

APPEARANCES (CONTINUED):

PATRICIA KRISE BURKET, Esquire
P. O. 3265
Harrisburg, Pennsylvania 17120
(For Law Bureau Prosecutory Staff)

CHARLES F. HOFFMAN, Esquire
ROBERT F. FRAZIER, Esquire
KANDACE F. MELILLO, Esquire
Room 210, North Office Building
Harrisburg, Pennsylvania 17120
(For the Office of Trial Staff)

TANYA McCLOSKEY, Esquire
DIANNE E. DUSMAN, Esquire
1425 Strawberry Square
Harrisburg, Pennsylvania 17120
(For the Office of Consumer Advocate)

ROBERT J. SUGARMAN, Esquire
100 North 17th Street
Philadelphia, Pennsylvania 19103
(For Intervenors, PAUSE)

JESSE DILLON, Esquire
Two North Ninth Street
Allentown, Pennsylvania 18101
(For Pennsylvania Power & Light)

-- 0 --

Commonwealth Reporting Company, Inc.

700 Lisburn Road
Camp Hill, Pennsylvania 17011

C O N T E N T S

WITNESSES

DIRECT CROSS . REDIRECT RECROSS

(None.)

E X H I B I T S

NUMBER

FOR IDENTIFICATION IN EVIDENCE

(None.)

Any reproduction of this transcript is prohibited without authorization by the certifying reporter.

P R O C E E D I N G S

1
2 ADMINISTRATIVE LAW JUDGE HERBERT SMOLEN: This is a
3 prehearing conference in the remanded Docket A-110550,
4 Folder 055.

5 For the record, I am going to again poll the
6 parties on this telephonic conference so that the
7 reporter can note them officially in the record.

8 Let me call out the parties first.

9 Philadelphia Electric Company, please enter your
10 formal appearance.

11 MR. BONNEY: Paul Bonney.

12 MR. SMITH: Ward Smith.

13 MR. WATSON: Tom Watson.

14 JUDGE SMOLEN: Now, for the Protestants. .

15 MR. SUGARMAN: Robert Sugarman, Your Honor.

16 JUDGE SMOLEN: The Law Bureau.

17 MS. BURKET: Patricia Krise Burket.

18 JUDGE SMOLEN: OTS.

19 MR. HOFFMAN: Charles F. Hoffman, Kandace F.
20 Melillo, Robert F. Frazier.

21 JUDGE SMOLEN: And OCA. .

22 MS. McCLOSKEY: Tanya McCloskey and Dianne Dusman.

23 JUDGE SMOLEN: And PP&L.

24 MR. DILLON: Jesse Dillon.

25 JUDGE SMOLEN: All right.

1 Now, have the parties received the copies of the
2 Commission's remand order? Let me put it this way: if
3 anyone has not, let him or her so indicate.

4 (No audible response.)

5 JUDGE SMOLEN: So that everyone has received it.

6 Now, I have in my hand a prehearing conference
7 memorandum distributed by the Philadelphia Electric
8 Company. Is there anyone who has not received it?

9 Did someone say they didn't receive it?

10 MR. HOFFMAN: Your Honor, I don't think we have it.

11 JUDGE SMOLEN: For the record, I don't think you
12 said who you are. That was Mr. Hoffman. But is there
13 someone who said they didn't have it?

14 (No audible response.)

15 JUDGE SMOLEN: How about OTS?

16 MS. BURKET: Law Bureau has it, Your Honor.

17 JUDGE SMOLEN: Law Bureau has it?

18 MS. BURKET: Yes. I believe it was OTS that said
19 that they didn't have it.

20 JUDGE SMOLEN: All right. Maybe you can get it to
21 them so that they have a copy of it also.

22 MS. BURKET: Okay. I will see what I can do.

23 MR. FRAZIER: It would probably be best if the
24 company -- I'm Bob Frazier -- it would probably be best
25 if the company faxes it to us directly.

1 JUDGE SMOLEN: All right. In an abundance of
2 caution, let's have Philadelphia Electric Company fax a
3 copy of its prehearing memorandum to the OTS.

4 All right, Mr. Bonney?

5 MR. BONNEY: It was my understanding that we had,
6 but in case there was a mix-up we will send another one
7 right at this moment.

8 JUDGE SMOLEN: Very good.

9 MR. HOFFMAN: Your Honor, we didn't receive the
10 other fax that Mr. Bonney had represented to me that he
11 sent. So maybe there is a problem with the phone number
12 he's using.

13 MR. BONNEY: Hold on a minute. We have a
14 confirmation that we sent it to a number, but let me
15 doublecheck it.

16 (Pause.)

17 MR. BONNEY: (717) 787-6641.

18 MR. HOFFMAN: Our fax machine is 772-2677.

19 MR. BONNEY: Can you repeat that?

20 MR. HOFFMAN: Our fax number is the same area code,
21 772-2677. I don't know where that other one is.

22 MR. BONNEY: We will send that to you right away.
23 And I apologize for that.

24 MR. HOFFMAN: That's all right.

25 JUDGE SMOLEN: It might be handy at this time to,

1 since this is a proceeding with certain time restraints,
2 maybe we can get all of those fax numbers now so that
3 everybody knows everybody else's fax number.

4 Mr. Bonney, what is PECO's fax number?

5 MR. BONNEY: (215) 568-3389.

6 JUDGE SMOLEN: What about Mr. Sugarman?

7 (Pause.)

8 JUDGE SMOLEN: Mr. Sugarman, can you hear us?

9 MR. SUGARMAN: Yes, Your Honor.

10 JUDGE SMOLEN: We are looking for your fax number.

11 MR. SUGARMAN: I'm sorry. It's (215) 864-2501.

12 JUDGE SMOLEN: The Law Bureau.

13 MS. BURKET: Area Code (717) 783-3458.

14 JUDGE SMOLEN: OTS, just repeat it again.

15 MR. HOFFMAN: Area Code (717) 772-2677.

16 JUDGE SMOLEN: OCA.

17 MS. McCLOSKEY: Ours is (717) 783-7152.

18 JUDGE SMOLEN: And PP&L.

19 MR. DILLON: (215) 774-6726.

20 JUDGE SMOLEN: All right.

21 Now, I just want to throw this idea out for comment
22 by the parties. Then we will let everybody have their
23 say.

24 PECO has proposed a schedule whereby the
25 Protestants file testimony first and then it is followed

1 by the testimony of it, the company, and then hearings,
2 cross-examination of all witnesses, and oral rebuttal
3 testimony. And PECO has suggested a three day or four
4 day hearing schedule.

5 I would like to get the parties' ideas or comments
6 on the simultaneous filing of testimony at the same time,
7 all parties filing at the same time their testimony, and
8 then having a longer set of hearings for
9 cross-examination of all parties and oral rebuttal by all
10 parties.

11 The reason that I -- I know FERC follows a
12 procedure similar to that. They may even have direct
13 testimony written and then rebuttal written and then
14 hearings where all of the cross-examination and any
15 surrebuttal cross-examination is done.

16 Does anybody have any comments on that?

17 MS. McCLOSKEY: Your Honor, this is Tanya McCloskey
18 of the OCA.

19 If I could speak first, because I was thinking
20 along the same lines, I was only able to contact our
21 consultants who had worked on this case in the last set
22 of hearings this morning and I was informed by them that
23 they are booked solid through the month of April and
24 therefore filing testimony before May would have been
25 impossible for us. And we also have contracting

1 requirements that we would have to go through. So a
2 short time frame does present a dilemma for us.

3 I too was going to suggest a simultaneous filing
4 and then the hearings or a longer set of hearings, and
5 would support that.

6 JUDGE SMOLEN: Well, that is what I had in mind.
7 Anyone else? What about OTS? Any comments?

8 MR. HOFFMAN: Your Honor, we were directed by the
9 Commission essentially to participate in this. We were
10 granted intervention nunc pro tunc. What about the
11 witnesses that have already been presented in this case
12 that we have not had the opportunity to cross-examine?

13 JUDGE SMOLEN: Well, that is reopening it old case.
14 I don't believe this is a reopener, that this Commission
15 order is a reopener.

16 MR. HOFFMAN: We believe that the provision that it
17 is nunc pro tunc would in effect reopen that.

18 JUDGE SMOLEN: Well, if that is what your belief
19 is, that is contrary to my belief. My understanding of
20 the order, unless someone convinces me to the contrary,
21 is that this is to consider all studies available not
22 repetitious of those which were presented in the other
23 case and then to determine whether there would be
24 standards. So that we would not be hearing the testimony
25 on the other studies.

1 MR. HOFFMAN: Are you suggesting, Your Honor, that
2 your ruling could not be based on evidence that was
3 already adduced? I'm sure you are not suggesting that.

4 JUDGE SMOLEN: My ruling on the other evidence is
5 of record already and that is for anyone to read. That
6 ruling may be changed based upon any new evidence which I
7 receive. But my ruling on the old evidence is my ruling
8 on the old evidence.

9 MR. HOFFMAN: Well, Your Honor, the matter was
10 remanded to you for a new decision and I submit to you
11 that --

12 JUDGE SMOLEN: No, it does not say a new decision.
13 It says a supplemental decision. And the order really
14 tells me what I am to consider. And I am referring to
15 page 21, the last paragraph, which says, "Because the
16 justification for remand is that additional hearings will
17 allow us to consider better information, we would not
18 restrict the scope of the hearings on remand to the only
19 new study," meaning that Swedish study, I take it, "about
20 which we happen to be aware. Other studies may have
21 become public since the close of the record in this case.
22 We would, therefore, direct the ALJ to consider all of
23 these studies which the parties feel are relevant."

24 And I take that to mean the other studies, not the
25 ones we have heard in the first case. That is the way I

1 read that paragraph.

2 MR. HOFFMAN: Well, Your Honor, we would disagree
3 with your interpretation, and I suppose we would
4 certainly have the right to file a document with you to
5 pursue this matter further.

