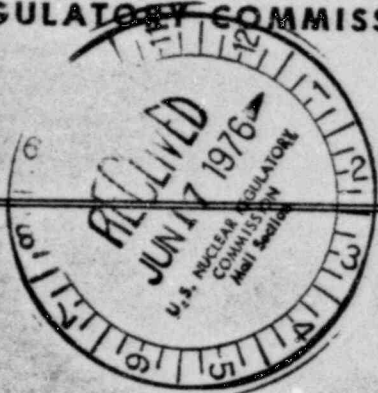


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**NUCLEAR REGULATORY COMMISSION**



**IN THE MATTER OF:**

TOLEDO EDISON COMPANY and  
CLEVELAND ELECTRIC ILLUMINATING CO.

Docket Nos.

(Davis-Besse Nuclear Power  
Stations, Units 1, 2 and 3)

50-346A  
50-550A  
50-501A

and

CLEVELAND ELECTRIC ILLUMINATING  
CO., et al.

50-440A  
50-441A

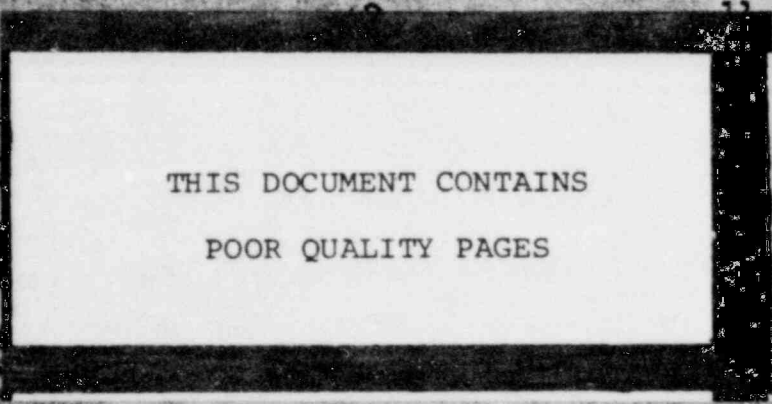
(Perry Nuclear Power Plants, Units  
1 & 2)

Place - Silver Spring, Maryland

Date - Wednesday, June 16, 1976

Pages 11,634

11 759



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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In the Matter of	:	Docket Nos.
TOLEDO EDISON COMPANY and	:	50-346A
CLEVELAND ELECTRIC ILLUMINATING CO.:	:	50-550A
	:	50-501A
(Davis-Besse Nuclear Power	:	
Stations, Units 1, 2 and 3)	:	
	:	
and	:	
CLEVELAND ELECTRIC ILLUMINATING	:	
COMPANY., <u>et al.</u>	:	50-440A
	:	50-441A
(Perry Nuclear Power Plants, Units	:	
1 & 2)	:	
	:	
	:	
-----x		

First Floor Hearing Room  
7915 Eastern Avenue  
Silver Spring, Maryland  
Wednesday, June 16, 1976

The hearing in the above-entitled matter was reconvened pursuant to adjournment at 9:30 a. m.,

BEFORE:

- DOUGLAS RIGLER, Chairman
- JOHN FRYSIK, Member
- IVAN SMITH, Member

APPEARANCES:

(As heretofore noted.)

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C O N T E N T S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>	<u>Voir Dire</u>
Abraham Gerber (resumed)			11,643	11,662	
Dr. Joe D. Pace	11,681	11,686	11,732		
<u>Exhibits</u>		<u>For Identification</u>		<u>In Evidence</u>	
Applicants No. 190 (Testimony of Joe D. Pace.)		11,681		11,632	
Applicants No. 44				11,637	
Applicant (CEI) 65, 66 and 69				11,736	
Applicants No. 191(CEI) (two-page letter, dated Feb. 20, 1976, with 12-page enclosure, from Mr. Guitini to Mr. Reynolds)		11,749			
Applicants No. 192 (two-page letter, dated Jan. 14, 1976, from Reynolds to Hjelmfelt.)		"			
Applicants No. 193(CEI) (letter dated April 13, 1976, from REynolds to Hjelmfelt)		"			
Applicants No. 194(CEI) (letter dated April 14, 1976, from Hjelmfelt to Reynolds.)		"			
Applicants Exhibit No. 195, deposition of Wayne R. Milburn, August 13, 1975.)		"			

ar

C O N T E N T S (Contd)

