and Licensing Board
9 U.S. Nuclear Regulatory Commission
10 Washington, D.C. 20555

11
12 APPEARANCES:

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15 Cleveland Electric Illuminating Co., and Toledo Edison Co.:

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1 APPEARANCES continued:

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13 On behalf of the Intervenor, American Municipal
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1 APPEARANCES continued:

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On behalf of the NRC Staff

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Steven R. Hom, Esquire

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Sherwin E. Turk, Esquire

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Joseph Rutberg, Esquire

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Office of General Counsel

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U.S. Nuclear Regulatory Commission

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Washington, D.C. 20555

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P R O C E E D I N G S

[9:29 a.m.]

1
2
3 JUDGE MILLER: The hearing will come to order,
4 please. These facilities are new to me, but they seem to be
5 convenient. I suppose that we will have an introductory
6 identification by counsel both of themselves -- that's not a
7 witness box, is it? It must be for multiple witnesses or
8 something.

9 Anyhow, this hearing will convene subject to
10 notice of hearing which was published in the Federal
11 Register as 57 Federal Register 20,136.

12 Simply by way of background, I will note that the
13 staff on May 1st, 1991 issued an order which also was
14 published in the Federal Register which denied the
15 applications previously made by Ohio Edison Company and
16 others for license amendments that you are all familiar
17 with.

18 We had a pre-hearing conference on October 7,
19 1991, and since then and pursuant to that order and the
20 discussions that we had with counsel, with you ladies and
21 gentlemen, there have been pending before the Board various
22 motions, cross-motions, counter-motions, et cetera, et
23 cetera, which we will ask you to identify for yourselves as
24 we go around and identify counsel.

25 Identify for the record your own work product so

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1 we'll know who's responsible for what motions, briefs,
2 points and authorities, points of light and whatever which
3 are now pending.

4 Essentially, there are two issues which are before
5 the Board as a matter of law by virtue of partial agreement
6 on identification of issues by counsel for the parties. The
7 first one which I will read into the record is the so-called
8 "bedrock" legal issue which was framed by counsel as
9 follows:

10 "Is the Commission without authority as a matter
11 of law under Section 105 of the Atomic Energy Act of 1954,
12 42 U.S. Code Section 2135, to retain antitrust license
13 conditions if it finds that the actual cost of electricity
14 from the licensed nuclear power plant is higher than the
15 cost of electricity from alternative sources or as
16 appropriately measured and compared?"

17 That is the so-called bedrock legal issue which
18 all of you will recognize.

19 In addition to that and a second matter, and
20 various of the parties have addressed the issue that was
21 raised by the City of Cleveland as to whether the licensee's
22 amendment request barred by four doctrines -- namely, res
23 judicata, collateral estoppel, laches, or law of the case
24 -- and those matters have been addressed by each of you,
25 too. Those were set up in the notice of hearing which I

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1 have identified.

2 Then there was a previous order picked up by
3 reference actually which allocated the time for argument as
4 follows. I'm assuming that it's still valid. If there have
5 been any changes or requests, let me know, but I believe
6 this would be still valid and governing. Applicants, 90
7 minutes, and a portion of that time could be reserved for
8 rebuttal; NRC staff and Justice Department, 50 minutes; and
9 other intervening parties, 40 minutes.

10 One counsel representing applicant Ohio Edison
11 Company and one counsel representing applicants Cleveland
12 Electric Illuminating Company and Toledo Edison Company may
13 present argument on behalf of applicants.

14 The Board prefers to hear argument from only one
15 counsel for each of the other parties, and as you identify
16 yourselves, please indicate for the record the name of the
17 one counsel who will be addressing the Board this morning in
18 that respect.

19 You will recall too that it was suggested that
20 counsel for staff, Justice and intervenor should consult and
21 arrive at an agreement concerning the division of the time
22 allotted to the respective parties. We assume that you have
23 done that and you may announce what your agreements are as
24 you identify yourselves.

25 I think you know my name is Miller. Judge

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1 Bechhoefer to my right, Judge Bollwerk to my left are, of
2 course, known to all of you.

3 I'll ask now that counsel identify themselves, the
4 matters that I have alluded to and any of their associates
5 for the record, please. Let's see. We'll start with the
6 applicants.

7 MS. CHARNOFF: Good morning, Mr. Chairman. My
8 name is Debbie Charnoff. I represent Ohio Edison. Sitting
9 to my right is Mr. Murphy from Squire, Sanders, who is
10 counsel for CEI and Toledo Edison. Collectively, we
11 represent the Applicants in this case.

12 We have filed two briefs that are relevant to the
13 issues pending. One is Applicant's motion for summary
14 disposition. The other is Applicant's reply to opposition
15 cross motions for summary disposition.

16 JUDGE MILLER: What were the dates of those, as
17 you go, please? I think the first one was January 6th, 1992
18 --

19 MS. CHARNOFF: Correct.

20 JUDGE MILLER: -- and I think the second was May
21 7, 1992?

22 MS. CHARNOFF: That's correct.

23 JUDGE MILLER: Thank you.

24 MS. CHARNOFF: With us today are a number of other
25 attorneys from our respective firms sitting behind us,

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1 including my husband, Mr. Charnoff, from Shaw, Pittman, and
2 Mark Singley, who worked with us on the brief, as well as
3 Colleen Conry from Squire, Sanders. We also have Mary
4 O'Reilly here who is an attorney from Toledo -- from Toledo
5 Edison Company.

6 JUDGE MILLER: Thank you. Next.

7 JUDGE BOLLWERK: Why don't you go ahead and give
8 us how you've allotted your time between the applicants, in
9 terms of the 90 minutes -- how they decided to divide it
10 up?MS. CHARNOFF: We have divided our time as follows: Mr.
11 Murphy is going to take 20 minutes, and will be focused on
12 what you've described, Chairman Miller, as the second legal
13 issue. In addition, he may touch upon some of the other
14 issues, particularly pertaining to the jurisdiction of other
15 federal agencies in the anti-trust area, which is something
16 on which he is much more expert than I.

17 I will take the balance of the time. What I would
18 like to do with that 70 minutes is reserve 20 of it for
19 purposes of rebuttal.

20 JUDGE MILLER: I might announce that Judge
21 Bollwerk will be our timekeeper. We do have a clock here.
22 I think that the new podium also has a device where you can
23 crank it up to alert yourselves. At any rate, we will be
24 keeping time. If there should be anything unusual, we would
25 take that into consideration. But, generally, the times, as

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1 set forth will be followe.d.

2 Anything further?

3 [No response.]

4 JUDGE MILLER: Next.

5 MR. MacGUINEAS: Good morning, Your Honor. My
6 name is D. Biard Mac Guineas. I'm with the law firm of
7 Volpe, Boskey and Lyons. We're here on behalf of the
8 limited Intervenor, Alabama Electric Cooperative, Inc. We
9 have filed one relatively slim document, dated March 9,
10 1992, encaptioned Alabama Electric Cooperative's combined
11 cross-motion for summary disposition and response to
12 Applicant's motion for summary disposition.

13 It's my belief that I will take about 10 minutes
14 for my presentation.

15 JUDGE MILLER: Thank you. Next.

16 MR. GOLDBERG: I am Rueben Goldberg. I represent
17 the City of Cleveland. Along with me today are Mr. Strother
18 and Ms. Brennan, of the firm, Goldberg, Fieldman and Letham,
19 P.C.

20 We filed two briefs. We filed originally a motion
21 for summary disposition of Intervenor, City of Cleveland,
22 Ohio, and answer in opposition to Applicant's motion for
23 summary disposition dated March 1992.

24 We have also filed a reply of City of Cleveland,
25 Ohio, to arguments of Applicants and NRC staff, with respect

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1 to the issues of law of the case, res judicata, collateral
2 estoppel and laches, and that's dated May 1992.

3 I have agreed with my colleagues, Mr. MacGuineas,
4 and Mr. Straus, on a division of our 40 minutes. I have 20
5 minutes and, as Mr. MacGuineas has told you, he has 10
6 minutes, and Mr. Straus has 10 minutes. We have also agreed
7 that if I take less than 20 minutes, the time that I haven't
8 used will accrue to Mr. Strauss, and what I have left will
9 accrue, additionally, to Mr. MacGuineas. And they've also
10 generously told me that if I exceed my 20 minutes, they
11 won't fault me.

12 JUDGE MILLER: That's fair.

13 MR. GOLDBERG: I think I've answered all of your
14 questions, have I not?

15 JUDGE MILLER: Yes, I believe you have, sir. I
16 thank you, Mr. Goldberg.

17 MR. STRAUS: I'm David Straus, of the law firm of
18 Spiegel & McDiarmid. We represent American Municipal Power
19 Ohio, Inc. We filed a brief of American Municipal Power
20 Ohio, Inc., in opposition to Applicant's motion for summary
21 disposition and cross motion for summary disposition, dated
22 March 9, 1992.

23 JUDGE MILLER: And you have 10 minutes more or
24 less?

25 MR. STRAUS: It looks that way, doesn't it?

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1 JUDGE MILLER: Okay. Next.

2 MS. URBAN: I am Janet Urban, I am with the
3 Anti-Trust Division, United States Department of Justice. I
4 will be taking no more than 25 minutes of the 50 minutes.
5 My friends at the NRC can have whatever is leftover.

6 We filed one piece of paper -- response of the
7 Department of Justice to Applicant's motion for summary
8 disposition, and that's dated March 9th, 1992.

9 JUDGE MILLER: Thank you.

10 MR. HOM: Good morning, Mr. Chairman, Board
11 members. My name is Steve Hom, and I am counsel for the NRC
12 staff. With me today are also Sherwin Turk and Joseph
13 Rutberg.

14 We have filed two briefs. The first, dated March
15 9th, 1992, entitled NRC staff's answer, in opposition to
16 Applicant's motion for summary disposition and NRC staff's
17 cross-motion for summary disposition.

18 The second filing is dated May 7th, 1992 and is
19 entitled NRC staff's answer to the motion for summary
20 disposition of Intervenor, City of Cleveland, Ohio.

21 And, as Ms. Urban indicated, we will be taking
22 half of the 50 minutes allotted to the staff and the
23 Department of Justice.

24 JUDGE MILLER: Thank you.

25 I believe that that covers all of the counsel of

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1 record, as well as those who will be addressing the Board
2 today.

3 Anyone else that you wish to identify for the
4 record that hasn't been so identified hitherto?

5 [No response.]

6 JUDGE MILLER: Here's your chance. You've got fee
7 bills and all that kind of thing.

8 We will start off, then. I believe it will be
9 well, then, for the applicant, being the moving party in
10 this proceeding, having divided time as indicated, to lead
11 off.

12 So, Ms. Charnoff, I guess the podium is yours.

13

14 ORAL ARGUMENT ON BEHALF OF THE APPLICANTS BY MS. CHARNOFF

15

16 MS. CHARNOFF: Good morning, gentlemen.

17 We view this opportunity as primarily an
18 opportunity to answer any questions that you may have, but
19 we do today have some things we would like to say.

20 I think that the most important point that we want
21 to make or, at least, the point that we hope you will leave
22 here with is that the bedrock legal issue in this case
23 raises one rather straightforward issue of law, and that is
24 whether a high-cost nuclear power plant can create or
25 maintain a situation inconsistent with the anti-trust laws.

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1 We submit and we have demonstrated, we believe, in
2 our filings that logic, first and foremost, and essentially,
3 every available indicia that we could turn to led to only
4 one conclusion, and that is that, in the absence of a low-cost
5 facility or, to put it another way, when a nuclear facility
6 is a high-cost facility, it simply cannot create or maintain
7 a situation inconsistent with the anti-trust laws.

8 The opposition has, in this case, endeavored to
9 make this, the bedrock legal issue, into something that it
10 is not or into a number of things, I should say, that it is
11 not, and we urge you to summarily reject these various
12 efforts.

13 First of all, we are not raising the so-called
14 nexus issue -- or issues, to be more precise -- which are
15 contained in a number of NRC cases, and let me review this
16 quickly with you.

17 We believe that, when you look at section 1. (c),
18 that there are three steps to analyzing the applicability of
19 that statute.

20 The first step is whether a facility creates or
21 maintains.

22 The second step is whether there is a situation
23 that will be created or maintained. This is sometimes
24 called situational nexus.

25 The third step is determining the proper remedy in

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1 the event you've answered the first two questions in the
2 affirmative. What is the proper scope of the remedy, and
3 that is sometimes called remedial nexus.

4 The opposition, in their various filings, focus
5 extensively on the competitive environment of various
6 applicants in various cases, the competitive situation, and
7 the conduct of the applicants in those situations.

8 All of this discussion goes to the issue of
9 situational nexus. What is the situation out there in the
10 marketplace? Who is doing what to whom? That's not our
11 issue.

12 Our issue is what we call the preliminary issue of
13 the incremental impact that a particular nuclear facility
14 will have, if any, on that situation.

15 Consequently, when the opposition refers to
16 language in the cases such as it's inappropriate to look at
17 the nuclear plant in isolation -- that's a Wolf Creek
18 statement; I believe it's ALAB 279, but it's from the Wolf
19 Creek decision -- that's really addressing a different
20 question altogether.

21 That's addressing the narrowness, or the lack of
22 narrowness, if you will, of the situation that the agency
23 must look at in order to determine whether a nuclear
24 facility's incremental impact will create or maintain that
25 situation.

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1 Thus, for example, there is a lot of language in
2 the cases about looking backwards and looking forwards,
3 looking to the past, the present, and the future.

4 All of this goes to figuring out what the
5 situation is, so that you can then assess what, if any,
6 incremental impact the nuclear facility has on that
7 situation.

8 In our case, for example, in the case of the Perry
9 and Davis-Besse facilities, the appeal board looked at the
10 prior conduct of the applicants, such as acquisitions of
11 municipal utilities, for example. That was part of their
12 look in order to define what the situation was.

13 I may be belaboring the point here, but I think
14 it's a very important point.

15 Once you define the situation, the issue
16 nevertheless remains whether the nuclear plant will, in some
17 way, contribute to that situation. That is the bedrock
18 legal issue. That is our issue. It is not nexus.

19 What is the bedrock legal issue. We have tried to
20 define it, or explain it, illustrate it, point to examples
21 of it in order to make clear what it is we are talking
22 about.

23 Our view is, in order for licensed activities to
24 "create or maintain" they must, in some affirmative way,
25 contribute to the owner's competitive situation, the owner's

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1 competitive position in the marketplace.

2 As the Appeal Board said in Wolf Creek, "An agency
3 must determine whether a facility can be used to the
4 disadvantage of competitors." That is another way, I
5 believe, of formulating the same point. Is the nuclear
6 facility going to enhance the competitive position of its
7 owners.

8 JUDGE BOLLWERK: Your point, I take it, is that
9 the logic of all this is that unless it enhances the product
10 owner's competitive position -- i.e., which higher
11 electrical cost cannot do -- then the NRC has no authority,
12 jurisdiction, however you want to put it, to have anything
13 to do with the conditions that have been imposed in this
14 instance.

15 MS. CHARNOFF: That is correct. I think, in the
16 absence of a competitive advantage flowing from the use of
17 nuclear power -- I am quoting now from Fermi, it is another
18 rendition of the same point -- in the absence of that value,
19 if you will, you are not creating or maintaining.

20 JUDGE BOLLWERK: There is a case called American
21 Federation of Tobacco Groups versus Neal, which is cited by
22 the Appeal Panel in the Davis-Besse Case, ALAB 560, 10 NRC
23 329, and, as I read that case, the language that is there,
24 and the case in its entirety, that seems to indicate to me
25 that, in fact, and we can look at it together, if you want,

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1 it says: The restraint of trade involving the elimination
2 of a competitor is to be deemed reasonable or unreasonable
3 on the basis of matters affecting the trade itself, not on
4 the relative cost of doing business.

5 What we are talking about here is a relative cost
6 of doing business, isn't it?

7 MS. CHARNOFF: I haven't looked back at that case.
8 Can you simply read the quote to me, again?

9 JUDGE BOLLWERK: I would be glad to.

10 Let me first put it in context, what was involved
11 here was a situation where a cooperative, a tobacco
12 cooperative was trying to buy time from an association to
13 put their tobacco on to the market, and the case makes clear
14 that in the absence of being able to buy that time, they
15 were basically shut out of the market.

16 The association, which did not want to sell them
17 time, basically said, "They have lower costs in some
18 respects than we do. Therefore, we don't think we have to
19 provide them an opportunity to be involved in our market."

20 The court basically rejected that argument saying,
21 and maybe I will read a little bit more of this, "To say
22 that a board of trade whose members of monopolistic control
23 of the market may exclude an outsider who wishes to compete
24 therein merely because he has an advantage in taxes or
25 construction cost is to advance a proposition that has no

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1 support in any decision with which we are familiar and none
2 has been cited in supporting it. Persons trading in and
3 controlling a market who have a heavy expense because they
4 operate in an expensive building would certainly not be
5 justified on that account in excluding from competition a
6 prospective competitor who is not burdened by such an
7 expense, but there would be just as much reason in this as
8 in permitting them to exclude him because his a warehouse or
9 factor was not subject to city costs and taxes."

10 This is the portion that is quoted in the Appeal
11 Board's decision in Davis-Besse, "A restraint of trade
12 involving the elimination of a competitor is to be deemed
13 reasonable or unreasonable on the basis of matters affecting
14 the trade itself, not on the relative costs of doing
15 business of the persons engaged in competition. One of the
16 great values of competition is that it encourages those who
17 compete to reduce costs and lower prices and, thus, pass on
18 the savings to the public. The bane of a monopoly is that
19 it perpetuates high cost and uneconomic practice at the
20 expense of the public."

21 This is a Sherman Act Section I Case, as I
22 understand it. Why doesn't that policy, which I understand
23 as "don't look at the cost, look at the monopolistic
24 practices," have a great deal of application in this case?

25 MS. CHARNOFF: Let me try to answer that in a

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1 couple of different ways.

2 First of all, the hypothesis that somebody is shut
3 out of the market suggests, in effect, that there are no
4 alternatives. That is not the situation that we are dealing
5 with here. Obviously, a nuclear power plant would not be
6 high cost if it was not high cost relative to something
7 else. So we are not talking about barriers to entry, to
8 use, as I understand it, the anti-trust lingo here.

9 Secondly --

10 JUDGE BOLLWERK: Although, again, you have a
11 situation, don't you, with the city of Cleveland, for
12 instance, and this goes back to the Davis-Besse Case and the
13 reason all of these conditions were imposed, where they are
14 essentially hemmed in and, in the absence of the wheeling
15 provisions that are here, they have no way to get power in,
16 at least in terms of wheeling it unless they buy it from the
17 applicant?

18 Is that not true?

19 MS. CHARNOFF: I don't know the answer to that.
20 However, I don't think the answer to that answers the
21 question that we are here to answer today, and let me
22 explain why.

23 There is no doubt, and I don't know in what
24 context this was raised in the Davis-Besse Case, but if it
25 was raised in the context of determining whether the

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1 applicants had monopoly power, and the whole discussion of
2 the competitive environment in that situation, we agree that
3 a lot of traditional anti-trust analyses are used to assess
4 what the competitive environment is, and what the relative
5 positions are of competitors in that environment, but that
6 is not the beginning and the ending point of analysis under
7 105(c). That is your standard anti-trust type of analysis,
8 which then may lead to a conclusion that you need a standard
9 sort of anti-trust remedy.

10 But Section 105(c) is not the same thing as that.
11 Section 105(c) is concerned particularly with the impact of
12 the nuclear facility on that environment, be it a
13 monopolistic environment, or some other type of environment.

14 In Davis-Besse, there was no question but that the
15 nuclear facilities were going to produce low cost power
16 relative to available alternatives, and so we had already
17 passed through the threshold of saying there was going to be
18 -- if there was a "situation" inconsistent with the
19 anti-trust laws out there, clearly those nuclear facilities
20 were going to contribute in some way to that, so that the
21 focus of the case was on the situation, if you will.

22 No matter how much you describe the situation, or
23 the ways in which you describe it, and who has done what to
24 whom, and who has shut out who, and I didn't pick up all the
25 language that you cited, that is not determinative of the

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1 issue under Section 105(c). That tells you your situation,
2 it doesn't answer the bedrock legal issue which is part of
3 the Section 105(c) analysis.

4 JUDGE BOLLWERK: Doesn't the language seem to
5 indicate, at least under the anti-trust laws, that cost is
6 not determinative, which is sort of, as I understand it,
7 your argument, at least here?

8 MS. CHARNOFF: Our argument is that cost is a
9 necessary predicate. If you don't have a situation, cost
10 isn't going to do it either. You need more than one thing.

11 But in the absence of a nuclear plant that somehow
12 incrementally and adversely, from a competitive point of
13 view, impacts a situation, it doesn't matter what situation
14 is out there.

15 One of the things we pointed to in our briefs is
16 the fact that in this industry virtually all licensees are
17 dominant in their service areas. If the only issue was
18 dominance, and monopolization, there would be no "whether
19 cause" -- what I call the whether clause, since the 105(c)
20 is phrased in terms of whether the licensed activities
21 create or maintain -- because it would be automatic, but
22 that is not the way the statute is written, and that is not
23 the intent of the statute.

24 To summarize our point here, we believe that the
25 Step 1 analysis, which is the bedrock legal issue in this

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1 case, requires a determination that licensed activities
2 create or maintain. That in turn requires a showing that
3 licensed activities are competitively advantageous. In
4 order to be competitively advantageous, the licensed
5 facility must produce low-cost power.

6 JUDGE BECHHOEFER: Let me question that for a
7 minute.

8 Are you saying that the -- just for an example now
9 -- are you saying that the environmental impact of the
10 nuclear plant is the same as the environment impact of a
11 similarly sized coal-powered facility?

12 MS. CHARNOFF: No, but I don't think that that --
13 I have two different ways to answer that, Judge Bechhoefer.
14 Let me do so.

15 First of all, environmental costs, if you will,
16 are fed into the process or considered in the process in a
17 couple of different ways, in the NRC process. One is before
18 both applicants and the NRC decide to go with the nuclear
19 plant, they consider alternatives to the nuclear plant, and
20 one of the issues in deciding whether to build a nuclear
21 plant are not only the financial costs but the environmental
22 costs of the different choices that are made, of the
23 different possibilities that can occur.

24 Now, you can treat environmental as separate from
25 financial costs or you can put them together because the

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1 fact is environmental costs to a significant extent can be
2 translated into financial costs -- how much will it cost to
3 make something equivalent environmentally, so that process
4 is fed in at the front end.

5 Once a decision is made to apply for a license,
6 for example in our case, the cost that you are talking
7 about, you have already passed through the hurdle of
8 deciding that that is option that you want to exercise and I
9 believe in the Section 105(c) analysis, first of all we are
10 talking about competitive value, which is traditionally
11 known as cost, and secondly, the decision by the consumer at
12 that point to use or not use electricity is not governed by
13 whether the particular electricity that is coming through to
14 their home is environmentally -- has produced more or less
15 environmental consequences, but the kind of cost that
16 affects choices in the marketplace in the area of
17 electricity is money.

18 In other words, someone will or will not be happy
19 with their electricity bill because it costs more or less.
20 There is no way because of the fungibility of electricity
21 and essentially because they have already passed through the
22 hurdle -- they may have opposed the construction of a
23 nuclear plant because they didn't think it was as
24 environmentally preferable, but once that plant goes into
25 the system, people don't turn on and off their electricity

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1 depending on -- if they could figure it out, which it's not
2 possible to do -- whether it came from a nuclear plant or a
3 more environmentally preferable plant or less
4 environmentally preferable plant, depending on your vantage
5 point.

6 JUDGE BECHHOEFER: Well, I thought --

7 MS. CHARNOFF: I don't think 105(c) -- that's a
8 long-winded answer to your question, but I don't think
9 105(c) is focused on costs other than financial costs and I
10 think that is the reason -- because it's concerned with
11 antitrust type impacts which are financial impacts.

12 JUDGE BECHHOEFER: Let me just read you a
13 statement now. This was a statement made in the hearings
14 leading up to the 105(c). It says --

15 JUDGE MILLER: What page is that?

16 JUDGE BECHHOEFER: I am reading now from page 436.

17 JUDGE MILLER: Page 436.

18 JUDGE BECHHOEFER: I am not sure that is a
19 meaningful page for anybody else.

20 MS. CHARNOFF: This is the legislative history?

21 JUDGE BECHHOEFER: Yes, this is from the hearing.

22 This is a statement by William R. Gould, who is a
23 Senior Vice President of Southern California Edison Company.

24 He says, "For our system nuclear plants do not
25 have a cost advantage on a mils per kilowatt hour basis over

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1 fossil fuel units. Our company is now committed to build
2 only nuclear units for major generation resources in the
3 California south coastal basin, not because of an economic
4 advantage but because air pollution control considerations
5 dictate that after 1975" -- and this was about 1969 or -70,
6 1970 I guess -- "under existing air pollution control
7 regulations, large fossil fuel generating units may not be
8 built in this coastal basis."

9 MS. CHARNOFF: Yes.

10 JUDGE BECHHOEFER: Now doesn't that contradict
11 something that you just said?

12 MS. CHARNOFF: No, I don't think so at all. Let
13 me try to explain why.

14 I am familiar with that, and let me tell you how I
15 view that.

16 The issue for any company including Mr. Gould's is
17 what are the options. Are there options, are there
18 alternatives and what are they?

19 Our thesis is that in order to create or maintain
20 a nuclear plant must be lower cost than available
21 alternatives. If a type of power plant is unavailable for
22 whatever reason, including the fact that it's environmental
23 impacts are too great, it's not part of our hypothesis.
24 That is no longer an alternative, so I think that the
25 environmental issue does determine which options are

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1 available and in that sense which plants you are comparing
2 your nuclear plant to for purposes of deciding whether it is
3 higher cost or not. In other words, our phase two, what we
4 put off into phase two here is what is the cost of the
5 nuclear facility and what do you compare it to.

6 You have to compare it to available alternatives
7 and I would say that in that situation, if nuclear is the
8 lowest cost compared to available alternatives, which from
9 his discussion appears to exclude coal plants --

10 JUDGE BECHHOEFER: That's correct.

11 MS. CHARNOFF: -- then nuclear may well be the
12 most competitively advantageous.

13 JUDGE BECHHOEFER: But then let me ask you, this
14 is one of the ingredients that went into the legislative
15 history of Section 105(c). Congress had this before it when
16 it passed the provision that you are now saying depends I
17 guess solely on low cost.

18 I'm saying doesn't that -- doesn't this type of
19 material, and I have a slew of others here, which I will get
20 to sometime during the day, doesn't this indicate that
21 Congress might have been thinking of something other than
22 cost?

23 MS. CHARNOFF: I don't think so and this is what I
24 want to convince you of.

25 I think that that issue, the issue of other types

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1 of costs, may well be an issue before the NRC and it may in
2 fact have contributed to when those issues are considered in
3 the NRC licensing process. I do not believe it is a
4 consideration under Section 105(c). As we described,
5 clearly options that are not available are options that you
6 can't compare anything with under Section 105(c).

7 JUDGE BECHHOEFER: But if there are no options, no
8 viable options available, aren't the antitrust conditions
9 even more useful? I mean, doesn't an --

10 MS. CHARNOFF: I would agree --

11 JUDGE BECHHOEFER: -- an operator of a plant in
12 such an area have every opportunity to be inconsistent with
13 the antitrust laws -- heaven forbid I should use "violate."

14 MS. CHARNOFF: I would agree that if there were no
15 available alternatives for whatever reason including for
16 example environmental costs, but it might not only be
17 environmental costs -- there might be other reasons -- then
18 nuclear power is not going to be higher cost relative to
19 alternatives because there are no alternatives. In fact, no
20 matter how high priced it is, it may well be the lowest cost
21 available because it is the only one available.

22 JUDGE BOLLWERK: Therefore, cost is irrelevant,
23 and if it's irrelevant in that situation, why isn't it
24 irrelevant generally?

25 MS. CHARNOFF: It's not irrelevant generally

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1 because --

2 JUDGE BOLLWERK: Or it's a factor, but it's -- I
3 shouldn't say irrelevant, but it doesn't have central
4 relevance as you are asserting.

5 MS. CHARNOFF: Well, it has central relevance
6 because of the fundamental -- we believe it's a truism that
7 if you have two things that are exactly the same and one
8 costs more than the other, people will buy the cheaper one.
9 If you only have one, people will pay whatever they have to
10 get it.

11 JUDGE BOLLWERK: People will buy the cheaper one
12 if they can get it, but if there's a monopoly there that
13 says you're going to buy it at our cost, they will have to
14 buy it at the monopoly cost. Isn't that correct?

15 MS. CHARNOFF: They will buy the cheaper one if
16 they can get it. That's correct.

17 JUDGE BOLLWERK: But if there's a monopoly there
18 saying you will buy it at this cost, that's what the
19 antitrust laws are all about.

20 MS. CHARNOFF: Yes, but if your commodity is more
21 expensive, they don't want it whether they can get it or
22 not. It doesn't matter whether they are blocked from
23 getting it. If I have an expensive whatever you want, a
24 widget, I mean, whatever object you want to talk about, it
25 doesn't matter whether people are blocked from getting it or

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1 not.

2 JUDGE BOLLWERK: Well --

3 MS. CHARNOFF: The issue under 105(c) is access to
4 nuclear power. If nobody wants the power because it's high
5 cost, it really doesn't matter for purposes of 105(c).

6 Now, I'm not going to say it's irrelevant --

7 JUDGE BOLLWERK: Oh, I see. Somebody is clearly
8 buying the power from your facility, and you are saying it
9 has high cost, and I don't hear you saying that you are in
10 bankruptcy. You have a situation where you have high cost
11 and yet somebody is buying it. So -- I guess I don't
12 understand.

13 I mean, the theory, if you take yours to its
14 logical conclusion, you all would be bankrupt by now. Is
15 that --

16 MS. CHARNOFF: Well, I wish I could -- the answer
17 to that is complicated because of how power is used on the
18 system. Once you have invested the money in the facility
19 and it's baseload power, as I understand it, and I'm not a
20 rate person or, you know, I'm not sure I can answer this in
21 the detail that would be appropriate, but you're still
22 better off using that power than using plants which are
23 peaking plants, for example, where the costs to run nonstop
24 are higher. So I don't think it's -- I don't think the
25 answer is as you've described.