6 JUDGE SMOLEN: Well, I think you really have to
7 file that -- well, you may file it with the Commission to
8 get an interpretation of this order. But I don't believe
9 that the Commission would have wanted a reopener of the
10 entire proceeding and put a 120 day limit on it.

11 MR. HOFFMAN: Well, Your Honor, how you interpret
12 the Commission's words is one thing and, you know, due
13 process requirements of the Constitution are another
14 thing. And I don't see how you can bifurcate this case
15 and act as though everything that has gone before is now
16 over and you have ruled on that but then you're going to
17 make a separate ruling on the new evidence. It seems to
18 me you have to rule on the health effects of EMF and it
19 has to take into consideration everything that is on the
20 record in this case and your final ruling has to consider
21 all of that.

22 JUDGE SMOLEN: Well, as I say, I have considered
23 the other things. All I want to hear are new things, and
24 if it makes me change my mind on the other things when
25 you can argue that. But I don't want to rehash old

1 evidence.

2 MR. SUGARMAN: Your Honor, I think Mr. Watson's
3 problem is solved by --

4 MR. HOFFMAN: It's Mr. Hoffman.

5 JUDGE SMOLEN: That's Mr. Hoffman.

6 MR. SUGARMAN: I'm sorry.

7 I think Mr. Hoffman's problem is solved by the fact
8 that the Commission has not -- the Commission has the
9 ability to factor in Your Honor's new record and new
10 supplemental decision as it deems appropriate when it
11 finally disposes of the case. So that as Your Honor has
12 indicated, I would have to concur with you that the
13 Commission has given you a very specific parameter by way
14 of requesting the supplemental opinion and that the due
15 process issue will be for the Commission when it gets
16 back to them as to what they need to do, if anything, to
17 integrate the new evidence with the old evidence. I
18 think their direction to Your Honor constrains you to new
19 evidence.

20 JUDGE SMOLEN: Well, new evidence in my view does
21 not necessarily mean only new studies which were
22 published since the date of the other case, but that I
23 could consider other studies which were published but not
24 introduced in the other case. Any studies which we did
25 not consider in the old case, in the former case. So I

1 am sort of broadening it, not to limit it to only the new
2 studies published since the date of the old case.

3 MR. SUGARMAN: And then if I understand it, the
4 output the Commission is looking for from Your Honor
5 would include but not be limited to a recommendation as
6 to what the minimum right-of-way widths should be?

7 JUDGE SMOLEN: Well, if that falls within the
8 definition of, quotes, standards, unquotes, then I would
9 agree with you.

10 MR. SUGARMAN: I am referring to paragraph
11 number --

12 JUDGE SMOLEN: I didn't hear that. Paragraph what?

13 MR. SUGARMAN: I believe -- I don't have it. I
14 believe it is on page 21. It is on the very last page.

15 JUDGE SMOLEN: The last page is 22.

16 MR. SUGARMAN: It's at the bottom of 21. And it
17 calls on Your Honor to make a recommendation with respect
18 to the --

19 JUDGE SMOLEN: Take your time and see if you can
20 get --

21 MS. McCLOSKEY: It's on the top of page 23 and it
22 is labeled with a small b.

23 JUDGE SMOLEN: Determining, yes, if any standards.

24 MR. SUGARMAN: But it specifically refers to the
25 width of the right-of-way. That was the only point I was

1 making.

2 JUDGE SMOLEN: Those are really specific as to what
3 the determination has to be. And, yes, I agree with you
4 on that.

5 MR. SUGARMAN: My only point is that where the
6 Commission is coming from is asking you to base your
7 recommendation in that regard on the new and additional
8 evidence that might be brought to your attention,
9 although I would not think that they would be -- feel
10 that they have been disobeyed if Your Honor were to refer
11 to some of the previous evidence in that regard.

12 I think the point that I would make is that the
13 remand direction is for a limited purpose which the
14 Commission has stated. And they have gone out of their
15 way to state that it is very limited and that it is an
16 unusual situation and they are only doing it because of
17 that.

18 JUDGE SMOLEN: Yes. I want to point out the second
19 full paragraph on page 21 of the Commission's remand
20 order, which says, "we note that the record concerning
21 EMF has been extensively developed but prior to our
22 disposition of the instant matter we shall direct a
23 limited remand. Our reopening of the record to secure an
24 important piece of information appeals to our sense of
25 fairness."

1 And the last sentence, "While we shall direct the
2 remand of this case to consider new evidence, it is only
3 the unique and extremely contentious nature of this case
4 which leads to this position."

5 They are talking new evidence, things that we
6 haven't heard before. That's the way I read it.

7 MR. SUGARMAN: I agree with Your Honor. Although,
8 again, I think you are allowed to consider whatever you
9 think his appropriate from the entire record.

10 JUDGE SMOLEN: With respect to that b. paragraph of
11 the ordering paragraphs.

12 MR. SUGARMAN: Exactly.

13 JUDGE SMOLEN: I think that's right.

14 MR. HOFFMAN: Your Honor, Mr. Hoffman.

15 I really have difficulty with the interpretation
16 that you are placing on this. You are going to have a
17 record and you are going to have to, I think, look at the
18 whole record. The determinations you may have made on a
19 limited record which may be modified by the evidence that
20 is taken in this remand proceeding may no longer -- that
21 evidence may no longer be appropriate upon which to base
22 a decision. You may at the end of this remand --

23 JUDGE SMOLEN: Well, then, you are arguing against
24 yourself. You're saying forget about the old, just base
25 it on the new if it's not relevant.

1 MR. HOFFMAN: I'm saying you can't forget about the
2 old.

3 JUDGE SMOLEN: Well, no one says we are. That is
4 what Mr. Sugarman said. But we want to only hear new
5 evidence. We don't want to rehash all the old. You can
6 argue what you want in a brief. But we don't want to
7 have new factual evidence based on the old studies. That
8 is only going to make this record for another year or so.

9 MR. HOFFMAN: Your Honor, this is a monumentally
10 important issue and I don't understand why the rush to
11 judgement here.

12 JUDGE SMOLEN: The rush to judgement is because the
13 Commission put it on us.

14 MR. HOFFMAN: That's what I'm talking about. And
15 we intend to possibly file a document with the Commission
16 and ask them to reconsider that.

17 JUDGE SMOLEN: Well, that's different. That might
18 be different. But right now all I have, all I can go by
19 is what the Commission has given me.

20 MR. HOFFMAN: Then I would ask you to go by their
21 use of the phrase nunc pro tunc, which if I may read to
22 you from Black's Law Dictionary, it says, "Now for then.
23 A phrase applied to acts allowed to be done after the
24 time when they should be done with a retroactive effect,
25 i.e., with the same effect as if regularly done."

1 JUDGE SMOLEN: That makes you a party as though you
2 were from the beginning.

3 MR. HOFFMAN: If we had been a party from the
4 beginning we would have been allowed to cross-examine
5 those witnesses that have testified that we chose to
6 cross-examine. And that's the right that we are
7 asserting right now. I am not saying we are going to
8 cross-examine every single one but we believe we have the
9 right to cross-examine who we wish to cross-examine.

10 JUDGE SMOLEN: If you want to subpoena anybody as
11 your witness you can do that. But that is up to you.
12 But I am limiting it to any new testimony they may give.

13 Now, that is my ruling. And if you want to have
14 reconsideration, file a reconsideration, that is up to
15 you. And you have to do whatever you think is right.
16 But my ruling is based on the way I read the limited
17 remand I am going to hear only evidence on studies which
18 we did not consider in the other case.

19 I am going to hear factual evidence. That is not
20 limiting you from arguing anything you may want to argue.
21 Had you wanted to participate in the other case, then
22 that was the appropriate time to cross-examine those
23 witnesses on that testimony in the other case.

24 MR. HOFFMAN: In the other case. Are you talking
25 about the letter of notification that --

1 JUDGE SMOLEN: I am talking about the case giving
2 rise to this remand.

3 MR. HOFFMAN: Without our knowledge.

4 JUDGE SMOLEN: Giving rise to this remand, the
5 remand which came from the Commonwealth Court, I think.
6 That was on the letter of notification. It went to the
7 Commonwealth Court. The Commonwealth Court remanded it
8 to the Commission. And I call it the other case, meaning
9 it's the same case, but the former portion of it.

10 MR. HOFFMAN: Your Honor, we were directed to be in
11 this case by the Commission. We didn't ask to intervene
12 in this particular case. And the reason for that has a
13 lot to do with the history of the thing and so forth,
14 which is probably not relevant. But the fact remains
15 that what we did or didn't do or might have done is not
16 as significant as the fact that the Commission directed
17 us to intervene in this case nunc pro tunc.

18 We understand that that is your ruling and we have,
19 of course, a right to pursue review of that ruling if we
20 chose to.

21 JUDGE SMOLEN: Okay.

22 MR. BONNEY: Your Honor, let me point out I
23 disagree with Mr. Hoffman's characterization about the
24 Commission's action. I believe --

25 MR. HOFFMAN: Who's speaking, Your Honor?

1 JUDGE SMOLEN: This is Mr. Bonney, is it not?

2 MR. BONNEY: Yes, it is.

3 JUDGE SMOLEN: Go ahead. Mr. Hoffman didn't know.

4 Let me put it this way. When Counsel makes a
5 remark let them state their name first so that everyone
6 knows who is speaking.

7 Go ahead, Mr. Bonney.

8 MR. BONNEY: I just wanted to clarify that it is my
9 understanding from reading the Commission's order, and I
10 am referring to Footnote 5 at page 19 as well as Ordering
11 Paragraph 4 that the Commission had granted the Trial
12 Staff leave to participate. They did not, as far as I
13 can tell, direct them to participate. So if that is
14 significant in any way, and it appears to be to the
15 argument that Mr. Hoffman is making, then I think his
16 characterization was, perhaps, incorrect.