	<u>Exhibits</u>	<u>For Identification</u>	<u>In Evidence</u>
1			
2			
3	Applicants No. 196 (CWI)		
4	(two-page letter, dated April 18, 1975, from Wayne Milburn to Howard Shapar.)	11,749	
5	Applicants Exhibit 197		
6	(letter dated April 16, 1975, with eight page attachment, from Thomas Cooper to Howard Shapar.)	"	
7			
8	Applicants Exhibit 198		
9	(two-page letter, dated January 15, 1970, from Stafanski to Howley.)	"	
10			
11	Applicants Exhibit 199		
12	(memo dated July 15, 1970, from Bergman to James.)	"	
13	Applicant's (CEI) 200		
14	(one-page letter from Gaskill to Garfoli, Oct. 1, 1970, enclosing two-page letter from Howley to Bergman dated Sept. 30, 1970, and two-page memo from Bergman to Gaskill dated Sept. 30, 1970, and eight-page outage report.)	"	
15			
16	Applicant's (CEI) 201		
17	(Three-page FPC order dated Jan. 10, 1972.)	"	
18			
19	Applicant's (CEI) 202		
20	(Four-page FPC order, dated May 30, 1972.)	"	
21			
22	Applicant's (CEI) 203		
23	(one-page emergency resolution, Cleveland City Council, dated May 10, 1976.)	"	
24			
25			

1	<u>EXHIBITS:</u> (Continued)	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
2	Applicant's (CEI) 204 (Ordinance No. 1389-76, from three pages of Cleveland City Record, May 26, 1976)	11,749	
4	Applicant's (CEI) 205 (1973-1978 capital improvement program of Cleveland City Planning Commission)		"
7	Applicant's (CEI) 206 (1975-1980 capital improvement program, Cleveland City Planning Commission)		"
10	Applicant's (CEI) 207 (Report and reconnaissance of MELP, dated April 26, 1976)		"
12	Applicant's (CEI) 208 (Three-page letter from Kohrman & Jackson to Forbes, dated May 4, 1976)		"
15	Applicants 209 (CEI) (a 3-page letter, dated August 28, 1975, from Kohrman and Jackson to Forbes. )		"
17	Applicants 210 (3-page ltr dated July July 11, 1975, from Glaus, Pyle to Labas.)		"
20	Applicants 211 (CEI) rpt from Ernst & Ernst, Financial Analysis City of Cleveland dated May 29, 1975.		"
22	Applicants 212 (CEI) FPC Complaint FPC v. City of Cleveland)		"
24			
25			

1           If I can't sign the stipulation, because I  
2 determine the facts in the stipulation are not true,  
3 then I believe the manner in which the Department should  
4 proceed is to provide evidence to the Board, evidence  
5 through testimony or documents other than through Mr. White.

6           If the Department believed what Mr. White was  
7 testifying to was erroneous, they were free to cross-examine  
8 him on it.

9           CHAIRMAN RIGLER: Our inclination would be to  
10 sign the subpoena, and then allow you to make a motion  
11 to quash. Perhaps I should hear from the Department first.  
12 It seems on preliminary hearing this morning that there may  
13 be some merit to your position with respect to using this  
14 as an attempt to reopen cross-examination.

15           My inclination probably would be to sign the  
16 subpoena, to permit you to move to quash, in the event an  
17 acceptable stipulation cannot be worked out.