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1 But I think the fact of the matter is that if the
2 commodity is not competitively advantageous in some way,
3 which either means there's something unique about it, and
4 when you have a product like electricity that's fungible,
5 electricity from one plant is no more unique than
6 electricity from another --

7 JUDGE BOLLWERK: Although transmission facilities
8 may be unique, which is something that goes into this mix,
9 doesn't it?

10 MS. CHARNOFF: Well, we do think that the NRC and
11 the NRC cases consider as a part of the package, if you
12 will, the transmission that goes along with the whole
13 project, but if you read the cases, there just isn't any
14 question that the reason they do that is because of the
15 issue of access to nuclear power.

16 Now, when you are describing the situation, again
17 going to a different issue than the issue we're talking
18 about, then you get into the whole world of what is the
19 entire position, including transmission, of a utility
20 company. But that's not the determinative issue under what
21 I've labelled Step 1, whether the licensed activities create
22 or maintain.

23 Judge Bechhoefer, I don't know if I've answered
24 your question.

25 JUDGE BECHHOEFER: Well, I'm not sure that you

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1 have, but --

2 MS. CHARNOFF: Let me just say something once
3 again and then I'll move on.

4 JUDGE BECHHOEFER: Let's put it this way. I'm not
5 sure you can view environmental affairs, for instance, or
6 factors as a precondition, that you get out of the way
7 before you get into anything else.

8 I think environmental factors -- there's always an
9 applicant that will submit an environmental report and it
10 will always say that it's preferable to alternatives and it
11 may or may not be, but presumably it is. I mean,
12 environmental statements say that it's no worse at least;
13 different, but no worse. But are there not enough
14 situations, then -- could you build a big coal fire plant in
15 the middle of the City of Cleveland, or even out where your
16 facilities are --

17 MS. CHARNOFF: Well, I think the environmental
18 --JUDGE BECHHOEFER: -- from an EPA standpoint?

19 MS. CHARNOFF: Right. I think environmental
20 considerations all along the way of the licensing process
21 affect the choices that are made and the choices that are
22 not made. But I think that whatever choices are made are
23 what you compare the nuclear plant to, and, conversely, if a
24 choice is not made or cannot be made for whatever reason,
25 it's not an alternative. That means by definition it is not

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1 a viable alternative.

2 There are some -- well, --

3 JUDGE MILLER: Go ahead. Continue your
4 argument. MS. CHARNOFF: I will move on.

5 JUDGE BECHHOEFER: Go ahead. I may have some more
6 questions along this line later.

7 MS. CHARNOFF: There are a series of issues, legal
8 and factual, which the opposition makes which, in addition
9 to the nexus issues which I've endeavored to distinguish
10 from our issue, are also not issues that our issue raises,
11 and I think there's sort of an effort to muddy the waters
12 here by suggesting that our issue raises a lot of other
13 concerns that it does not.

14 The first one of these is, I believe, an issue
15 raised by AMP-Ohio, which is that applicants are somehow
16 asking you to re-write the statute or to otherwise do
17 something beyond your statutory authority.

18 This is a mischaracterization of our request.
19 What we are saying is that we believe Section 105(c) means
20 something in particular, and we are asking you to consider
21 whether it does or does not mean that. We believe that you
22 are particularly -- that this Agency and this Board as well
23 is exactly the type of tribunal that is supposed to consider
24 that kind of issue in the first instance, and that we're not
25 asking you to do anything other than that. We're not asking

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1 for a different statute. We believe the statute as written
2 means what we're now saying it means.

3 Similarly, or on a slightly different bent of the
4 same type of argument, the Department of Justice argues that
5 all we're doing here is asking the Agency to exercise
6 remedial authority, or remedial discretion is, I think,
7 their expression, and to ask the Agency to somehow define
8 itself as losing authority it once had doesn't make any
9 sense.

10 I don't think either of those characterizations
11 are fair characterizations, again, of what we're trying to
12 do here. This is not a discretionary issue. The statute
13 either means something or it doesn't mean something, and if
14 it means one thing, we believe the outcome goes one way; if
15 it means something else, the outcome's another. If in fact
16 to create or maintain, licensed activities must be high cost
17 -- must be low cost -- excuse me -- then that leads to one
18 outcome. It's not an issue of discretion here; it's an
19 issue of statutory interpretation.

20 JUDGE BOLLWERK: Do you consider it a
21 jurisdictional manner? We find that this Board -- assuming
22 we were to agree with you and find that high cost has to be
23 a finding within the statute, in order for the NRC to
24 exercise its authority, is that a matter or the Agency's
25 jurisdiction?

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1 MS. CHARNOFF: I think so. We've debated this.
2 We danced on the head of the pin within our own -- the
3 Applicants have, on that point. But, I don't believe
4 Section 105(c) gives the NRC authority to impose license
5 conditions on its licensees, in the absence of a facility
6 that creates or maintains a situation inconsistent with the
7 anti-trust laws.

8 JUDGE MILLER: So, it would be jurisdictional?

9 MS. CHARNOFF: So, in that sense, I do believe it
10 would be jurisdictional.

11 JUDGE MILLER: If there were an application
12 pending before the Board or before NRC for the first time,
13 would your position then be that 105(c) and 105(c)(5) should
14 be interpreted as you are urging it.

15 MS. CHARNOFF: Absolutely.

16 JUDGE MILLER: And, therefore, would not only be
17 an issue, and possibly a jurisdictional issue, but it's one
18 that the parties would all be required to address?

19 MS. CHARNOFF: Yes.

20 JUDGE BOLLWERK: So, they cannot waive it, in
21 other words -- or waive it by failing to raise it?

22 JUDGE MILLER: Jurisdiction.

23 JUDGE BOLLWERK: In other words, you can come in
24 any time in the proceeding and say, as a matter of
25 jurisdiction -- we've gone along, but now we've come up with

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1 this issue. You have no jurisdiction here, therefore,
2 you're out. I mean, normally, jurisdictional issues, if
3 they're true jurisdictional issues, cannot be waived.

4 MS. CHARNOFF: Right. And this is subject matter
5 jurisdiction.

6 JUDGE BOLLWERK: So, you're saying it cannot be
7 waived?

8 MS. CHARNOFF: I don't believe so.

9 JUDGE MILLER: It cannot ever be waived.

10 MS. CHARNOFF: No, I don't believe so. The
11 reason, as we've said repeatedly in our briefs, the reason
12 this didn't come up is because the plants were all
13 anticipated to be low-cost. So, everyone just moved right
14 past the issue. It simply wasn't a --

15 JUDGE MILLER: Suppose everybody was wrong or they
16 become more informed with the passage of time and change of
17 circumstances in that case that you are now arguing,
18 whatever the reason. If it is jurisdictional, in the sense
19 that there must be a certain issue, or low cost, addressed
20 and resolved whether rightly or wrongly by the NRC, then
21 isn't that a matter which could not be waived and which
22 would be both present, if there were an initial application
23 now. And you're reaching back into the history of this
24 thing -- where there was something that was not addressed
25 for whatever reasons, including assumptions, nonetheless was

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1 overlooked. Isn't that your argument?

2 MS. CHARNOFF: Well, we believe -- yes. I mean, I
3 think that the legal issue, as resolved, for example, by
4 this Board, then would need to be applied in other cases. I
5 mean, you still have this -- what we put off to Phase II,
6 which is whether a particular facility, in fact, is low-cost
7 or high-cost, relative to alternatives. And that's a
8 different question -- the answer to that is -- is, I'm quite
9 sure going to be different in different situations.

10 JUDGE MILLER: That may well be. I am going to
11 give you some time out here, because I am getting things
12 that are beyond your present argument. But, nevertheless,
13 wouldn't that have the effect or the result of a widespread
14 pandemonium in the nuclear industry, when there are all
15 sorts of attitudes currently in different parts of the
16 country and so forth, as to the viability or desirability of
17 nuclear power?

18 If this were to be followed to its logical
19 conclusion as a jurisdictional matter, then wouldn't that
20 throw into serious question nuclear licensing, insofar as
21 there were anti-trust implications throughout the country?

22 MS. CHARNOFF: I hesitate to buy into that
23 characterization, because I don't think the sort of
24 pandemonium aspect that you've described is, in fact, what's
25 going to happen. This is something that we've talked about

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1 in our reply brief, and I will just tough upon here, which
2 is that, contrary to some of the opposition's
3 characterizations that if you do this the sky will fall, the
4 sort of chicken little type of description --

5 JUDGE MILLER: No. The chicken big.

6 MS. CHARNOFF: Chicken big. I don't see that as
7 realistic in any way, shape or form. And there -- there are
8 a variety of reasons for that, depending on what you're
9 talking about here. First of all, contrary to certain
10 descriptions by our oppositions, applicants cannot
11 unilaterally go in and do whatever they want with respect
12 to, for example, Wheeling. We can talk -- you know, that's
13 a good example to pick.

14 They simply don't have the ability to do that.
15 And, so you don't even have to reach the question of whether
16 they might want to or all this stuff the Justice Department
17 says out our incentive -- we're going to have more of an
18 incentive -- because we are less competitive, we somehow
19 have more of an incentive, and therefore, the anti-trust
20 laws ought to apply more severely to the underdog than to
21 the competitively advantage -- the person who is situated
22 advantageously. I think that's counter-intuitive.

23 JUDGE MILLER: That is what?

24 MS. CHARNOFF: I said counter-intuitive.

25 Illogical may be a simpler way to put it.

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1 JUDGE MILLER: Oh, I see.

2 MS. CHARNOFF: The --

3 JUDGE MILLER: It's not disingenuous is it? I
4 notice at least three times, and this goes back here -- is
5 it worse to be ingenuous, naive and so forth, or
6 disingenuous? I've never been able to decide where it
7 falls.

8 MS. CHARNOFF: I would say it depends on how
9 deliberate you are.

10 JUDGE MILLER: I guess.

11 MS. CHARNOFF: But there are other agencies, and
12 this is not something that I want to go into in great depth.
13 My co-counsel here may be able to do a better job of it.
14 But there is no question that, for example, we applicant's
15 have tariffs filed with FERC. We can't just ignore those
16 tariffs. We cannot unilaterally change those tariffs. We
17 have to go into FERC and get their approval of whatever
18 change we want to make and we have to justify that change.
19 And FERC is interested in the competitive impact of the
20 changes that we make.

21 JUDGE BOLLWERK: Given FERC's interest in this
22 matter, I mean, are we here sort of cleaning this up as a
23 legal matter, so then you can go to FERC? Why don't you go
24 to FERC first, get the willing provision, then come back to
25 us? Then the anti-trust provisions that are in the

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1 licensing theory have some meaning. Right now it sounds to
2 me like what you're saying is that FERC is the one --
3 despite what the NRC's provisions may be, FERC is the one
4 that really is controlling this matter.

5 MS. CHARNOFF: No, I don't follow that, Judge
6 Bollwerk. We have conditions binding us in both agencies.

7 JUDGE BOLLWERK: Right.

8 MS. CHARNOFF: We're trying to disentangle
9 ourselves from this agency, and then we will deal with FERC
10 on FERC's terms, which do include consideration of the
11 issues that, for example, Judge Miller was worried about.
12 Are we going to be in a state of pandemonium here? My
13 answer is no, because there are lots of other people who
14 worry about these things, and worry about them in the
15 context of the entire industry.

16 The NRC's jurisdiction is very focused, as I've
17 said before, on the incremental impact of the nuclear
18 facility.

19 JUDGE BOLLWERK: So, the next stop is FERC then,
20 assuming you went here?

21 MS. CHARNOFF: Well, if we want to change those
22 conditions, we would have to go to FERC. I don't want to
23 suggest that the only issue here is Wheeling. I mean, there
24 are other obligations we have. For example, our client,
25 Ohio Edison, has explained to us all of the reserve capacity

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1 and what not that we have to maintain under these
2 conditions. And the standards for FERC on that issue might
3 be different.

4 JUDGE BOLLWERK: I guess my concern is, I mean, I
5 don't want -- this Board obviously doesn't sit here to rule
6 on sort of interesting legal questions, and this is
7 certainly an interesting legal question. But, I guess I'm
8 going to find out what the practical impact is. If your
9 recommendation is that even if we remove all the license
10 with the NRC, the FERC is still standing there.
11 becomes sort of academic, doesn't it?

12 MS. CHARNOFF: No. We don't believe it is
13 academic. First of all, we do think it makes a difference
14 to a company how many agencies they're dealing with it.
15 That transmits to a money issue.

16 Secondly, as I said, there are a lot of
17 considerations, not just the Wheeling. And, on the Wheeling
18 issue, we don't know the outcome, to tell you the truth. We
19 don't know, A, whether we would go to FERC; and B, if we do
20 go to FERC what the outcome would be. What I want to assure
21 you here is that we can't unilaterally do that.

22 JUDGE BECHHOEFER: Well, you could unilaterally
23 start the process by going to FERC.

24 MS. CHARNOFF: Yes. We can unilaterally seek to
25 do it, but we cannot accomplish it, not unless we want to

1 break the law.

2 JUDGE BOLLWERK: Is there any reason we should
3 wait until you go to FERC and sort of have these two things
4 proceed in tandem?

5 MS. CHARNOFF: Well, I don't think what FERC will
6 or will not do has any bearing on what the NRC's authority
7 is or is not. So, my answer to that is no.

8 JUDGE MILLER: Give her some more time.

9 JUDGE BECHHOEFER: Would you have the NRC staff,
10 yearly, go and look at your cost to see, well, should these
11 conditions be reimposed or should there be applicable
12 conditions? Do you think that type of regimen is
13 contemplated by the statute, as written?

14 MS. CHARNOFF: You're describing, Judge
15 Bechhoefer, what I proverbially call the yo-yo effect, which
16 is an argument made, I believe, primarily by the NRC staff,
17 and again, I think this is a red herring.

18 Unfortunately for those companies who have built
19 and invested enormously in nuclear power, we don't have a
20 yo-yo effect.

21 We have nuclear power costs which are much higher
22 than those anticipated and which we can now pinpoint,
23 because certainly, the construction costs on operating
24 plants are fixed, and the operating costs are quite
25 reasonably ascertainable.

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1 The only real variable in this type of analysis,
2 as far as I can tell, when I look at it, is the possibility,
3 which I think is very remote, that alternative sources of
4 power, their cost, might change in some unanticipated way.

5 If, suddenly, coal power -- the cost of coal
6 doubled or something like that, that's the type of
7 circumstance which I think would prompt a reevaluation under
8 105(c).

9 JUDGE BECHHOEFER: What if coal were unavailable
10 due to the circumstances that were raised earlier?

11 MS. CHARNOFF: Exactly the same analysis. I think
12 that would prompt the same analysis if that meant that there
13 were no alternatives that were lower cost.

14 If the lower-cost alternative that was available
15 was coal and coal became unavailable, then you would be in a
16 different situation, but that's, frankly, why we fashioned
17 our license amendment request as a suspension, because we
18 could not remove entirely the possibility, however remote,
19 that alternatives would become so high cost that, no matter
20 how high cost the nuclear, it would still be lower than the
21 alternatives.

22 But that is not a realistic picture of the
23 marketplace. It simply is not, and so, you can throw this
24 out again as a Chicken Little type of a thing, that you're
25 worried, every year, people are going to have to come in and

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1 reevaluate, because our costs go up and down.

2 Relative to alternatives, our costs do not go up
3 and down. Our costs are higher, and perhaps the most
4 telling indication of that is people like AMP-O don't want
5 to buy nuclear power, and that's because they have better
6 alternatives from a cost point of view.

7 JUDGE MILLER: Is that relevant, really?

8 MS. CHARNOFF: Well, I just think that it
9 illustrates the point that we're saying. If nuclear power
10 was competitively advantageous, it would be desirable.
11 It's not. It's not desirable, and it's not desirable
12 because it costs more.

13 JUDGE MILLER: In interpreting the statute, you
14 don't need to go to Adam Smith, do you?

15 I guess my question is what you're asking, what
16 anyone in this argument is asking NRC to do is to either
17 reinterpret the statute or interpret it in such a way that
18 it has never been interpreted, although there have been more
19 than one anti-trust hearings within the supposed
20 jurisdiction of NRC and the 105(c) aspects of the Atomic
21 Energy Act.

22 MS. CHARNOFF: Well, I would say, first of all --
23 you said reinterpret or interpret -- I forget your exact
24 phrase.

25 JUDGE MILLER: Since your theory applies to either

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1 20 years ago or now or in the future -- it's an all-purpose
2 theory --

3 MS. CHARNOFF: Yes.

4 JUDGE MILLER: -- I guess it doesn't much matter.
5 I mean this is a tablet of stone, isn't it, that you are
6 telling us what it means, and you may surprise people, but
7 if you're correct, then it has all sorts of implications,
8 repercussions, and the like.

9 MS. CHARNOFF: That's right, and in fact, in our
10 brief, Judge Miller, we endeavored to show, for example,
11 that, as I said when I started speaking earlier, all
12 available indicators, indicia, suggest that this is what
13 everybody had in mind.

14 While it is true that the cases that are the --
15 and let me set Fermi aside for a second, because Fermi is
16 different. This is not true with respect to Fermi.

17 But in the other traditional, if you will, NRC
18 anti-trust cases, the low-cost factor was built into the
19 analysis. To us, that's very consistent with our theory
20 that it's a necessary predicate to reaching the other issues
21 that are involved in 105(c).

22 JUDGE MILLER: Well, if I understand you, the fact
23 that everybody thought they didn't have to bring it up or
24 you could assume that this was a predicate and so forth,
25 both in the hearings and in the statute and what NRC did 20

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1 or 25 years ago, I guess it's like the Constitution.

2 It may have been drafted, except for the first 10
3 amendments, in 1787. When you seek to analyze the
4 Constitution and to apply its principles in light of the
5 present environment, if you wish, of the government, are you
6 starting from scratch?

7 Is it something that the founding fathers
8 overlooked, and they should have said privacy and various
9 things of that kind that the Supreme Court may have
10 interpreted or found in there --

11 MS. CHARNOFF: I would not use the word
12 "overlook," but I would use the expression "didn't focus"
13 particularly upon. It wasn't a controversial issue.

14 JUDGE MILLER: It was something they couldn't
15 focus on, like the airplane.

16 MS. CHARNOFF: Well, to some degree -- I don't
17 know if, analytically, they couldn't, but there is certainly
18 no need to.

19 There is absolutely no need to, because it was
20 understood, it was represented repeatedly, and the going-in
21 proposition -- why would people build nuclear plants, after
22 all, if they weren't competitively advantageous?

23 JUDGE MILLER: Somebody might have \$2 billion to
24 spend and say, gee, I'd just like to have a cooling tower
25 and a nuclear plant. I guess there's all kinds of reasons.

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1 JUDGE BOLLWERK: Or they might if that's the only
2 way that they can get base-load power.) the environmental
3 considerations are such, that's the only kind of plant they
4 can build.

5 MS. CHARNOFF: But again, if that's true, then
6 it's still the most competitively advantageous.

7 JUDGE BOLLWERK: But it's not because of cost, and
8 that's what you're here telling us.

9 MS. CHARNOFF: It is because of cost, because it's
10 because, regardless of the cost, it's the only alternative.
11 The only way cost becomes, as you put it, irrelevant is when
12 there is no other option.

13 If it is the only baseload alternative, and there
14 is no other baseload alternative and, therefore, if you want
15 baseload, you take that whatever it costs.

16 If there are two, three, four alternatives, and
17 they all cost a different amount, you are going to want the
18 cheapest one.

19 JUDGE BOLLWERK: But the fact that this baseload
20 lower, which is only available through a highly costly
21 method, but is the only one because of environmental
22 considerations, that has nothing to do then with the
23 anti-trust laws.

24 MS. CHARNOFF: If it is the only one available,
25 then the bedrock legal issue remains the same. That is, I

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1 would answer the bedrock issue affirmatively, yes, that it
2 requires a low cost facility relative to alternatives to
3 create or maintain.

4 But if the facility costs a zillion dollars, it is
5 still low cost relative to alternatives because there are no
6 alternatives. It is the lowest option in existence, the
7 lowest cost option in existence, as the only option in
8 existence.

9 While the bedrock legal issue is answered in the
10 same way, Phase II, if you will, comes out differently. In
11 other words, notwithstanding the fact that it may cost a lot
12 of money, you still are subject to anti-trust conditions
13 because it is the lowest cost available however high cost it
14 may be. It becomes a factual issue. It doesn't change the
15 answer to the bedrock legal question.

16 JUDGE BECHHOEFER: I am not sure about this method
17 of analysis. Are you saying that the anti-trust review
18 provisions were put there only because of low economic cost,
19 or are you talking about low other kinds of cost, because
20 usually the environmental review is separate and apart from
21 the anti-trust review.

22 There is some of this legislative history -- I
23 went over one thing earlier -- there are maybe a dozen
24 segments of these hearings which reference matters such as
25 environmental cost as a reason for putting in the anti-trust

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1 review provisions.

2 MS. CHARNOFF: No, I don't believe those are a
3 reason for putting in. This is where I will disagree with
4 you. I think that the environmental costs are very relevant
5 to the consideration of whether there are alternatives, and
6 what those alternatives are.

7 JUDGE BECHHOEFER: Let me read you --

8 MS. CHARNOFF: I don't think that they are
9 relevant to the consideration of whether a facility creates
10 or maintains a situation inconsistent with the anti-trust
11 laws.

12 JUDGE BECHHOEFER: I am just looking for something
13 here. There was a series of statements by a Mr. Charles
14 Robinson, who is Staff Counsel for the General Manager of
15 the National Rural Electric Cooperative Association, and he
16 made this statement -- he made a couple of them, and I will
17 read both of them.

18 It says: They are presuming the relative
19 economics or the necessity to reduce atmospheric sulfur and
20 nitrogen-oxides, or both, will establish nuclear generation
21 as our principal source of electricity in the future. The
22 small system must be afforded some means to enforce such
23 participation or purchase in the event that other sources of
24 equivalent wholesale energy are unavailable.

25 MS. CHARNOFF: Yes.

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1 JUDGE BECHHOEFER: Later on he says: If nuclear
2 energy is going to be the principal source of generation in
3 the future, as it appears to be for either economic reasons
4 or reasons of the need to prevent air pollution, this is
5 going to be the principal source of generation. Then we
6 want to be able to participate in it to whatever small
7 degree we can. In order to do that, we are going to have to
8 buy into a large plant because large plants are the only
9 economical kind of plant, or we are going to have to be
10 allowed to purchase a portion of the output of these plants
11 at cost.

12 That essentially is all we are seeking, a way of
13 enforcing this right. That was in favor of the anti-trust
14 review.

15 MS. CHARNOFF: Yes.

16 JUDGE BECHHOEFER: That was a statement in favor
17 of the anti-trust review.

18 MS. CHARNOFF: Yes, I am familiar with these Judge
19 Bechhoefer.

20 Again, let me say that there are factors beyond
21 cost which determine what your options are in building.
22 Assume a company needs a baseload plant, they have to pick
23 what type of plant to use, and one of the factors is clearly
24 environmental.

25 If the environmental costs are so enormous that

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1 that is not an option, it is not alternative, what 105(c)
2 does is asks you to compare nuclear with other viable
3 options, which means other options that are environmentally
4 acceptable because if it is environmentally unacceptable, it
5 is not an option.

6 The 105(c) analysis focuses on the monetary cost
7 and, therefore, the competitive value, the competitive
8 impact of the different alternatives.

9 JUDGE BECHHOEFER: As I say, these statements
10 which were in favor of 105(c) and which were one of the
11 predicates for 105(c) say that social costs, environmental
12 costs, are one of the reasons that section was put in the
13 statute.

14 MS. CHARNOFF: I am not disagreeing with that.
15 This is why I am struggling with you. I am not disagreeing
16 with the fact that there are many reasons why nuclear is
17 picked in the first instance, but before you are going to
18 put license conditions on it under 105(c), it has to be
19 competitively advantageous. That means it has to create or
20 maintain a situation inconsistent with the anti-trust laws.
21 To that, we submit, it has to be low cost. The
22 environmental issue is not part of that 105(c) analysis.

23 JUDGE BECHHOEFER: As I say, the environmental
24 statements were part of the reason for 105(c) coming into
25 being. These were all statements made --

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1 MS. CHARNOFF: Yes, I am familiar with those
2 statements, but I don't think they are inconsistent with
3 what I am saying, and this is where I am struggling with
4 you.

5 JUDGE BECHHOEFER: They are advocating 105(c) to
6 take care of these problems.

7 MS. CHARNOFF: Let me take the situation the other
8 way. If you assume that a plant has a very high
9 environmental cost, it is not going to make it more or less
10 competitive if it is permitted to be built.

11 JUDGE BOLLWERK: I guess I don't understand what a
12 high environmental cost is?

13 JUDGE MILLER: Would you like to have a short
14 recess for all of us?

15 MS. CHARNOFF: I would appreciate it very much.

16 JUDGE MILLER: Let's take fifteen minutes, please.

17 [Brief recess.]

18 JUDGE MILLER: The hearing will resume, please.

19 Mrs. Charnoff, I think the Board -- Judge Bollwerk
20 may have one or two more questions. Then I think we're
21 going to give you an additional 10 minutes in order to cover
22 the balance of your planned argument, and then we'll proceed
23 on.

24 So, you may have the floor.

25 JUDGE BOLLWERK: I guess, in your reply brief, in

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1 footnote 105, on page 45, you note that most of the
2 statements that we're talking about in the legislative
3 history were made by witnesses, not by committee members,
4 and I guess the statements that you do cite, at least in the
5 brief, made by members of Congress are really in the form of
6 questions, more or less. I'm not mischaracterizing what you
7 said, I take it.

8 MS. CHARNOFF: No. I think that's correct.

9 JUDGE BOLLWERK: All right.

10 Also, on pages 41 to 44 of your reply brief, you
11 indicate that there is nothing in the joint committee report
12 regarding the low cost of nuclear power. It's really an
13 analytical document, and it doesn't really discuss the
14 matter that you're raising. Am I mischaracterizing your
15 position in that regard?

16 MS. CHARNOFF: I say there is nothing expressed.
17 I don't know if I want to say there is nothing in, because I
18 think the reference in the joint committee report to
19 licensed activities creating or maintaining -- and they do
20 restate, virtually verbatim, the 105(c) standard.

21 One could argue that that's a recognition of cost,
22 and in that --

23 JUDGE BOLLWERK: But there is nothing explicit
24 that says low-cost.

25 MS. CHARNOFF: No.

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1 JUDGE BOLLWERK: All right.

2 Let me then ask you a question about -- and I
3 recognize you don't have this case in front of you, but I
4 will try to describe it as fully as I can.

5 There is a Supreme Court case called Kelly versus
6 Robinson. It's found at 479 U.S. 36, and specifically, on
7 page 50, I want to talk about footnote 13, and this is
8 background.

9 The question in that case was whether, under
10 Chapter 7 of the bankruptcy code, an obligation to make
11 restitution imposed in a state criminal case as a condition
12 of probation was discharged by filing for bankruptcy.

13 It's a bankruptcy case, but what the Court was
14 involved in was looking at the legislative history of the
15 bankruptcy code to see if, in fact, this was the case, and
16 they found that they, in fact, did not find the legislative
17 history persuasive, and they made this statement.

18 "We acknowledge that a few comments in the
19 hearings and the bankruptcy law's commission report may
20 suggest that the language bears the interpretation adopted
21 by the Second Circuit," and I would note that that is not
22 the interpretation they, in fact, agreed with in the end.

23 Then the Court goes on to say that, "None of
24 those" --

25 MS. CHARNOFF: I'm sorry. Could you repeat your

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1 --

2 JUDGE BOLLWERK: I'm sorry.

3 The Court says, "We acknowledge that a few
4 comments in the hearings and the bankruptcy law's commission
5 report may suggest that the language bears the
6 interpretation adopted by the Second Circuit."

7 This is the interpretation that, eventually, they
8 do not adopt; they disagree with.

9 MS. CHARNOFF: Who is the "they" when you say
10 "they did not adopt"?

11 JUDGE BOLLWERK: The Supreme Court.

12 MS. CHARNOFF: Okay.

13 JUDGE BOLLWERK: Sorry.

14 Then the Court goes on to say, "But none of those
15 statements was made by a member of Congress, nor were they
16 included in the official Senate and House reports. We
17 decline to accord any significance to these statements."

18 In light of that statement by the Supreme Court,
19 basically saying that hearing statements, if they're not
20 made by a member of Congress or are not somehow incorporated
21 into the Senate and House reports, have no significance,
22 what significance should we give to any of these statements
23 that have been cited?

24 MS. CHARNOFF: I wouldn't say "have no
25 significance." I would say that they are not necessarily

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1 dispositive, and let me go through this a little bit.

2 First of all, when I was going back and preparing
3 a little bit for this oral argument, I noticed a statement
4 in Wolf Creek which I, frankly, had missed before then, and
5 in Wolf Creek, the appeal board makes the point that they
6 view the joint committee report as addressing 105(c) in
7 several ways.

8 Beyond the issue of the standard of whether you
9 have to have actual violations of the anti-trust laws or
10 not, they saw two points being raised by the language
11 "licensed activities that create or maintain a situation
12 inconsistent with the anti-trust laws." Those two points
13 are these.

14 One, we're talking about the activities of -- the
15 licensed activities of the licensee. We're not talking
16 about vendors, for example. That was their first point.

17 The second point they made is really very close,
18 in words, to the way we have phrased it over and over again,
19 namely that you're talking about the licensed activities,
20 per se, the contribution of the nuclear power plant, per se.

21 Again, we're not talking about -- that doesn't say
22 cost, but you get into this question of what is that
23 contribution, what does that mean to say it contributes to
24 the situation inconsistent with the anti-trust laws?

25 So, I am qualifying slightly the statements we

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1 have made in our briefs that there is nothing in the joint
2 committee report.

3 The word "cost" is clearly not in there, and that
4 doesn't change, but as I understand the appeal board's
5 decision in Wolf Creek, they have interpreted the reference
6 to the 105(c) language as an acknowledgement of the focus on
7 licensed activities during what I call step one of the
8 105(c) analysis.

9 Now, I think, when you look at legislative
10 history, to go to the point, Judge Bollwerk, that you've
11 raised, I would wager to say you can find cases that use
12 legislative history every which way.