17 MR. HOFFMAN: Your Honor, Mr. Hoffman.

18 JUDGE SMOLEN: Yes.

19 MR. HOFFMAN: There is a specific statutory
20 provision which permits OTS, and for that matter the Law
21 Bureau, as I recall -- maybe not the same provision, but
22 the Law Bureau has the same right -- to file exceptions
23 in matters where they were not a party. So that is how
24 we filed exceptions in this case, pursuant to that
25 statutory authorization, first of all.

1 JUDGE SMOLEN: Well, is it your view that merely by
2 filing exceptions to the case you have a right to reopen
3 the case and cross-examine the witnesses that have
4 already been cross-examined and excused as witnesses?

5 MR. HOFFMAN: No. As a matter of fact my view was
6 that that didn't give us any rights at all. We filed
7 exceptions under the statutory provision and that's all
8 we did at the time and that is what we were authorized to
9 do by that statutory provision. Subsequent to that the
10 Commission decided that we should be granted
11 intervention, although we didn't ask for it, and it would
12 be nunc pro tunc. That is the Commission's wishes, Your
13 Honor.

14 JUDGE SMOLEN: All right. I have made my ruling or
15 at least my interpretation of this remand order and OTS
16 has to do whatever it deems advisable to do to further
17 its position.

18 MR. BONNEY: Your Honor, this is Paul Bonney.
19 Would you be interested in our response to your
20 initial question?

21 JUDGE SMOLEN: Yes, go ahead.

22 MR. BONNEY: One of the reasons we had proposed the
23 schedule we did was, as we state also in our prehearing
24 conference memo, our belief that the Protestants and
25 other similarly situated parties have the burden of going

1 forward.

2 JUDGE SMOLEN: I am going to stop you at that
3 sentence, but I am going to let you continue. Because I
4 want you to consider this question.

5 Is this remand -- let me put it this way -- really
6 in the nature of a mixed rulemaking as well as an
7 adjudicatory process? And if the B part, namely,
8 standards, is rulemaking what is your view on burden of
9 proof on rulemaking?

10 The A part may be more adjudicatory in the sense
11 that there are adverse parties on both sides. There are
12 adverse parties in the rulemaking also, but I think A is
13 more adjudicatory and B is more rulemaking.

14 Do you have any view on that? Let's turn back.

15 MR. BONNEY: Yes, Your Honor. Thank you.

16 I think although it appears that B may sound like a
17 rulemaking it is clear that it is with respect to this
18 line only and as a consequence I believe they are looking
19 for adjudication ultimately of whether this line should
20 be energized. For that reason I believe it is more in
21 the nature of an adjudication and they are looking for a
22 factual determination here.

23 I would also add that even if it were a rulemaking,
24 I think that each party would have the burden of proving
25 the position that they intend to take forward. And that

1 ties in to my earlier comments, and that is we have not
2 yet heard the positions of any of the other parties with
3 respect to the remand. And it may well be that they have
4 not yet developed their positions. So it's difficult if
5 not impossible for us to respond to that, which we think
6 given this remand we are in a responsive mode, as we were
7 before.

8 JUDGE SMOLEN: Well, that is why I thought -- by
9 not having a simultaneous filing of testimony on the
10 remand is not PECO really getting a double shot at
11 rebuttal? Namely, rebutting -- by calling it direct
12 testimony, rebutting the testimony which you would
13 require Protestants to produce and then having a further
14 opportunity of oral rebuttal. That is the thing that
15 occurred to me.

16 MR. HOFFMAN: Your Honor, Charles Hoffman, Officer
17 of Trial Staff.

18 We have not gotten a chance to respond to this. We
19 object to that procedure.

20 JUDGE SMOLEN: Which procedure?

21 MR. HOFFMAN: We think they have the burden of
22 proof, the utility, and they should go forward first. I
23 don't think there is any question that they have the
24 burden of proof in this application.

25 As far as your coment before --

1 JUDGE SMOLEN: Wait, wait. Just a minute,
2 Mr. Hoffman.

3 MR. HOFFMAN: I would like to address that other
4 point, too.

5 JUDGE SMOLEN: Yes, you can.

6 You have to take this a step backward to place this
7 case in proper perspective as against the Duquesne case.
8 Now, it is clear, and I am not the Judge in the Duquesne
9 case, but whatever the burden of proof in the Duquesne
10 case is or was is different than in this particular case
11 because in this particular case we had the Commission
12 approving the line and then the Protestants securing a
13 court order from the Commonwealth Court whereby the
14 burden which was previously ruled on in this case, the
15 burden was placed upon the Protestants to demonstrate
16 adverse health effects.

17 So, by reason of the different posture of this case
18 you may want to reconsider the burden of proof comments
19 that you want to make. This is not really based on an
20 application whereby the utility would have had a burden
21 of proof of proving the elements of their application.

22 And, as a matter of fact, in this case I did rule
23 that the utility had the burden of proving those elements
24 which were contained in the letter of notification
25 regulations, but that the Protestants had the burden of

1 proving the adverse health effects as I interpreted the
2 Commonwealth Court order remanding it to the Commission.

3 So we have a little different posture than in the
4 Duquesne case and in the ordinary application case.

5 MR. HOFFMAN: Your Honor, we did not participate,
6 of course, at that point in time. Had we participated
7 you would have gotten some arguments that you may or may
8 not have considered on some of these issues.

9 But let me just tell you from my review of the
10 record in this case, what I think happened here, I think
11 this is essentially almost a comedy of errors. It
12 started out as a letter of notification and it turned out
13 to be something I think totally inappropriate for a
14 letter of notification and it should have ended up a full
15 blown siting application.

16 I completely disagree with your ruling that I had
17 no standing to challenge that the burden somehow shifted
18 to the private citizens, to the Protestants --

19 JUDGE SMOLEN: That was the Commonwealth Court.

20 MR. HOFFMAN: -- because of --

21 JUDGE SMOLEN: That was the Commonwealth Court. I
22 didn't make that decision. The Commonwealth Court said
23 the Protestants have the burden of showing.

24 MR. HOFFMAN: My recollection was that they gave
25 them a hearing on health effects. I didn't recall that

1 that was explicitly stated in the Commonwealth Court's
2 order. If that is the case, I apologize.

3 JUDGE SMOLEN: I don't know that it was explicitly
4 stated either. But that is the way I ruled. Nobody as
5 far as I know appealed.

6 Hold on for a minute. Is Mr. Sugarman still on the
7 phone?

8 (No audible response.)

9 JUDGE SMOLEN: My secretary has passed me a message
10 that somehow Mr. Sugarman was cut off and he is on one of
11 our other lines. He called back on another line.

12 Can you folks hold for a minute? I'm going to see
13 if I can get Mr. Sugarman back in here. So hold on. If
14 we are disconnected, I don't know what we are going to
15 do. Hold on just for a second.

16 (Pause.)

17 JUDGE SMOLEN: I think Mr. Hoffman was speaking.

18 MR. HOFFMAN: Your Honor, I have a copy of Judge
19 Palladino's remand order. I just want to read a few
20 things to you from it.

21 JUDGE SMOLEN: I don't want to reargue it. I've
22 already ruled on that.

23 MR. HOFFMAN: Well, if we are going to intervene
24 nunc pro tunc then we totally disagree with this ruling
25 and ask you to reconsider it.

1 JUDGE SMOLEN: It's done and I will not reconsider
2 it.

3 MR. HOFFMAN: May I make a brief statement in this
4 regard?

5 JUDGE SMOLEN: Yes.

6 MR. HOFFMAN: The order says, "It is clear to the
7 Court that the letter of notification process of 52 Pa.
8 Code, 57.72(d) under which Philadelphia Electric Company
9 proceeded before the PUC did not contemplate the fact
10 matrix before this Court," et cetera, et cetera. And
11 then they go on to remand the thing for a hearing on the
12 issue -- "this Court concludes that the petitioners are
13 entitled to a hearing on the question of whether they
14 will be adversely affected by the reconductoring of the
15 high tension electric line at issue in this case.
16 Consequently this Court orders this case remanded to the
17 PUC to hold a hearing on this issue within 90 days from
18 the date of this order."

19 JUDGE SMOLEN: So the Protestants went forward to
20 attempt to show adverse effects.

21 MR. HOFFMAN: Why would the protestants have to
22 prove adverse effects if the company is applying for a
23 right to site this transmission line?

24 JUDGE SMOLEN: Because the company didn't make an
25 application. The company filed a letter of notification.

1 That's why.

2 MR. HOFFMAN: And they knocked that process down,
3 essentially, in this order.

4 JUDGE SMOLEN: Say again?

5 MR. HOFFMAN: The Judge essentially rejected the
6 Commission's permitting the company to proceed by letter
7 of notification. It found that there were people out
8 there who should have had their day in court.

9 JUDGE SMOLEN: And the Commonwealth Court ordered
10 their day in court and gave them their day in court and
11 they proceeded with their testimony.

12 MR. SUGARMAN: Your Honor may recall that in fact
13 Your Honor split that. I remember we first --

14 JUDGE SMOLEN: Yes, we did split it. I said before
15 we split it. You would go forward with your adverse
16 effects and the company would go forward with the other
17 items required in the letter of notification.

18 MR. SUGARMAN: I don't remember it exactly that
19 way, but I was going to say that the problem that we had
20 -- and I remember participating in that one by a
21 conference call from an airport in North Carolina -- was
22 that the Commission had issued an order.