18           MR. STEVEN BERGER: I would bring to the Board's  
19 attention that certainly the signing of the subpoena is not  
20 a pro forma event. Under the rules the Board has  
21 discretion and can require the party seeking the subpoena  
22 to make a certain demonstration of relevance of the testimony  
23 being sought.

24           HCAIRMAN RIGLER: Well, that is true. Let us  
25 reflect on this before we deliver the subpoena.

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1 In the meantime, does the Department have a  
2 response?

3 MR. CHARNO: It certainly isn't customary  
4 to rebut a witness' testimony through his own rebuttal  
5 testimony --

6 I don't think it constitutes an expansion of the  
7 cross-examination, and I don't think it is improper in any  
8 way to do so.

9 I think Mr. White is the witness most centrally  
10 placed, and the one witness who, standing alone, could provide  
11 the testimony necessary as opposed to calling a number of  
12 witnesses from different places.

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arl 1                   CHAIRMAN RIGLER: The question to which he would  
2 be asked to address himself is what was the first delivery  
3 date under the Buckeye agreement by which Ohio Edison delivered  
4 power.

5                   MR. CHARNO: No, the question is Mr. White  
6 testified on cross-examination that the reason that Ohio  
7 Edison service area cooperatives did not receive power  
8 from Buckeye until 1970 was because the Cardinal facilities  
9 were delayed and there was no power available to any Buckeye  
10 member cooperatives anywhere until 1970.

11                   The record as it presently stands shows that in 1968  
12 cooperatives outside of Ohio Edison's area did receive power  
13 from Cardinal and the question becomes one of why there was a  
14 two-year hiatus in the receipt of power by cooperatives in  
15 Ohio Edison's service area.

16                   Whether that was due to a delay in the Cardinal  
17 plant or whether that was due to the conduct of Ohio Edison.

18                   CHAIRMAN RIGLER: What is it that you are asking  
19 Ohio Edison to stipulate?

20                   MR. CHARNO: As to the dates that certain contracts  
21 were entered and that power was delivered in 1968 outside of  
22 the Ohio Edison area.

23                   CHAIRMAN RIGLER: Well, we will hear further argument  
24 on the subpoena, if necessary. It certainly seems to me  
25 that these are factual areas that are readily ascertainable.



1 I cannot imagine why it would not be possible  
2 to stipulate if you can exchange documentary evidence with  
3 the Ohio Edison people. I can't imagine there would be  
4 dispute on the facts. If you have contracts that reflect  
5 certain dates or if you have evidence that power deliveries  
6 were made on certain dates, I would think you would stipulate  
7 to that.

8 MR. CHARNO: That would be our hope.

9 MR. STEVEN BERGER: One further comment, if I may.

10 As I stated in my statement, I certainly am trying  
11 to ascertain whether or not Mr. White testified in error with  
12 regard to that matter. If he did, and the facts are other-  
13 wise, I can assure you that Ohio Edison will enter into the  
14 stipulation.

15 My only point, as I indicated, was if the facts  
16 are not as set forth in the proposed stipulation, it is  
17 inappropriate to call Mr. White. There are representatives  
18 of the co-ops originally on the Department's list. There  
19 are documents, I am sure, the Department may want to put in  
20 for purposes of establishing the facts, but Mr. White is not  
21 the person to do it.

22 CHAIRMAN RIGLER: We understand your position.

23 MR. REYNOLDS: I would like to interject another  
24 matter, if I could. It goes to the question of the Board as  
25 to the schedule next week. We are at the present time endeavoring

1 to obtain an additional witness who will be able to appear  
2 and authenticate the Pennsylvania Economy League report and  
3 be subject to whatever cross-examination the other parties  
4 wish on that score, and tentatively I think the witness  
5 will be available on Monday the 21st, if the Board can meet  
6 that day.

7 MR. CHARNO: The Department would strongly oppose  
8 any further abridgement of the 10-day notice rule. We  
9 will present today, should Applicants formally/<sup>request</sup>to bring a witness  
10 in, a subpoena duces tecum addressed to the Pennsylvania  
11 Economy League. It would be impossible to do cross-  
12 examination of the witness without receiving the documentary  
13 materials requested under that subpoena.