13 As I understand the rules for the use of
14 legislative history, if you go to a statute and you're
15 absolutely convinced, on the face of the statute, there is
16 only one possible interpretation, you need not go any
17 further.

18 That doesn't mean you can go any further, but you
19 need not go any further.

20 Then you go to legislative history. Obviously,
21 there is somewhat of a pecking order in legislative history.

22 If you have absolutely dispositive statements by
23 the people who voted on the legislation, you look at that
24 before you look at other things. If you don't have that,
25 you move on, and this is essentially what we did in our

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1 analysis.

2 I really was troubled, frankly, by, particularly,
3 the NRC staff's short shrift paid to the legislative history
4 -- Department of Justice, also -- in their effort to, in my
5 view, incorrectly characterize the legislative history,
6 because we think that, in contrast to your statement -- you
7 said that the Supreme Court, in your case, said there were a
8 few comments on the point in issue.

9 We don't just have a few comments, and I don't
10 think that's a fair characterization of the record at all.

11 I think, repeatedly, over and over, throughout the
12 legislative history, there is not information inconsistent
13 with that in the legislative history.

14 JUDGE BOLLWERK: I think the Supreme Court's point
15 here, if I'm reading it correctly, is, to the degree that
16 these statements were not made by members of Congress nor
17 included in the official Senate and House reports, that they
18 don't get any significance.

19 It's not a question of being there. It's a
20 question of who said them.

21 MS. CHARNOFF: Well, I think that their point is
22 that they're not bound by them, not that they have no
23 significance.

24 JUDGE BOLLWERK: Why should we bound by them if
25 the Supreme Court doesn't feel it's bound?

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1 MS. CHARNOFF: Well, we haven't argued that the
2 legislative -- we have not argued -- and I have tried to be
3 very clear on this -- that the legislative history controls.

4 What we've argued is that we believe logic
5 controls and that everything else available supports, is
6 consistent with the position that we are advocating.

7 We don't think that, because these statements were
8 made in the legislative history, that determines the
9 outcome, but certainly, we do think that, when you try to
10 sort of test our theory against all available evidence, that
11 evidence is fully consistent with our theory and, in fact,
12 inconsistent with the opposition's theory in the case.

13 JUDGE BOLLWERK: All right.

14 Why don't we give you 10 minutes to wrap up?

15 MS. CHARNOFF: Okay. I may not need that long.
16 We'll see.

17 JUDGE BOLLWERK: That's fine.

18 JUDGE MILLER: Then you'll give it over to your
19 colleague or your quasi-colleague.

20 MS. CHARNOFF: I would like to make one point, if
21 I could, before I go to the series of points that I had
22 prepared, for Judge Bechhoefer's benefit, I hope, and that
23 is, at the risk of repeating myself ad nauseam, I'd like to
24 say one thing, which is that, w.en you're talking about
25 environmental expenses -- the cost of adding scrubbers to a

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1 coal plant, the cost of building a containment over a
2 nuclear power plant, or to look at it another way, the
3 environmental consequences of not doing those kinds of
4 things -- we account for those by actual dollar costs.

5 I alluded to this earlier, when I first addressed
6 the subject with you, that there are ways to translate
7 environmental issues into dollars by eliminating an
8 environmental problem through some sort of technological --
9 technology will remove the problem and that technology costs
10 a certain amount of money.

11 So, a lot of environmental issues get translated
12 into costs of different options.

13 The situation that you pose is a hypothetical one
14 which, I should add, is not applicable in our situation at
15 all, where there are absolutely no alternatives, and the
16 reason you pose is environmental.

17 JUDGE BECHHOEFER: Would EPA allow a large
18 coal-fired plant to be constructed these days in the heart
19 of Cleveland, for instance?

20 MS. CHARNOFF: I would assume not in the heart of
21 Cleveland, but I would not assume that there would be no
22 coal option as a viable alternative. I mean we are
23 operating coal plants. So, clearly, coal is a viable
24 option.

25 The analysis required by 105(c), not by the whole

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1 Atomic Energy Act -- there are a lot of other provisions
2 which deal with a lot of other things, but what 105(c) is
3 focused on is the competitive advantage of nuclear versus
4 other alternatives, and that, we believe, is a cost
5 analysis.

6 JUDGE BECHHOEFER: Would this be true if the
7 environmental costs were determined to be lower but other
8 costs are higher and the utility for one reason or another
9 elected to go not with maybe the lowest overall cost but
10 with the lowest --

11 MS. CHARNOFF: Yes. I think the 105(c) analysis
12 would still only focus on the dollars. You don't get a
13 credit dollar-wise because you are environmentally
14 preferable or however you want to translate it. Whether you
15 are preferable or less preferable, I don't think that that's
16 considered in the -- in the 105(c) context. I don't want to
17 tell you nobody cares about it, which is the sense I have
18 that you're worried about. That's not the case.

19 JUDGE BECHHOEFER: Well, what I'm worried about is
20 that the people who would testify with respect to 105(c)
21 mention the environmental differences and --

22 MS. CHARNOFF: Yes, but they mention that --

23 JUDGE BECHHOEFER: -- as a predicate for 105(c).

24 MS. CHARNOFF: Well, they mention it as leading to
25 their conclusion that nuclear is the most -- is the best

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1 alternative including the lowest cost alternative, dollar
2 cost, because there may have been an alternative out there
3 that they would have had to spend less on, but they couldn't
4 -- it's not available as a real option.

5 I think I should move on. I'm afraid I'm
6 repeating myself.

7 JUDGE BECHHOEFER: Well, the only thing is if we
8 get to the second part of the case, if we should agree with
9 you on the law and we get to the second part, are we going
10 to have to re-analyze the entire environmental position of
11 Perry and Davis-Besse?

12 MS. CHARNOFF: No, because I think that if there
13 is -- if there are five alternatives, each one has a dollar
14 cost and that dollar cost already has built into it the
15 environmental differences between them or among them.

16 JUDGE BOLLWERK: Again, if there are five
17 alternatives, unless nuclear is the lowest, then we don't
18 get an antitrust at all. In other words, let's say nuclear
19 is the middle one rather than the highest one; are we into
20 the antitrust laws, or is it only if it's the very lowest?

21 JUDGE MILLER: Well, the bedrock issue: Is the
22 Commission without authority as a matter of law to retain,
23 and so forth. So I think you could wrap up this phase and
24 quickly move ahead unless you feel you've had the
25 opportunity to cover all the points that you had planned in

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1 your initial address. You did save time, as I recall, for
2 rebuttal.

3 JUDGE BOLLWERK: Right. I would like an answer to
4 my question.

5 MS. CHARNOFF: Well, the answer is the bedrock
6 issue is in terms of whether it's higher. So I would say
7 --

8 JUDGE BOLLWERK: Well, my question is let's say
9 it's higher than some but not than others; are we into
10 antitrust considerations or not?

11 MS. CHARNOFF: I don't think we are.

12 JUDGE BOLLWERK: Why not?

13 MS. CHARNOFF: Because I don't think --

14 [Pause.]

15 MS. CHARNOFF: Well, frankly, I'll tell you, I
16 haven't thought about this because the facts in our case are
17 such that there are no alternatives, unfortunately, that are
18 -- or that there are lower cost alternatives available,
19 which is why people are not using the nuclear power.
20 Whether there may also be out there higher cost, I don't
21 think is relevant.

22 I mean, maybe somebody could build some plant that
23 we haven't even thought of yet which costs a trillion
24 dollars. That will not make our plant more competitive;
25 it'll just mean that they can't possibly sell power from

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1 their plant.

2 So I think you could create a hypothetical where
3 there's a plant out there that's exorbitant which is also
4 not competitive. Its exorbitancy and lack of
5 competitiveness will not make ours more competitive.

6 JUDGE BOLLWERK: I mean, you can make up a
7 hypothetical. You've got coal, oil and nuclear. Let's say
8 coal's the lowest, nuclear is in the middle, and oil is
9 higher, and let's say that the increments between them are
10 not very great, but that nonetheless that's the way it comes
11 out.

12 MS. CHARNOFF: I don't think you're going to get a
13 competitive advantage in terms of being able to create or
14 maintain a situation inconsistent with the antitrust laws if
15 there are alternative baseload power available which is
16 cheaper. I just -- I don't see logically how you can
17 achieve that.

18 JUDGE BOLLWERK: Okay. You've got about three
19 minutes.

20 MS. CHARNOFF: Okay.

21 JUDGE BOLLWERK: This is the timekeeper; I'll let
22 you know that.

23 MS. CHARNOFF: I am going to go to my closing
24 remarks because I think we have, one way or the other,
25 covered most of the subjects I was going to cover.

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1 As much as we've all, I'm sure, on our own danced
2 a bit on the head of a pin with this case, I really like to
3 think of this as a rather straightforward question, which is
4 why I started this oral argument saying this is the issue,
5 period, whether a low cost plant -- whether a high cost
6 plant can create or maintain.

7 From our point of view, it makes no sense for the
8 NRC to impose antitrust conditions on a licensee whose
9 nuclear facility produces high cost power. While the world
10 and the licensees may have anticipated that it would produce
11 low cost power, not only are the licensees now possessors of
12 facilities that are not competitively advantageous, but they
13 are also subject to license conditions which other entities
14 who don't happen to have a nuclear plant are not subject to.
15 It's certainly not an incentive for getting into the nuclear
16 business.

17 Because it makes no sense as a matter of logic and
18 because we don't believe that was the original intention --
19 when you go to the legislative history and you go to the NRC
20 cases and you go to representations made by the staff and
21 the Department of Justice, we pointed to some DOJ advice
22 letters, every indication that we could think of to look at,
23 in our view, suggests that the issue under 105(c) was access
24 to low cost nuclear power. That is no longer an issue
25 because nuclear power is high and nobody wants access. So

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1 the purpose that these conditions served is no longer being
2 served, and therefore it makes no sense to continue to
3 impose them.

4 We don't believe that the relief we seek here is
5 different in kind from a type of relief that the NRC rather
6 automatically gives in very different context. That is,
7 when the agency, either by rule or case-by-case basis,
8 decides that its requirements don't make any sense anymore,
9 it changes the requirements. I think that an agency has to
10 do that in order for its actions to be meaningful, and
11 that's what we're saying here.

12 We do not believe this is a radical idea. We do
13 believe it is a different context. We do not believe it is
14 a radical issue. Our answer to the bedrock legal issue is
15 yes, because Section 105(c) does not give the NRC authority
16 to impose anti-trust conditions on licensed activities that
17 do not "create or maintain." If a high-cost facility does
18 not create or maintain, there simply is no basis for posing
19 conditions. That's our case.

20 Thank you gentlemen.

21 JUDGE MILLER: Thank you.

22 Mr. Murphy, I believe you're next. And I believe
23 that you have allocated to yourself 20 minutes; is that
24 correct, sir?

25 MR. MURPHY: Yes, sir. That's correct.

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1 JUDGE MILLER: You may proceed.

2
3 ORAL ARGUMENT ON BEHALF OF THE APPLICANTS, BY MR. MURPHY

4
5 MR. MURPHY: Thank you. Good morning. My name is
6 James Murphy, and along with Ms. Charnoff, I represent the
7 applicants in this proceeding. I appreciate the opportunity
8 to address you this morning.

9 I would like to try to put my client's position
10 before you in as concrete a way as possible. Let me try to
11 explain the current situation that we perceive ourselves to
12 be in.

13 We have several nuclear power plants, Davis-Besse
14 and Perry. Those plants today, and for a considerable time
15 in the past, at least since the time of these applications,
16 has produced electricity, a fungible commodity, at
17 substantially higher costs than alternatives available to
18 our competitors and what the alternative cost would have
19 be had the companies instead constructed fossil fuel
20 plants. At least in the area of Northern Ohio and Central
21 Ohio, there are indeed alternatives available to our
22 competitors at considerably lower costs than the costs of
23 nuclear plants that we have in operation.

24 Our position in this case is that, given that
25 situation -- that present situation, and one that we think

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1 has persisted and will persist, is the license activity,
2 that is the operation of the nuclear plant, and can that
3 activity create or maintain a situation inconsistent with
4 the anti-trust laws?

5 We think that when the situation is explained in
6 the concrete, it answers a number of questions. We think,
7 as Ms. Charnoff has argued, that it answers the fundamental
8 -- I think I first used the word, unfortunately -- the
9 bedrock issue.

10 JUDGE MILLER: Yes. You're the one that got that
11 started.

12 JUDGE BOLLWERK: We won't hold that against you.

13 MR. MURPHY: I have beaten myself numerous times.
14 But we think that it's answered yes. But we also think, and
15 what I will try to address quickly, and then I'd like to
16 touch on some of the other very interesting questions that
17 you gentlemen asked today -- we think it also answers the
18 issues raised by the City of Cleveland: The collateral
19 estoppel, laches, and law of the case arguments.

20 What we are here asking for is relief, suspension
21 of the anti-trust license conditions, because of the current
22 situation, based on actual history. We do not perceive how
23 it can be argued persuasively that that issue was raised or,
24 indeed could have been raised during the 1970's, when the
25 license hearings took place. Similarly, we do not perceive

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1 how we can be accused of laches when we brought these
2 applications in around the time Perry became fully
3 operational. But, perhaps more importantly, I would argue
4 to the panel that, in order to have laches, there has to be
5 reasonable reliance. And, as the NRC staff pointed out in
6 its brief, to say that laches could apply in this situation
7 would be, in effect, to say that a jurisdictional lapse at
8 the NRC, because of the situation we perceive, could
9 nonetheless, result in a continuation of the license
10 conditions. We don't perceive that to be the case at all.

11 Finally, with respect to law of the case, we
12 believe this is a separate proceeding. We do not believe
13 there is a law of the case. Indeed, one of the things I
14 find so enjoyable about this matter, in its entirety, is it
15 -- as the NRC staff said in one of its briefs, it raises
16 issues on the frontier of law and policy. We do not
17 perceive that there is any law of the case at all.

18 JUDGE BECHHOEFER: Are you casting aspersions on
19 our pre-hearing conference order?

20 MR. MURPHY: No. Indeed, I love the pre-hearing
21 conference order in that respect. I mean, I thought -- in
22 fact -- oh, I see what you mean. Yes. Yes. Somewhere in
23 my notes in this argument, I have wanted to say that the law
24 of the case is that this is a separate proceeding, and that
25 the City's argument, in that respect, is incorrect. I think

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1 -- I don't want to be too facetious, but, indeed, I think
2 that is true. I think it was an accurate statement in the
3 pre-hearing order.

4 And it seems to me that that issue, as well as the
5 collateral estoppel and laches issues, are not meritorious
6 and should be rejected by the panel. And, consequently, we
7 would encourage the panel to move on to the substantive
8 issue raised by the bedrock issue.

9 JUDGE BOLLWERK: Do you agree that the substantive
10 issue is jurisdictional, as Ms. Charnoff has indicated that
11 that's her position?

12 MR. MURPHY: Yes. I'm always afraid of that word
13 for exactly the reason you raised -- and that is this idea
14 that it can be raised at anytime, and as soon as it's
15 raised, you know, everything sort of falls apart.

16 I would put it a little differently. I'm not sure
17 it's different in how it plays out. I would say that if
18 we're able to prove what we believe to be true about the
19 actual situation, that the Commission would be without
20 continued statutory authority to maintain the license
21 conditions. And so, I mean, if there is a difference in
22 nuance here, it is, I guess, along the lines of if we want
23 relief, we have to bring an independent proceeding asking
24 for suspension of the license conditions.

25 And so, I wouldn't state at the moment that our

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1 nuclear cost became higher than alternative costs, this
2 Commission was without jurisdiction, the license conditions
3 became invalid or anything of that sort. To me it obviously
4 requires the filing of an application such as we did, a
5 hearing on the facts, to determine whether, in fact, the
6 actual costs are higher than the alternative and if, indeed,
7 there are alternatives. And if those questions are answered
8 in the affirmative, we believe the Commission would be
9 without statutory authority to continue the license --

10 JUDGE BOLLWERK: Well, is it an issue you can
11 waive? In other words, if you don't raise it, it's waived?

12 MR. MURPHY: Well, I think it's waived to the
13 extent that if you don't file -- if we don't file an
14 application on --

15 JUDGE BOLLWERK: Let me put it this way, you file
16 an application, as you did back in the late '70s, early '80s
17 -- late '70s, I guess, and you simply -- it's not raised
18 until let's say three-quarters of the way through the
19 adjudicatory proceeding; is this the sort of issue that you
20 can come in at any point, let's say there's a proceeding
21 ongoing, and say, oh, by the way, you had no jurisdiction?
22 Because as -- because, we have a high-cost facility?

23 MR. MURPHY: I would be inclined to say no to
24 that. I mean, I think -- we have -- I mean, I guess, at
25 least, as I perceive what we are about is that we have an

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1 obligation to raise this issue -- the issue that I'm talking
2 about -- let me put it in a little different context.

3 The issue I'm talking about is, based on the
4 actual operating history, we believe that the cost of the
5 nuclear plant are higher than alternatives, and, therefore,
6 that plant, that licensed activity cannot create or maintain
7 a situation inconsistent with the anti-trust laws. It
8 doesn't give us any economic power. In fact, it is a
9 detriment in the competitive fight.

10 At least, to my clients, this is as plain as it
11 the nose on my face. But, obviously, the other side
12 disagrees with me.

13 To get back to your point, we may find that that
14 actual operating history as such, we would have the
15 obligation to come forward and file a petition. Whether ten
16 years ago we could have -- I don't perceive how we could
17 have done what we are doing now. I mean at least as I
18 perceive what we are doing now is we are coming before you
19 gentlemen based on our actual operating costs. We are not
20 coming here on a hypothetical situation at all.

21 In fact, one of the things I really want to
22 emphasize to you is that for our clients this is indeed a
23 serious, real problem. It is based on the current cost and
24 operating situation out in northern and central Ohio. This
25 is not in any respect an academic exercise.

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1 We believe that given the cost situation of the
2 nuclear plants, the licensed activity, those plants not only
3 can't create or maintain a situation inconsistent with the
4 antitrust laws but they are hurting us in the competitive
5 struggle, which indeed exists, and this is why we think we
6 are entitled to relief. If we get tha' relief, the question
7 was asked, what would happen next?

8 There are probably several things that would
9 happen -- one, that licensed petitions would be removed, and
10 one consequence conceivably could be on Wheeling.

11 JUDGE MILLER: On what?

12 MR. MURPHY: On Wheeling. Third party wheeling.
13 These license conditions create an unqualified obligation to
14 third party wheeling.

15 These license conditions create an unqualified
16 obligation to wheel to third parties.

17 The FERC statute does not create an unqualified
18 obligation. I believe the statute says something to the
19 effect that FERC can order wheeling only where it would not
20 disturb existing competitive relationships.

21 JUDGE BOLLWERK: Isn't wheeling the real problem
22 here, as a practical matter? I mean they haven't sought
23 access to the power from the plant. They haven't sought an
24 ownership interest. What is left that they are getting from
25 the antitrust conditions but the wheeling authority.

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1 MR. MURPHY: I think that's right. I agree. I
2 mean if in fact -- part of the proof of the pudding that
3 these nuclear plants don't give us a competitive advantage
4 is nobody else wants a piece of them

5 I mean one of the things that the NRC Staff
6 emphasizes in its brief is how one gets economic power. They
7 said you could get economic power in three possible ways: a
8 patent, land -- they had some unique piece of land, some
9 kind of a central facility, or better cost structure.

10 Then they say, well, this is sort of -- they say
11 bulk power is sort of analogous to patents or land, but if
12 it were, if it were unique, if it were helpful in the
13 competitive struggle as presumably a patent is or a land
14 through which people must pass, other folks would want it.
15 Nobody wants, nobody's asked to buy the nuclear power and
16 indeed to some extent this case is about wheeling

17 JUDGE MILLER: Pardon me, how much does a wheeling
18 aspect affect your client in terms of cost, not necessarily
19 dollars and cents but how much of an economic factor is the
20 wheeling?

21 MR. MURPHY: The wheeling is an economic factor.

22 JUDGE MILLER: How significant? How much? How
23 can we measure it?

24 MR. MURPHY: I am not sure that you can measure it
25 in that kind of dollars and cents but under the general

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1 antitrust laws, there --

2 JUDGE MILLER: I thought the wheeling provision is
3 the major thing that has caused your client to make less
4 money or to lose money and to be where nobody wants your
5 product. I thought you had attributed it essentially,
6 significantly to the wheeling burden.

7 MR. MURPHY: No, I don't think --

8 JUDGE MILLER: How significant is the wheeling
9 burden?

10 MR. MURPHY: I don't think it is the wheeling
11 burden --

12 JUDGE MILLER: Per se?

13 MR. MURPHY: -- per se. What it is in part is the
14 higher cost of nuclear plants that hurt us in the
15 competitive struggle versus, relative to, the alternative
16 power sources that are indeed readily available to our
17 competition.

18 JUDGE MILLER: In that event, what significance
19 economically is the wheeling provision of the conditions?

20 MR. MURPHY: Because the wheeling enables -- the
21 wheeling enables people without using their own capital to
22 bring the power from one place to another.

23 JUDGE MILLER: How does that hurt your client?

24 MR. MURPHY: Because my client when it constructed
25 those transmission lines invested its own capital and did

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1 so, at least in some part, so that it could prevail in the
2 competitive struggle.

3 JUDGE MILLER: At what point in time did that take
4 place

5 MR. MURPHY: Well, the transmission line
6 construction has gone on continuously.

7 JUDGE MILLER: What's the oldest date you can lay
8 your hands on?

9 MR. MURPHY: I don't know what the oldest date -
10 -

11 JUDGE MILLER: It's not a new phenomenon, is it?

12 MR. MURPHY: Of transmission lines? Of course
13 not. Of course not.

14 JUDGE MILLER: Well, I am curious as to what cost
15 it is other than the way you look at competitive factors. I
16 am interested in what cost penalty your client is under by
17 virtue of the wheeling requirements.

18 MR. MURPHY: Well, we believe we are under a
19 competitive disadvantage. That is, we are required to allow
20 our competitors without the use of their capital to use our
21 transmission lines.

22 I can assure you, sir --

23 JUDGE BECHHOEFER: Do they pay for that?

24 MR. MURPHY: They pay for the incremental cost,
25 yes, but I assure you if we did not think that this was an

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1 important proceeding, we wouldn't be here spending our
2 money.

3 JUDGE MILLER: We are all spending money and the
4 taxpayers' money is involved too. I don't think I've had a
5 clear-cut answer from you about wheeling.

6 In response to a question from Judge Bollwerk you
7 said yes, that was maybe one of the linchpins -- that seems
8 to be another term of art we've gotten into -- in the
9 adverse effect of these conditions upon your client.

10 When I seek then to find out, not dollars and
11 cents as such necessarily, but certainly in principle, it
12 doesn't seem to me that your client is hurt economically by
13 the obligation to wheel as wheel per se and wholly apart
14 from the big plans.

15 MR. MURPHY: Well, let me explain the concrete -
16 -

17 JUDGE MILLER: Go ahead.

18 MR. MURPHY: -- how my client is hurt in the city
19 of Cleveland.

20 JUDGE MILLER: Tell me how it hurts.

21 MR. MURPHY: For years the city of Cleveland and
22 the Municipal Light System and CEI have competed for house
23 to house competition.

24 When Muni Light wants to expand its system, retail
25 system, at the expense of ours, we presently because of

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1 these license conditions have an obligation to wheel in
2 power for them so that they can compete with us, because
3 they don't have the high cost nuclear plant but indeed have
4 other available sources at considerably lower price of bulk
5 power.

6 They can use our lines to come in and sell their
7 power at lower cost than ours, rather than having to expend
8 their own capital to construct those transmission lines.

9 JUDGE MILLER: Is that a bad thing economically in
10 terms of the public interest?

11 MR. MURPHY: I would say this, sir, that the
12 antitrust laws are designed to protect competition.

13 JUDGE MILLER: Preserve competition in order to
14 protect the public interest.

15 MR. MURPHY: But that doesn't necessarily mean
16 trying to protect competitors or give competitors a free
17 ride on the basis of the capital invested by other
18 competitors.

19 JUDGE MILLER: Well, the Sherman and Clayton Acts
20 essentially are to remove impediments to reasonable
21 competition and then to let the competition and the
22 marketplace make whatever judgments will be made as a
23 result.

24 JUDGE BOLLWERK: I mean to some degree what I am
25 hearing here are arguments of why there shouldn't be

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1 wheeling as opposed to arguments about -- I mean what you
2 are saying is there should be access to nuclear power, no
3 wheeling provisions, and hasn't that already been decided?

4 I mean the wheeling provisions are in there. They
5 are clearly consistent with what the NRC's authority is
6 under the antitrust laws.

7 MR. MURPHY: The NRC's authority is premised on
8 the proposition that the licensed activity can create and
9 maintain a situation inconsistent with the antitrust law.
10 Absent that finding, the NRC does not have the authority to
11 impose license conditions at all.

12 Our purpose in being here is to demonstrate that
13 because of the high cost of the nuclear plants, relative to
14 alternative costs, the NRC is without present statutory
15 authority to impose license conditions. So, in a very real
16 sense, we are talking about what the -- about the authority
17 of the NRC given to it by statute.

18 In that sense, we are not talking about general
19 antitrust situations or what might be good, bad or
20 indifferent to people; what we are talking about is what is
21 the underlying premise for any NRC authority to impose
22 antitrust license conditions.

23 JUDGE BOLLWERK: Although, again, the Committee
24 report on this particular provision says that the -- what
25 the agency is to look at is whether the activity is

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1 inconsistent with the antitrust laws or the policies clearly
2 underlying those laws. Now, arguably -- and this goes back
3 to the American Federal of Tobacco Group's case that I read
4 earlier. It talks about the value of competition is to
5 encourage those who compete to reduce costs and lower prices
6 and thus pass on the saving to the public.

7 Those who are operating at a cost have a choice
8 under the antitrust laws. They can continue to do so and
9 take the chance that their monopoly -- that they will be
10 forced out of business, or they can lower their costs.
11 Isn't that what we're really here about?

12 MR. MURPHY: The Neal case, I think, was very
13 different. As I understand the Neal case, it was a
14 situation where a tobacco grower wanted to become part of
15 the auction. It wasn't able to. He couldn't compete at
16 all.

17 The defense that was interposed was that we don't
18 want the -- we, the group, don't want to let him in because
19 he has lower costs once he gets in. The essential thing was
20 that he couldn't compete without access to the market.

21 In that sense, it was a classic, concerted
22 refusal-to-deal case. What --

23 JUDGE BOLLWERK: Can Cleveland compete without
24 access to the Wheeling provisions? I mean, isn't that what
25 this case is all about back in the --

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1 MR. MURPHY: No. I beg to differ. That's not
2 what this case is about.

3 JUDGE BOLLWERK: All right.

4 MR. MURPHY: This case is about whether or not the
5 nuclear plant, the licensed activity, is an essential
6 facility. This case is about whether or not the license --
7 whether the city must -- whether the licensed activity has
8 -- gives my clients a competitive advantage and if so, then
9 this Commission has authority. It's not about whether or
10 not there's Wheeling.

11 Wheeling wasn't a licensed activity. Indeed, in
12 the city of Cleveland, I mean, we -- I tried -- one of my
13 retired partners tried an antitrust case about a dozen years
14 ago where the question was whether -- one of the questions
15 was whether or not the city of Cleveland could compete
16 without Wheeling.

17 The jury returned a verdict saying, yes, they
18 could, on the premise that they could construct their own
19 transmission lines over a distance of only about 30 miles
20 along an already existing railroad right-of-way. So, we
21 would argue plainly that they could compete, but I say that,
22 but at the same time, I beseech you that that is not a
23 matter before this panel, nor should it be.

24 The matter before the panel is whether or not the
25 licensed activity, the operation of a nuclear power plant,

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1 in the concrete, the here-and-now, can create or maintain a
2 situation inconsistent with the antitrust laws. Our premise
3 is that because of the higher costs versus alternatives
4 available, it is not. Indeed, there are alternatives.

5 I think I've used up my --

6 JUDGE MILLER: May I suggest that your time is up,
7 but I'm not going to be too technical. Can you, in
8 fairness, give us the substance of the remaining portion of
9 your argument in, say, five minutes?

10 MR. MURPHY: I think, sir, I have. I appreciate
11 your time.

12 JUDGE BOLLWERK: Let me just clarify one other
13 thing I want to make sure of: The reason I raise this
14 jurisdictional question is that in terms of the res judicata
15 and collateral estoppel arguments is that if, in fact, this
16 is jurisdictional, in the sense that it can be raised at any
17 time, then obviously res judicata or collateral estoppel, it
18 seems to me, don't apply.

19 MR. MURPHY: That's right.

20 JUDGE BOLLWERK: What I hear you saying is, no,
21 that is not a correct analysis, and, in fact, there are
22 arguments on res judicata and collateral estoppel that will
23 not collapse for that reason?

24 MR. MURPHY: I think that is right as to
25 collateral estoppel and res judicata. I mean, we believe as

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1 to those issues, that the issue that we are raising here
2 today was not, and, indeed, could not have been raised at an
3 earlier stage.

4 That is really the underlying premise of our's
5 that collateral estoppel and res judicata do not apply. I
6 mean, the simple fact is that the so-called nexus arguments
7 that were raised by our clients a dozen years or so ago,
8 were that this -- that so long as we provided access to the
9 nuclear plants, that the plants -- by way of ownership
10 interest which our clients had offered -- that the -- that
11 once we'd done that, there could be no nexus between the
12 operation of the plant and the -- and a situation
13 inconsistent with the antitrust laws.

14 We also argued that the remedy had to be limited
15 to access to the plant. The city's suggestion now that we
16 argue that nuclear power has no cost advantage -- and I'm
17 reading now from their brief, but they claim we argued
18 before that nuclear power had no cost advantage and as a
19 result, the requisite nexus between the licensed activity
20 and the anticompetitive situation is lacking.

21 That's just not true and, in fact, one support for
22 that is, the Department of Justice in its Appeals Board
23 brief many years ago, says that the marketing of power from
24 the subject nuclear units will enable applicants to lower
25 their average cost of power. It is undisputed that the

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1 power available from the subject nuclear units is expected
2 to be the cheapest base load power available to serve new
3 and growing loads.