23 JUDGE SMOLEN: That's right. There is also a
24 Commission order. You are correct.

25 MR. SUGARMAN: And the Commission order in my

1 judgement at the time and in my judgement today
2 misconstrued and misapplied the Commonwealth Court order
3 as a result of which whatever the Commission does here
4 will be out of compliance in our direction, that is to
5 say will not give us what the Commonwealth Court gave us.
6 Because the Commission narrowed the Commonwealth Court's
7 mandate and put it in terms that caused Your Honor to
8 allocate a certain burden of going forward to us. Even
9 so, Your Honor directed that PECO go first and PECO did
10 go first.

11 JUDGE SMOLEN: Yes.

12 MR. SUGARMAN: They put on their case as
13 essentially what they believed they had to put on to
14 prove their application.

15 JUDGE SMOLEN: Yes.

16 MR. SUGARMAN: And then Your Honor held that it
17 would be sufficient for them to prove whatever they
18 thought was necessary. And the way I understood what
19 Your Honor said, it was in essence you put us in a
20 position of raising the health effects issue -- well, the
21 EMF issue to put it more precisely --

22 JUDGE SMOLEN: And land use, also.

23 MR. SUGARMAN: -- as if it were new matter. You
24 limited the whole hearing to the issue of effect.

25 JUDGE SMOLEN: And I think that was based on --

1 again perhaps I omitted a fact -- not only the
2 Commonwealth Court order but as Mr. Sugarman correctly
3 points out, the Commission remand order.

4 MR. SUGARMAN: And I thought at the time and I
5 still think the Commission remand order does not comply
6 with the mandate from the Commonwealth Court. But Your
7 Honor is not the Commission.

8 JUDGE SMOLEN: Exactly.

9 MR. SUGARMAN: That has been my concern all along.
10 But I would like to come back to where you were
11 when I lost my voice.

12 JUDGE SMOLEN: Go ahead.

13 MR. SUGARMAN: That was in the middle -- I believe
14 I was trying to find out who was speaking.

15 JUDGE SMOLEN: Mr. Hoffman was.

16 MR. SUGARMAN: I believe it was Mr. Watson or --

17 JUDGE SMOLEN: "No. It was OTS. It was Mr.
18 Hoffman.

19 MR. SUGARMAN: No. Before that is when I lost my
20 voice. A long statement was made by somebody that we had
21 the burden of going forward.

22 JUDGE SMOLEN: Mr. Bonney.

23 MR. SUGARMAN: Okay.

24 That was not Your Honor's ruling. That was not the
25 Commission's ruling. That was not the Commonwealth

1 Court's ruling.

2 What Your Honor did, as I recall, was that you put
3 us in the position of raising what we wanted to raise by
4 way of response after PECO put on its case.

5 JUDGE SMOLEN: That's right.

6 MR. SUGARMAN: And so PECO had the burden of going
7 forward. It still has the burden of going forward, if
8 there is any burden at all at this time. And therefore
9 just as PECO had to produce its written testimony first
10 as it has in all application cases, it should do so on
11 this remand because that is what the procedure is when a
12 party submits an application.

13 We don't want to do anything. We are not trying to
14 build anything anywhere. We are not asking for any
15 permission from the Commission to do anything.

16 JUDGE SMOLEN: But you are reopening the old case
17 rather than following the remand order: receiving
18 evidence and comment regarding all studies of the health
19 effects of magnetic fields which are available on or
20 before the hearings, on or before the hearings commence.

21 MR. SUGARMAN: I am not trying to --

22 JUDGE SMOLEN: What you are suggesting, then, is
23 that PECO put in evidence contrary to its position, or
24 seemingly contrary to its position.

25 MR. SUGARMAN: Well, PECO has the responsibility to

1 do what any party would have to do on remand, which is
2 that certain issues have been decided. The Commission
3 has decided that there is sufficient reason --

4 JUDGE SMOLEN: To consider new evidence.

5 MR. SUGARMAN: I beg your pardon?

6 JUDGE SMOLEN: To consider new studies or any other
7 studies not previously considered.

8 MR. SUGARMAN: Prior to that, however, in the
9 Commission's order, prior to dealing with that subject,
10 the Commission clearly reaches a conclusion based on the
11 prior evidence. It does not indicate any desire to
12 rethink that conclusion. The only issue that is open at
13 this time is the remedy. And the extent of the remedy is
14 what the Commission is asking Your Honor to hear evidence
15 on. And the Commission has decided in its opinion that
16 Your Honor was right, that there is sufficient evidence
17 of electromagnetic fields being unsafe, that people have
18 a reasonable basis for fear, and that in turn has an
19 adverse effect on them. And they make that very clear in
20 their opinion.

21 And they further suggest that that discussion --
22 that discussion is at page, basically, 19 of the
23 Commission's opinion. It says --

24 MR. BONNEY: On the Commission order?

25 MR. SUGARMAN: It says, "In general, however, we

1 cannot conclude as does the Law Bureau that Protestants
2 concern, if not fear, is unfounded. We shall accept the
3 ALJ's conclusion as to the reasonableness of Protestant's
4 fear concerning potential health effects of EMF,
5 generally, and to a lesser extent their fear of EMF from
6 the subject line."

7 Now they go on to say what the remand is all about.
8 "However, by accepting the ALJ's conclusion on this issue
9 we do not endorse his ultimate recommendation as to the
10 delay in the energization of the line at this juncture.

11 "The major issue in this matter may well concern
12 the development of a prudent policy concerning the
13 mitigative effects." And then they go on to talk about
14 the different approaches to mitigative effects.

15 And at the bottom of page 20 they say, "Prior to
16 the adoption of the I.D." -- that's Your Honor's --
17 "recommendations concerning some of the mitigative
18 measures," that is where --

19 JUDGE SMOLEN: Keep going.

20 MR. SUGARMAN: They are saying we are greatly
21 concerned that the parties have not addressed the Swedish
22 study.

23 JUDGE SMOLEN: Exactly.

24 MR. SUGARMAN: I take a little umberage at that
25 since the Swedish study had come out at a time when the

1 Commission had closed the record.

2 But in the event, they then say, "We note that the
3 record concerning EMF has been extensively developed, but
4 prior to our disposition of the instant matter we shall
5 direct a limited remand."

6 And they say, "We cannot go on forever in hope that
7 the next piece of evidence or study will resolve the EMF
8 question once and for all."

9 And while they don't make the direct words that the
10 scope of Your Honor's remand is limited to remedy, when
11 you read the two ordering paragraphs, that is what it
12 says. It says determining -- they are asking Your Honor
13 to give them the benefit of Your Honor's views on the new
14 evidence in paragraph A.

15 JUDGE SMOLEN: Yes.

16 MR. SUGARMAN: And then they are asking you to make
17 a determination what if any standards should exist for
18 right-of-way width for the line. And so it is clear to
19 me that they have adopted Your Honor's conclusion that
20 the fears are not unreasonable. They are not intending
21 to reopen that conclusion. But what they are intending
22 to do is to use the new information in scoping a remedy,
23 and that is what they are asking Your Honor to address
24 yourself to, that.

25 JUDGE SMOLEN: In this regard I don't think that

1 scoping a remedy is limited only to new information.

2 MR. SUGARMAN: I agree with that. I absolutely
3 agree with that. They are asking you to consider the new
4 information and give them the benefits of your thinking
5 and then they are asking you to write a determination on
6 a remedy which would be presumably based on the new
7 information and whatever Your Honor draws from the old
8 information.

9 JUDGE SMOLEN: Right.

10 MR. SUGARMAN: The point that I would be making, I
11 am coming back to the burden of going forward, is that we
12 are in the position of a party which has prevailed on the
13 issue of, I will say, liability, to borrow an analogy,
14 and now the issue is the question of what is going to be
15 the remedy. And since PECO is the Applicant, just as
16 they have been told now by the Commission that the EMF
17 issue does give rise to effects on our people, on my
18 people --

19 JUDGE SMOLEN: No, no. Just a minute. You are
20 saying EMF issue. But I think the Commission, perhaps,
21 defines it as uncertainty gives rise.

22 MR. SUGARMAN: I agree with that.

23 JUDGE SMOLEN: Okay. The uncertainty. Because
24 your comments are postured in the light of that the
25 Commission has found EMF causes adverse health effects.

1 MR. SUGARMAN: If I said that I did not mean to.
2 What I meant to say was that the data that exists
3 regarding EMF gives rise to a reasonable concern and
4 fear.

5 JUDGE SMOLEN: Based on the uncertainty of that
6 data.

7 MR. SUGARMAN: I beg your pardon? -- Yes. Well,
8 the uncertainty.

9 JUDGE SMOLEN: Okay. Now we are on the same track.

10 MR. SUGARMAN: And I think they completely endorsed
11 Your Honor's finding in that regard. Then they go on to
12 say, all right, what are we going to do about it? So my
13 point is when we get to the what are we going to do about
14 it --

15 JUDGE SMOLEN: So isn't the question now thrown
16 open to all the parties? What are we going to do about
17 it now? Let's hear evidence on any new studies or
18 studies we haven't heard before and let's see if there
19 should be any standards.

20 MR. SUGARMAN: And my point is that PECO, having
21 been told now that there has to be consideration of a
22 standard is in the same position as they would be if the
23 Commission had, again by analogy, if the Commission had
24 found that the right-of-way was too narrow because it
25 didn't adequately deal with poles falling over. Now the

1 question is -- or it might not. So therefore the
2 question is should the right-of-way be wider. And since
3 PECO is the one seeking to build here, they are the ones
4 that have to prove in the first instance what the width
5 of the right-of-way should be. If they want to contend
6 that it does not have to be any wider than it is now,
7 that is up to them. If they want to contend it should be
8 20 feet wider, that is up to them.

9 And then we have to respond. How can we respond
10 when PECO has not told us what their position is going to
11 be given the decision made by the Commission?

12 This is not an unique case where one issue has been
13 decided and other issues remain to be decided. That
14 happens all the time before the Commission. And the
15 Commission has told you this is the present status: we
16 endorse Judge Smolen's determination that the fear is
17 reasonable. Now what are we going to do about it?