14 We should have opportunity to get a return on that  
15 subpoena prior to the time the witness testifies.

16 MR. LESSY: I note the original Pennsylvania  
17 Economy League study was included with the documents handed  
18 out for one of Duquesne's witnesses, Mr. Fieger. The  
19 document was not used during that examination. No substitute  
20 was provided in accordance with the rules set forth by the  
21 Board for notice.

22 CHAIRMAN RIGLER: This would be a witness who  
23 would testify as to the authenticity of that report.

24 MR. REYNOLDS: That's right, and as to the  
25 membership of the Pennsylvania Economy League and the

1 extent to which -- and address the allegations to  
2 Duquesne Light's purported influence over the activities  
3 of the Pennsylvania Economy League.

4 MR. CHARNO: Would the witness be in a position  
5 to address the preparation of the study in question?

6 MR. REYNOLDS: Our intention is to bring in  
7 the gentleman who prepared the study.

8 CHAIRMAN RIGLER: The Board will discuss it  
9 either during the first break or during the lunch hour.

10 At a minimum, I think we would adhere to our  
11 10-day rule. Whether it would be possible for you to  
12 present a witness at all, I don't know. We will consider it.

13 MR. LESSY: I note in addition that such a witness  
14 was not, according to my recollection, included in the  
15 filings of Duquesne Light for their intended fact witnesses  
16 in the list filed before this hearing started.

17 MR. REYNOLDS: I'm advised that the gentleman was  
18 listed in the list of witnesses.

19 MR. LESSY: What was the gentleman's name?

20 MR. REYNOLDS: Mr. Emery Sedlak.

21 MR. LESSY: Can you spell the last name?

22 MR. REYNOLDS: S-e-d-l-a-k.

23 I suggested the 21st only in that I have the  
24 impression that the Board hoped we could close Applicant's  
25 case as soon as possible.

1 CHAIRMAN RIGLER: That's correct. That is  
2 one of the disturbing things about the request, that it comes  
3 in at this very last minute, so to speak.

4 MR. LESSY: The other possibility this brings  
5 up is if in fact the witness is called in defense of  
6 Duquesne. Aspinwall, we would have a rebuttal witness  
7 on Aspinwall to bring up.

8 MR. REYNOLDS: I understand that.

9 CHAIRMAN RIGLER: The Board will discuss it.  
10 Whereupon,

11 ABRAHAM GERBER

12 resumed the stand as a witness on behalf of Applicants and,  
13 having been previously duly sworn, was examined and  
14 testified further as follows:

15 REDIRECT EXAMINATION (Continued)

16 BY MR. REYNOLDS:

17 Q Yesterday afternoon when we left off, I believe  
18 we were in the middle of a discussion relating to your  
19 reference to destructive competition as it appears on page  
20 9 of your direct testimony, Mr. Gerber.

21 I would like to ask you whether you distinguish  
22 between predatory conduct and destructive competition?

23 A Yes, I do.

24 Q Could you explain to us what your distinction is  
25 between those two terms?

1           A       Yes. I think in part the confusion arose because  
2 I was asked about practices that I would consider  
3 destructive competition and I was trying to develop my view  
4 of practices at the present time, and I was also mindful of  
5 Dr. Wein's testimony regarding what he called the destructive  
6 competition and really would be more appropriately referred  
7 to as predatory practices.

8                   The distinction I draw is as follows:

9                   The destructive competition I had in mind was  
10 the kind of circumstances within an industry such as capital  
11 intensity -- inherent in the industry's character, which  
12 leads to economically appropriate competitive responses  
13 which ultimately result in the destruction of the competitors  
14 and are of such nature that in the electric industry, at  
15 least, as well as some others, have led to a policy determina-  
16 tion that competition would be undesirable and regulated  
17 monopoly would be appropriate.