4 That was the premise on which the proceeding
5 occurred a dozen years ago. What we're seeing is,
6 gentlemen, it just hasn't turned out that way, and because
7 it hasn't, and because our costs are higher than available
8 alternatives, our plants, the licensed activities, cannot
9 create or maintain a situation inconsistent with the
10 antitrust laws.

11 I'd be glad to answer more. I've abused my time
12 limit. I apologize for that.

13 JUDGE BECHHOEFER: I've got a question here.

14 MR. MURPHY: Sure.

15 JUDGE BECHHOEFER: Are these so-called higher
16 costs -- I realize that we'll perhaps have to determine what
17 those are later on -- but are they based on higher operating
18 costs or higher capital costs or what? If you deleted the
19 capital costs, just looked at the operating costs, are the
20 nuclear plants then disadvantageous?

21 MR. MURPHY: The costs of which we speak, that we
22 believe are the appropriate measure, are the total costs,
23 capital costs and operating costs. I'm reluctant to say
24 too much for fear that I am saying something I am not
25 certain of, but I do believe that the operating costs of at

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1 least one of the nuclear plants is higher than the operating
2 costs of some of the fossil fuel plants, which, of course,
3 is diametrically different from what most people would
4 think.

5 One of the reasons why our clients take this
6 matter so seriously is because their total cost of operating
7 the nuclear plant are, in their view, so much higher than
8 the alternatives available, whether based on other
9 construction they could have done, or alternatives available
10 to their competitors.

11 JUDGE BECHHOEFER: The reason I asked the question
12 is because, at least the capital costs will probably lower
13 the time, at least in the operating cases proceeding, fairly
14 reliably, if not shortly after the --

15 MR. MURPHY: I think there is an answer to that
16 that applies to both capital and operating cost. That is,
17 that over time, with increased regulatory surveillance,
18 capital costs and operating costs have gone up.

19 We would dispute that you could make a decent
20 estimate, a fair estimate, at any time prior to operation,
21 and, indeed, when we read the arguments of the city in this
22 respect, it kind of infuriates us a little bit, I guess --
23 not really -- but because we know if we had come in here
24 asking for relief in 1986, or 1984, before the operation of
25 these plants, before we could demonstrate what the actual

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1 costs were, we know the city would have said, "How do they
2 know, they have to operate the plants for a while before
3 they really know what their total costs are going to be."

4 So we really don't believe that we were at all
5 party to bringing this proceeding.

6 JUDGE BECHHOEFER: But the fact remains that you
7 are saying that some of those higher than expected costs are
8 operating as distinguished from capital costs, which, of
9 course, capital costs depend on how long you have
10 appreciated over, and if you get a renewal, they drop
11 drastically, and et cetera.

12 MR. MURPHY: But it is definitely operating as
13 well as capital costs.

14 Thank you very much. I appreciate your time.

15 JUDGE MILLER: Thank you, Mr. Murphy.

16 Let me inquire, who wishes to go next?

17 We are going to recess until 1:00 o'clock.

18 [Whereupon, at 11:40 a.m., the hearing recessed to
19 reconvene at 1:00 o'clock p.m., the same day.]
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A F T E R N O O N S E S S I O N

[1:00 p.m.]

JUDGE MILLER: All right. We'll start the afternoon session. Let's see. Staff or Justice, or Justice and Staff, or --

MS. URBAN: Justice.

JUDGE MILLER: Let Justice -- I ..on't say prevail, but you may have the podium.

[Laughter.]

ORAL ARGUMENT ON BEHALF OF
THE DEPARTMENT OF JUSTICE

MS. URBAN: Good afternoon. I'm Janet Urban. I'm with the Antitrust Division of the Department of Justice. What I'd like to talk about since I have heard a lot of questions on this particular topic earlier is market power and the difference between having dominance in a market and having assets that allow you to compete.

The applicants keep talking about how their nuclear plant doesn't enhance their competitive position or how it doesn't have any competitive value, and what they are talking about is that this plant doesn't help them to win if they are competing on a level playing field; it doesn't make them cheaper, perhaps, than competitors.

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1 But that isn't what the antitrust laws are about.
2 The antitrust laws are about market power and abusive market
3 power, and let me read the definition of monopoly which was
4 stated by the court in U.S. versus Grinnell Corp.

5 JUDGE MILLER: Grinnell.

6 MS. URBAN: Grinnell. And was quoted in the 1984
7 case Aspen Skiing, which is one of the most recent antitrust
8 cases except for the one that came down Monday. It says,
9 "The offense of monopoly under Section 2 of the Sherman Act
10 has two elements: 1) the possession of monopoly power in
11 the relevant power and 2) the willful acquisition or
12 maintenance of that power as distinguished from growth or
13 development as a consequence of a superior product, business
14 acumen, or historic accident." Then later in the case, the
15 court goes on to state that "Monopoly power is the power to
16 control prices or to exclude competition."

17 That's what we're talking about when we're looking
18 at 105(c) in a situation inconsistent with the antitrust
19 laws. We're looking at market power and potential abuse.
20 You don't have to be an efficient competitor to have market
21 power. In fact, monopolists are often not efficient. They
22 don't need to be. They are able to use their market power
23 to exclude competitors. That's why we think competition is
24 so important in this country, because it produces and
25 encourages efficiency.

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1 Whether or not applicant's nuclear plant is
2 expensive or cheap, it can still contribute to a situation
3 inconsistent because it is large-scale baseload generation
4 and because, as the Licensing Board found and was affirmed
5 by the Appeal Board, the transmission of the applicants was
6 a part of -- the transmission and the generation were part
7 of applicant's system, and applicants have dominance in
8 their market whether or not this plant is expensive.

9 Mr. Murphy, I think, basically said it all when he
10 said that without Wheeling -- with Wheeling, the munis are
11 able to bring power in from somewhere else. In other words,
12 if applicants wouldn't allow use of their lines, the munis
13 can't get power. Applicants have dominance and the ability
14 to exclude competition whether or not the plant is
15 expensive.

16 JUDGE BECHHOEFER: Ms. Urban, are the lines in
17 question sort of like public utilities unless they are made
18 available at some cost at least to anyone who seeks to use
19 them?

20 MS. URBAN: Under the . . . cense conditions, they
21 have to. Under the Federal Power Act, no. The law has
22 never -- Congress has never made utility lines common
23 carriers.

24 JUDGE BECHHOEFER: Okay.

25 JUDGE MILLER: They are not -- they have not

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1 historically been viewed as common carriers, and that's
2 still the state of the law.

3 MS. URBAN: That is still the state of the law. I
4 know there is legislation in Congress concerning
5 transmission, but it's floating around. Nothing has been
6 passed.

7 JUDGE MILLER: Every session, you get some.

8 MS. URBAN: Yes.

9 JUDGE MILLER: Yes.

10 MS. URBAN: And if there are no questions on
11 market power, I guess let me just speak very briefly about
12 the statute, and the word "cost" is not in the statute.
13 There is no requirement under the statute that these plants
14 be low cost. There is nothing in the joint committee report
15 that says these plants have to be low cost, and I think
16 contrary to applicant's assertions, there is nothing in the
17 legislative history which would support an argument that
18 everyone knew these plants would be low cost. In fact,
19 different people had different views on the cost of the
20 plant and you can't look at these joint hearings and say
21 everyone had a common view.

22 JUDGE MILLER: Well, do you consider that there
23 are potential ambiguities in the statutes such as would lead
24 one to look to legislative history, or does the Department
25 say no, it's reasonably clear-cut; there is no ambiguity;

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1 you don't even need legislative history?

2 MS. URBAN: The Department says that on the issue
3 of cost, whether or not a plant must be low cost for there
4 to be a situation inconsistent, the statute is extremely
5 clear. The word "cost" isn't in there; the word, you know,
6 "competitive position" isn't in there. The statute says
7 "whether or not a plant will create or maintain a situation
8 inconsistent under the antitrust laws," and, as was just
9 discussed, you don't have to have a low cost asset to have
10 market power.

11 JUDGE MILLER: Under that theory, why then would
12 you bother or clog up the record by looking at legislative
13 history? Wouldn't the Department simply stand on the
14 statute, the reasonable interpretation of it, and say the
15 heck with history?

16 MS. URBAN: Well, the Department certainly would.
17 I mean, of course, in our papers, we talked about the
18 legislative history, but we were responding to applicants.
19 Now, I don't think you need to get to the legislative
20 history, and if you want to look at it a little bit, I think
21 the joint committee report is sufficient. Certainly it's
22 not necessarily to look at those here.

23 JUDGE MILLER: Well, why would we want to look at
24 a little bit of the history if the whole subject of the
25 history is irrelevant because of the clearness and lack of

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1 ambiguity of the statute?

2 MS. URBAN: Well, I think --

3 JUDGE MILLER: Just color, or --

4 MS. URBAN: You know, as attorneys, obviously we
5 respond when someone raises an argument. It's in our blood
6 to respond to the argument.

7 JUDGE MILLER: I see.

8 MS. URBAN: But certainly, I would say that this
9 panel could make a decision based solely on the face of the
10 statute without ever having to get into the legislative
11 history.

12 JUDGE MILLER: Well, looking at the statute itself
13 apart for the moment from the legislative history, if there
14 were an application today for construction, whether it was
15 one step or two step, of a nuclear power plant and somebody
16 wasn't going to worry about what the board of directors said
17 or did to him, what would be the position of the Department
18 of Justice in reference to this question of this high cost
19 pain-in-the-neck commodity, nuclear power, nuclear electric
20 power? What would you do? What would be the criteria that
21 you would employ?

22 MS. URBAN: Well, I think we would do a two-step
23 criteria under the criteria talked about in Grinnell. We'd
24 first look and see whether the applicant has market power
25 and we'd look and see whether he abused it. You know, under

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1 the Section 105(c), you have to do that third step, which is
2 whether there is a nexus; that we would look at whether the
3 plant would -- you know, if we found that there is market
4 power and if we found that there is some abusive market
5 power, then we would look and see whether the plant would
6 maintain that market power.

7 We'd also obviously look to see, if there is an
8 absence of market power, whether adding a plant and the
9 transmission that goes with it would create market power and
10 then would there be an abuse.

11 But, you know, we have to look at each separate
12 case, and one would presume that if you're building a plant,
13 just as if you keep running a plant you already have, there
14 is some benefit somewhere. You are doing it for some
15 reason. Again, the plant doesn't have to help you to win a
16 fair competitive contest to give you dominance, to give you
17 market power.

18 JUDGE MILLER: It helps, though, doesn't it?

19 MS. URBAN: Well, it helps you to win that
20 contest, but if you are a monopolist, you don't need to win
21 because you don't have to play fair. If you are a
22 monopolist, you can exclude your competition.

23 JUDGE MILLER: Does a monopolist automatically
24 wins, like good guys or whatever?

25 MS. URBAN: Well, they certainly have a leg up.

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1 JUDGE MILLER: They sure do.

2 MS. URBAN: I mean, you know, if you can stop
3 someone from competing with you, you're going to win. If
4 you're the only game in town, you win whether you are more
5 expensive or whether you're not.

6 JUDGE MILLER: Okay.

7 Did you have a question, Judge Bechhoefer?

JUDGE BECHHOEFER: Yes. Do you think that market
9 power could be enhanced or detracted from based on the
10 environmental impacts which flow from the production of the
11 electricity you're trying to sell?

12 MS. URBAN: Certainly. I mean, a good example
13 would be if a utility has, say, 3,000 megawatts of expensive
14 plant and anyone else who wants to build additional
15 generation can't get siting permits because there's no need,
16 there's already sufficient power in the area even if that
17 power happens to be very expensive and, you know, not
18 efficient in terms of cost.

19 JUDGE MILLER: Who would make that determination?
20 Is that for the states' power commissions?

21 MS. URBAN: I am not an environmental lawyer, but
22 if I recall from litigating this case, the states involved
23 have to give permission to build.

24 JUDGE MILLER: Okay.

25 MS. URBAN: Usually they have siting authority.

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1 JUDGE MILLER: Okay.

2 MS. URBAN: And I guess if you're impacting on
3 wetlands or something, then you are starting to worry about
4 the Federal environmental statutes. But that's not my area;
5 I'm sorry.

6 JUDGE MILLER: That's okay.

7 JUDGE BECHHOEFER: Do you know if there are any
8 EPA requirements that govern the area that the Perry Plant
9 or the --

10 MS. URBAN: I have absolutely no idea. I'm sorry.

11 JUDGE BECHHOEFER: Okay.

12 JUDGE BOLLWERK: Do you have any comments on Ms.
13 Charnoff's point that a plant that may be more expensive
14 but, because of environmental factors, nonetheless falls
15 within the statute because it's -- or subject to antitrust
16 review because it's the only alternative that you have to
17 -- when it becomes the only alternative, the only cost, then
18 it's within the statute, as opposed to when you are
19 comparing costs?

20 MS. URBAN: Well, I think in both cases you're
21 within the statute. Again, I would go with a traditional
22 antitrust theory and look at market power and abuse of
23 market power. Once you build the plant, then the attorney
24 -- once a plant is to be licensed, the attorney general has
25 the obligation to advise.

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1 We would advise looking at the whole picture and
2 obviously take into consideration -- you know, we take into
3 consideration what the system -- what the structure looks
4 like of the industry in that market, and what the utility
5 building the plant looks like, and what the plant and its
6 transmission are going to do to that structure, and also
7 look, you know, for abuse, because in order to be in
8 violation of Section 2, you don't have to have just monopoly
9 power; you have to have some abuse of it.

10 If you are a monopolist because you have the best
11 product in the world and you are not using your market power
12 to exclude competition, then you are not in violation. It's
13 a very simplistic statement, obviously.

14 [Pause.]

15 JUDGE MILLER: Proceed. Have you run out of gas?

16 MS. URBAN: Well, I think -- you know, I had a
17 couple of things that I wanted to talk about and I think I
18 have talked about them, and if there are no --

19 JUDGE MILLER: No, we are not urging you. We just
20 want to be sure you have a fair, full opportunity, and I
21 suppose your time was over to --

22 MS. URBAN: Yes.

23 JUDGE BOLLWERK: One other question. The Neal
24 case that we talked about this morning, I think Mr. Murphy
25 basically said that's a classic refusal-to-deal case and has

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1 nothing to do with this. Is that correct, or do you have
2 any comments on the Neal case and its application here?

3 MS. URBAN: I do not. I think -- I believe that
4 refusal to deal was an element of the proceedings in the
5 plant and refusals to deal are still good law, as you see in
6 Aspen Ski. You know, the refusal to wield power and the
7 refusals to grant coordination services I think could be
8 construed as refusals to deal. Other than that, I don't
9 have any comment.

10 JUDGE BOLLWERK: Are the court statements that I
11 read -- that's still good law as far as you're concerned?

12 MS. URBAN: I'm sorry, I have to hear them again.

13 JUDGE BOLLWERK: Okay.

14 MS. URBAN: I'm sorry.

15 JUDGE BOLLWERK: I'll just read the one that was
16 in the Appeal Board's opinion. It says, "The restraint of
17 trade involving the elimination of a competitor is to be
18 deemed reasonable or unreasonable on the basis of matters
19 affecting the trade itself, not on relative cost of doing
20 business of the persons engaged in competition."

21 MS. URBAN: Yes, I would say that's still good
22 law. The way the courts are formulating and the way we
23 formulate it now is you look to see whether the activities
24 complained about are a reasonable business activity or
25 whether they have as their purpose and effect excluding

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1 competition. So it is -- the effect of excluding
2 competition is not sufficient to find an action a violation;
3 there also has to be some finding that this was not, you
4 know, done in the reasonable course of running a business.
5 And I think that's changed a little bit.

6 JUDGE MILLER: It's some kind of rule of reason?

7 MS. URBAN: Well, Section 2, I think, has always
8 been a rule of reason statute. I mean, you don't --

9 JUDGE MILLER: I thought it was 1. Section 2?

10 MS. URBAN: Well, on Section 2, you've always
11 looked at the reasonableness of the action.

12 JUDGE MILLER: Yes.

13 MS. URBAN: There's no per se monopolization.

14 If there are no further questions, thank you.

15 JUDGE MILLER: Any further questions?

16 [No response.]

17 JUDGE MILLER: Thank you. Are you relinquishing
18 your time to someone else?

19 MS. URBAN: I am relinquishing my time to my
20 fellow government employees and the NRC.

21 JUDGE MILLER: Thank you.

22

23 ORAL ARGUMENT ON BEHALF OF THE NRC STAFF

24

25 MR. HOM: Mr. Chairman and Board Members, my name

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1 is Steve Hom and I'm counsel for the NRC Staff. I'll try
2 and make three brief points in response, not only to matters
3 that have been raised in the pleadings by the Applicant, but
4 also some comments made today:

5 The first point I'd like to address is the notion
6 that cost advantage of this industry is the only sole
7 competitive advantage a nuclear facility can provide to a
8 utility. Most recently, in their reply brief, the Applicant
9 stated, and I quote, "The only distinction among different
10 producers of electricity is the cost advantage of one method
11 of production over another. After all, no one cares whether
12 their lights are working because their electricity comes
13 from a coal plant or a nuclear plant."

14 JUDGE MILLER: What page is that?

15 MR. HOM: This is Applicant's reply at 32.

16 JUDGE MILLER: Thank you.

17 MR. HOM: I will continue to quote. "But a
18 consumer does care if his cost of electricity is higher than
19 his neighbor's." Now, the significance of this theme,
20 according to the applicant's theory is that if there is no
21 cost advantage provided by the nuclear facility, there can
22 be no competitive advantage provided by that facility
23 whatsoever. Therefore, without the possibility of a
24 competitive advantage, there is no way that this licensed
25 activity, the nuclear facility, can create or maintain a

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1 situation inconsistent with the antitrust laws.

2 The Staff has never taken the position that a
3 customer or a consumer is not concerned with the cost of
4 electricity. In fact, the Staff would probably be the first
5 to admit that the cost of electricity is an important factor
6 in the customer's decision to purchase electricity from any
7 particular provider of that service. I'd like to emphasize
8 the word, service, because I'll be addressing the point
9 about the fungability of electricity shortly.

10 From their 1989 annual report, Ohio Edison makes
11 my point the clearest. In that '89 annual report, Ohio
12 Edison states, "It isn't necessarily price that drives
13 customer decisions. The quality and reliability of the
14 services we provide are as important to customers as price."

15 Now, again, the Staff is not arguing that cost can
16 never provide a competitive edge in a competitive situation
17 such as the electric utility industry. We are definitely
18 always talking about here for the purpose of the bedrock
19 issue, situational competition. Even though there may be
20 some fairly dominant utilities, the whole purpose of the
21 bedrock issue is comparing the cost of electricity from one
22 supplier to another.

23 If you accept the position that the Staff takes,
24 which is, class is not the only factor in determining
25 competitive advantage, then as a matter of law, the

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1 Commission, under Section 105, still would have the
2 authority to impose antitrust license conditions, even if it
3 were determined that the actual cost of the electricity from
4 the licensed nuclear facility was higher than an alternative
5 source.

6 JUDGE BECHHOEFER: Could you spell that out a
7 little?

8 MR. HOM: Yes. The Applicant's position is that
9 once you determine the cost of a facility is higher than an
10 alternative competitor, as I take it, then that facility can
11 never contribute to a competitive advantage. Therefore, if
12 it can never contribute to a competitive advantage, there
13 can be no -- I'm not sure what the term the Applicants use --
14 -- but there can be no nexus between the licensed activities
15 and the creation or maintenance of an anticompetitive
16 situation because that plant, in their theory, is that there
17 is no way that this plant can contribute more of an
18 advantage to a competitive situation that exists or could be
19 created

20 The Staff is trying to focus on the bedrock issue
21 which the parties here all spent actually several months
22 formulating. Now, we're talking about the cost of
23 electricity from one plant versus an alternative source as
24 being the sole dispositive factor on whether essentially
25 there can be a competitive advantage.

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1 As the Applicants have demonstrated, there can be
2 at least one other competitive advantage provided by a
3 nuclear plant, and that is reliability. In fact, I believe
4 there is a District Court case that we've cited in our brief
5 where that Court found in that record that coal plants were
6 less reliable than nuclear facilities, in general terms.

7 One has to look at the customer, the consumer
8 decisionmaking to determine what that customer feels
9 determines his -- is going to be his or her choice in the
10 selection of electric service. Now, there have been some
11 statements that electricity is fungible, and I would agree,
12 the Staff would agree that electrons may not be
13 distinguishable from other electrons, and in that limited
14 sense, electricity is fungible.

15 However, in the world of competition, we are
16 talking about competition among electricity suppliers. One
17 customer presumably knows that he or she or it is buying
18 electricity from a certain supplier. In making that
19 decision whether to select that service, that customer,
20 according to Ohio Edison, at least, considers not only the
21 cost or the price of that electricity, but considers other
22 factors such as service, reliability.

23 Reliability, for one, to me, would be a very
24 important factor. It's conceivable, therefore, that even
25 though the cost of electricity from one nuclear facility may

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1 be higher than from an alternative source, hypothetically,
2 if that slightly higher cost electricity is much more
3 reliable than the alternative source, one consumer may make
4 a different decision than another consumer as to which
5 supplier he chooses.

6 If you do not believe the Applicants that cost is
7 the sole competitive advantage to be considered, then the
8 Commission still has the authority to impose license
9 conditions, if it determines on the basis of all factors,
10 that that licensed facility may create or maintain a
11 situation inconsistent with the antitrust laws.

12 JUDGE BECHHOEFER: Mr. Hom, could differing
13 environmental impacts from the production of one plant
14 versus another, one source of electricity versus another,
15 affect the competitive impact that a given facility might
16 have?

17 MR. HOM: I believe that, depending upon the
18 customer, if the customer is concerned at all where the
19 source of electricity is coming from, and the customer, if
20 it's important to a customer that they do not purchase this
21 electricity from a plant, for instance, that contributes to
22 acid rain, then I believe certainly that in the eyes of that
23 customer, it is important, the environmental impact of a
24 particular facility; if that's answering your question.

25 That, therefore, can have a bearing on the

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1 competitive edge one type of plant may have over another.

2 JUDGE BECHHOEFER: Do you think that's one of the
3 considerations that the framers of Section 170, the current
4 170 of the Atomic Energy Act had in mind when they put the
5 provision in there for antitrust review?

6 MR. HOM: Section 170, Your Honor?

7 JUDGE BECHHOEFER: Well, the antitrust review
8 provision, the one that was put in --

9 MR. HOM: That's Section 105.

10 JUDGE BECHHOEFER: I'm sorry, in 1970, the Section
11 105, which is what I meant to say, which was put in 1970. I
12 got my numbers mixed.

13 MR. HOM: Your Honor, it would be impossible for
14 me to stand here and say that I believe that certain members
15 of Congress had certain things in mind when they enacted the
16 statute, however, I believe that when they drafted the
17 statute the way they did, with specific reference to certain
18 antitrust laws, the Sherman Act, the Clayton Act, Federal
19 Trade Commission Act, that they intended that the Commission
20 refer and defer to the antitrust laws as developed under
21 those statutes and consider all factors relevant for any
22 given case or situation.

23 The Sherman Act, for example, by analogy, was
24 written fairly broadly. Congress specifically did not
25 intend to provide a laundry list of every consideration,

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1 every violation that would violate the Sherman Act. They
2 left it to the courts to consider specific facts and
3 circumstances in every case to determine whether it would be
4 a violation of the antitrust laws.

5 I believe that it's safe to assume that Congress,
6 in enacting Section 105, had something not entirely
7 dissimilar in mind. My reference specifically to condition
8 -- a creation or maintenance of a situation inconsistent
9 with the antitrust laws as specified in Section 105(a), they
10 had in mind not to put specific limits, not to provide a
11 laundry list, not to say that you have to consider costs,
12 high costs, low costs, whatever, and that will be dispositive.

13 Situations change, and I think Congress is well
14 aware of that, and the intention, as a general proposition,
15 was that the Commission would perform its role, consider all
16 factors relevant to a situation and make its determination.

17 JUDGE BOLLWERK: Let me put the question another
18 way. We've been focusing on ultimate customer, the consumer
19 of electricity. But Applicants make the point, why would a
20 utility build a high cost plant? It's never going to be
21 competitive. That's their basic point. What is your
22 response to that? Why would a utility build a high cost
23 plant?

24 MR. HOM: I don't know. I'm not in the position
25 of a utility to make that decision, but I think that there

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1 could be other reasons that a utility would choose to build
2 a plant that may be higher cost than another plant. For
3 instance, if the environmental considerations were such that
4 it was more publicly acceptable, or they would have a
5 greater chance to get their plant approved or whatever, then
6 they may, in fact, decide to choose a slightly higher
7 alternative tact and build a nuclear plant under the theory
8 that in the long run perhaps, we will be more competitive
9 with the cleaner plant, that we will not be accused of
10 contributing to environmental pollution and so on and so
11 forth.

12 That is not necessarily, obviously, a complete
13 answer. I can't speak on behalf of the utilities in the
14 United States, but as long as there is the potential that a
15 plant or a utility chooses to do so for different reasons
16 other than cost, then the Applicants cannot win on the
17 bedrock issue.

18 JUDGE BOLLWERK: Going back, you mentioned this to
19 your colleagues, I guess Ms. Charnoff makes the point that
20 when you choose a plant on the basis of a factor other than
21 cost, I mean, that it has the highest cost and there are no
22 other alternatives, therefore, it comes within the antitrust
23 law. I mean, it's still within the statute, but that's the
24 only instance when high cost, I guess, controls in some way.

25 I'm not sure I'm expressing your argument

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1 properly, but you heard it and maybe you can respond to it.

2 MR. HOM: Well, if there were only one plant to
3 build, one type of plant to build, if I'm understanding this
4 correctly, then I don't see how, number one, that even
5 applies to the bedrock issue because we're talking about
6 alternative sources, essentially, in the bedrock issue, a
7 competitive situation.

8 If a plant is any particular existing competitive
9 posture and it needs to obviously build greater capacity
10 into its system, then I'm not sure how having that only one
11 option necessarily excludes that plant from being able to
12 contributed to the utility's competitive advantage, assuming
13 it has one, if it has one or not. This is part of the
14 entire analysis that the Commission goes through.

15 JUDGE MILLER: Is that your complete answer?

16 MR. HOM: As I understand the question.

17 JUDGE BOLLWERK: I guess what I wanted to get was
18 your response to the points Ms. Charnoff made here about why
19 a high cost plant might be within the antitrust laws, to the
20 degree that it was the only alternative, maybe because of
21 environmental considerations?

22 MR. HOM: Well, our position -- the staff's
23 position is whatever the cost of the plan is, it still is -
24 -there are still other factors that can be considered by the
25 Commission, in making its determination whether to impose

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1 license conditions.

2 In other words, it's not the be all and end all.
3 As long as you have the ability to look further into the
4 matter beyond cost, then the Commission still would have the
5 authority to consider the entire situation and consider
6 whether conditions are appropriate.

7 JUDGE BOLLWERK: Well, maybe I can express it this
8 way. I guess your argument is that when environmental costs
9 are taken into account, even though it's a higher cost in
10 one way, and, in fact, the lowest cost or the only cost
11 that's being considered. Do any members of the panel want
12 to help me? Am I misstating the argument?

13 JUDGE BECHHOEFER: Well, I think the argument is
14 is if environmental factors operate to make the proposed
15 facility the only available facility, then you've only got
16 one alternative.

17 MR. HOM: Well, clearly, in that situation, and I
18 understand --

19 JUDGE BECHHOEFER: I'm just saying this is what I
20 expect -- what I understand the argument to be. I'm not
21 stating it as a fact. That is what I understand the
22 argument was.

23 MR. HOM: Well, the staff's position -- maybe I
24 can clarify it this way. The staff's position is that if
25 you had only one alternative -- if you had only one source

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1 of power to build, or if you had two alternatives, cost
2 would not necessarily be the end of the matter in
3 determining whether that plant could contribute to an anti-
4 competitive situation.

5 JUDGE MILLER: Would it have to be, in order to
6 come within the scope of the bedrock issue -- would it have
7 to be only? What if it were substantially, significantly,
8 95 percent?

9 MR. HOM: If costs were 95 percent of the
10 equation?

11 JUDGE MILLER: Uh-huh?

12 MR. HOM: I believe you would still have to
13 consider the other five percent in making the determination
14 whether conditions are appropriate or not. As long as you
15 have that five percent or even one percent, then cost is
16 not, as a matter of law, the only issue to consider.

17 JUDGE MILLER: What are the other issues then,
18 besides the 99 percent?

19 MR. HOM: Well, the other issues could be, as the
20 Applicants have stated, service reliability, for instance.

21 JUDGE MILLER: Reliability? How does that factor
22 in?

23 MR. HOM: Well, if a plant is to be built, and
24 it's of such -- hypothetically, of such high technology that
25 it's going to be the most reliable plant there ever was

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1 built, then conceivably, to certain customers in the
2 marketplace, a customer may be willing to choose that plant
3 -- chose it, buy electricity from that supplier, knowing
4 that it has that very reliable plant, even though it may
5 cost \$10 a month or whatever high, more than the cost of --
6 than electricity from a cheaper plant.

7 JUDGE MILLER: Do you think this is a reality in
8 the marketplace?

9 MR. HOM: Well, I believe that -- yes. Number
10 one, reliability is a very distinct reality in the
11 marketplace.

12 JUDGE MILLER: Well, we come across this
13 reliability argument rather recently. But, assuming that
14 there's no absolute on reliability, I suppose it's all a
15 matter of judgment and probabilities and so forth. In your
16 experience, is there that significant a difference in the
17 reliability of different types of plants in the present
18 market for the production and sale of base power?

19 MR. HOM: I believe that reliability is a very
20 important factor, judging from the difference in prices that
21 customers pay for firm power and interruptible power.

22 JUDGE MILLER: Yes, but that's with the same
23 producer possibly.

24 MR. HOM: I'm sorry?

25 JUDGE MILLER: I say those are differences in the

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1 type of merchandise you're buying.

2 MR. HOM: Right.

3 JUDGE MILLER: Or you can buy different prices of
4 the same commodity and pay more or less from the same
5 producer or seller.

6 MR. HOM: Your Honor, if there is no distinction
7 whatsoever, other than cost or price, no distinction
8 whatsoever, then the applicant's argument may hold greater
9 weight.