18 JUDGE SMOLEN: No one is taking away your right to
19 respond.

20 MR. SUGARMAN: I know you're not.

21 JUDGE SMOLEN: Wait a minute.

22 And the fact that direct testimony may be required
23 to be filed simultaneously, that does not give you --
24 that is only for expeditiousness in handling the case.
25 That does not prevent you from responding to their direct

1 testimony at a further hearing for the rebuttals.

2 MR. SUGARMAN: It makes it a Dutch auction, Your
3 Honor. It makes it a Dutch auction.

4 JUDGE SMOLEN: It has been followed in other
5 regulatory proceedings, particularly FERC. I know that I
6 participated in such proceedings. And I don't know that
7 it has been declared to be an improper method of
8 procedure. Everybody files their direct testimony,
9 everybody has a chance to respond to that testimony.
10 That doesn't really necessarily negate any arguments on
11 burden of proof that have been made by anybody here.

12 MR. SUGARMAN: Except, Your Honor, it puts us in
13 the position of presenting evidence in the first instance
14 to meet something that we don't know what we are meeting.
15 That is where it changes the burden of proof. It puts us
16 in a position of --

17 JUDGE SMOLEN: No. I think it may relate to going
18 forward but not necessarily to burden of proof.

19 MR. SUGARMAN: You are saying, Your Honor, we
20 should take the position on how many feet wider the
21 right-of-way should be before we know what PECO's
22 position is?

23 JUDGE SMOLEN: I am saying that all direct
24 testimony should be filed at the same time.

25 MR. SUGARMAN: And that means that we have to take

1 a position on what the width of the right-of-way should
2 be before we know what PECO's position is.

3 JUDGE SMOLEN: I don't know what it means that you
4 have to say. But I don't see anything wrong with having
5 testimony filed at the same time.

6 Let's hear what the Law Bureau has to say. Did you
7 comment on this yet?

8 MS. BURKET: We have not stated our position on
9 this. But listening to the argument on all sides, I
10 believe it would be fairer as the Judge and OCA have
11 suggested to have simultaneous filing of the testimony.
12 It just seems like a quicker approach and a fairer
13 approach, and we would support that --

14 MR. SUGARMAN: Fairer to whom?

15 MS. BURKET: -- scheduling.

16 MR. SUGARMAN: Fairer to whom?

17 MS. BURKET: To everyone.

18 MR. SUGARMAN: It's not fairer to me. It is fairer
19 to me to know what the Applicant is requesting before I
20 have to respond to it. So please don't say fairer to me.
21 Maybe it is fairer to PECO.

22 MS. BURKET: Well, okay.

23 MR. HOFFMAN: It is certainly fortunate that PECO's
24 doesn't have to argue their own case in this matter.
25 This is Mr. Hoffman.

1 MS. BURKET: Yes, Chuck.

2 MR. HOFFMAN: Let's see what they have to say.

3 JUDGE SMOLEN: I think Mr. Bonney already said it
4 in his --

5 MR. HOFFMAN: Between you and the Judge we don't
6 even have to talk to them.

7 JUDGE SMOLEN: In his prehearing conference memo he
8 stated that he wants the Protestants to go first and they
9 to go second. And I have changed that, or suggested a
10 change. If anyone were arguing for PECO, they would go
11 along with what PECO says in its proposed schedule. But
12 I have not heard anybody do that except PECO.

13 MR. HOFFMAN: Mr. Hoffman for OTS.

14 I just had this prehearing memorandum handed to me,
15 at least that's what I believe it is. I have not been
16 able to read it in the middle of this purported -- well,
17 in the middle of this conference call. I think we should
18 have a real prehearing conference, Your Honor. It is
19 obvious there are a lot of issues here that need to be
20 thrashed out.

21 JUDGE SMOLEN: I believe this is a real prehearing
22 conference.

23 MR. FRAZIER: In person and with time to respond.

24 JUDGE SMOLEN: There is no time with respect to a
25 prehearing conference. We are discussing the issues

1 here, the procedural issues. Not necessarily merits
2 issues. That is for the testimony.

3 Here is a prehearing schedule which was proposed by
4 PECO. I have not accepted it. I've tried to modify it,
5 and OCA joins, I think, and Law Bureau has.

6 We have not heard from PP&L.

7 MR. DILLON: Yes, Your Honor. There is Jesse
8 Dillon at PP&L.

9 As you know, our participation in this proceeding
10 has been as limited as we can make it. We are attempting
11 to do nothing duplicative in any way and have attempted
12 to continue that in this remand proceeding.

13 I do have one concern with having only one round of
14 testimony submission, and that would be if PP&L chose not
15 to submit testimony at that stage would it still have the
16 right to submit sort of, I guess, we are left with then
17 only oral rebuttal. And I think ordinarily we might
18 choose to do that. We obviously don't know what other
19 parties would submit and we would need to be rebutted.

20 JUDGE SMOLEN: Well, that is why we suggested that
21 there be cross-examination of all witnesses and oral
22 rebuttal.

23 MR. DILLON: And that would include oral rebuttal
24 from PP&L as well even we did not submit direct
25 testimony?

1 JUDGE SMOLEN: I don't hear any objections by
2 anybody.

3 MR. HOFFMAN: Your Honor, OTS.

4 We cannot -- I am going to tell you this
5 unequivocally -- we cannot file testimony on April 21,
6 1993.

7 JUDGE SMOLEN: I didn't say April 21. That is what
8 PECO suggested.

9 MR. HOFFMAN: We are in the transmission line case
10 having EMF hearings over that period of time. There is
11 no way that we can contract for and get testimony in 22
12 days, period.

13 JUDGE SMOLEN: Wait. You are assuming that we
14 adopt the schedule presented by PECO.

15 MR. HOFFMAN: Then I will assume we won't and I
16 won't have any problems.

17 JUDGE SMOLEN: Don't assume anything. And you may
18 have problems. But that is a problem of OTS. You have
19 to recognize we have a remand order that is a mandate by
20 the Commission that we have to do something in 120 days.

21 MR. HOFFMAN: Your Honor, I think you should give
22 some serious thought to presenting something back to the
23 Commission to straighten this proceeding out so that the
24 Constitution is being followed and people are being given
25 due process. There is no reason for railroading this

1 case through the way they are doing it. And I think it
2 has got to be brought to their attention.

3 JUDGE SMOLEN: Mr. Hoffman, you're now an
4 Intervenor nunc pro tunc. So you have to do whatever you
5 want to. I don't know of a judge going back to the
6 Commission telling the Commission that they are wrong,
7 unless it is in a recommended decision or in a initial
8 decision. But you are a party nunc pro tunc, as you have
9 argued. You do what you have to do.

10 MR. HOFFMAN: All right, Your Honor.

11 MR. BONNEY: Your Honor, this is Paul Bonney.

12 JUDGE SMOLEN: Yes.

13 MR. BONNEY: Let me offer something.

14 Upon hearing the comments, we tried to put together
15 a schedule that we thought made sense. It sounds like
16 simultaneous filing will be more in everyone's interests,
17 recognizing the constraints that the other parties and we
18 are under. So we would not at this point object to
19 simultaneous filing.

20 But let me just state a couple of other things that
21 might also expedite this proceeding if we are going to go
22 that way.

23 One comment I have is I think we are going to have
24 a larger rebuttal case and we might want to schedule more
25 than three days of hearings.

1 MR. SUGARMAN: Can I know who is talking?

2 MR. BONNEY: Yes. This is Paul Bonney.

3 MR. SUGARMAN: Okay.

4 MR. BONNEY: I would also ask that you direct the
5 parties to identify their witnesses and perhaps --

6 JUDGE SMOLEN: Your memo, as I read it, is to
7 identify new witnesses, witnesses who have not testified
8 before in this proceeding or the Duquesne proceeding, is
9 that right?

10 MR. BONNEY: Yes. But, Your Honor, I am modifying
11 that now in light of your suggestion of simultaneous
12 filing to have the parties identify the witnesses that
13 they will call sometime in advance, to perhaps in a
14 paragraph list the subject matter of their testimony and
15 the conclusions that they expect to reach and also to
16 list the studies that they will be discussing. That
17 might help.

18 I also just want to mention as with PP&L we may
19 need to call additional witnesses at the rebuttal stage
20 of the case to respond to the direct testimony that is
21 filed simultaneously. In other words, our initial case
22 might be quite limited and our rebuttal case might be
23 larger given this approach, given that we would only then
24 have an opportunity to respond.

25 JUDGE SMOLEN: Well, let me say this --

1 MR. HOFFMAN: Your Honor, that is going to be true
2 of OTS as well.

3 JUDGE SMOLEN: It would probably be true of
4 everyone.

5 MR. SUGARMAN: I object to that procedure. This is
6 Bob Sugarman. That is outrageous. I mean, we have 120
7 days. Why does PECO need -- see, that goes back to the
8 illogic, if I may respectfully say so, of having
9 simultaneous filing. This gives PECO the chance to sit
10 back and wait until the 90th day or the 60th day to put
11 its real case in. That does not make any sense at all
12 because then it is too late for anybody to say anything
13 of any use.

14 JUDGE SMOLEN: Mr. Sugarman, rebuttal is exactly
15 that, rebuttal. They have to put in their direct case,
16 which would set forth whatever position the parties have.
17 Rebuttal is merely rebutting what the other parties say,
18 not to offer new evidence which would not be permissible
19 on an ordinary rebuttal.

20 MR. SUGARMAN: Your Honor, if I understand the
21 normal concept of rebuttal, it is limited to that which
22 could not have been put forward in the first instance.
23 And it becomes material only in light of the unexpected
24 in the opposition's case.