18                   And this is what I had in mind by destructive  
19 competition.

20                   Predatory practices I would view as those practices  
21 to which I referred yesterday, which would be economically  
22 inappropriate, designed to drive a competitor out of business  
23 and some economically inappropriate or unfair means.

S4  
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1 Q Do you have a copy of yesterday's  
2 transcript in front of you?

3 A I'm sorry, I don't.

4 MR. SMITH: Along that line on page 11631, beginning  
5 at line 12, I think there is an error, either in the way I  
6 phrased the question or the reporting of it.

7 On line 16, where I referred to the demise  
8 of competitors, I intended to say "inefficient."

9 MR. VOGLER: Could we have the page?

10 MR. SMITH: 11631.

11 MR. REYNOLDS: Let me return to that in a  
12 minute, if I might, Mr. Smith, unless you want to follow  
13 up on that.

14 Perhaps we better make sure the witness'  
15 answer comported with your correction.

16 Before I do that I want to follow up for a  
17 minute on this.

18 BY MR. REYNOLDS:

19 Q Look at page 11469, the question and answer  
20 beginning at line 15. When you just now indicated your  
21 understanding of the term predatory practices and referenced  
22 your earlier testimony, did you have in mind the activities  
23 that you referred to on page 11469, in the answer beginning  
24 at line 18 and carrying over to the next page?

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A I would think those are predatory practices.

2 Q Would you then explain to me, if you will, what  
3 competitive processes you had in mind as being present in  
4 the industry at the time you were referencing in your  
5 testimony on page 9, when you talked about intense  
6 destructive competition which led to the intense destructive  
7 competition?

8 A Well, I was referring to the characterizations  
9 of the industry which I had described earlier in that  
10 answer that began on line 7 of page 8.

11 And I had in mind the situation in which there  
12 was duplicative competition.

13 That is more than one utility serving the  
14 same area in which because of economies of scale,  
15 and particularly in those circumstances, short-run economies  
16 of scale, that is with very large capital investment, the  
17 incentive to retain customers, even if prices are driven  
18 down to incremental operating costs which led competing  
19 utilities to permit service, for example, to deteriorate  
20 in an effort to reduce costs and be able to compete  
21 in terms of price more effectively.

22 The destructive financial impacts, the impairment  
23 of the ability to finance at a time when the industry  
24 generally had difficulty in financing, it was not  
25 in its earliest days at least an industry that was viewed

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1 as being a prime investment.

2 It is these kinds of things that led to the decision  
3 that regulated monopoly would be preferable to this kind  
4 of competition which ultimately led to the destruction  
5 of one or both or more competitors and the emergence of  
6 one supplier, in any event.

7 Since there was going to be only one supplier,  
8 the policy determination was that there should be a regulated  
9 monopoly.

10 Q And this is what you intended to convey, when you  
11 made reference to destructive competition at that point  
12 in time?

13 A Yes, what I intended to convey was that the  
14 competitive process itself, given the characterization of  
15 the industry would lead to a monopoly supplier in a given  
16 area.

17 Q Now, yesterday, there was some discussion with  
18 respect to options available to small municipal systems  
19 as alternatives to building a 100 megawatt coal unit.

20 Do you recall that?

21 A Yes.

22 Q I believe you indicated that the other options  
23 were the ownership participation in a large nuclear unit  
24 or unit power purchase of an amount of power out of a  
25 nuclear unit, or the purchase of wholesale power; is that



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correct?

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A Yes.

Q Are those three options available to entities in the Applicants' service areas today?

A As far as I can determine those three options are available to the entities in the CCCT area.

Q Now, the Chairman made reference to some testimony in this proceeding by Dr. Hughes, and I'm paraphrasing, but I believe his question was whether you agreed that the municipalities in the area or the small municipal system should have available to it various options without regard to whether the competitor, investor-owned utility believed it was desirable for that municipality to have the option or not to have it.

MR. LESSY: I believe that is a mischaracterization of the question and answer, Mr. Reynolds.