10 JUDGE MILLER: Now, wait a minute, let me get you
11 now.

12 MR. HOM: All right.

13 JUDGE MILLER: None whatsoever. Then their
14 argument may hold greater weight. Now, is that as far as
15 you're willing to go logically?

16 MR. HOM: Well, it's a very theoretical argument.

17 JUDGE MILLER: Yes, it is.

18 MR. HOM: If there is no conceivable way, as what,
19 I believe you're boiling it down to, that there is any
20 perceivable advantage, from a customer's standpoint, to
21 supplier A and supplier B other than cost, then I believe
22 that there is -- well, I guess, as far as I would say right
23 now, is that I would have to rethink my position.

24 JUDGE MILLER: What would you say right now? I
25 didn't follow you. You said you were coming to some

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1 conclusion and you backed off from it. What were you
2 talking about?

3 MR. HOM: No. I would say that we would have to
4 reevaluate our position.

5 JUDGE MILLER: Oh, I see. In other words, you
6 might change sides? The staff might change sides in this
7 particular controversy, I'm going to call it?

8 MR. HOM: Well, if you're giving me a
9 hypothetical, and I'd have to make a call on that, the staff
10 would at least consider changing sides. I don't believe
11 that's reality.

12 JUDGE MILLER: I see.

13 MR. HOM: I don't believe there's anything in the
14 world that is perfectly competitive, where cost is the sole
15 one and only factor in competition.

16 JUDGE MILLER: Well, my question to you then, I
17 think, was, in the real world, and looking at reality, do
18 you ever have a hundred percent, and do you need to have a
19 hundred percent in order to make value judgments in this
20 context?

21 MR. HOM: Do you ever have a hundred percent?

22 JUDGE MILLER: You never had a hundred percent, do
23 you -- assurance, reliability, whatever you want to name?

24 MR. HOM: No. I don't believe you do. But, I
25 believe you have some indication that, for instance, in the

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1 terms of reliability, one facility may be more reliable than
2 another.

3 JUDGE MILLER: All right. Now, what does the
4 staff believe is a reasonable basis for its position that
5 the reliability factor significantly favors nuclear power?

6 MR. HOM: What is the --

7 JUDGE MILLER: Yes?

8 MR. HOM: -- the basis?

9 JUDGE MILLER: Yes?

10 MR. HOM: I can cite to you one case that I've
11 come across in research.

12 JUDGE MILLER: Okay.

13 MR. HOM: U.S. v. United Technologies Corporation,
14 U.S. District Court, Northern District of Ohio, 1977, where
15 the Court states: "Since the oil embargo..." --

16 JUDGE MILLER: What was the citation on that?

17 MR. HOM: This is September 9, 1977.

18 JUDGE MILLER: No, I mean, is that in the Federal
19 Supp. or what?

20 MR. HOM: This is out of the -- the copy I have is
21 1977-two trade cases.

22 JUDGE MILLER: Oh, is that a U.S. District Court
23 decision or what?

24 MR. HOM: Yes, District Court, Northern District
25 of Ohio.

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1 JUDGE MILLER: Okay. Well, that's easy to report
2 it, if it's reportable in the Federal Supplement, isn't it?

3 MR. HOM: Sometimes not, Your Honor.

4 JUDGE MILLER: Oh, I see. This -- okay. Go
5 ahead.

6 MR. HOM: Quoting on page 72,647. "Since the oil
7 embargo of 1973, utilities have generally ordered only coal-
8 fired or nuclear steam systems where such were feasible.
9 While all fossil steam systems require both planned and
10 unplanned maintenance, coal-fired systems are especially
11 susceptible to reliability problems."

12 JUDGE MILLER: Coal-fired has susceptibility,
13 reliability problems.

14 MR. HOM: Right.

15 JUDGE MILLER: In the case of coal-fired, they
16 have to have adequate maintenance and so forth?

17 MR. HOM: Right.

18 JUDGE MILLER: Okay.

19 MR. HOM: Now, I'm not saying -- I to clarify.
20 I'm not saying that reliability is a factor or the only
21 factor or the most important factor. The staff's position
22 is on the bedrock legal issue. If it is possible that it is
23 a factor --

24 JUDGE MILLER: If it is possible that it is a
25 factor. You see, you're watering it down so much, I am

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1 trying to see whether or not it's within the scope of our
2 consideration here.

3 Now, the position taken by the Applicants, as I
4 understand it, is that the Commission does not have
5 authority, as a matter of law, to retain these conditions,
6 if it finds that the actual cost from a license is higher
7 than the cost of electricity from alternative sources --

8 MR. HOM: Right. In other words, the --

9 JUDGE MILLER: -- is appropriately measured. But
10 that doesn't require a hundred percent certainty of
11 anything, including cost, reliability or patriotism.

12 MR. HOM: Well, that considers that no other
13 factor is relevant to contributing to an anti-competitive
14 situation. And that's not the staff's position. The
15 staff's position --

16 JUDGE MILLER: Well, it's the contention, I guess,
17 that no other factor is within the statutory language. In
18 other words, the creation or maintenance of a situation
19 inconsistent with the anti-trust laws -- say the activities
20 under the license. Now, those activities under the license
21 are what? How does the staff interpret that part of the
22 statute?

23 MR. HOM: The staff interprets --

24 JUDGE MILLER: Whether -- start off with the term
25 "whether." Whether the activities under the license would.

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1 MR. HOM: What is the staff's interpretation of
2 that?

3 JUDGE MILLER: Yes?

4 MR. HOM: Well, I think the Waterford Decision
5 said that there's not specific criteria to determine
6 activities under the license. It says, normally -- and, I
7 think in the Davis-Besse decision, the licensing board
8 rather succinctly said that the five plants to be licensed
9 would be the activities under the license in that situation.

10 I think the Waterford decision left it fairly open
11 that the Commission may consider various factors, given any
12 certain situation.

13 But, for the purposes of answering your question
14 today, I think we can assume right now that we're talking
15 about the nuclear facility in this case.

16 JUDGE MILLER: Yes.

17 MR. HOM: Okay. Now, the phrase continues:
18 "...would create or maintain a situation." The question
19 then becomes --

20 JUDGE MILLER: Would create or maintain a
21 situation inconsistent -- would it have to be a hundred
22 percent certainty?

23 MR. HOM: No. No.

24 JUDGE MILLER: So, now you're willing to go less
25 than a hundred. How about 95 percent? Where's your line on

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1 reasonableness, rather than a mathematical statement of 90
2 or 92?

3 MR. HOM: The best I can cite to you is the Joint
4 Committee Report which says Congress intended this to be a
5 reasonable probability standard.

6 JUDGE MILLER: Who said that?

7 MR. HOM: The Joint Committee Report.

8 JUDGE MILLER: Yes, the report. But it was not
9 written into the statute was it?

10 MR. HOM: That's correct.

11 JUDGE MILLER: So, do you consider if it's not
12 written in the statute that it might have been left out for
13 logical reasons?

14 MR. HOM: If it was --

15 JUDGE MILLER: It might have been rejected in
16 other words?

17 MR. HOM: I'm sorry, the question?

18 JUDGE MILLER: My question is, the fact that
19 something appears in a 20 or 25 year-old Joint Committee
20 Report to Congress, in the days when Congress was a
21 considerably different instrumentality, at least in terms of
22 nuclear power, does that really have any present
23 significance to the staff one way or the other?

24 MR. HOM: I believe yes, Your Honor.

25 JUDGE MILLER: Okay. Go ahead.

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1 MR. HOM: The Joint Committee Report, in
2 particular, and this will get to my next point. The Joint
3 Committee Report was a specific vehicle by the Committee to
4 explain Section 105. With respect to Section 105(c)(5),
5 they used that specific vehicle, the report, to explain
6 their intentions clearly on reasonable probability and on
7 what activities under the license would not -- was not
8 intended to encompass, which I believe another party has
9 already addressed today. It would not encompass the
10 activities of contractors unless a utility was culpably
11 involved in any anti-competitive activity.

12 Because the Joint Committee took the effort to
13 specify those two points in Section 105(c)(5), in particular
14 -- in particular, with respect to that phrase that you're
15 asking me about now -- whether activities under the license
16 would create or maintain a situation inconsistent with the
17 anti-trust laws. I believe that that is a fairly clear
18 articulation by the legislation -- legislators of
19 legislative intent.

20 I grant you that, in every statute, not every
21 single intention of Congress is necessarily spelled out
22 verbatim. But, here where you have the omission of cost
23 from the statute, number one, you have another vehicle, the
24 Joint Committee Report, which took great pains to say, with
25 respect to this standard, we are pointing out that our

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1 intention is reasonable probability and not to include
2 contractors. And they stop there. And they do not say
3 anything there further about cost.

4 The staff's position is that there is no issue
5 about whether Congress intended somehow to put cost as an
6 absolute criteria, low-cost as an absolute make or break
7 criteria in the statute.

8 JUDGE MILLER: Now, you say absolute make or break
9 -- now, you're citing extremes again.

10 MR. HOM: Well, the bedrock issue is phrased in
11 terms of an extreme, Your Honor.

12 JUDGE MILLER: All right.

13 MR. HOM: It's phrased in terms of -- as a matter
14 of law.

15 JUDGE MILLER: Let's take a look. How do you
16 interpret? You helped to frame it, I think -- how do you
17 interpret this bedrock issue?

18 MR. HOM: I interpret it that if you find that the
19 cost of Davis-Besse is one dollar higher than an alternative
20 source "as appropriately measured," then there's noway,
21 according to the Applicants, that that facility can
22 contribute to the creation of maintenance of an anti-
23 competitive situation, or a situation inconsistent.

24 JUDGE MILLER: One dollar?

25 MR. HOM: One dollar is what the bedrock --

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1 JUDGE MILLER: One dollar per what?

2 MR. HOM: One dollar per any measurement that will
3 later be determined if we go to the next phase of this
4 proceeding.

5 JUDGE MILLER: Per kilowatt hour? One dollar per
6 kilowatt hour? You're giving me one dollar. I want to know
7 what your dollar is measured against.

8 MR. HOM: I could say one dollar per kilowatt
9 hou .

10 JUDGE MILLER: Okay.

11 MR. HOM: And I'm sure the applicants can say some
12 other measure was more appropriate.

13 JUDGE MILLER: I want to know what the staff says.

14 MR. HOM: The staff --

15 JUDGE MILLER: You're giving me the staff's view.

16 MR. HOM: The staff's position could be one dollar
17 per kilowatt hour. That would be sufficient under the
18 bedrock issue.

19 JUDGE MILLER: Now, tell me the staff's position.
20 Why should -- I think I've asked you this -- why should we
21 bother to look at the Joint Committee reports, if the
22 statute itself contains no ambiguity and no hint or one
23 percent of an ambiguity?

24 MR. HOM: You should not -- I'm not saying, Your
25 Honor, that the statute itself -- I think we're getting

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1 confused here.

2 JUDGE MILLER: Well, I want to find out.

3 MR. HOM: The reference to legislative history, as
4 the Department of Justice mentioned, was only in response to
5 the Applicant's brief.

6 JUDGE MILLER: Well that doesn't make it any more
7 logical or illogical as an element of reasoning before this
8 Board, does it? Just because they say something, then you
9 have to counter it and so forth, and we have to decide who's
10 up at the top of the ballbat in terms of meaningfulness or
11 relevance?

12 MR. HOM: That was the primary reason we --

13 JUDGE MILLER: That's the primary reason?

14 MR. HOM: Right.

15 JUDGE MILLER: Well, what percentage is that, 80
16 percent, 90 percent of the staff's reasoning?

17 MR. HOM: That we -- why we cited legislative
18 history or --

19 JUDGE MILLER: Yes.

20 MR. HOM: -- what the impact of legislative
21 history has?

22 JUDGE MILLER: Why you went into it at all?

23 MR. HOM: The principal reason was in response --
24 our position is that the statute is clear. It had no
25 reference to cost, and that should be the end of the

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1 question.

2 JUDGE MILLER: Okay.

3 MR. HOM: But, as I point out, the Joint Committee
4 did, in the report, specifically point out two areas, none
5 of which were cost.

6 JUDGE MILLER: Well, if the Joint Committee Report
7 isn't in conflict with, it doesn't take precedence over the
8 statute as written, adopted, and signed by some president,
9 does it?

10 MR. HOM: That's where the statute is --

11 JUDGE MILLER: So far as the staff is concerned,
12 we can just check out all these 25 year-old mutterings of
13 the Joint Committed?

14 MR. HOM: That's correct.

15 JUDGE MILLER: Okay.

16 JUDGE BECHHOEFER: Is it possible ambiguities or
17 uses of the terms "create" or "maintain" or "inconsistent"
18 -- I mean, could that be a justification for looking to
19 legislative history, to see what some of these terms mean?

20 MR. HOM: I believe, Your Honor, I would have to
21 concede that there may be different interpretations to those
22 words. Obviously --

23 JUDGE MILLER: Which words? Go ahead.

24 MR. HOM: What Your Honor said, "create" or --

25 JUDGE BECHHOEFER: "Create" or "maintain" or --

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1 JUDGE MILLER: I like to be specific, if you
2 would, for the record.

3 JUDGE BECHHOEFER: Well, those words are just
4 words I took out of the statute.

5 JUDGE MILLER: Yes.

6 JUDGE BECHHOEFER: I'm just saying, are there
7 possible differing interpretations of those words which
8 would lead one to look to legislative history?

9 MR. HOM: I believe in any case, Your Honor, there
10 easily could be a situation where you have two differing
11 views.

12 JUDGE BECHHOEFER: "Situation" is another one.

13 MR. HOM: Correct.

14 JUDGE BECHHOEFER: Another such word.

15 JUDGE MILLER: Well, then you are saying that
16 there is a possible ambiguity in the statute whereby you
17 would then be not only entitled but maybe even compelled to
18 look at the legislative history.

19 MR. HOM: Not --

20 JUDGE MILLER: Now, you've taken two different
21 positions. Why don't you settle down on one?

22 MR. HOM: Not with respect to costs, Your Honor.
23 We have never taken a --

24 JUDGE MILLER: Not with respect to anything on the
25 interpretation of the statute. I'm asking you to look at

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1 this statute. You're very familiar with it. I'll do the
2 reading into the record. "The Commission shall give due
3 consideration to the attorney general's advice" and so
4 forth.

5 MR. HOM: Right.

6 JUDGE MILLER: "And shall make a finding as to
7 whether the activities under the license would create or
8 maintain a situation inconsistent with the antitrust laws as
9 specified in Subsection A of this section."

10 Now, does that contain any potential ambiguities
11 or not in the staff's judgment?

12 MR. HOM: It is something that is open for
13 interpretation by the Commission.

14 JUDGE MILLER: Okay.

15 MR. HOM: Did I answer your question, Judge
16 Bechhoefer?

17 JUDGE BECHHOEFER: Yes, you answered mine.

18 MR. HOM: Okay.

19 JUDGE MILLER: We'll give you --

20 JUDGE BECHHOEFER: I may have some others. I do
21 have some others.

22 JUDGE MILLER: Well, you don't have too many
23 others at this point, although at the end we'll give you
24 full opportunity. I'm going to extend your time by about
25 five minutes so that you may fairly present what you wanted

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1 to have the record show in your presentation.

2 MR. HOM: Only one more point, Your Honor.

3 JUDGE MILLER: Go right ahead.

4 MR. HOM: Obviously, we stand by everything we've
5 written in our pleadings. I just want to add one more
6 point. And we did discuss this; I just want to clarify this
7 today.

8 The statute was drafted to require an antitrust
9 review before -- at the construction permit stage, in most
10 cases before an operating license was issued, before a power
11 plant could come on line and generate electricity, before
12 the actual cost of electricity could be determined. The
13 bedrock issue is framed in terms of the actual cost of
14 electricity.

15 The staff's view is that given that scheme set up
16 by Congress to require the Commission to decide whether
17 conditions are appropriate before there could be any
18 determination whether there are actual costs of a plant is a
19 very strong indication that Congress had no intention
20 whatsoever to have the actual cost of a plant be the pivotal
21 factor on a determination of whether conditions were
22 appropriate.

23 Now, the bedrock issue is phrased in terms of
24 retained antitrust conditions. The only question left in
25 the staff's view is whether there should be any substantive

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1 distinction between retaining conditions -- that is, whether
2 the retention of conditions can now be dispositive, the cost
3 can now be dispositive -- or should the standards for the
4 imposition and retention of conditions be one and the same.

5 The staff's position is that -- I'm making
6 reference to what I think counsel for Ohio Edison called the
7 yo-yo phenomenon -- the staff's position is that it would
8 make no sense whatsoever if, all a sudden, after antitrust
9 conditions were imposed, after a long antitrust review
10 proceeding, once a plant came on line and it could be
11 determined after the first day or week or month or year that
12 the actual costs then were higher than the so-called
13 alternative source, all of a sudden the retention of those
14 conditions should turn on a different standard, a cost-base
15 standard only, rather than a standard that we believe is in
16 the statute, which is the Commission is to consider all
17 facts and circumstances and make a determination, a rule of
18 reason so to speak, as to whether this plant can create or
19 maintain a situation inconsistent with the antitrust laws.

20 Those are all my remarks.

21 JUDGE MILLER: Thank you sir.

22 JUDGE BECHHOEFER: I just wanted to follow up one

23 --

24 JUDGE MILLER: I'm going to suggest that when we
25 get through with everybody having a shot, that we have an

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1 open session in which the Board may have other questions.
2 Are you willing to do it then?

3 JUDGE BECHHOEFER: Well --

4 JUDGE MILLER: It's your choice.

5 JUDGE BECHHOEFER: Yes. I just wanted one quick
6 question.

7 JUDGE MILLER: Go ahead. Quick answer.

8 JUDGE BECHHOEFER: What significance, if any, do
9 you accord to the fact that at the time Section 105 was
10 passed in 1970, the AEC had failed to make a finding of
11 practical value?

12 MR. HOM: What significance?

13 JUDGE BECHHOEFER: If any.

14 MR. HOM: If any? I really don't know the -- I
15 don't have a position on -- the staff doesn't have a
16 position on that. The joint committee report which I
17 reviewed only seems to indicate that it was time consuming,
18 expensive. There were many delays. I'm not sure exactly
19 what was involved in the Commission's process in trying to
20 make that determination.

21 JUDGE BECHHOEFER: Do you think the failure to
22 make a practical value finding meant that the old AEC
23 thought that those plants really weren't low cost?

24 MR. HOM: I really don't have any opinion on that.

25 JUDGE MILLER: Are you familiar with that ongoing

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1 argument historically that Judge Bechhoefer was mentioning,
2 the finding of practical value and so forth?

3 MR. HOM: I'm afraid I'm not that familiar, Your
4 Honor.

5 JUDGE MILLER: Okay.

6 MR. HOM: I haven't been at the Commission very
7 long.

8 JUDGE BECHHOEFER: Well, Section 105 replaced the
9 practical value --

10 JUDGE MILLER: Yes. It became a Congressional
11 determination.

12 JUDGE BECHHOEFER: Yes.

13 JUDGE MILLER: Yes.

14 JUDGE BECHHOEFER: Yes.

15 JUDGE MILLER: I take it you are not really
16 familiar with that as such?

17 MR. HOM: I am aware that it was omitted in 1970
18 and that the Commission was no longer required to make that
19 finding.

20 JUDGE MILLER: Was the -- well, I won't go into it
21 because it's not.

22 JUDGE BECHHOEFER: Okay. That was my basic
23 question.

24 JUDGE MILLER: Thank you, sir. Now, you may be
25 asked questions later by the Board; we reserve the right.

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1 But in the interest of getting everything on the surface as
2 it were, why, we thank you for your presentation.

3 MR. HOM: Thank you.

4 JUDGE MILLER: Let's see. Who is next now in the
5 order of things? I guess it's Mr. Goldberg.

6

7

ORAL ARGUMENT ON BEHALF OF THE
CITY OF CLEVELAND, INTERVENOR

8

9

10 MR. GOLDBERG: Your Honor, my name is Reuben
11 Goldberg. I represent the City of Cleveland. It so happens
12 that the very first thing I was going to talk about was
13 practical value.

14 JUDGE MILLER: Is that right? Okay. Go ahead.

15 MR. GOLDBERG: I'd like to tell you the reason why
16 I chose that as the beginning.

17 JUDGE MILLER: Okay.

18 MR. GOLDBERG: In their original motion, the
19 applicants did not talk about practical value in any manner,
20 sense, sense or form. The first time they talked about
21 practical value was in their reply, and in their reply, they
22 made certain claims to which we had no opportunity for
23 written response.

24 I've looked into the question of practical value
25 and a response must be made, and since we have a reporter,

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1 you will have a written response.

2 JUDGE MILLER: Very well.

3 MR. GOLDBERG: At Page 59 of their reply, the
4 applicants proclaim as follows, and I quote: "By 1970, the
5 statutory requirement for a finding of practical value had
6 been overtaken by events. Numerous facilities licensed as
7 research and development reactors were being constructed and
8 going into commercial nuclear power plants. In short," and
9 please listen very carefully to this sentence --

10 JUDGE MILLER: All right. We're focused.

11 MR. GOLDBERG: -- "the reality was by 1970 the
12 technology and economics of nuclear power appeared to be
13 sufficiently developed that reasonably accurate predictions
14 about cost could be made. Accordingly, the statutory
15 requirement for an agency finding of practical value was
16 eliminated and the commercial licensing procedure, with its
17 associated antitrust review, was initiated." End of quote.

18 The applicants then go on to conclude that this
19 supports their bedrock issue as correct.

20 One would imagine -- and incidentally, those
21 statements are footnote -- one would imagine that they were
22 relying on the 1970 legislative history, but they were not.
23 The first footnote relies upon a letter written in August
24 1966 by Chairman Seaborg of the Commission in response to a
25 letter dated January the 20th, 1966 from Congressman

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1 Holifield, Chairman of the then Joint Committee on Atomic
2 Energy.

3 Chairman Seaborg was sending a response to a
4 letter from the Congressman, and he had sent him a copy of
5 the Commission's determination of December 29th, 1965 in
6 which the Commission said, we can't make a determination of
7 practical value even with respect to what I would refer to
8 as tea kettle nuclear research and development plants.

9 Chairman Holifield then sent another letter to
10 Chairman Seaborg and he asked for their opinion, the
11 Commission's opinion, on eliminating the practical value
12 requirement because he thought the time had arrived to
13 consider that question, and he pointed out that he was
14 linking that request with respect to the possible
15 consideration in a session of Congress for an amendment
16 which would eliminate the practical value requirement.

17 Chairman Seaborg's reply is devoted to answering
18 the questions, one of which was, and I quote, "Is there a
19 continued need for the requirement of a finding of practical
20 value as embodied in Section 102?"

21 This question Chairman Seaborg answered in the
22 negative, noting that, "The requirement for a finding of
23 differences in treating between developmental facilities
24 under Section 104(b) and commercial facilities licensed
25 under Section 103 appears to have been based principally

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1 upon anticipated scarcity of nuclear materials and the
2 desire for a mechanism" -- these are the Chairman's words
3 -- "which would serve to designate the point at which a
4 facility type has reached the commercial stage and therefore
5 should not be eligible for further government assistance."

6 Let me pause there to interpolate. He's pointing
7 out reasons that have absolutely nothing to do with the
8 bedrock issue.

9 He goes on, and I quote, "The reasons for making
10 the distinction have either receded in importance or have
11 been shown to have less significance than was previously
12 attributed to them." End of quote. And he goes on, "In
13 view of the present abundant supply of nuclear materials and
14 the recent private ownership amendments to the Act
15 permitting individuals to acquire and own special nuclear
16 material, the reason based on scarcity can no longer be
17 considered valid." End of quote.

18 Responding to the question whether a statutory
19 distinction should be retained such as existed in the
20 present Act, he answered this question also in the negative,
21 that it would be not appropriate for the reasons already
22 given.

23 He then goes on to discuss a major area in which
24 the requirements of the Act are applicable only to licenses
25 issued under Section 103. The answer refers to the

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1 necessity for, and these are his words, quote, "the
2 prevention of monopolies and restrictions of free
3 competition with respect to facility types which have
4 entered the commercial stage." Unquote. The very thing Ms.
5 Urban was talking about when she was presenting her
6 argument.

7 As the Joint Committee Report makes clear, over a
8 period of 24 years beginning in 1946 until 1970, as the
9 Board probably knows, in the original Act, there was a
10 requirement that a report as to practical value be made to
11 the President by the Commission. When that report was made,
12 the President was to submit it to Congress with his
13 recommendations and, following 90 day passed of the
14 submission to Congress, the licenses could be issued under
15 Section 103.

16 JUDGE MILLER: That never happened, did it?

17 MR. GOLDBERG: That never happened. They never
18 made a report. They just couldn't do anything.

19 In 1954, the practical value matter was changed to
20 a finding. The Commission had a requirement to make a
21 finding of practical value before you could go to licensing
22 under Section 103, and they couldn't do that.

23 Finally in 1970, Congress said, we've had enough
24 of that practical value and the efforts, and they threw it
25 out. It had absolutely nothing to do with supporting, as is

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1 claimed here today and in the reply by the applicants that
2 that supports their position that if a plant is high cost,
3 this Commission has no authority to impose license
4 conditions.

5 It's just incomprehensible to us that they would
6 have relied on a 1966 letter, on memoranda written by the
7 general counsel -- this is all in the reply -- from the
8 general counsel to the Commission dated 1964 -- it gets
9 older all the time -- and argue --

10 JUDGE MILLER: Pardon me. What page of the reply?
11 Could you give that to me?

12 MR. GOLDBERG: It's Pages 57 --

13 JUDGE MILLER: It's the applicants' reply you're
14 now addressing?

15 MR. GOLDBERG: Pages 57 to 61.

16 JUDGE MILLER: Thank you. Okay. I've got it.

17 MR. GOLDBERG: And you'll find the references in
18 the footnotes to 1964 memoranda, to 1966 letters.

19 JUDGE MILLER: Starting with Footnote 133 et seq.?

20 MR. GOLDBERG: Right.

21 JUDGE MILLER: Okay.

22 MR. GOLDBERG: And not only that, when they do
23 finally resort to the Joint Committee Report, do they look
24 at Page 13, where the reasons are given for the elimination?
25 No. They look at Page 9, which has nothing to do with the

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1 reasons why it was eliminated.

2 I don't have to tell you why they waited to put it
3 in their reply, on the basis of what I have told you. They
4 expected we wouldn't have an opportunity refer to it.

5 JUDGE MILLER: We are going to give everybody here
6 today an opportunity to refer to anything within reasonable
7 bounds that will help develop a sound and full record for
8 the board, and for whatever appeals may ensure.

9 MR. GOLDBERG: I have responded to the practical
10 value question.

11 JUDGE MILLER: Yes.

12 MR. GOLDBERG: When you read their motion, their
13 original Motion for Summary Disposition, and when you read
14 their reply, they repeat ad nauseam a central theme. That
15 central theme is that if a plant's cost is high cost, there
16 can't be any anti-trust violations, and the Commission has
17 no authority to impose anti-trust conditions.

18 The problem with their position is that they
19 disregard the balance of the nuclear project, the
20 transmission facilities that are associated with it, and
21 without which transmission facilities those nuclear projects
22 would have to sit there. They couldn't send the power
23 anyplace. That is why they had to build those transmission
24 facilities.

25 What was the result of building those transmission

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1 facilities, they became barriers to entry into the market of
2 anybody else. Let me call your attention to whether you
3 need --

4 JUDGE BECHHOEFER: Could you explain that a little
5 bit?

6 MR. GOLDBERG: Of course.

7 JUDGE BECHHOEFER: Or develop it, perhaps.

8 MR. GOLDBERG: Let me put it to you this way, the
9 nuclear related transmission lines associated with the
10 construction of the nuclear units add to the applicant's
11 market share, and they raise barriers to the construction of
12 transmission facilities by others, and they make it more
13 difficult for competitors to deal with those.

14 In these circumstances, the cost of the nuclear
15 power is irrelevant. The increased market power raises
16 entry barriers, whatever the cost of the additional power.
17 I can relate that to the situation of the City of Cleveland.

18 The City of Cleveland was surrounded by the
19 transmission facilities of Cleveland Electric Illuminating
20 Company. The City of Cleveland was compelled to buy the
21 power just from Cleveland Electric Illuminating Company,
22 whether it was low cost or high cost was beside the point.
23 They could buy it only from them because they had no access
24 to any other markets.

25 It was the anti-trust license conditions that gave

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1 them, for the first time, access to other markets, and I can
2 tell you that without that access there probably wouldn't
3 be, today, a municipal electric operation in the City of
4 Cleveland.

5 JUDGE BECHHOEFER: Could the City of Cleveland
6 have decided to build a transmission line from, say,
7 Cleveland to Niagara Falls, or wherever you get cheap power?

8 MR. GOLDBERG: I would doubt that very much.

9 Let me point out to you that the City of Cleveland
10 was given the right to ownership access of Davis-Besse and
11 Perry, they never were able to raise the money to buy any
12 ownership access. They certainly didn't have the money to
13 build the kind of transmission facilities they would have
14 had to have built to get to sources that end up in Kentucky,
15 and stays even farther than that.

16 Actually, in Otter Tail, the Supreme Court of the
17 United States found that Section 2 of the Sherman Act was
18 violated because Otter Tail Power Company had lost its
19 franchise in one or two of the cities, and those cities had
20 determined that they wanted to have a municipal distribution
21 operation. They needed transmission, and Otter Tail
22 refused.

23 They went to the Supreme Court, the District Court
24 first, and then to the Supreme Court of the United States,
25 and the Supreme Court of the United States held that this

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1 monopoly of the transmission amounted to a violation of the
2 Sherman Anti-Trust Laws, and that was without regard to what
3 the cost of power might be.

4 All I have to do to relate it to Otter Tail is to
5 substitute the name "City of Cleveland." That is exactly
6 the situation we had, and we were saved from that disaster
7 only by reason of the fact that this Commission found that
8 the licensing of the projects would create or maintain a
9 situation inconsistent with the anti-trust laws.

10 Let me also mention to you, I have heard it said
11 by Mr. Murphy, and perhaps also by Ms. Charnoff, that they
12 never raised the question of the Commission's authority to
13 impose anti-trust license positions in the Davis-Besse and
14 Perry proceedings.