25 Now, here there is no basis for the application of

1 any generosity to rebuttal. We all have all the
2 information that existed as of the time that the record
3 closed in whatever, it was, in the summer --

4 JUDGE SMOLEN: That is precisely why I have
5 suggested simultaneous filing. Because everybody has all
6 the evidence.

7 MR. SUGARMAN: Well, if Your Honor is --

8 JUDGE SMOLEN: Exactly right.

9 MR. SUGARMAN: If Your Honor is suggesting
10 simultaneous filing, I made my position clear on that. I
11 am going past that.

12 If you compound that by giving PECO the right to
13 put it's main case on in a second round, then -- and Your
14 Honor has not said that, I am only responding to what
15 Mr. Bonney has said -- if you do that then you have
16 destroyed any value of having a first round and you have
17 given PECO the opportunity to hold back it guns just like
18 it did the last time.

19 MR. BONNEY: Your Honor.

20 JUDGE SMOLEN: Okay. Mr. Sugarman has made his
21 point. Now, let's hear Mr. Bonney respond.

22 MR. SUGARMAN: I want to finish making my point.

23 JUDGE SMOLEN: All right. Go ahead.

24 MR. SUGARMAN: If we didn't have a time constraint
25 that would not be as objectionable. It would still be

1 objectionable but it would not be as objectionable as it
2 is. Because what it does is it gives PECO the
3 opportunity to hold back its case not only until the
4 second round, but until the 120 days is just about up.

5 JUDGE SMOLEN: Mr. Bonney, do you want to respond?

6 MR. BONNEY: Just briefly. Thank you, Your Honor.

7 I just want to make it clear that that is not our
8 intention. In fact, we identified at page six of our
9 prehearing conference memo that we expect to call
10 Dr. Cole to talk about the epidemiological studies which
11 we expect based on what we know now will be the major
12 thrust of the science case. All I am suggesting is that
13 our rebuttal case, which we intend to follow all the
14 rules for rebuttal, would be larger than it would have
15 been under our proposed approach. And that is just the
16 way rebuttal works.

17 MR. SUGARMAN: We has just taken back what we gave
18 an away, then. He is saying he can come second. He is
19 going to do what he did in the last round.

20 JUDGE SMOLEN: Let me throw this other thought out.
21 In other hearings, and I am relating particularly to
22 FERC, they have and I have participated in them, hearings
23 where they have simultaneous direct written testimony and
24 then simultaneous rebuttal written testimony and then
25 hearings on the whole works.

1 MR. BONNEY: That is acceptable to PECO, Your
2 Honor.

3 MS. McCLOSKEY: Your Honor, this is Tanya McCloskey
4 with the OCA.

5 I just want to join in a point that Mr. Sugarman is
6 making. And perhaps if I understand it, I think what Mr.
7 Sugarman's concern is is that the Commission order
8 specifically gives two things that it wants considered in
9 broad brush terms. It is the new studies and the
10 standards. And I think the concern is that if PECO
11 intends to only put on in its direct case someone who is
12 going to testify on the new epidemiological studies and
13 reserve its testimony on standards, then I think --

14 JUDGE SMOLEN: I don't think -- let's ask
15 Mr. Bonney.

16 MS. McCLOSKEY: Okay. I just think we do have the
17 situation that Mr. Sugarman mentioned, which is
18 prohibited by the rules. I think if we are going to go
19 forward with simultaneous filing it has to be clear that
20 the direct needs to address everything written within the
21 Commission's order that the party intends to address.

22 JUDGE SMOLEN: Let's hear Mr. Bonney.

23 MR. BONNEY: I agree with what Ms. McCloskey was
24 saying and if I misled any of the parties it was by
25 mistake.

1 JUDGE SMOLEN: So you would intend to address both
2 A and B?

3 MR. BONNEY: Yes. We are not sure to what extent B
4 requires testimony. It may be given -- it may be more of
5 a policy question. But we will make that determination
6 and file the testimony we think is relevant.

7 JUDGE SMOLEN: What I am asking is that your
8 current intention, your present intention, is that your
9 testimony would cover -- your direct testimony would
10 cover both issues set forth in A and B?

11 MR. BONNEY: Yes, Your Honor.

12 Let me just if I may make one more responsive --

13 MR. SUGARMAN: The word cover --

14 MR. BONNEY: Excuse me.

15 JUDGE SMOLEN: Address. Let's put it that way,
16 address.

17 MR. SUGARMAN: Even address. I am not quarreling
18 with Your Honor. I just want -- the question is are they
19 going to really put their case in. Because what they did
20 the first time, if Your Honor will recall, was they put a
21 perfunctory case in the first time. They didn't put any
22 of their experts in, and then they put their experts in
23 by way of answer to new matter as if they could withhold
24 their fire, although they had the burden of going forward
25 in the first instance.

1 JUDGE SMOLEN: Would not the suggestion that both
2 direct testimony and rebuttal written testimony filed at
3 the same time by all parties -- I don't know mean the
4 direct and rebuttal filed at the same time -- but all
5 parties file direct testimony and then all parties file
6 rebuttal testimony and then go to the hearings and let
7 all cross-examination on the direct and all
8 cross-examination on the rebuttal take place.

9 MR. SUGARMAN: The key thing is to have PECo put
10 only -- any witnesses that it is going to bring forward
11 should provide their testimony at the time of original
12 direct unless there is no basis that they could have for
13 anticipating that the witness' testimony would be
14 relevant. That is the issue. They cannot put in new
15 expert testimony at the time of rebuttal simply because
16 they want to hold them back to see what we come forward
17 with.

18 JUDGE SMOLEN: Well, I agree there. And I don't
19 think anyone disagrees with that.

20 Does anyone disagree with what Mr. Sugarman said?

21 MR. BONNEY: Your Honor, let me just say this: we
22 did not hold back --

23 JUDGE SMOLEN: We don't want to argue the old case
24 all over again. Let's talk about this one.

25 MR. BONNEY: If you ignore Mr. Sugarman's comments

1 in that regard I would be happy to avoid the issue.

2 We agree we don't hold back here as well, but I
3 don't think we should be limited. If something is raised
4 that is proper for rebuttal we should be permitted to
5 address that. Particularly with respect to standards, I
6 just point out that we have never proposed standards. We
7 don't think standards are appropriate for this line.

8 MR. SUGARMAN: The issue is now are you going to --

9 MR. BONNEY: Let me finish, Your Honor.

10 JUDGE SMOLEN: Go ahead.

11 MR. BONNEY: I would like to say the Protestants
12 have requested standards. And for them now to suggest --

13 MR. SUGARMAN: We requested no line. We requested
14 no line.

15 JUDGE SMOLEN: I don't want to argue this now. We
16 are talking procedure. Let Mr. Bonney finish.

17 MR. BONNEY: The question is whether, if any,
18 standards should be adopted. Our position is that there
19 should none and we have not proposed them. So it is
20 obvious that it is the Protestants that desire a
21 standard. For them to suggest that --

22 JUDGE SMOLEN: Don't characterize what the
23 Protestants want.

24 MR. SUGARMAN: The Commission has determined that
25 there are going to be standards.

1 MR. BONNEY: No, they have not. They have raised
2 the question what, if any, standards are appropriate.

3 MR. SUGARMAN: No, no. They have not said that.
4 That is in the right-of-way width. But in their previous
5 statement at page 19 and 20 they have said what
6 mitigation is appropriate. They are going to give
7 mitigation. They decided that. And you are in a
8 position of a litigant who has lost on the first issue:
9 should there be any mitigation beyond what you have
10 offered. You have lost that issue. Now the question is
11 what do you propose by way of additional mitigation if
12 you want to have a voice.

13 MR. BONNEY: I am disagreeing with that
14 characterization.

15 JUDGE SMOLEN: Yes. I have a question before
16 Counsel and that is simultaneous filing of direct
17 testimony by all parties and then a period of time to
18 elapse and filing of rebuttal testimony by all parties
19 and then hearings.

20 Let me ask OCA.

21 MS. McCLOSKEY: Your Honor, as I stated before, we
22 would not have an objection to that procedure as long it
23 is made clear that PECO is required to put on its entire
24 direct case. If it feels that the answer to the question
25 B is that there should be no standards, that it present

1 that and its reasons in its direct case so that we have a
2 fair shot at the rebuttal and the hearings.

3 MR. BONNEY: Your Honor, we ask that it apply to
4 all parties.

5 JUDGE SMOLEN: It would be to all parties.

6 MS. McCLOSKEY: It would be to all parties but at
7 this point PECO is the only one that I have heard that
8 apparently did not have that intention.

9 MR. SUGARMAN: May I say this, Your Honor? I would
10 like to put PECO on notice that we are going to propose
11 standards. And so they better, if Your Honor, is going
12 to go forward with simultaneous direct testimony --

13 JUDGE SMOLEN: But you are leaving out the
14 simultaneous rebuttal testimony, which would then place
15 all the positions of all the parties before all of the
16 parties and then go to the hearings on all of the
17 testimony, the direct and the rebuttal. Everybody would
18 know what everyone else's position was before you even
19 come to a hearing to cross-examine anyone.

20 MR. SUGARMAN: I understand that, Your Honor. But
21 I still say that a rebuttal, an opportunity for rebuttal
22 is meaningless if the party does not take its position at
23 the time of its direct testimony and support its position
24 with all its intended witnesses. And that is the
25 critical thing.

1 MS. McCLOSKEY: The OCA would concur in that
2 comment by Mr. Sugarman.

3 MR. BONNEY: We would agree, as well, Philadelphia
4 Electric.

5 JUDGE SMOLEN: Then everyone is in agreement here,
6 at least everyone who has spoken on it. I know that OTS
7 doesn't.

8 Let's ask Law Bureau about simultaneous direct and
9 rebuttal. I don't mean -- you know what I mean.

10 MS. BURKET: I understand, Your Honor.

11 I have no objection to it.

12 MR. HOFFMAN: May I ask, are you putting on a
13 witness?

14 MS. BURKET: No. I don't intend to put on a
15 witness. That is why I was kind of hanging on back on
16 the whole issue until the Judge asked me for my opinion.