MR. REYNOLDS: I haven't characterized the answer.

MR. LESSY: I object to your question as stating incorrectly yesterday's exchange between the Witness and the Board.

CHAIRMAN RIGLER: Sustained.

MR. REYNOLDS: I will try again.

I was not trying to mischaracterize the Chairman's question.

I believe that it went to your view of the desirability of making available to other electric systems

bw4

1 whatever options -- let me put it this way --  
2 no, I won't -- whatever options were available in the industry  
3 without regard to one entity might feel to be desirable  
4 for an entity exercising the options to want.

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1 CHAIRMAN RIGLER: That is not yet.

2 MR. REYNOLDS: Maybe you can help me.

3 CHAIRMAN RIGLER: It was making available options  
4 and allowing the companies selecting between and among  
5 these options the freedom to make the wrong choice or to  
6 make the less desirable economic choice.

7 Where your question went astray was that these  
8 options had to be "identical to those of all other companies  
9 in the industry." We concentrated on the desirability of  
10 having a range of possibilities available and on the antitrust  
11 policy of permitting the selector of the option to choose  
12 the one he thought was appropriate even though  
13 someone else felt another option may be preferable for him.

14 BY MR. REYNOLDS:

15 Q All right. Do you recall that?

16 A Yes.

17 Q In response you stated at 11,571, "I agree it  
18 would be undesirable in most cases to arbitrarily limit  
19 any particular parties' alternatives even if the choices  
20 they make are wrong."

21 My question to you is what did you mean by the  
22 phrase "to arbitrarily limit" in response to the question?

23 A Well, I deliberately, very deliberately used  
24 the phrase "to arbitrarily limit" and I emphasize the words  
25 "arbitrarily limit" because I had in mind that there are

1 conditions under which it may be appropriate to limit  
2 options and I think I even followed that statement, further  
3 down on that page, with an example, line 22, where an  
4 entity has a range of options involving only that entity's  
5 own action, it seemed to me a second entity should not  
6 engage in behavior that would restrict that first entity's  
7 options. Where the options involve action or participation  
8 by another entity, then there are circumstances in which  
9 it may be appropriate for the second entity to -- not to  
10 take whatever actions it would require to make the first  
11 entity's options good.

12 That is if the first entity wishes to exercise  
13 an option which imposes an undue cost burden without adequate  
14 compensation on the second entity, it seems to me that would  
15 provide a reasonable business reason for not making the first  
16 entity's option feasible.

17 CHAIRMAN RIGLER: Suppose that the exercise of  
18 the option is done on terms that are fully compensatory, but  
19 that the net result is to enhance the ability of the system  
20 exercising the option to compete with the other system.

21 THE WITNESS: If the option is one that provides  
22 terms that are fully compensatory, the fact that it affects  
23 the competitive relationships is probably not sufficient  
24 reason to deny the option.

25 The one area where I think there may be some

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1 exception to that, and I'm excluding now any other  
2 policy considerations that Congress or regulatory agencies  
3 may impose -- the one possible exception to that may be  
4 where the exercise of the option is to provide the entity  
5 seeking to exercise the option with an opportunity to exploit  
6 a subsidy without necessarily making any contribution  
7 other than the exploitation of the subsidy. If in order to  
8 exercise that option it imposes obligations on the other  
9 entity with whom it may compete.

10 CHAIRMAN RIGLER: Who makes the judgment as to  
11 whether unfair advantage is being gained by taking  
12 advantage, let's say, of a public law or public policy?

13 THE WITNESS: Well, it seems to me that is a  
14 policy judgment that some governmental body would have to make  
15 a determination on, possibly a regulatory agency, or court or  
16 legislative body.

17 CHAIRMAN RIGLER: But we are discussing whether  
18 or not some intervening entity should deny the availability  
19 of the option. You suggested one reason the intervening  
20 entity might deny the option is because the availability  
21 of the option really turns on some public subsidy.