15 Well, I am holding pages 126 and 127 of the appeal
16 briefs to the Appeal Board in those cases, and in the text
17 this appears, the Licensing Board points to the quote:
18 "pronounced effect on the overall economies" of nuclear
19 generation, citing to the record, as a reason to assume that
20 applicants will derive a competitive advantage by virtue of
21 the Perry and Davis-Besse facilities. Footnote 147.

22 Now I will read the footnote: It should be
23 understood that such a finding is an absolute prerequisite
24 to the Licensing Board's structural analysis. That is the
25 analysis of nexus. As Dr. Pace testified -- that was their

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1 expert economic witness -- there first must be made a
2 "determination of whether or not the nuclear plant offers to
3 its owners cost advantages of such a magnitude that those
4 excluded from access to the nuclear unit in question or to
5 similar units are at a significant competitive
6 disadvantage." If that is not the case, the analysis need
7 be carried no further. There is no authority for the
8 Commission to impose anti-trust license conditions.

9 JUDGE BECHHOEFER: Isn't that the applicant's
10 argument now?

11 MR. GOLDBERG: The applicant used that same Dr.
12 Pace, and filed an affidavit as part of their pleadings in
13 support of their application, and he in that affidavit he
14 says the very same things.

15 They are telling you today that their position at
16 that time was different in degree and kind and, moreover,
17 they had also said at that time that even if there were some
18 advantages, they were going to be shared by the customers.

19 The fact that they also said that doesn't detract
20 one iota from the fact that they did make that contention.
21 Why did they bring in Dr. Pace with that kind of testimony,
22 if it was going to be low cost power?

23 The fact of the matter is that we have submitted
24 evidence of the rising costs in our reply on the preclusion
25 issues, which shows that they knew at early stages that the

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1 costs were going way beyond what they had anticipated, and
2 we have shown that in our reply based upon exhibits, their
3 own exhibits, their own press releases.

4 Let me point out to you in connection with this
5 business of laches that we heard about this morning, Davis-
6 Besse was in operation in 1978, at that time, they knew what
7 the actual costs were. They waited ten years to file their
8 application.

9 Mr. Murphy said it was a very serious problem that
10 they were faced with, and yet they hadn't even filed it at
11 the same time that Ohio Edison filed, they filed in May
12 1988, whereas, Ohio Edison filed in September 1987.

13 At the moment, I must confess to you that i don't
14 know how much time I have used.

15 JUDGE MILLER: You have five more minutes.

16 MR. GOLDBERG: How much?

17 JUDGE MILLER: We are giving you an extension.
18 You have five more minutes.

19 MR. GOLDBERG: Thank you very much.

20 The applicants, in their original motion,
21 purported to analyze the Attorney General's advice letters
22 in very summary fashion, and NRC precedents, and argued on
23 the basis of their analysis that the Attorney General
24 himself had recognized the validity of the bedrock issue.

25 I wonder if the letters they referred to of the

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1 Attorney General was his first letter with respect to Davis-
2 Besse I. My recollection was it was 1973. What they didn't
3 refer to was his letter with respect to Perry. With respect
4 to the Perry letter, he refers to his May 1973 letter, and
5 explains why he did not, in that letter, recommend an anti-
6 trust hearing.

7 He points out that there was pending before the
8 Federal Power Commission some application by the City of
9 Cleveland which would probably dispose of the problem
10 between the City of Cleveland and Cleveland Electric
11 Illuminating Company.

12 But by the time of his Perry letter, he had been
13 apprised by the City of Cleveland as to what had been going
14 on, and at that point he recommended not only an anti-trust
15 hearing with respect to Perry I and II, but with respect to
16 Davis-Besse I, II and III, and it was that proceeding in
17 which we actively participated that the license conditions
18 were imposed.

19 I thank the Board very much. If you have any
20 questions, I will be delighted to deal with them.

21 JUDGE BECHHOEFER: I have one follow-up question,
22 sort of. Does the fact that they did not --

23 Would you have said they should have raised the
24 question back in the late '70s then?

25 MR. GOLDBERG: When we had the original decisions?

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1 JUDGE BECHHOEFER: Right.

2 MR. GOLDBERG: I say they did raise it, they
3 raised it to the Appeal Board in what I read to you. They
4 raised that question.

5 JUDGE BECHHOEFER: Are you saying the Appeal Board
6 then ruled on that question?

7 MR. GOLDBERG: They certainly did sub silentio for
8 this reason, that attacked the very right of the Appeal
9 Board to affirm the Licensing Board, and not only to affirm
10 those conditions, but actually to add an additional
11 condition which we had requested.

12 JUDGE MILLER: That was sub silentio, did you say?

13 MR. GOLDBERG: Yes.

14 JUDGE BECHHOEFER: It is not in so many words
15 certainly.

16 JUDGE MILLER: That's correct. That is what it
17 means.

18 MR. GOLDBERG: They dealt. That was an issue that
19 was important to the outcome. It attacked the very
20 jurisdiction of the Commission.

21 Thank you very much.

22 JUDGE MILLER: Thank you.

23 Let's hear the next one.

24 MS. CHARNOFF: Your Honor, I'm sorry to interrupt,
25 but I wondered if we could take a break.

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1 JUDGE MILLER: Yes, fifteen minutes.

2 MS. CHARNOFF: Okay.

3 [Recess.]

4 JUDGE MILLER: Yes, sir -- you may resume.

5 You may proceed.

6

7

ORAL ARGUMENT ON BEHALF OF INTERVENORS

8

9 MR. STRAUS: Thank you. My name is David Straus.

10 I am counsel for AMP-Ohio, which represents the interests of
11 its 75 municipal electric system members, about 40 of which
12 are direct beneficiaries of the license conditions here
13 because they are located in what's called the CCCT, the
14 Capco service territories.

15 You've had a lot of detail here this morning and
16 hundreds of pages of detail in the briefs. It's not my
17 intention to go into any detail that I can avoid. I thought
18 instead I would try to hit on a couple of the major themes
19 or a couple of the major problems I see in the Applicant's
20 position, especially as expressed for the first time in
21 their reply brief.

22 The first problem, a generic type problem, I think
23 a fatal one is the Applicant's discarding of the second
24 half of the test for "create or maintain." That's two
25 words, create or maintain, in Section 105.

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1 The Applicants deal only with the creation of a
2 situation inconsistent, not with the maintenance of one.
3 You'll see therefore that their entire thrust of their low
4 cost argument is that absent low cost a utility with a
5 nuclear plant cannot obtain or "enhance," to use Ms.
6 Charnoff's words, a competitive advantage. A site, for
7 example, pages 6 to 7 of their reply brief, where they say
8 and I quote, "The incremental impact on the marketplace of a
9 less competitive product than is otherwise available cannot
10 enhance the product owner's competitive positions." Again,
11 Ms. Charnoff in response to questions from the bench today
12 repeated that enhancement of the competitive position was
13 what she was examining, but the statute doesn't require
14 enhancement of anti-competitive situation or situation
15 inconsistent, just its maintenance.

16 While we strongly believe that a situation
17 inconsistent can in fact be created or enhanced because of
18 market power absent low cost, it is absolutely clear that
19 the addition of new bulk power supply by a utility already
20 dominating the bulk power market can be maintained by the
21 addition of that nuclear plant, even if that nuclear plant
22 isn't the cheapest possible plant. Therefore, they can help
23 continue in effect a situation inconsistent with the
24 antitrust laws without being that low-cost plant.

25 The 1977 and 1979 decisions which established

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1 these license conditions did not predict that these nuclear
2 plants would in the future create or enhance a situation
3 inconsistent with the antitrust laws. Rather, in
4 painstaking detail this agency described the situation
5 inconsistent which already existed without these plants, a
6 situation they reasonably believed would be maintained by
7 activities under the license.

8 A finding of lower cost was not required by the
9 statute, was not made. It was not necessary.

10 A second problem with the Applicant's position is
11 their understandable attempts to separate the sanctions of
12 the license conditions from their own activities. According
13 to them, low-cost plants create situations inconsistent;
14 higher cost plants do not. Their activities are presumably
15 irrelevant.

16 At page 17 of their reply brief they describe
17 their first part of their three-part test which they again
18 described this morning as, quote, "determining whether a
19 nuclear facility will create or maintain."

20 At page 61 they say that the issue posed by
21 Section 105(c) is whether a particular facility is so
22 advantageous, and again I quote, "that its construction and
23 operation would create or maintain a situation inconsistent
24 with the antitrust laws." It's not the plant that is the
25 problem; it's the activities of its owners which creates this

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1 situation, in the words of the statutes -- the activities,
2 not the plant which creates the situation inconsistent.

3 The Applicants have so confused themselves while
4 attempting to confuse you on this point that they make the
5 preposterous claim on page 32, footnote 64, which Ms.
6 Charnoff repeated again this morning, "But if Congress were
7 concerned with market clout, with market share rather than
8 lower cost" -- quote -- "it simply would have mandated
9 license conditions for every nuclear plant."

10 No, it would not, not any more than it would have
11 mandated license conditions for every low-cost nuclear plant
12 under their theory of cost. Congress, unlike the
13 Applicants, recognized that it is not the plants but what
14 owners do with them that create anti-competitive situations.

15 Congress therefore had no reason to distinguish
16 between those kinds of plants. The Applicants simply choose
17 to ignore the decades of anti-competitive behavior which
18 brought them here, trying to pin blame on plants and then
19 pin blame only on low-cost plants.

20 A third major problem with the Applicant's
21 position is their claim that they do not run afoul of the
22 doctrine of Federal Power Commission v. Texaco cited in the
23 AMP-Ohio brief. That case, as you may recall, prohibited an
24 administrative agency from administratively modifying a
25 statute simply because the underlying beliefs or the

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1 impressions that Congress had at the time it passed it may
2 have changed. We cited other cases for that proposition.

3 They say no, we shouldn't be citing that case.
4 They are not trying to obtain a different interpretation or
5 different statutory scheme. They say the statutory scheme
6 was always this way, that things were so clear they didn't
7 have to be stated.

8 Well, let's look at the statute that the
9 Applicants are trying to create here. It's not just low
10 cost that they are trying to read into the statute. I have
11 tried to come up with a formulation of some statutory
12 language, which is the statute the Applicants are urging on
13 you here.

14 They say that the license conditions should be
15 imposed when nuclear plants are less expensive than
16 alternatives and when that lower cost creates or maintains a
17 situation inconsistent with the antitrust laws and even when
18 the agency reasonably concludes that these situations exist
19 if the nuclear plant turns out to be or becomes at any
20 future more expensive than an alternative plant which could
21 have been built, the license conditions should be suspended
22 until it is once again less costly.

23 That is the statute that they say is so clear that
24 it need not have been spelled out in the statutory language
25 or in the legislative history. Of course the law says none

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1 of that.

2 Under the Applicant's own test of statutory
3 construction, set forth at page 85, that the rationality of
4 a statute must be assessed. This strange statutory language
5 or the interpretation which I just read to you clearly fails
6 the test of rationality.

7 For the reasons that AMP-Ohio and others stated in
8 their briefs, it is ludicrous to believe that Congress
9 intended a scheme for this industry where the rights of
10 customers, the rights of competitors could come and go as
11 costs change and that this Agency would be required to
12 conduct periodic, maybe annual, maybe semiannual, maybe
13 biennial, reviews of nuclear power costs and costs of some
14 alternatives, whatever they might be.

15 Rather, Congress clearly contemplated that what
16 the NRC would do is examine the situation at the time the
17 license was applied for, would determine if these plant
18 owners were likely to use this nuclear plant in a manner
19 consistent with prior behavior and inconsistent with the
20 antitrust laws and if they so found to impose license
21 conditions. Applicants are about 10 years too late to argue
22 that no license conditions should have been imposed on them.

23 But the Applicants in their brief and again this
24 morning have down-played the "now you see it, now you don't"
25 problem, which we continually raise in this case about

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1 license conditions. We are the ones, after all, that have
2 to live with them. We're the ones who will have our
3 interconnections reasonable sometimes and unreasonable other
4 times. Sometimes we can buy maintenance power and sometimes
5 we can't. Sometimes we'll get transmission and sometimes we
6 won't. One of the license conditions requires the
7 utilities, the Applicants to plan for our disclosed
8 transmission needs. Does this mean that sometimes they plan
9 for them and sometimes they don't plan for them, depending
10 upon economics?

11 They deny that this will exist. They raise a
12 factual question, what was supposed to be a legal argument.

13 At pages 77 and 78 of the reply they make the
14 unsupported and certainly unsupportable assertion that there
15 is no reasonable risk that their nuclear facilities will
16 ever be low cost because all of the fixed costs, all the
17 capital costs are already sunk. Ms. Charnoff again this
18 morning said that what she called the yo-yo effect
19 possibility was remote. I respectfully submit that this is
20 just another example of the Applicant saying one thing
21 before one audience and another thing before another
22 audience because these statements are expressly
23 contradicted with statements these Applicants are making
24 elsewhere.

25 The Applicants' brief, reply brief, at Footnote

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1 256, tells us that we should go look at the Cleveland Plain
2 Dealer of April 12, 1992. They refer to that newspaper
3 article. Well, I usually do what I'm told, so I did see it.

4 That newspaper article has the following statement
5 in it. I'll read it to you: "'The Clean Air Act will place
6 additional costs on coal-burning plants, forcing rates to
7 rise,' said Centerior's Lang." Centerior is the holding
8 company which owns both CEI and Toledo Edison, two of the
9 three Applicants. "He said Centerior would not face as much
10 of a burden because 40 percent of its power is from nuclear
11 plants. Lang said that those who switched to Municipal
12 Power claim to have control of their destinies but they are
13 rolling the dice. 'The short-term power is out there for
14 another couple of years. They will probably be able to have
15 some minimal savings. Well, when that period dries up, they
16 are totally at the mercy of the power market.'"

17 This has nothing to do with cost. It has to do
18 with market dominance where we're totally at the mercy of
19 those utilities, the Applicants, which control all of the
20 baseload power. That is what they are telling the Cleveland
21 Plain Dealer, that the nuclear plants might be more
22 expensive but wait till the Clean Air Act hits and those
23 utilities are adding scrubbers, which are not an operating
24 expense, they are a capital cost and a very big one at that.
25 These utilities are predicting in public that the cost of

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1 the nuclear plants are going to decline and get below
2 those of coal plants.

3 This isn't the only statement of the Applicants
4 inconsistent with what they tell you here this morning.

5 The October 30, 1989 issue of Electric Utility Week, quotes

6 Edison Edison concedes its rates are high. 'We recognize
7 that our customers are upset with us over rates,' said the
8 spokeswoman, but efforts are underway to bring them down

9 'by the next year.' With 40 percent of its generation
10 composed of nuclear power and 14 percent of coal plants with
11 scrubbers, the company sees itself as a clean utility with
12 better relative pricing if acid rain legislation is passed."

13 We all know that acid rain legislation was passed,
14 and phase one begins in 1995.

15 The document submitted Cleveland Electric Illuminating
16 Company. This is a document they prepared to distribute in
17 the village of Chardon, Ohio, which was considering public
18 power.

19 This is what CEI has to say -- this is January 30,
20 1992, a few months ago: "Due to our previous investment in
21 nuclear power and our ongoing environmental improvement
22 program, we expect relatively minimal rate increases (five
23 to seven percent in total) to meet Clean Air Act standards.
24 Many other coal-dependent utilities in our region are facing
25 emission reduction costs two to three times higher."

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1 Ohio Edison sings the same tune but it's not in
2 this hearing room. In an Oh. Edison document prepared for
3 distribution in the city of Rittman, October, 1990, this is
4 what Ohio Edison says: "About 42 percent of Edison's
5 generating capacity, its nuclear, oil and scrubbed coal-
6 fired units, won't need major additional environmental
7 controls as a result of new Clean Air legislation. Some
8 midwestern electric companies which haven't made similar
9 investments as well as the government power systems they
10 supply will be affected far more by the new legislation."

11 Finally, we have an Ohio Edison document prepared
12 for the city of Medina, Ohio, another community thinking
13 about going into the power business, dated April, 1988.
14 Again I quote Ohio Edison: "In effect AMP-Ohio knows its
15 future ability to supply power and transport it to municipal
16 electric systems is uncertain, especially with the
17 significant impact new environmental legislation would have
18 on the available supply of electricity it buys on the open
19 market. These supply and transmission problems don't exist
20 for Ohio Edison customers."

21 They are not talking about price. They are
22 talking about supply and transmission problems created
23 undoubtedly by Ohio Edison's monopoly over both supply and
24 transmission, certainly a monopoly in the absence of these
25 license conditions.

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1 Ohio Edison continues, and I will too -- this is a
2 quote: "Ohio Edison has completed its new plant
3 construction program which will have the effect of
4 stabilizing Edison rates well into the future. The first of
5 Edison's two new generating units, Perry I, was placed into
6 rates at less than one-third the level that had been
7 predicted by some special interest groups" -- treating the
8 low-cost nuclear power, no doubt.

9 JUDGE BECHHOEFER: Is that "had been placed in
10 service" or actual service costs?

11 MR. STRAUS: "-- was placed into rates at less
12 than one-third the level that had been predicted."

13 JUDGE BECHHOEFER: Okay.

14 MR. STRAUS: Getting to a couple of --

15 JUDGE MILLER: Are you ready to conclude?

16 MR. STRAUS: Yes, a couple of, two brief points
17 and a concluding sentence.

18 JUDGE MILLER: Go ahead.

19 MR. STRAUS: Ms. Charnoff discussed this morning
20 that if a plant was the only plant available irrespective of
21 cost because of environmental considerations, then probably
22 antitrust conditions might be appropriate because then there
23 would be no alternatives.

24 This is a part of the Applicant's confusing
25 alternatives to Ohio Edison at the time it chose to build

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1 the plant and alternatives to the customers. In that
2 situation neither had alternatives, but if Ohio Edison had
3 available to it an alternative lower cost plant that it
4 didn't build, or if other utilities in the area had lower
5 cost plants, they are no more available to us than the
6 environmentally unsound plant which wasn't built unless we
7 have access to it.

8 The available supply for the customers is what we
9 are talking about in terms of alternatives, not the
10 alternative that the company could have built but didn't.

11 Mr. Murphy said that nobody wants this nuclear
12 plant, that we had the right to buy into it and chose not
13 to. That is not quite right. Shortly after the license
14 conditions were issued, AMP-Ohio and municipal systems
15 individually tried to pass a constitutional amendment in
16 Ohio which would have permitted them to do exactly that.
17 The Ohio constitution prohibits joint ownership between
18 municipals and private entities. A municipal utility in
19 Ohio cannot now and counsel has told us this when we tried,
20 cannot now jointly own a plant. We could not buy a share of
21 that plant.

22 We tried to get a constitutional amendment. I
23 personally wrote a letter to the capital companies trying to
24 preserve our right to buy. While we tried to pass this
25 constitutional amendment, who opposed it? Ohio Edison, CEI

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1 and Toledo Edison created an entity called Citizens Against
2 Tax Exemption and raised lots of money and beat the
3 constitutional amendment, which would have permitted us to
4 buy into the nuclear plant.

5 Would we buy into it today? Not on a bet! Would
6 we have bought it then? Probably would have, if they had
7 let us raise the money.

8 In these cases the Applicants are trying to stave
9 off competition from communities which are contemplating the
10 creation of municipal power systems and from communities
11 which already have them.

12 This case is about competition, that kind of
13 competition. The license conditions have worked.
14 Competition is now flourishing and the Applicants just can't
15 stand it.

16 That's all I have, unless there are some
17 questions.

18 JUDGE MILLER: Thank you. We may ask you a
19 question later, but we want to conclude the direct.

20 Mr. MacGuineas, I guess you are at bat now.

21

22 ORAL ARGUMENT ON BEHALF OF THE INTERVENORS

23

24 MR. MacGUINNESS: Your Honor, I am Squire
25 MacGuinness, and I'm here representing the Alabama Electric

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1 Cooperative as a limited Intervenor for the purpose of
2 briefing and briefly here discussing the substantive issue
3 before the Board. I want to just take my time here to
4 respond to Applicant's contention that their interpretation
5 of 105(c) was never aired or articulated in the substantive
6 antitrust reviews because it was universally conceded that
7 nuclear power at issue in the license proceedings would be a
8 low cost or was anticipated to be low cost, and therefore,
9 the companies didn't raise the matter in the substantive
10 licensing reviews, although it was just as jurisdictionally
11 a prerequisite then as it is today, according to Applicant
12 this morning.

13 In fact, that's not the case, and the reason that
14 in our brief that we rely heavily on the 11th Circuit
15 opinion in the Alabama Power Company case is that this
16 second contention was raised in that proceeding and before
17 the Court of Appeals. The Court of Appeals in the Alabama
18 Power Company versus Nuclear Regulatory Commission that we
19 cite in our brief, stated that Alabama Power argues that the
20 NRC overstepped its authority in looking past the direct
21 effects of the nuclear plant on the present or prospective
22 competitive situation.

23 In fact, Alabama Power Company represented to the
24 Court in its reply brief, that APCo submits the situation is
25 necessarily limited by the phrase, "activities under the

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1 license," and the word, "situation," being the statutory
2 language. Congress' concern arose from a perception that
3 extraordinary cost advantages would result from the use of
4 nuclear energy to generate electricity.

5 Alabama Power has demonstrated that construction -
6 - that that construction gives full effect to the
7 predominant concern of the Joint Committee on Atomic Energy
8 that by virtue of a perceived low cost output from nuclear
9 facilities, owners of such plants would, over the life of
10 the unit, obtain a decisive competitive advantage over their
11 rivals. They were making a contention there that, we
12 submit, is indistinguishable from the contention being made
13 by Applicants here today; that first, you have to look at
14 whether the nuclear facility itself is producing a
15 competitively low cost output before you can go on to look
16 at any of the other anticompetitive conduct on the part of
17 the Applicant or any of the other matters in the competitive
18 environment.

19 We submit that that was rejected by the Court of
20 Appeals in the 11th Circuit very clearly, using the language
21 that the statute clearly calls for a broad inquiry and
22 common sense does not allow interpretations to the contrary.
23 The Congress intended this broad inquiry using all available
24 information. The traditional antitrust enforcement scheme
25 was not envisioned and a wider one is put in its place. In

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1 other words, one did not limit one's view, even initially,
2 to an analysis of the cost of power coming, either
3 anticipated, or in fact, from the nuclear units that were
4 being licensed, but that you looked at the entire
5 anticompetitive environment produced by the Applicants'
6 conduct.

7 Chairman Miller, you will recall that many of the
8 facts in the Farley case went back to the 40's and up
9 through the 70's in gathering the data and the information
10 that permitted the necessary conclusion in that case that
11 there was a situation inconsistent with the antitrust laws
12 which would be exacerbated by the licensing of the plants.
13 With that, I'll conclude. Thanks very much.

14 JUDGE MILLER: Thank you. I think we have some
15 time for rebuttal reserved by Ms. Charnoff. Is that 20
16 minutes?

17 MS. CHARNOFF: It is. I hope that I won't use all
18 that.

19 JUDGE MILLER: Okay, take your time. We're in
20 good time so we want everyone to have -- I don't think that
21 there was anyone else who reserved time. In any event, when
22 counsel has the opportunity to present, the Board likes to
23 open the matter up for general questions or things that may
24 have been overlooked, so we make sure that everybody's had a
25 full, fair, due process kind of hearing.

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1 Inasmuch as we're not going to have a trial, we'd
2 like to have an adequate record for our own purposes and the
3 appellate bodies. You may proceed.
4

5 REBUTTAL ARGUMENT ON BEHALF OF THE APPLICANTS
6

7 MS. CHARNOFF: If the Board will bear with me, I'm
8 going to go over these points from my notes from the various
9 parties.

10 JUDGE MILLER: Sure, no problem.

11 MS. CHARNOFF: I believe both the Department of
12 Justice and AMPO suggest that our position on the bedrock
13 legal issue ignores activities of the Applicants which they
14 contend are the critical inquiry under Section 105(c). I
15 don't think we ignore that at all, and I want to make that
16 clear:

17 We have said that Section 105(c) has three steps.
18 We haven't said it has one step, only our step; we said it
19 has three steps. Their focus on activities, and, for that
20 matter, as counsel for Alabama just argued, focusing on
21 Farley, again, activities and the scope of the situation,
22 all of that goes to what we have described as Step Two; what
23 is the situation.

24 So, it's not that we've ignored it or we think we
25 never reached that question. Our point is that you have to

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1 first establish that the licensed activities will create or
2 maintain before you get into that. So, to continue to
3 characterize our argument as suggesting that Applicants'
4 activities are irrelevant, which is, I think, the word that
5 counsel for AMPO used, is not correct. We're not saying
6 it's irrelevant to Section 105(c); we're saying it's
7 irrelevant to the bedrock legal issue, which is the first
8 step in a 105(c) analysis.

9 I'd like to talk about something that the NRC
10 Staff focused on. The NRC Staff wants to suggest that other
11 competitive advantage is available by virtue of a nuclear
12 power plant, our quality and reliability. I would like to
13 challenge that, both as a legal matter, and for that matter,
14 as a factual matter.

15 The issue of reliability which seemed to be the
16 focus of the discussion here a little while ago, really goes
17 to the entire system of the utility and their ability to
18 interconnect effectively, their ability to provide backup
19 power appropriately. It doesn't go to the licensed
20 activity.

21 To the extent you're talking about whether a plant
22 is operating or not operating at a given time, that either
23 results in the consumer being provided with another source
24 of power, or, to put it another way, a higher cost on an
25 annual basis for that plant because it's used less often and

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1 has a lot of downtime, to put in NRC lingo, so I think that
2 the quote, "reliability factor," is being confused here,
3 both with the cost issue, because reliability translates to
4 cost, and to the question of reliability of one utility
5 company versus another, not one plant or one type of plant
6 versus another.

7 The other point I want to make about this is that
8 our bedrock legal issue requires lower cost visa vis
9 alternatives. And it requires -- we haven't determined yet
10 - this is an issue of fact for the second phase of the
11 proceeding, and it requires a determination of what do you
12 compare the nuclear plant to? What is the appropriate
13 comparison?

14 I would contend that the issue of reliability, to
15 the extent it's relevant at all, is a fact issue; that is,
16 what plant do you compare to what? You don't compare --
17 perhaps you don't compare it -- and I haven't analytically
18 thought this out -- but perhaps you don't compare a very
19 unreliable plant to a very reliable plant. I must say that
20 the Staff citation to a 1977 decision which we've not seen -
21 - it was not in their brief, this United Technologies case,
22 to me is not compelling because, unfortunately, I don't
23 believe nuclear plants have proved to be more reliable than
24 other sources of baseload power.

25 I'd love to be proven wrong on that point, but in

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1 any event, I think it's an issue of fact. It doesn't go to
2 the bedrock legal issue. I don't think it detracts from the
3 fundamental issue that we think this case is about, which is
4 cost.

5 Turning to the city of Cleveland, first of all,
6 the issue of transmission facilities being a barrier to
7 entry and their argument that Otter Tail established under
8 Section 2 of the Sherman Act, Wheeling would be appropriate
9 to respond to that type of situation, that's very much part
10 of our argument; that there are other forums available and
11 functioning which address the issue of transmission access
12 and provide the remedy of Wheeling.

13 They cite the critical Supreme Court case on this
14 point. That proves our point to some extent that the NRC
15 does not stand alone here, and, in fact, the NRC's focus, by
16 virtue of the very wording in question here, the
17 particularized regime, as the case law says of Section
18 105(c), that the NRC's focus is somewhat different than that
19 under the Sherman Act. It is a narrower focus. It is
20 focused on the licensed activities, specifically.

21 JUDGE BECHHOEFER: Ms. Charnoff, isn't it, to some
22 extent, broader when you consider the 10(2) language *visa*
23 *vis* violation language which is part of those other
24 statutes? Aren't the very circumstances that if the
25 conditions were eliminated, a number of activities would not

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1 be subject to challenge or to questioning, which are subject
2 under the NRC conditions, just the fact that they go beyond
3 violations?

4 MS. CHARNOFF: Well, I think that you're correct.
5 I hope that I have tried to be consistent here, and that's
6 why we talk about a different, rather than a narrower or
7 broader standard under the NRC regime. I think that the NRC
8 regime, unlike the general antitrust laws, the NRC regime is
9 focused on the incremental impact of a particular facility
10 on the, quote, "situation," the competitive situation in the
11 marketplace.

12 That's not in the general antitrust laws at all.
13 That is a requirement utterly absent from the general
14 antitrust law, something the opposition never seems to
15 mention. So that you are limited to that focus.

16 But once you go into that, once you pass the
17 threshold which we've described, of establishing that there,
18 in fact, will be an adverse incremental impact, then I agree
19 with you that the standard for conditioning the license
20 before the NRC, that standard is a lower standard than the
21 standard for imposing an antitrust remedy under the civil
22 antitrust statute.

23 JUDGE BECHHOEFER: Yes, but from the other
24 standard, though, dropping the antitrust conditions, would
25 then reduce to some extent, the antitrust protection

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1 afforded certain ample higher utilities or Cleveland or
2 anybody who sought access to power.

3 MS. CHARNOFF: We are being held to the standard
4 that we're being held to, which, I agree, is tougher,
5 presumably because the licensed activities create or
6 maintain and NRC is very interested in not having its
7 actions by virtue of licensing this nuclear plant -- they
8 don't want that action, the Government-sanctioned activity,
9 to create an antitrust problem.

10 So, I agree that once you get through our
11 threshold, our Step One Issue, there's a lower threshold.
12 But if there's no Step One Issue, if there is no incremental
13 impact from the nuclear plant, our point is precisely this:
14 Why should we be held to a different standard than anybody
15 else? That's our issue.

16 JUDGE BOLLWERK: Although I take it, as Ms. Urban
17 has phrased it, anyway, the impact that you're looking at is
18 the effect on market power and how you use it; am I correct?

19 MS. CHARNOFF: I don't know.

20 JUDGE BOLLWERK: The focus of AMPO/Ohio and Ms.
21 Urban is that market power is the critical factor here, not
22 cost, and if I'm understanding what they're saying, it
23 doesn't matter what your costs are, as long as you're
24 impacting on your -- you have market power or are having
25 some impact because you're becoming a licensed facility and

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1 can use that market power in some way, in a way that
2 violates the antitrust laws and that's all that's required.