17 JUDGE SMOLEN: What about PP&L? You didn't put a
18 witness on in the other case. What about here?

19 MR. DILLON: That's correct, Your Honor. We have
20 not made a final determination about witnesses yet. The
21 way it appears to be playing out is it is our goal to do
22 nothing duplicative of anything done by the other
23 parties. It will be difficult for PP&L to know what is
24 duplicative or not given the two rounds of hearings that
25 you propose.

1 JUDGE SMOLEN: No, I didn't propose two rounds of
2 hearings.

3 MR. DILLON: Two rounds of testimony.

4 JUDGE SMOLEN: Yes.

5 MR. DILLON: It would be difficult until we see the
6 testimony for us to know how to not be duplicative.

7 JUDGE SMOLEN: That is a problem that's not an ALJ
8 problem. That is a problem for PP&L.

9 MR. DILLON: Yes, Your Honor.

10 JUDGE SMOLEN: If you want to file direct you can
11 file direct. If you want to file rebuttal, you can file
12 rebuttal. But our case and the going forward and the
13 procedural methodology which we adopt should not depend
14 on whether PP&L is going to sometime decide whether it
15 wants to file testimony or not.

16 MR. DILLON: That is correct, Your Honor. I was
17 merely trying to stress that we are trying to accommodate
18 the other parties in this matter. We are not trying to
19 be aggressive with regards to taking a position here.

20 MR. SUGARMAN: Your Honor, I would object to their
21 filing rebuttal if they don't file direct.

22 JUDGE SMOLEN: Well, we will address that once we
23 decide which way we are going to go.

24 MR. DILLON: If I may respond, if our rebuttal
25 testimony is properly drafted to only contain rebuttal

1 related to testimony filed by other parties and does not
2 assert any new positions, I think that is perfectly
3 proper even if we don't submit direct testimony.

4 MR. SUGARMAN: Your Honor, I think that --

5 JUDGE SMOLEN: I want to pass on that at the
6 moment.

7 MR. HOFFMAN: Your Honor, did you want to hear
8 OTS's position?

9 JUDGE SMOLEN: You might as well spread it on the
10 record.

11 MR. HOFFMAN: Our position would be to do this the
12 way cases are almost invariably done here. I think in
13 this case the burden of proof should be assigned the
14 Applicant, the Applicant should put on its case, the
15 other parties should put on their case afterwards and
16 then there should be a rebuttal-surrebuttal round.

17 We cannot possibly adhere to this schedule that is
18 being proposed here. We don't have --

19 JUDGE SMOLEN: We don't have any dates proposed
20 yet, other than that proposed by PECO.

21 MR. HOFFMAN: Your Honor, obviously your decision,
22 which apparently has been made already, requires us to be
23 ready --

24 JUDGE SMOLEN: I have not made any determination at
25 all.

1 MR. HOFFMAN: All right. Then if you do agree with
2 the Applicant's suggestion we will be required to file
3 testimony at the same time that the earliest testimony is
4 filed.

5 JUDGE SMOLEN: That's not Applicant's suggestion.
6 That is not the company's suggestion at all.

7 MR. HOFFMAN: Whose is it?

8 JUDGE SMOLEN: That is my suggestion in order to
9 speed up this case because of the time frame.

10 Applicant has a different schedule altogether.
11 Look at his prehearing conference memo.

12 MR. HOFFMAN: I understand. They wanted to have
13 everybody else go first.

14 JUDGE SMOLEN: Exactly. And I am saying that that
15 is not the way -- I am suggesting for comment because of
16 the time constraints that everyone file at the same time
17 and then perhaps even everyone file rebuttal at the same
18 time.

19 MR. HOFFMAN: My point is that we don't have a
20 witness under contract unlike, I suppose, everybody else.
21 So we are not going to be able to have a witness under
22 contract and have direct testimony prepared on the kind
23 of schedule that you are obviously contemplating.

24 JUDGE SMOLEN: Well, you're a mindreader, then. If
25 you are a mindreader like that, Mr. Hoffman, maybe you

1 can mindread my ultimate decision in the case. I haven't
2 proposed any time schedule yet.

3 MR. HOFFMAN: Your Honor, you have never tried to
4 obtain expert witnesses as a member of the Office of
5 Trial Staff.

6 JUDGE SMOLEN: I have been a practicing attorney
7 for many, many, many years, probably more than
8 Mr. Hoffman.

9 MR. HOFFMAN: Not in the OTS.

10 JUDGE SMOLEN: No, but in the city solicitors
11 office of the City of Philadelphia, and I have faced the
12 same kinds of problem and it is a logistical problem in
13 your office and that really should not guide -- should
14 not bind the Administrative Law Judge or the presiding
15 officer in a particular case as to how the scheduling of
16 a case should be, particularly where we have a time
17 frame. Had there been no time frame in this case, the
18 120 days, we wouldn't have a problem.

19 MR. HOFFMAN: The time frame is wrong.

20 JUDGE SMOLEN: Well, then, take an action. Take a
21 reconsideration. Do what you have to do. But it is only
22 because of the 120 day time frame that we are having this
23 prehearing conference on such short notice.

24 MR. HOFFMAN: Let the record show it is not any
25 logistical problem in my office. It has to do with the

1 Attorney General. It has to do with comptroller. It has
2 to do with all the processes that have to be gone through
3 before we can contract for an expert witness. And we
4 can't pay him for the work that he does before the
5 contract is final. We just found that out in the
6 transmission line case.

7 JUDGE SMOLEN: Weren't those facts known to you
8 when the motion of -- I don't know who it was, the
9 Chairman, or Commissioner Rhodes, when the motion was
10 made for OSA to prepare such an order as they did on
11 remand for 120 days? Weren't all those facts known to
12 you? Should not that have been transmitted to the
13 Commission at that particular time before this opinion
14 and order was adopted to bring those facts to the
15 attention of the Commission?

16 MR. HOFFMAN: The best of my knowledge, Your Honor,
17 there was nothing said about us being a party to this
18 case at the public meeting. It came as a complete shock
19 to me when I got a phone call from Mr. Bonney, I think it
20 was last Friday afternoon. I had not even seen the order
21 which was circulated that day because I was in hearings
22 all day. So I had no ability to anticipate this.

23 MR. FRAZIER: Any prior knowledge would have been
24 ex parte.

25 JUDGE SMOLEN: Well, from the tenor of your

1 comments, Mr. Hoffman, I assume that you are going to --
2 and it may be an incorrect assumption -- that you are
3 going to take some action to the Commission to expand the
4 120 day limitation.

5 MR. HOFFMAN: I see no other way to comply with
6 their directive to be in this case.

7 JUDGE SMOLEN: I don't have any problems with that.
8 The company may have problems with it. Other parties may
9 or may not have problems with it.

10 But what we are faced with at this time is the
11 order as it stands and until it is changed we have to go
12 along with it. Now, if the order somehow is changed so
13 that there would be no time limit, then we can proceed in
14 a different fashion. But I'm proceeding this way because
15 of the time constraints.

16 MR. HOFFMAN: Right, Your Honor. But you can't
17 expect me to tell you that I can have my testimony on a
18 day what it is not possible. I just have to be honest
19 with you.

20 JUDGE SMOLEN: Well, we have not even chosen a day
21 yet.

22 Let me ask you -- you don't know when you could
23 have it ready?

24 MR. HOFFMAN: I honestly don't know.

25 JUDGE SMOLEN: Are you -- I don't know -- are you

1 in the Duquesne case?

2 MR. HOFFMAN: You mean the transmission line case?

3 JUDGE SMOLEN: Yes.

4 MR. HOFFMAN: Yes.

5 JUDGE SMOLEN: You have experts in that case?

6 MR. HOFFMAN: Yes, we do.

7 JUDGE SMOLEN: At this stage, if you know --

8 MR. HOFFMAN: On line properly, and it took varying
9 lengths of time. You know, when it sits on somebody's
10 desk in some other agency you have no control over it.

11 JUDGE SMOLEN: I know. We have time problems here,
12 as well, shortages of Presiding Officers in this office.
13 I think you know the problem, you having been a former
14 Administrative Law Judge. So you know the problems we
15 are faced with here.

16 MR. HOFFMAN: Yes, Your Honor.

17 JUDGE SMOLEN: And that is the reason, and that's
18 the only reason, why I am trying to get a time frame here
19 that everybody can fit into. And I would ask you as well
20 as all the other parties to give me some idea as to when
21 they could have direct testimony.

22 MR. SUGARMAN: May I suggest this, Your Honor, on
23 that?

24 JUDGE SMOLEN: Go ahead.

25 MR. SUGARMAN: I would suggest that direct

1 testimony be due in 60 days and rebuttal testimony be due
2 ten days thereafter and --

3 JUDGE SMOLEN: That's too long..

4 MR. SUGARMAN: -- ten days after that.

5 JUDGE SMOLEN: Sixty days is too long. Because you
6 have to have brief writing, brief periods. Remember, 120
7 days, you are talking four months. Now, you have eaten
8 up two months with only direct testimony.

9 MR. SUGARMAN: Well, then --

10 JUDGE SMOLEN: Then everyone will say they don't
11 have enough time to file briefs.

12 MR. SUGARMAN: Let me try this: 45 days for direct,
13 ten days for rebuttal and hearings ten days after that
14 and briefs 20 days after the hearings.

15 JUDGE SMOLEN: Well, we have to really have dates
16 certain for this. And I started to work with PECO's
17 suggested dates, not necessarily what is to the left of
18 the date, but just using their dates.