22 Doesn't that put the intervening entity in a  
23 position of judging or second-guessing this public policy?

24 THE WITNESS: At the very least, it seems to me  
25 the second entity would have the opportunity to test that

ar 4

1 public policy.

2 CHAIRMAN RIGLER: By denying the option?

3 THE WITNESS: Possibly by denying the option  
4 and bringing it to issue. Because given the subsidy,  
5 it unbalances the competitive relationships and tends to --

6 CHAIRMAN RIGLER: Wasn't that judgment made  
7 by the legislature or commission or whatever body at the time  
8 they made available the subsidy?

9 THE WITNESS: There are some behavior -- forms of  
10 behavior on which that judgment was not affirmatively  
11 expressed.

12 For example, where access to that subsidy requires  
13 wheeling, there has been no affirmative Congressional or  
14 legislative action to require providing that service, whether  
15 it be from a subsidized source or not, and in fact, my  
16 understanding is that where that question has arisen, and  
17 the question of whether it should be in legislation to  
18 require such wheeling, the Congress has refused to  
19 incorporate that in legislation. So that it would seem that  
20 that may be a legitimate issue on which the entity  
21 being requested to wheel might want to have heard.

22 BY MR. REYNOLDS:

23 Q Mr. Gerber, yesterday in response primarily to a  
24 question by Mr. Smith and I think also during the course of  
25 some of the other testimony, you discussed the role of

1 competition in this industry. Let me ask you, at the wholesale  
2 level, to what extent is there competition between investor-  
3 owned utilities and small municipal systems in Ohio?

4 A I think there is virtually none.

5 Q You say virtually none. Would you please  
6 explain to us what competition you consider there to be?

7 A The competition that there is consists principally,  
8 I think, of the potential of a municipal system, municipal  
9 distribution system or generation, partial purchase system,  
10 installing its own generation to replace purchases from  
11 existing suppliers.

12 MR. SMITH: May I hear that answer, please?

13 (Whereupon, the reporter read from the  
14 record, as requested.)

15 BY MR. REYNOLDS:

16 Q Why is it your conclusion that but for the  
17 situation where a municipality has self-generation, there  
18 is virtually no competition at the wholesale level?

19 A You mean competition between --

20 Q Between investor-owned utilities --

21 A And municipalities. Where a municipality  
22 provides its own generation entirely and can install  
23 surplus generation, it can then seek new markets, wholesale  
24 markets.

25 Where it is fully a distribution system, or only

ar6

1 a partial generation, partial purchaser, it does not  
2 have the power supply that it can offer to a wholesale  
3 purchaser.

4 Q Why do you say it does not have the power supply  
5 to offer to a wholesale purchaser?

6 A If a wholesale -- if a municipality purchases  
7 all its supply at wholesale, then it has no -- by definition  
8 has no surplus capacity to sell.

9 If it buys partially and supplies from its  
10 own generation partially, then to the extent it increases  
11 its purchases, it would reduce its generation presumably  
12 because the purchase would be more economic than the genera-  
13 tion or else if it fully loads its generation, it would  
14 just purchase an amount equal to the difference between  
15 its own generation and its total needs.

16 To the extent it would want to purchase in  
17 excess of its needs from its wholesale supplier, there  
18 would be no basis for competition since it would be  
19 purchasing at a cost from the wholesale supplier which  
20 the wholesale supplier could supply directly to the potential  
21 buyer in any case.

22 So there would be no basis for competition.

23 MR. SMITH: Mr. Reynolds, may I inquire on that  
24 point, or do you want to develop it further?

25 MR. REYNOLDS: I was going to continue, but I will



1 defer to your questions first, if you want. Why don't  
2 you proceed?

3 MR. SMITH: Did you read or were you present  
4 when Mr. Firestone testified concerning price squeeze  
5 problems in the Ohio Edison territory?