3 MS. CHARNOFF: Maybe this will answer your point,
4 because one of the other points that I wanted to make, Judge
5 Bollwerk, is AMPO's assertion that we're not talking about
6 maintaining; that our incremental impact language is only
7 dealing with creating and not maintaining. That's not at
8 all correct.

9 That is, we believe incremental impact is what
10 maintaining means. You can't maintain unless you in some
11 affirmative way, make some contribution to it. I don't know
12 what other words in the English language to use. That they
13 seem to suggest that it's a self-evident proposition that
14 new bulk power, regardless of its cost, will maintain.

15 You know, I could build 20 plants and if they all
16 cost twice as much as other available power, that is not
17 going to give me anything, except it's going to make me a
18 very costly company. There's this constant assertion in the
19 briefs and again here today, that it's somehow intuitive or
20 self-evident that new bulk power, per se, more bulk power,
21 more power, will inherently maintain an anticompetitive
22 situation under the statute. I don't think that's correct.

23 I don't think that's logical and I don't see why
24 that is true. Our position is that it won't do that unless
25 it's low cost bulk power, and that's why you always see

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1 those words in tandem in the cases and in the legislative
2 history and whatnot, because it has to be both. There's
3 nothing inherently valuable about bulk power.

4 JUDGE BOLLWERK: Well, or unless it is used in
5 that manner, I think is what they're saying. If it's used
6 in a manner that maintains those antitrust conditions, which
7 is what you have to look at, then --

8 MS. CHARNOFF: What I'm saying is that it can't be
9 used. That's out point. It cannot be used.

10 JUDGE BOLLWERK: Okay, I see what you're saying.

11 MS. CHARNOFF: That's our point; it simply cannot.

12 JUDGE BOLLWERK: I think their response to that -
13 -without putting words in their mouths -- you don't know
14 until you look at it, but you can't say it simply because
15 it's not low cost if you're not going to use it that way.

16 MS. CHARNOFF: Well, I would say that that's not
17 logically consistent, and that's not consistent with any
18 experience that you want to cite to. I mean, we've tried -
19 -part of the reason our briefs have been so long is, we
20 tried to look at every source we could to see whether you
21 need that combination, and we think you do. Nobody has
22 shown us that you don't.

23 We just aren't aware of a situation anywhere where
24 bulk power that is high cost nevertheless maintains a
25 competitive situation as we understand that word; we just

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1 don't see it.

2 JUDGE BECHHOEFER: Well, wouldn't it be less
3 expensive to buy high cost bulk power under any
4 circumstances than to go in and build a new facility to make
5 such power under any circumstances? Your pricing would be
6 based, theoretically, on operating costs. You've already
7 spent the money on the facility and you're not going to get
8 that back, except maybe by doubling its life by adding to its
9 renewal or something.

10 You could cut costs drastically by depreciating it
11 over 60 years rather than 40 or whatever the figures are, and
12 there are a lot of ways that these things could be made to
13 vary, so --

14 MS. CHARNOFF: I don't know if this is directly
15 answering you, but I think we're getting back to the point
16 that we talked about somewhat earlier, which is, if there is
17 no alternative --

18 JUDGE BECHHOEFER: I'm not saying no alternative;
19 there's always an alternative to build a new source.

20 MS. CHARNOFF: But if there's no alternative but
21 the high cost source that you have, and therefore you have
22 to build an alternative, then it may be more costly to build
23 an alternative, in which case nuclear power is low cost
24 relative to the alternative, in which case the NRC's
25 antitrust jurisdiction would be invoked.

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1 JUDGE BOLLWERK: Or you may just swallow hard and
2 accept the monopolistic practices that are being imposed on
3 you. I mean, isn't that the other alternative and isn't
4 that what they're trying to avoid?

5 In other words, Cleveland gives in in this
6 situation and says, okay, we give up. We're going to buy
7 your high cost power because we don't have transmission
8 access of whatever the problem is.

9 MS. CHARNOFF: First, let me say that I think that
10 Cleveland itself, in pointing to the Otter Tail case, made
11 the point that there -- that NRC is not the guardian of
12 transmission across the United States. That's not the
13 purpose of Section 105(c) and they also pointed out, there's
14 more than -- this has been a rational issue for many, many
15 years, and there is legislation pending, but the point is
16 that this is not the NRC's purpose nor role.

17 JUDGE BOLLWERK: But it may well be the guardian,
18 at least within the confines of the service area, unless
19 there's a nuclear power plant. I mean, that's what I guess
20 we're here about in large part.

21 MS. CHARNOFF: I think that if the nuclear power
22 plant exacerbates the situation by virtue of increasing the
23 competitive -- or advancing, enhancing, the competitive
24 position of its owners, then the whole world of the licensee
25 is open for consideration, including transmission. But

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1 transmission is not a licensed activity of the NRC; other
2 people license transmission.

3 The cases get into transmission because they're
4 looking at the entire situation, so they're looking at
5 everything going on in the universe there.

6 JUDGE BECHHOEFER: Yes. When you are applying for
7 a license before the NRC, you're transmission facility is
8 built to serve whatever the facility is, and is clearly
9 subject to review. It may not be license, but it's
10 certainly subject to environmental review.

11 MS. CHARNOFF: That's right, there are NEPA
12 considerations.

13 JUDGE BECHHOEFER: Well, they have to pass muster
14 before us, as well.

15 MS. CHARNOFF: We do not license -- when you issue
16 a construction permit or an operating license, you're not
17 licensing specific transmission facilities.

18 JUDGE BECHHOEFER: No, but we're considering them.
19 They are a factor.

20 MS. CHARNOFF: You're considering them in very
21 specific ways. You consider them in your NEPA analysis and
22 when you look at the entire situation, in which a nuclear
23 plant will enhance the competitive marketplace, you look at
24 all of the transmission that's available.

25 JUDGE BOLLWERK: Do I understand you to be saying

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1 that in the absence of the anti-trust, or for whatever
2 reason the Licensing Board here had decided not to impose
3 any kind of an access requirement in terms of ownership or
4 power, but it simply put the Wheeling provisions in, that
5 that was something the NRC could not do simply because that
6 deals with only sort of transmission issues, and not access
7 to the plant itself?

8 MS. CHARNOFF: No. That goes to remedial nexus,
9 and I think that that was clearly established to not be the
10 case in Farley. I beg to differ with counsel for Alabama on
11 what Farley was all about.

12 Farley was about situational nexus and it was
13 about remedial nexus. Once it is established that a
14 licensed facility creates or maintains, and once it is
15 established that there is a situation inconsistent with the
16 anti-trust laws, it is very clear that the NRC has very
17 broad authority to remedy that situation in any way it sees
18 fit, in any way that will, in fact, remedy it, and imposing
19 Wheeling requirements is one such way.

20 Without going into great detail, I would like to
21 just waive a big flag over what is probably about the last
22 half of what counsel for AMPO said. Mr. Straus spent a lot
23 of time talking about facts, which, first of all, I would
24 like to suggest are outside the scope of the disposition of
25 a Motion for Summary Disposition.

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1 Secondly, I really seriously beg to differ. I
2 can't put on an evidentiary case at this point, but his
3 suggestion that Ohio Edison, or applicants generally, have
4 said that the nuclear plants will be lower cost than the
5 coal plants, I would be very surprised if there is any such
6 statement, and the statements he read simply did not say
7 that.

8 The fact that he said that AMPO would not buy into
9 the nuclear plants on a bet, which I think is the phrase he
10 used, certainly suggests to the contrary.

11 The fact is that in the case of Ohio Edison, for
12 example, with which I am most familiar, the Perry Plant
13 represents about 7 percent, I believe that is the figure, of
14 the total system power supply. On the other hand, it
15 probably represents close to 25 percent of Ohio Edison's
16 costs.

17 So there is an enormous disparity between the
18 contribution, if you will, of the nuclear plant, and its
19 cost.

20 JUDGE BECHHOEFER: Again, is that operating costs,
21 or is that construction costs?

22 MS. CHARNOFF: I believe that that is construction
23 costs. It does not even include -- It is rate based. I
24 believe that doesn't even include the operating costs. Of
25 course, when we are talking about costs, we are talking

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1 about both.

2 The operating costs also are very, very high, much
3 higher than anticipated.

4 In general, I would like to say on this point that
5 all this discussion about comparing nuclear with other
6 things that is a Phase II issue. We have deliberately, and
7 all the parties agreed to divide the case into the legal
8 issue, the bedrock legal issue, and consideration of facts
9 such as what you compare what to for Phase II.

10 If you would give me one moment, I think that is
11 all I have, but I just want to double check my notes.

12 JUDGE MILLER: Sure.

13 MS. CHARNOFF: I would like to make one little
14 point, and that is that early on, I believe it was with my
15 co-counsel, there was discussion about Wheeling, and whether
16 that is what this case was all about.

17 I don't want to suggest Wheeling is not a part of
18 this case, but I do want to suggest, as Mr. Straus from AMP
19 Ohio pointed out, there are other issues, and controversies
20 that the license conditions address besides Wheeling.

21 One is interconnection point issue that I believe
22 Mr. Straus raised, and also the issue of availability of
23 back-up power which I raised earlier.

24 I am not as familiar, frankly, with the situation
25 with CEI in Toledo, but I can certainly say that it would

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1 not be correct to reduce the whole importance of the license
2 conditions to the Wheeling provision.

3 Obviously, unfortunately, we are not talking about
4 the access to the nuclear plant provision, so there are some
5 provisions that are not implicated, but it is more than one.

6 JUDGE BOLLWERK: But the Wheeling are certainly
7 significant.

8 MS. CHARNOFF: I can only tell you what I know,
9 Your Honor, which is, Wheeling may become significant, but,
10 at least in the case of Ohio Edison, we don't have a lot of
11 confidence that it necessarily is.

12 JUDGE BOLLWERK: At least for your client, you are
13 saying it is not significant?

14 MS. CHARNOFF: I am not in a position to represent
15 that they would never go to FERC and ask to change the
16 Wheeling requirements that FERC imposes. However, they do
17 feel very strongly that they would have to satisfy FERC that
18 they are not doing this for any reason that is going to
19 create an anti-trust type problem.

20 JUDGE MILLER: In the case of Wheeling, are they
21 not compensated for at least the costs, the embedded costs
22 involved in providing Wheeling services?

23 MS. CHARNOFF: I wish I knew exactly what embedded
24 costs are.

25 JUDGE MILLER: I will strike that.

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1 In other words, the re not losing money by
2 providing that service where compelled to do so either by
3 NRC requirements or otherwise, are they?

4 MS. CHARNOFF: I don't know. I can't answer that.
5 That is all I have.

6 JUDGE MILLER: Thank you.

7 I believe at this time we will open up the floor
8 for the Board. First of all, since we have had the benefit
9 now of reading all of your briefs that have been filed over
10 a period of time, and your points of authorities, and having
11 heard the arguments of counsel, and their responses to each
12 other, now we would like to have the Board to have an
13 opportunity to follow-up, perhaps, on some things, or not,
14 as they wish.

15 But at least the opportunity will be there, and we
16 will also preserve the rights of all of you counsel to be
17 sure that the record is going to fairly reflect your own
18 positions insofar as there being any further necessity.

19 Judge Bechhoefer, you are up. Bring out your
20 quotations and have at them.

21 JUDGE BECHHOEFER: I have referred to several
22 statements made during the hearings leading to Section 105
23 in the 1970 hearings, and they do include some of the
24 references to low cost power that we have seen referred to,
25 but they seem to have many other references, a couple of

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1 which I have already gone over.

2 I would like to have Ms. Charnoff, I guess,
3 comment on a couple of the other ones, like, Mr. Donnem of
4 the Department of Justice, a fairly famous speech he put in
5 the record, or that is in the record, stated, for
6 instance -- I will read this: Pre-licensing review of
7 plants for nuclear power plants -- he was talking about the
8 anti-trust review now -- is not only beneficial from the
9 usual anti-trust viewpoint of promoting cost reduction by
10 permitting undue lessening of competition, it also permits
11 the AEC to promote cost reduction by reducing, to the extent
12 possible, social costs that would not or could not be
13 adequately redressed by the power company.

14 That is in the same speech.

15 MS. CHARNOFF: I have the legislative history
16 here, could you tell me where you are reading because I am
17 having trouble following.

18 JUDGE MILLER: What is your page number?

19 JUDGE BECHHOEFER: It is page 11 of the hearings,
20 the bottom of page 11.

21 To me, that would suggest that to the extent cost
22 is significant, it means not only economic cost, but also
23 social costs, or environmental costs, in other contexts, as
24 a separate cost item.

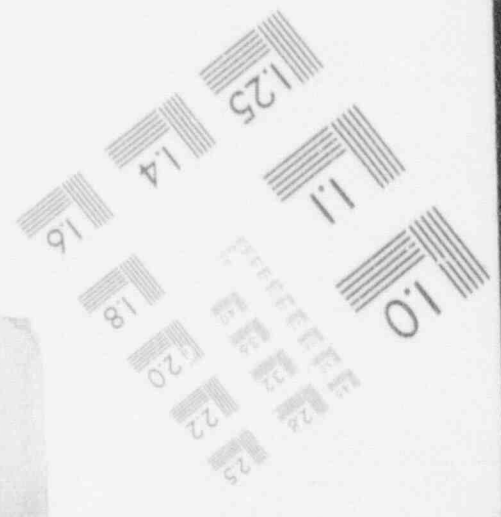
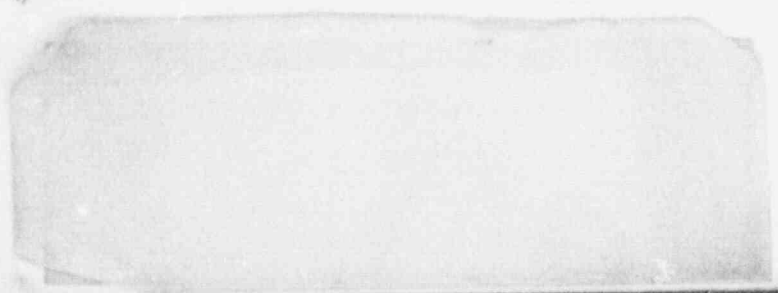
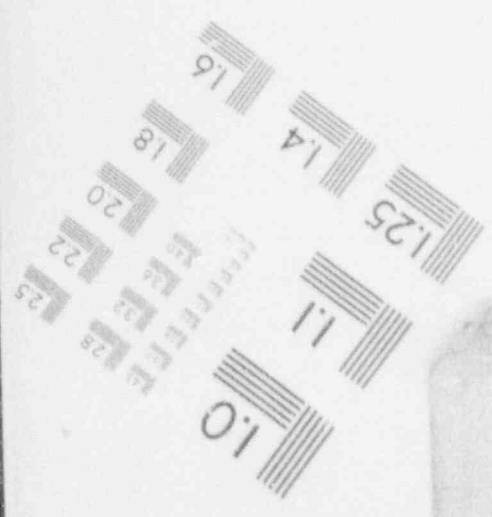
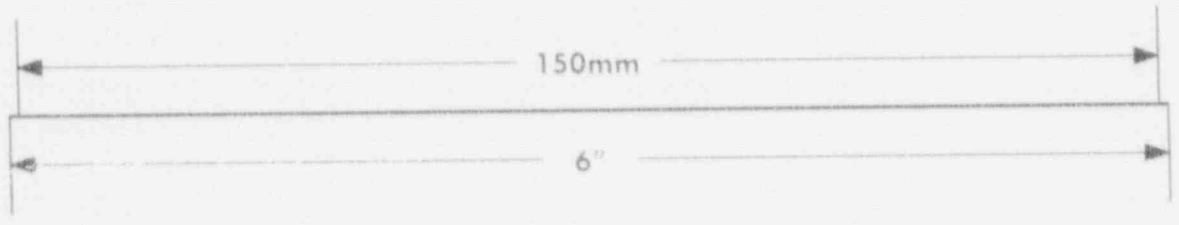
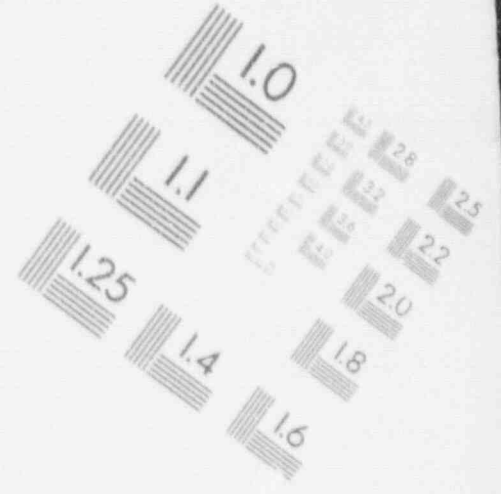
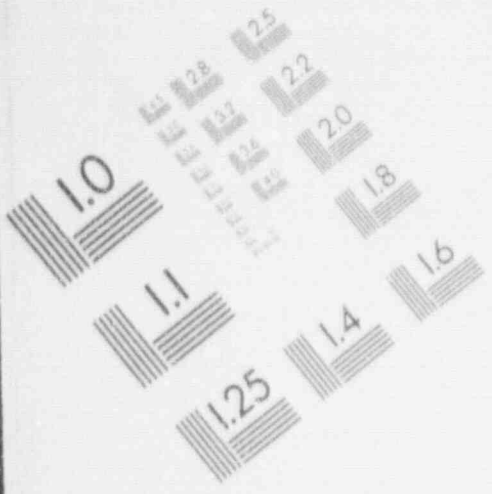
25 MS. CHARNOFF: I am only reading the paragraph

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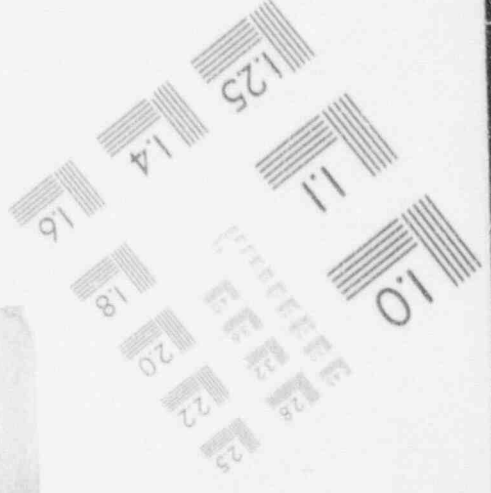
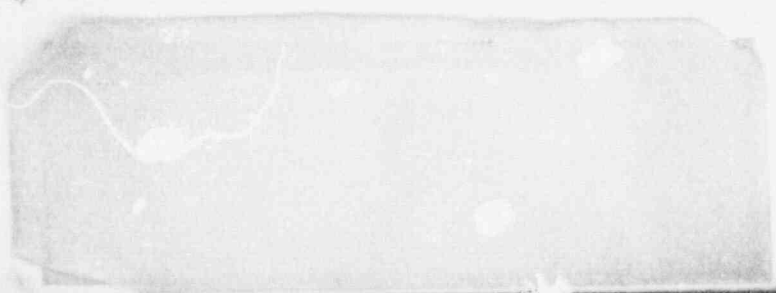
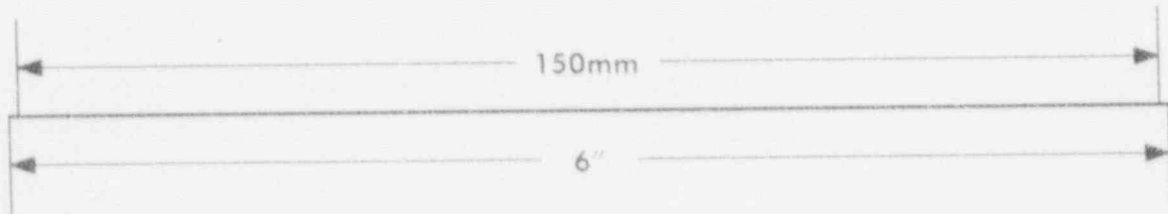
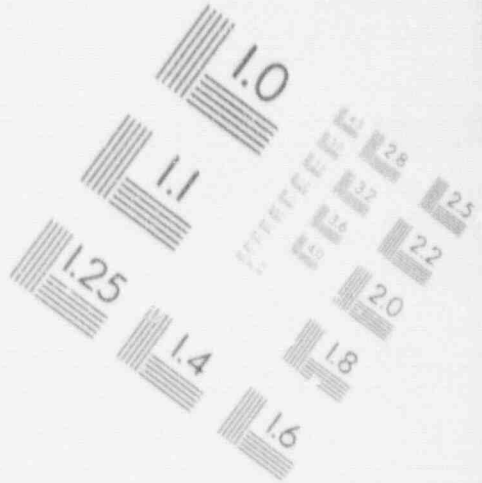
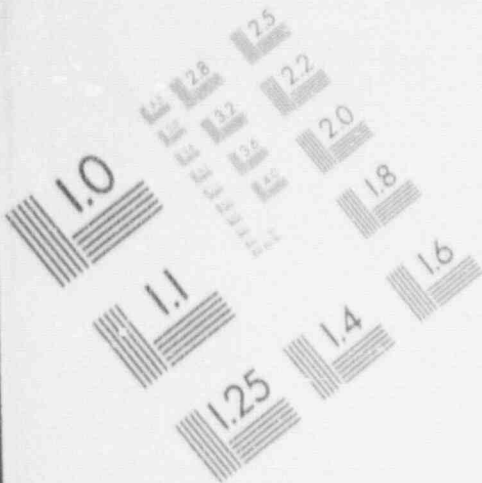
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IMAGE EVALUATION TEST TARGET (MT-3)



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IMAGE EVALUATION TEST TARGET (MT-3)



1 that you are referring to. While I have read Mr. Donnem's
2 statement, it has been a little while.

3 Let me say, what I think he is referring to is the
4 value of pre-licensing review on any subject. You are
5 better off doing it before than during or after. I think
6 that is the point of this paragraph, and I don't think, when
7 he talks here about reducing social costs, he is talking
8 about doing that through 105(c). I may be misreading it.

9 JUDGE BECHHOEFER: I am wondering whether I am
10 misreading it, or how it should be read is what I am really
11 trying to figure out.

12 MS. CHAPNOFF: I remain convinced -- I don't know
13 that I have convinced you -- that the 105(c) way of dealing
14 with environmental costs is, there are two things: One,
15 that environmental costs are translatable into dollar costs,
16 and so you can compare a coal plant to nuclear plant with
17 whatever environmental protections are considered necessary
18 built into each plant. That is one way that costs are
19 compared.

20 You can compare environmental to environmental,
21 and you can translate those environmental into dollar to
22 dollar. That is one way that is implicitly part of a 105(c)
23 analysis of environmental costs.

24 The other way is, if an option is environmentally
25 unacceptable, it is not an alternative and, therefore, it is

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1 not available to compare to the nuclear options.

2 So those are the two ways that I think
3 environmental are indirectly built into 105(c), but I don't
4 think 105(c) intends to guarantee that an environmental
5 comparison be made for purposes of determining create or
6 maintain.

7 I think that the create or maintain language is a
8 way to compare dollar to dollar the cost of a nuclear plant
9 versus the cost of alternatives.

10 JUDGE BECHHOEFER: To get into it more as a matter
11 of degree, such as Judge Bollwerk was referring to, what if
12 the environmental factors say a nuclear plant is preferable,
13 it doesn't say that other plants are unacceptable, say it is
14 preferable, and that at least a government agency would have
15 to look at that, but if a government agency chose to balance
16 other factors, they can still accept the somewhat less
17 favorable environmental plant.

18 MS. CHARNOFF: Under your situation, let's assume
19 a nuclear plant is environmentally preferable that will
20 immunize it from the 105(c) authority of the agency to
21 impose anti-trust restrictions on that plant, on that
22 license. The fact that it may be environmentally preferable
23 will not, if it is also low cost, protect it from license
24 conditions.

25 JUDGE BECHHOEFER: What I am saying is, if it is

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1 environmentally preferable, whatever its cost, the
2 purchasers may seek that power.

3 MS. CHARNOFF: Yes, they may, but that is not the
4 issue under 105(c). Under 105(c) the issue is, should the
5 NRC impose anti-trust license conditions on it or not.

6 JUDGE BECHHOEFER: Wouldn't logic say that if it
7 is a preferable facility, and it is a large facility, and it
8 has a lot of power to offer, yes, there should be a
9 requirement of equal access, and the attendant conditions
10 that go along with it. I think the logic would say, and we
11 have used the word "logic" a lot, but my logic would say, if
12 it is at all different from other sources, given the
13 condition in the statute now, the conditions could be
14 imposed on that license.

15 MS. CHARNOFF: I would say that if it is a high
16 cost plant, but also environmentally preferable, it would
17 still not be competitively advantageous if there are other
18 alternatives, because people won't buy the power from that
19 plant no matter how environmentally preferable it is.
20 Witness the Perry Plant.

21 If the environmental status of nuclear was the
22 issue under 105(c) then a lot of people would be buying into
23 the nuclear plants versus coal, which is the usual baseload
24 alternative, but that is not what is happening. Why,
25 because of dollars.

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1 JUDGE BOLLWERK: Or an instance where you need the
2 baseload power, and the only way to get it is the
3 environmentally preferable way to build a nuclear power
4 plant.

5 MS. CHARNOFF: Then you are saying there is no
6 alternative.

7 JUDGE BOLLWERK: Okay, I guess we are back to the
8 same thing.

9 JUDGE BECHHOEFER: What about the fact that in
10 considering any large nuclear plant, go a couple of
11 paragraphs up on page 11 of Mr. Donnem's statement, the
12 paragraph toward the top of that page, where it says: So
13 far we have been focusing on the disposition of the power
14 of a single nuclear plant.

15 Then he talks about the largest generating plants,
16 and he goes into the fact that where you have a large unit,
17 such as a nuclear unit, you need a lesser number of back-up
18 plants, for instance, for firm power, and that kind of
19 thing. Why isn't that a reason to make at least the nuclear
20 plants susceptible to a create or maintain?

21 The very fact that a large plant is there and can
22 offer back-up power would make that power perhaps acceptable
23 at any price.

24 MS. CHARNOFF: I am not sure I completely follow
25 you, but I will say that I think all of this translates into

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1 dollars. This is all a dollar question. If you don't need
2 to have other plants, then you don't need to spend money on
3 other plants. If you don't need to have short-term demands
4 for power, you don't have to spend the additional cost for
5 that type of expenditure. I think all of this is a dollar
6 question.

7 One of the inherent values of baseload power is
8 that it is a lot, but a lot of expensive power doesn't do
9 you much good. It is a lot of low cost power that does you
10 a lot of good.

11 JUDGE BECHHOEFER: If you are considering whether
12 to build new sources, and you have a lot of high cost power
13 lying around, isn't it always better to rely on what you
14 have in existence.

15 Are there any smaller --

16 MS. CHARNOFF: It depends on how costly it is.

17 JUDGE BECHHOEFER: Are there any smaller utilities
18 that rely on your plants for back-up power, and only
19 purchase if they need it, which may never happen?

20 MS. CHARNOFF: AMPO, for example, takes 5 percent,
21 I believe is the statistic -- and correct me if I am wrong,
22 Mr. Straus -- takes 5 percent of its power from Ohio Edison

23 MR. STRAUS: You are wrong. Are you talking about
24 AMPO statewide, or just this facility in the Ohio Edison
25 service area?

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1 MS. CHARNOFF: I believe in the Ohio Edison
2 service area. I thought the number that I had was 5
3 percent.

4 In any event, they are not taking baseload power,
5 I don't believe. I believe what they are taking is surplus
6 power.

7 JUDGE MILLER: Let's find out, and we can at least
8 clarify that point for the record.

9 What are they taking and to what extent, Mr.
10 Straus

11 MR. STRAUS: I believe that at the present time it
12 is correct that approximately 5 percent of the load in the
13 Ohio Edison service territory comes from Ohio Edison.

14 However, that is because Ohio Edison has refused,
15 thus far, to offer to AMP Ohio the opportunity to purchase
16 short-term power, which is what we want to buy. AMP Ohio,
17 in fact, with the load in the Ohio Edison service
18 territory, buys power from, among others, Toledo Edison
19 Company -- lo and behold, another applicant.

20 It is not that we are avoiding nuclear utilities,
21 we aren't even avoiding the applicants, we are avoiding Ohio
22 Edison. Ohio Edison has been a problem for many, many
23 reasons, as stated in our brief, and if Ohio Edison would
24 sell us short-term power, we would be happy to buy it from
25 Ohio Edison. In fact, we are negotiating an agreement right

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1 now with Ohio Edison which would increase our purchases from
2 Ohio Edison.

3 But the important point is, we are buying power
4 from Toledo Edison, AMP Ohio is to sell to communities in
5 the Ohio Edison service territory. Toledo Edison, I think,
6 is more heavily nuclear than is Ohio Edison.

7 MS. CHARNOFF: But are you buying the wholesale sale
8 power rate which includes the cost of the nuclear plant?

9 I think that the rates that AMPO has sought to get
10 are rates which exclude the high cost of the nuclear plant.

11 MR. STRAUS: We have no ability to require any
12 utility to sell us power below the fully allocated cost of
13 that power. If Toledo Edison chooses to sell power
14 competitive, which it does, which Ohio Edison does not, then
15 we will buy it.

16 MS. CHARNOFF: You are not answering the question.

17 JUDGE MILLER: Hold it. I am getting too many at
18 a time.

19 First of all, let's get back to procedure. You
20 may ask each other questions through the chair.

21 Who wishes to ask a question of another?

22 [No response.]

23 JUDGE MILLER: That settled that.

24 Go ahead. You may complete your remarks, Ms.
25 Charnoff.

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1 MS. CHARNOFF: I believe there is a question from
2 Judge Bechhoefer, and I was trying to answer that with an
3 illustration of AMPO, but now I have lost the train of
4 thought with respect to the question.

5 JUDGE MILLER: Well, you lost AMPO, too. Go ahead
6 and start over.

7 JUDGE BECHHOEFER: The question was concerning the
8 other advantages of large power plants such as nuclear power
9 plants are such as are listed by Mr. Donnem in this
10 paragraph towards the top of Page 11.

11 MS. CHARNOFF: I would stick with the answer I
12 gave before. I think that the other advantages are
13 translatable to cost. That's what those things are all
14 about. And I think that the question that you asked me to
15 do with whether a small utility bought surplus power, I
16 think that I can say with some confidence that there is a
17 preference for buying power that does not include the cost
18 of a nuclear plant, and if there is a rate available which
19 doesn't include imbedded costs which would include the cost
20 of the nuclear plant, that's clearly the preference. Why?
21 Because the nuclear plant is so high cost.