19 Their first date for testimony they have,
20 Mr. Bonney has, is April 21. Now, that is only three
21 weeks.

22 MR. SUGARMAN: Your Honor, there is no way I can
23 meet that.

24 MS. McCLOSKEY: This is the OCA. There is no way
25 we can meet that either.

1 JUDGE SMOLEN: Well, give me some -- 45 days,
2 really, you know, you are losing a quarter of the case,
3 more than a quarter of the time period.

4 MS. McCLOSKEY: Your Honor, as I said -- this is
5 Tanya McCloskey for OCA -- I was only able to contact my
6 consultant this morning and due to other commitments that
7 he has throughout the month of April for testimony filing
8 dates and hearing dates the earliest date he thought he
9 could file any testimony was May 12.

10 MR. HOFFMAN: May 12. And he's under contract.

11 MS. McCLOSKEY: He is not under contract yet
12 either.

13 JUDGE SMOLEN: Mr. Hoffman is laughing. We are all
14 laughing because we are all really pressured. It's not a
15 pressure on any one particular person here. It is
16 pressure on all the parties.

17 MR. SUGARMAN: The only party that has unlimited
18 resources and instant ability to commit them at the
19 expense of the other parties is PECO, that does it at the
20 expense of the ratepayers. Whatever they want they can
21 spend --

22 JUDGE SMOLEN: Wait, wait. We are not arguing in
23 front of a jury, Mr. Sugarman. You don't have to go
24 through that rhetoric. We are looking for a date now.

25 MR. HOFFMAN: But, Your Honor, there is a lot of

1 truth to what he says. They live with this issue
2 constantly. I mean, they are much better prepared. This
3 is their case, this is their application. They are much
4 better prepared to respond than the other parties are.

5 MR. SUGARMAN: I am leading up to a request for
6 funding from the Commission or from PECO. That's what --
7 I wasn't just trying to persuade the jury.

8 JUDGE SMOLEN: You are bringing up other issues,
9 now, funding for Protestants. I think maybe the
10 Legislature thought that was why they created the OCA and
11 the Office of Small Business Advocate. That was supposed
12 to be funding for the public.

13 But I don't want to really get into that. All I am
14 trying to do is focus everyone on dates within the time
15 frame which we have now. If the time frame somehow is
16 changed by further order of the Commission, we can
17 revisit this. We can look at these dates and look at
18 this procedural schedule that we are trying to work out.
19 I'm only trying to work it out within this time frame.

20 Again, I am repetitious, but if there is another
21 time frame which the Commission affords us, we will look
22 at this again and try to work it out some other way
23 giving the parties more time. But this is what we have
24 and we have to live in it. And there is nothing I can
25 do. I am not a magician. I have to live with the order

1 that is in front of me. And I think we all do.

2 MR. HOFFMAN: Your Honor, could I suggest that we
3 adjourn this hearing and maybe resume tomorrow afternoon
4 at two o'clock --

5 JUDGE SMOLEN: No. I am going to be in Harrisburg
6 Thursday and Friday on a rate case, a fully litigated
7 rate case, which I have going on at the same time as
8 this.

9 MR. HOFFMAN: I was going to suggest that maybe if
10 the parties got together maybe they could work something
11 out.

12 JUDGE SMOLEN: Well, I am satisfied to let the
13 parties get together by themselves without me and we get
14 together again on Monday.

15 MR. HOFFMAN: Monday would be fine with OTS.

16 MS. BURKET: Monday we are in Pittsburgh.

17 MR. HOFFMAN: That's true, Ms. Burket. Thank you.
18 They are running together.

19 JUDGE SMOLEN: Off the record.

20 (Discussion off the record.)

21 JUDGE SMOLEN: If you folks want to discuss it
22 Thursday and Friday, a proposed schedule, that is okay
23 with me. And if there is a consensus someone can get
24 back to me on that.

25 MR. HOFFMAN: Maybe a designated spokesperson can

1 get in touch with you while you are in Harrisburg.

2 JUDGE SMOLEN: Well, I'll be in hearings.

3 MR. HOFFMAN: That's what I mean. At the end of
4 your hearing --

5 JUDGE SMOLEN: Well, they can tell me on Monday.

6 MR. HOFFMAN: I beg your pardon?

7 JUDGE SMOLEN: The designated person can tell me on
8 Monday.

9 MR. HOFFMAN: Didn't you say you would be up here
10 Thursday and Friday?

11 JUDGE SMOLEN: Right.

12 MR. HOFFMAN: I was just saying maybe we could
13 catch you while you were in town, if we had agreed, and
14 let you know then.

15 JUDGE SMOLEN: That's okay, if you can catch me.
16 If you catch me -- you know, if you agree Monday is early
17 enough.

18 MR. HOFFMAN: Fine.

19 JUDGE SMOLEN: And if you catch me there Thursday
20 or Friday, that is fine, too, if you agree.

21 MR. HOFFMAN: We will get the word to you if we can
22 agree, I'm sure.

23 JUDGE SMOLEN: Who volunteers -- this is like the
24 Army -- who wants to volunteer to be a designated person?
25 Any volunteers? Good soldiers?

1 MR. HOFFMAN: I'll volunteer.

2 JUDGE SMOLEN: That's Mr. Hoffman?

3 MR. HOFFMAN: Yes.

4 JUDGE SMOLEN: All right, Chuck. Thanks a lot.

5 All right, let's then conclude today with the
6 following comments: the parties are going to attempt to
7 work out a satisfactory schedule keeping in mind the
8 ALJ's suggestions of filing direct testimony
9 simultaneously, possibly rebuttal testimony
10 simultaneously and an extended period of time for
11 cross-examination and any surrebuttal testimony.

12 I might add that that may fare better for the
13 experts. They only have to make one trip in for the
14 entire hearings rather than coming back two times.

15 Also, I want to point out that the date of filing
16 the reply briefs of June 23, 1993, as set forth in PECO's
17 prehearing conference memorandum is a date that I don't
18 want to go beyond. Because this is an important case, I
19 have to have an initial decision in and I need time to
20 consider all the issues and write a decision. I think
21 you have to --

22 MR. SUGARMAN: June 23 or July 23, Your Honor?

23 JUDGE SMOLEN: No. The filing of reply briefs,
24 which is suggested by June 23, which will give me some
25 opportunity to -- there's a lot of briefs that are going

1 to come in, a lot of testimony, et cetera. So I would
2 like that as an outside date for the receipt of the reply
3 briefs.

4 So just keep that in mind as you are attempting to
5 discuss this to work out a procedural schedule.

6 All right. Any final --

7 MR. SUGARMAN: Your Honor, would Your Honor
8 considering based on the results of this prehearing
9 memorandum --

10 JUDGE SMOLEN: No, prehearing conference. Go
11 ahead.

12 MR. SUGARMAN: -- submitting or certifying to the
13 Commission a suggestion for an additional 60 days?

14 JUDGE SMOLEN: I think Mr. Hoffman may be doing
15 that. Why don't you folks discuss that.

16 MR. SUGARMAN: I would certainly join Mr. Hoffman.
17 But if I remember correctly, Your Honor --

18 JUDGE SMOLEN: I'm not sure I have to certify
19 anything. Do I? I really don't know.

20 MR. SUGARMAN: I think you can if I remember
21 correctly. I certainly know with respect to discovery
22 and discovery rulings --

23 JUDGE SMOLEN: Let me ask Mr. Hoffman. Do you
24 recall what the specific rule is?

25 MR. HOFFMAN: Well --

1 JUDGE SMOLEN: I think you are going to file
2 anyway. I don't know and I can't tell you.

3 MR. HOFFMAN: I would just as soon, I think, put
4 together our arguments and submit it that way.

5 JUDGE SMOLEN: I think that is probably the best
6 way and maybe the Commission will rule on it. The
7 parties will have an opportunity to respond, do whatever
8 they want to do.

9 MR. SUGARMAN: All I am asking is if Your Honor
10 would consider, I believe Your Honor has the discretion
11 to certify an order --

12 JUDGE SMOLEN: I don't have any question in front
13 of me to certify. You are making a request of the
14 Commission to extend the 120 days. If you want to make
15 such a request, make it directly to the Commission.
16 Maybe the other parties will join you. Maybe the
17 Commission will take action on it.

18 MR. SUGARMAN: And with respect to my request for
19 partial funding from PECO, for my --

20 JUDGE SMOLEN: Well, that is clearly not within my
21 province or power or authority.

22 MR. SUGARMAN: So Your Honor is directing me -- I
23 don't mean directing me --

24 JUDGE SMOLEN: I am suggesting that you have to
25 take another route to accomplish that desired end.

1 MR. SUGARMAN: I'm sorry?

2 JUDGE SMOLEN: I said you will have to take another
3 route other than through me to attempt to accomplish that
4 end.

5 MR. SUGARMAN: Got you.

6 JUDGE SMOLEN: All right.

7 MR. SUGARMAN: Thank you very much.

8 JUDGE SMOLEN: Let me hopefully urge the parties to
9 work out something right now on the 120 day schedule and
10 if that schedule should be changed by the Commission then
11 we will work out something else.

12 Okay? So with that, we will adjourn today's
13 prehearing and I will hear from someone, either Thursday,
14 Friday or Monday. And that someone will be Mr. Hoffman.
15 All right.

16 MR. HOFFMAN: All right.

17 JUDGE SMOLEN: Then this hearing is adjourned.

18 MR. SUGARMAN: Thank you, Your Honor.

19 (Whereupon, at 12:40 p.m., the telephonic
20 prehearing conference was concluded.)

21

22

23

24

25

C E R T I F I C A T E

1
2 I hereby certify, as the stenographic reporter,
3 that the foregoing proceedings were taken
4 stenographically by me and thereafter reduced to
5 typewriting by me or under my direction; and that this
6 transcript is a true and accurate record to the best of
7 my ability.
8

9 COMMONWEALTH REPORTING COMPANY, INC.
10
11

12 By: 

13 Robert J. Stonaker
14
15
16
17
18
19
20
21
22
23
24
25