22 JUDGE MILLER: Well, the preference is based on
23 money, I believe you said.

24 MS. CHARNOFF: Correct.

25 JUDGE MILLER: The preference is based upon money.

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1 MS. CHARNOFF: Exactly.

2 JUDGE MILLER: It gets down to money, which can
3 transmute other types of consideration, but --

4 MS. CHARNOFF: Exactly.

5 JUDGE MILLER: Okay. Anything further?

6 JUDGE BECHHOEFER: Give me a second.

7 JUDGE MILLER: Judge Bollwerk, while Judge
8 Bechhoefer is taking a second, would you like to fire some
9 questions?

10 JUDGE BOLLWERK: I don't have any questions. I
11 just have a comment, I think.

12 JUDGE MILLER: Go ahead.

13 JUDGE BOLLWERK: For my purposes, I just wanted to
14 thank the applicants for getting together and filing a joint
15 brief. I think it made it much easier for the Board to
16 focus on the issues in this case. I recognize it took extra
17 coordination on your part, but I certainly appreciate and I
18 just wanted you to know that we thought that was a very
19 useful thing that is done.

20 MS. CHARNOFF: Thank you. It's always nice to be
21 thanked.

22 JUDGE MILLER: While we're awaiting further
23 perusal of some quotations by my friend here, do any of you
24 have any questions for anyone else that you would like to
25 address through the Chair?

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1 MR. STRAUS: Mr. Chairman, I would like to try to
2 answer as factually as I can without getting argumentative a
3 couple of questions about costs and rates that were asked
4 which Ms. Charnoff couldn't answer.

5 JUDGE MILLER: All right. Proceed.

6 MR. STRAUS: You asked her, I believe, whether
7 they get fully compensated on their transmission rate. Mr.
8 Murphy had earlier incorrectly referred to an incremental
9 transmission rate. He and I talked and he admitted that
10 that was a mistake.

11 In fact, I'm involved in rate matters for all
12 three of these utilities on the purchasing side, and I can
13 tell you that in each case, CEI, Toledo Edison and Ohio
14 Edison, they charge a fully imbedded rolled-in transmission
15 rate, which means that they collect the return of capital
16 through depreciation, return on capital through rate of
17 return, and all of the O and M, and A and G expenses
18 associated, on a proportionate basis; so that if the -- the
19 load in the Ohio Edison territory is about five percent of
20 the load on their transmission system, AMPO-Ohio pays five
21 percent of all of Ohio Edison's transmission costs including
22 return of capital and return on capital, and the same holds
23 true for Toledo Edison and CEI, to the extent you might
24 consider those facts relevant.

25 A similar issue came up. Ms. Charnoff said that

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1 Perry is seven percent of Ohio Edison's capacity and 23
2 percent of its costs, and then she retreated to rate base.

3 I would just like to say that the percentage of
4 rate base and the percentage of costs, while related, are
5 certainly not identical or even close to it because of
6 depreciation and operating expense as opposed to capital
7 expense from rate base included and so forth. I would warn
8 you that that kind of comparison which she made in two
9 different ways has to be looked at carefully.

10 That's all along that line.

11 JUDGE MILLER: Thank you.

12 Anybody else?

13 JUDGE BECHHOEFER: I have a question I would like
14 to ask Mr. Goldberg.

15 JUDGE MILLER: Shoot.

16 JUDGE BECHHOEFER: This deals with the procedural
17 type questions that you have raised. Since the applicants
18 seem to be claiming that a portion of the higher cost to
19 which they are referring in describing the nuclear plants, a
20 portion of it is based on operating costs and the
21 contribution of operating cost to the higher than expected
22 overall cost, how could they have sought the change that
23 they are seeking, or how would they have had the information
24 base to --

25 MR. GOLDBERG: I'm not sure that I understand --

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1 JUDGE BECHHOEFER: -- seek the change much earlier
2 than they actually did?

3 JUDGE MILLER: Do you understand the question?

4 JUDGE BECHHOEFER: I said since some of the --

5 JUDGE MILLER: We'll rephrase it. Thank you.

6 JUDGE BECHHOEFER: Well, since some of the excess
7 cost or high cost -- alleged high cost, I guess I should say
8 -- is based on operating costs and since operating costs
9 would not have been known before the plants went into
10 operation, how could the applicants have sought the change
11 they are seeking based on costs prior to the time they
12 actually sought it?

13 MR. GOLDBERG: Well, if I understood the question,
14 it's related to Davis-Besse, is it?

15 JUDGE BECHHOEFER: Well, it's related to any of
16 the plants to which we've had claims. I think we had claims
17 both by Ms. Charnoff and by Mr. Murphy that the operating
18 costs of their plants were also much higher than they ever
19 expected.

20 MR. GOLDBERG: I think I'm right on this. So far
21 as capital costs are concerned, they are aware of those
22 capital costs even before the operating license is issued.

23 JUDGE BECHHOEFER: Well, they have said, though,
24 that they are not basing this solely on capital costs; that
25 they also are -- their so-called high cost plants are based

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1 on operating costs as well as --

2 MR. GOLDBERG: I guess their operating costs would
3 not be -- they had no experience with operating costs;
4 they'd only have estimated operating costs prior to
5 operation.

6 JUDGE BECHHOEFER: Correct. So wouldn't that make
7 the timing of their motions to suspend the conditions,
8 wouldn't that make it reasonable when they filed their
9 motion?

10 MR. GOLDBERG: No. No. As far as Davis-Besse is
11 concerned, they were in commercial operation in 1978. Their
12 application wasn't filed until ten years later. By any
13 standard, that's not a reasonable delay; that's a clear case
14 of laches.

15 As far as Perry is concerned --

16 JUDGE BECHHOEFER: Well, wouldn't it have taken
17 some time at least for operating costs to be ascertained?
18 Wouldn't you need a year or two --

19 MR. GOLDBERG: A couple of years at the most.

20 JUDGE BECHHOEFER: Okay.

21 MR. GOLDBERG: So while we're talking about that,
22 if you want me to say eight years, I'll say eight years, and
23 I'll say eight years is still too long.

24 JUDGE BECHHOEFER: Okay. Now, what about the
25 other plant?

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1 MR. GOLDBERG: The other plant -- they went into
2 commercial operation in November, 1987. They filed their
3 application to suspend in September even before commercial
4 operations. So in September, they must have felt
5 sufficiently knowledgeable about their operating expenses,
6 and they certainly were knowledgeable about their capital
7 expenses long before they got the operating license.

8 JUDGE BECHHOEFER: Okay. So are you claiming that
9 they're too late as well?

10 MR. GOLDBERG: Oh, yes. They certainly are. As a
11 matter of fact, we have laid out with respect to Perry in
12 our reply on the subject of laches some exhibits provided by
13 Cleveland Electric Illuminating Company showing the
14 ascendancy of costs from the early 1970s all the way up
15 through '83, if I recall, perhaps even later than that, of
16 capital costs. They knew those capital costs were going up.

17 JUDGE BECHHOEFER: Well, that's capital costs, but
18 I'm saying they're claiming both capital and operating.
19 Maybe they wouldn't have found their motion if only the
20 capital costs --

21 MR. GOLDBERG: Well, I would venture to say that
22 the capital costs alone are a sufficient basis for their
23 claim -- in other words, high cost.

24 JUDGE MILLER: While you are there, Mr. Goldberg,
25 how are you making out with your appeal? The Board hasn't

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1 had any information, so maybe --

2 MR. GOLDBERG: It's dormant, as far as I know.

3 JUDGE MILLER: It's dormant?

4 MR. GOLDBERG: We've heard nothing.

5 JUDGE MILLER: That's life. Okay. Thank you.

6 JUDGE BOLLWERK: I think the term is "under
7 advisement," probably.

8 JUDGE MILLER: Anybody else?

9 MR. STRAUS: This is sort of a free for all at
10 this point?

11 JUDGE MILLER: It's free for all.

12 MR. STRAUS: Okay. Ms. Charnoff accused me of
13 introducing facts into the record concerning Ohio Edison's
14 projections of unscrubbed dirty coal which was contemporary
15 with their nuclear plants.

16 I'm not the one who started it. On Pages 77 to 78
17 of their reply brief, they made the claim that these costs
18 were so much higher that they could never be low cost in
19 comparison. This was in response to our statement that
20 Congress could not rationally be said to have created a
21 situation where the conditions can come and go. This was a
22 theoretical proposition back in 1970. Congress wouldn't
23 have done that, they said. They came back with a factual
24 assertion that the costs are so much higher, don't worry
25 about it. My factual response was simply -- and it was

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1 their own words, not mine -- was simply in response to their
2 factual assertion.

3 I neglected to say earlier that I do have copies
4 available for the parties and the Bench of those documents
5 from which I read, should you care to have copies.

6 JUDGE MILLER: Well, you read the data and figures
7 into the record, didn't you?

8 MR. STRAUS: That's right, but I don't want there
9 to be any concern that I took them out of context.

10 JUDGE MILLER: All right. Unless there's some
11 question raised, we will rely upon your representations as
12 counsel. We have no problem with that.

13 Well, I think we're --

14 JUDGE BECHHOEFER: I have one more for Mr. Hom.

15 JUDGE MILLER: Okay. I was just going to say
16 we're moving forward with all deliberate speed.

17 JUDGE BECHHOEFER: Okay.

18 JUDGE MILLER: I wasn't going to shut it off.

19 JUDGE BECHHOEFER: Oh, okay.

20 JUDGE MILLER: Go ahead, sir.

21 JUDGE BECHHOEFER: I would like to ask Mr. Hom
22 whether he shares the projected -- it was projected by some
23 party, the -- maybe -- I guess it was projected by the staff
24 -- the administrative costs of looking over the cost
25 situation if we should hold that costs are crucial; the

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1 thing that was referred to by one of the counsel as a red
2 herring when I asked the other counsel. I want the staff to
3 comment on that a little bit.

4 MR. HOM: Well --

5 JUDGE BECHHOEFER: Following the cost year by year
6 or month by month as the case may be.

7 MR. HOM: We did raise a point in our brief that
8 if what the applicants are saying is true, then technically
9 speaking, as a matter of law, there would be an enormous
10 burden on the system every time costs fluctuated relative to
11 alternative sources, whatever those would eventually be
12 defined to be.

13 Although Ohio Edison may state here today that
14 they wouldn't see themselves coming here -- I'm not sure
15 exactly how they characterized it, but I was under the
16 impression that they essentially told the Board not to worry
17 about them coming in here more than every few years to
18 determine costs -- I don't think that Ohio Edison can speak
19 for every other utility that is now subject to antitrust
20 license conditions, and it's conceivable that there are
21 relative costs that fluctuate on a fairly frequent basis.
22 If that were true, then it would appear that if Ohio Edison
23 is correct, utilities would essentially be knocking on the
24 door every day to have a review of their costs vis-a-vis
25 their competitors.

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1 JUDGE BECHHOEFER: Well, even if they didn't,
2 would the staff feel compelled to itself keep an eye on
3 comparative costs?

4 Like, for instance, would you feel it necessary to
5 have various licensees file routine reports on current costs
6 of running various facilities and current knowledge of what
7 other types of facilities cost to run? I mean, would we
8 have a new reporting requirement as at least a theoretical
9 outcome of a change such as is suggested? I would think
10 maybe we would have to.

11 MR. HOM: Well, I would certainly say that there
12 is that potential, but I would presume that an applicant or
13 a utility would under these circumstances be keeping track
14 of their cost to their benefit and would let the staff know
15 any time they deemed it appropriate to have costs re-
16 evaluated and reconsidered.

17 JUDGE BECHHOEFER: Well, I don't think they would
18 invite the antitrust conditions back, so that if their cost
19 dropped too much, I'm not sure how forthcoming the
20 information would be.

21 [Laughter.]

22 JUDGE BECHHOEFER: But I would think almost the
23 staff would have to set up some sort of a systemic reporting
24 requirement in order to police the cost to know whether the
25 antitrust conditions had to go back.

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1 MR. HOM: Are you talking about whether they had
2 once been suspended and then we --

3 JUDGE BECHHOEFER: Yes. I'm talking about -- this
4 is what I'm talking about.

5 MR. HOM: I would imagine that there could
6 possibly be some requirement imposed in order to do so.
7 Otherwise, it would be, I presume, left up to anyone else in
8 the marketplace to bring the increase in cost to the staff's
9 attention. I really can't answer what is feasible at this
10 point.

11 JUDGE MILLER: Judge Bollwerk I think has an
12 inquiry.

13 JUDGE BOLIWERK: I just have one more question. I
14 don't want to extend this any further, but one quick
15 question. Can someone give me a situation or explain to me
16 a situation in which this whole question about the high cost
17 of a nuclear power plant and the effect on an antitrust
18 review would ever be raised in an initial licensing
19 proceeding, because if I understand what you're saying, if
20 it's high cost, you're not going to be building the plant
21 anyway.

22 MR. MURPHY: I think that's essentially correct.
23 One of the things that struck me when I was working on the
24 brief was the assertion by the Department of Justice back in
25 their brief in front of the Appellate Board that everybody

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1 -- that it was undisputed, I think was the language, that
2 this nuclear power from these units would be the lowest cost
3 base-load power available.

4 Absent some extraordinary reason, such as an
5 environmental constraint, I don't think any company would
6 deliberately construct a high cost plant -- a higher cost
7 plant than the alternatives available to the company at the
8 time.

9 It does seem to me that, in answer to your
10 specific question, I would think almost inevitably that this
11 issue would be raised after a period of operation when
12 indeed the costs were shown to be higher than the
13 alternatives available and relief from the antitrust
14 condition would be sought at that time.

15 JUDGE BOLLWERK: So this is always, at least in
16 the way you have framed this question, it's always going to
17 be a post-licensing question?

18 MR. MURPHY: Yes. I think that's essentially
19 right. I think it's a question of whether we have the right
20 to obtain a suspension of the license condition when indeed
21 the operating history of the plant shows that the costs are
22 higher than the alternatives available.

23 JUDGE BOLLWERK: Okay. Ms. Urban, I think you are

24 --

25 MS. URBAN: Yes.

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1 JUDGE BOLLWERK: I see two hands up. I want to go
2 with Ms. Urban first. I think she's ready. Then Mr.
3 Straus, perhaps we'll go over to you.

4 MS. URBAN: I've been thinking about this question
5 of when would a utility build an expensive nuclear plant,
6 and one answer is that they may not build one, but they may
7 acquire one through a merger, and if a utility is non-
8 nuclear to begin with, then they would be, I believe, and
9 the NRC can correct me if I'm incorrect, they would be
10 subject to an initial antitrust review.

11 Then the next question is, of course, why would a
12 utility buy a high cost nuclear plant? And the answer is
13 because if they short of power or if they anticipate needing
14 power in the next few years, it's cheaper to buy a high cost
15 nuclear plant than build their own.

16 The other reason they might buy a high cost
17 nuclear plant or even perhaps build one -- I suspect I could
18 construct some kind of moderately reasonable scenario where
19 they'd build one -- is that they may be willing to pay a
20 monopoly premium so that they have, for example, all of the
21 generation within the area. That way, they can charge rates
22 which make up the cost of the plant and make up the monopoly
23 premium -- in other words, the additional cost that they are
24 paying -- so that they get the 1,000 megawatts and someone
25 else doesn't.

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1 Perhaps you could construct some kind of again
2 reasonable scenario where they might build under those
3 circumstances. Perhaps there is one site left within the
4 area and someone else is going to put a plant on it if they
5 don't, so they go quick and dirty, you know, build as fast
6 as they can, and perhaps that means they build at a higher
7 cost than if they had waited a few years.

8 But, you know, there are reasons and there are
9 reasons in fact that are anti-competitive for doing this,
10 which is, again, to acquire all of the generation so that
11 you have a monopoly in that generation, and then it doesn't
12 matter if you paid a premium because you can charge rates to
13 recoup that payment because you are the only game in town
14 again.

15 JUDGE BOLLWERK: MR. Straus, I'll allow you to
16 reply, if you want.

17 MR. STRAUS: I was going to say, on the other side
18 of the coin from you question was if everyone assumes back
19 in 1977, '79 that these were much lower priced, based on
20 plants than anything else available to the municipal
21 utilities and the states, why in the world would there have
22 been any problem? Why would we have needed Wheeling, other
23 than Wheeling access to the plant, itself? Why would we
24 have needed wheeling access to other systems? To avoid the
25 lowest cost power in the world? Apparently not. Apparently

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1 there was a contemplation that the nuclear plant would be
2 more expensive or less expensive, and that's why you have a
3 licensing proceeding not knowing or sure, and that's why you
4 have Wheeling conditions, which say you can have Wheeling
5 not only to this nuclear plant, but you can Wheelings, you
6 can buy it from somebody else. They wouldn't want to buy it
7 from somebody else less cheap.

8 So, the contemplated cost at the time of the
9 licensing proceeding raises more questions than just
10 wondering why would you ever have one in the first place.

11 JUDGE BOLLWERK: If you all would like to respond?

12 MS. CHARNOFF: I want to say a couple of things.
13 One, I would like to say that the comments by the NRC staff
14 counsel on the administrative costs, which were presented as
15 a matter of law, technically speaking, are not matters of
16 law, which, of course, this issue is. They are matter of
17 facts, which this issue is not. I would object -- I simply
18 disagree with the Chicken Little scenario, and, as an
19 elementary point in this case, would like to have the
20 opportunity to show that that's not what this hearing is
21 about. It gets very frustrating. Because when I do answer
22 on the basis of fact, Mr. Straus, for example says you're
23 talking about fact; and when we don't answer, we leave
24 unanswered all of these allegations about the sky is
25 falling, the sky is falling.

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1 So, let me say that I don't want to belabor the
2 point here. But, I do think that these issues of fact are
3 not pending before the Court, are not part of the bedrock
4 legal issue. To the extent that they're questions that need
5 to be answered to decide whether to lift the particular
6 conditions that are involved in the case of Perry and Davis-
7 Besse, they will have to be answered in Phase Two of this
8 proceeding, and we will all have an opportunity equally to
9 present facts on those points.

10 Now, the Department of Justice hypotheticals which
11 I find extraordinary in their imaginativeness, also do not
12 address -- when you fit them into the framework of the
13 bedrock legal issue, fit our model to a tee. That is, if
14 building another plant is more costly than a so-called high-
15 cos. nuclear plant, then the nuclear plant is the lower cost
16 alternative, period. And if the only alternative power
17 available is power from a plant that has to be built, then
18 the nuclear plant is going to provide a competitive
19 advantage presumably. I don't think that's a situation out
20 there. That's what phase two is about. Whether there are
21 viable alternatives that are lower in cost -- but, in any
22 event, the scenario described doesn't challenge the analysis
23 that we've set forth in our bedrock legal issue.

24 JUDGE MILLER: Well, let me say that -- and I'll
25 recognize you in a moment -- that was one of the questions

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1 that I, at any rate, had in mind when you all told me that
2 it was a bedrock issue which would solve everything, at
3 least as far as the Board was concerned, and you would
4 happily accept it. Those who felt they'd won would be
5 happy; those who felt they hadn't would go up on appeal.
6 Those are the kinds of things where you were specifically
7 asked, are you sure that there are no sub-issues of a
8 factual nature or collateral matters.

9 Now, to the extent that collateral matters of a
10 factual nature have been gone into, I think the Board is
11 going to have to disregard them, unless all of you stipulate
12 that they may be considered. When you go through the
13 record, the transcript, I would like to have all of you
14 consider those matters which seem to be beyond the scope of
15 the bedrock issue, matter of law matter which we are here
16 discussing.

17 I think that -- we don't want to create a kind of
18 a hybrid here, partly legal, partly factual, partly dream
19 stuff. So, I, and I'm sure the Board would appreciate, if
20 you wish to ask the Board to disregard any of the matters,
21 since there will be no hearing as such until this bedrock
22 issue is resolved, address it in writing to the Board, with
23 copies to all concerned. Because I think there has been --
24 since this has gone on, I'm not at all sure that the
25 bedrock approach fully encompasses. But, since everybody

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1 felt and believed that it did and would, very well.

2 But, I think you better sort out now any mixed
3 questions or mixed issues of fact and law. And if any have
4 been handled as such here today, you may call it to the
5 Board's attention when you have an opportunity to study the
6 transcript. Because there is to be no hearing unless and
7 until the bedrock issue has been decided -- as I recall, the
8 offer made to the Board by counsel by all parties.

9 So, we're going to conclude this shortly, but I'm
10 going to -- I want to be sure that we've touched all bases
11 before we do. Excuse me.

12 [Discussion held off the record.]

13 JUDGE MILLER: Yes, all right.

14 Judge Borwick suggested that the -- that you would
15 screen out any motions to strike or to disregard that were
16 not fundamental to your position. In other words, there's
17 no sense trying to go through the whole record and comb out
18 the small fleas.

19 But, I think we've had some very interesting
20 language -- new wine in old bottles. I mean, these terms
21 are perhaps not original, but they're colorful -- like yo-
22 yo and Red Herring, and chicken little and short shrift, and
23 sub silentio and NRE lingo among others. So, to the extent
24 that those might require a deeper understanding than
25 suggested superficially by the term, you could let us know.

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1 But, it is true.

2 Now, we are asking you to address, after you've
3 had a reasonable opportunity to read the transcript,
4 anything further with copies to -- we don't want to prolong
5 the considerations. So, we'd ask for you to be both
6 expeditious -- and if any of you feel that you must respond
7 to something someone else had raised, please do it promptly,
8 within a matter of five days or something.

9 [Discussion held off the record.]

10 JUDGE MILLER: Yes. Judge Bechhoefer has
11 indicated, we're not asking for additional briefs now. And
12 you don't even have to say anything if you don't want to.
13 But, to the extent that some of these matters appear
14 significant. Ms. Charnoff mentioned -- you mentioned one or
15 two where you felt that you were being put into a position
16 of confronting factual matters in the course of an argument
17 strictly on the legal merits that were being present.
18 Certainly you would be entitled to present that to the
19 Board, in a short form, as I say, not in a brief or
20 anything. And be sure you copy everybody, including,
21 specifically, those that you feel may have treaded in this
22 particular area.

23 Are there any further questions now?

24 MS. CHARNOFF: Chairman, can I clarify two quick
25 points?

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1 JUDGE MILLER: Yes.

2 MS. CHARNOFF: One is that we have, in our reply
3 brief, to some degree, in some of the circumstances in there
4 may be complete overlap. I'm honestly not sure till I read
5 the transcript --

6 JUDGE MILLER: All right.

7 MS. CHARNOFF: -- where we think issues are raised
8 are factual issues. And we will --

9 JUDGE MILLER: Yes.

10 MS. CHARNOFF: -- not repeat ourselves, needless
11 to say.

12 JUDGE MILLER: Yes. I recall that there are some.

13 MS. CHARNOFF: The second point is, you bowled me
14 over with your five days. We weren't planning to get the
15 transcript, frankly, until something like that.

16 JUDGE MILLER: Well, Mr. Reporter, how soon are
17 you going to have this transcript available to this nice
18 people?

19 THE REPORTER: It can be available daily.

20 JUDGE MILLER: It's available daily if you want it
21 daily, and this is the day. You can get it as a daily, if
22 you like.

23 MR. STRAUS: Judge, I think what you said was that
24 if somebody -- you didn't set a date for filing such
25 pleadings, you simply said a response within five days. I

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1 think if you said make it 15 days from today to file. Daily
2 transcripts are awfully expensive. This would be a long
3 one. I would prefer just to get a five-day transcript.

4 JUDGE MILLER: This is only one day -- a one-day
5 daily.

6 MR. STRAUS: It seems like a long day.

7 JUDGE MILLER: I see. Pardon me. How long does
8 it take to get it out normally, without expediting it?

9 THE REPORTER: I'm not sure. I don't usually do
10 these hearings. I heard that it was ordered daily by
11 somebody, so.

12 JUDGE MILLER: We did, NRC. She does dailies.

13 All right. We think that you will probably get
14 your copies within say less than five days. Those of you
15 who wish to or are willing to pay the monopolistic charges
16 or costs, there is only one reporter in town, may get a
17 daily. I mean, it will be available.

18 I would say -- is 15 days all right?

19 JUDGE BECHHOEFER: From now, yes.

20 JUDGE MILLER: All right. Fifteen days overall
21 sounds reasonable. You'll probably get your transcript even
22 in due course. I don't know how good the mails are. But
23 you'd probably get it within five days I'd say. If you need
24 it sooner you can order it. Five days then from the date
25 you -- from today -- five days. And five days from the date

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1 that you and others received the copy. Where you feel that
2 further comment, again, not briefing it, nothing long and
3 tedious is necessary, shoot it in. You'll have five days
4 for that.

5 So, you've got five days to receive it, five days
6 to read and write it, and a final five days to get all
7 matters into us.

8 MR. STRAUS: I'm confused. I thought you said 15
9 days.

10 JUDGE MILLER: Yes. That is 15. Five times three
11 is 15.

12 MR. STRAUS: No. I thought you said 15 from today
13 to file the request?

14 JUDGE MILLER: Oh, no.

15 JUDGE BECHHOEFER: Yes. I thought that was what
16 you said.

17 MR. STRAUS: Judge Miller, despite the fact that
18 the reporting service will have the transcript available
19 tomorrow for you, they will not mail it to me for five more
20 days, and that will take a couple of days in the mail to get
21 it. If you're telling me I should order it expedited
22 transcript, I guess I'll have to do it.

23 JUDGE MILLER: No. I'm not telling you that.
24 But, instead of relying on U.S. Mail, you can sure get an
25 overniter for about nine dollars, can't you?

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1 JUDGE BECHHOEFER: That will cost him about \$500
2 to get the quick one.

3 JUDGE MILLER: I'm not suggesting the quick one.
4 I'm saying that the quick and dirty one -- that you can
5 expedite the mail delivery by doing it overnite from the
6 time the quick and dirty is available, you can, in another
7 24 hours, get it to you.

8 MR. STRAUS: Only if the reporting service is
9 willing to do it, and they're not.

10 JUDGE MILLER: Well, if you ask them, and you pay
11 for the UPS, I'll bet you they'll do it. Do you really
12 think it's going to be that much time and effort required to
13 comb through here and get out factual matters? Did we
14 really get into it that extensively?

15 MR. STRAUS: No. I just don't want to have just
16 one day to do it. And that's what you're doing. If you say
17 10 days today, it's probably going to give us about one day.
18 I don't think --

19 JUDGE MILLER: No. I said 15 days from today.
20 Fifteen days from today. You know, figure it out any way
21 you want to.

22 JUDGE BOLLWERK: Does anybody happen to have a
23 calendar? I don't have one. Does that fall on a weekend,
24 or is it -- that would be the 25th?

25 MR. GOLDBERG: No. That would be a Thursday.

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1 JUDGE BOLLWERK: Okay.

2 JUDGE MILLER: Well, maybe the following Monday,
3 what's the date? Anyway, this will speed it up.

4 JUDGE BOLLWERK: That would be -- Tuesday the 30th
5 of June, that's -- I'm sorry, Monday the 29th of June, that
6 would be the first Monday after.

7 JUDGE MILLER: All right. Let's make it the 29th
8 of June, 1992 that this whole thing is accomplished and you
9 have in our hands -- and remember, you're going to have to
10 pop for a little bit, because I'm in Florida -- in our
11 hands, so that we can -- we'll be reading the transcript as
12 well, as well as going through it. We have read and will
13 re-read all of the briefs, I assure you that. We'll
14 consider your arguments.

15 Now, since this decision is going to be
16 dispositive, we want to be sure that you've had a full
17 opportunity to make your record. And the ball will be in
18 our court.

19 Each member of the Board has read everything
20 that's been filed to date. But, if we intend to reread
21 substantial portions, in conformity with the points that
22 you've made here today, we have open minds, and open mouths,
23 I guess. So, anything anyone thinks should be in the
24 record, in addition to and besides the factual matters,
25 which you contend should not be considered by the Board in

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1 the hearing on determinations as a matter of law.

2 Okay? Thanks very much for coming. I appreciate
3 it. I appreciate the effort.

4 MR. OTTINGER: Judge Miller?

5 JUDGE MILLER: Yes. Just a minute. He has
6 something he wants to put on the record. Yes. Go ahead.

7 MR. OTTINGER: Thank you very much.

8 My name is Greg Ottinger. I'm with the law firm
9 of Duncan & Allen. I'm here today on behalf of the City of
10 Brook Park, Ohio, whose intervention was denied without
11 prejudice September 19th at a pre-hearing conference.

12 JUDGE MILLER: Yes, I remember.

13 MR. OTTINGER: Since that time, the City has held
14 a referendum which passed, establishing a municipal electric
15 department within the city governing structure, under the
16 Ohio Constitution, to actually establish a municipal
17 electric system. The City needs to act by ordinance, which
18 it did in late April. That ordinance needs to sit 30 days
19 to give the population a chance to circulate a referendum
20 petition. That 30-day period has run. We're just a couple
21 of days after that right now.

22 So, the short of it is, the City of Brook Park
23 will be in the next -- by Friday, let's say, filing another
24 motion to intervene. So, I'm warning all the parties, don't
25 send your files to storage yet.

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1 Thank you.

2 JUDGE MILLER: I suspect no one will send his or
3 her files to storage yet, in terms of both the possible
4 further actions of this Board and potential appeals.

5 JUDGE BOLLWERK: I take it you're aware of the
6 requirements that have to be met for late intervention?

7 MR. OTTINGER: Yes, sir.

8 JUDGE BOLLWERK: All right.

9 JUDGE MILLER: Very well.

10 JUDGE BECHHOEFER: And I guess I would say don't
11 rely on your statement today. Try to include it in your
12 material -- whatever is relevant to that.

13 MR. OTTINGER: Yes, sir. Thank you. That's why
14 we won't have it until Friday. We're going to look at the
15 transcript and the law very carefully.

16 JUDGE MILLER: Very well.

17 JUDGE BECHHOEFER: Okay.

18 JUDGE MILLER: Thank you.

19 Anything further?

20 [No response.]

21 JUDGE MILLER: If not, we stand adjourned. Thanks
22 very much.

23 [Whereupon, at 4:20 o'clock p.m., the above-
24 entitled hearing was adjourned.]

25

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