6 MR. STEVEN BERGER: Mr. Smith, are you  
7 referring to Mr. Wilson?

8 MR. SMITH: Yes, Mr. Wilson.

9 THE WITNESS: No, I was not, but I did read the  
10 transcript.

11 MR. SMITH: Do you agree with his analysis of  
12 the potentials for municipalities to buy from Ohio Edison  
13 and resell successfully to industrial contracts?

14 THE WITNESS: Yes, I do. We have done similar  
15 analyses and it is the kind of analysis that he provided  
16 that is required before one can determine whether there is a  
17 price squeeze.

18 MR. SMITH: Is that consistent with your  
19 testimony here this morning? Isn't it your testimony that  
20 there is no basis for a municipal to purchase from an  
21 investor-owned utility and resell in competition with the  
22 investor-owned utility?

23 THE WITNESS: No, sir, my testimony this morning  
24 is that there is no basis for a wholesale purchaser from  
25 an electric utility, a bulk power supplier, turning  
around and then competing with that wholesale supplier for

1 wholesale customers, because the wholesale rate at which  
2 he would buy from the supplier would be equally available  
3 to the potential customer he is thinking of serving.

4 MR. SMITH: I see. I didn't understand.

5 You are talking about three levels of selling  
6 potential. From generator to customer to customer  
7 for resale.

8 THE WITNESS: Right.

9 What we have been talking about is the possibility  
10 of a wholesale customer buying something above his needs for  
11 his own retail customers and then in turn selling that to  
12 another wholesale customer, who would resell that power  
13 to the retail customers.

14 That is different than the kind of analysis  
15 that you were referring to.

16 MR. HJELMFELT: Might I ask a clarification  
17 question?

18 When you were talking then about virtually no  
19 competition, you were talking about the wholesale market?

20 THE WITNESS: Yes.

21 BY MR. REYNOLDS:

22 Q What if the municipality made a unit power  
23 purchase of power from the nuclear plant which was in excess  
24 of its needs?

25 A If the wholesale customer made a unit power

1 purchase, there would be no basis for competition because  
2 the cost of the nuclear power then would be identical  
3 to the cost to everyone else who obtains power from that  
4 particular nuclear unit.

5 In fact, given that the cost of nuclear plants  
6 being added today exceeds the average imbedded costs and  
7 wholesale rates are determined on the basis of average  
8 imbedded cost, power purchased on a unit power basis from a  
9 nuclear plant would have to be sold at a higher cost than  
10 existing wholesale rates if it were to recoup the full cost of  
11 that power.

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bw2 1 subsidy or financial advantages, whatever you want to call  
2 it that the municipal system would have compared to the  
3 investor-owned system.

4 Q Would you look at page 11631 of your transcript.  
5 Mr. Smith has indicated at line 15, that the word "efficient"  
6 should be "inefficient" in that line.

7 If you will read your answer and indicate whether  
8 you understood the question as it has been corrected now  
9 in giving the answer therewith.

10 A The word --

11 Q On line 15. The line is "demise of efficient  
12 competitors."

13 It has been corrected to read "demise of  
14 inefficient competitors." I'm really, for clarification  
15 purposes, asking you if you will read your answer to assure  
16 us that it conforms to a response that would be given to the  
17 question as it has now been corrected.

18 A Yes, as I recall this exchange, I understood  
19 the word Mr. Smith used was "inefficient."

20 That is the way I heard it, and that is the way  
21 I responded.

22 It is the transcript that is incorrect.

23 MR. REYNOLDS: That is how I understood your  
24 answer to.

25 I don't have anything further.

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MR. CHARNO: The Department has limited  
2 recross examination.

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CHAIRMAN RIGLER: While we are clearing up the  
4 way the Witness answered, can we check something.

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arl 1 CHAIRMAN RIGLER: On the question pending on page  
2 11,605, we have ascertained that line 25 is incomplete  
3 and two words should be added, those words being "were less."  
4 So that the line would read, "During the last 50 years  
5 during which incremental costs were less."

6 My suggestion is we all pencil that in, in the  
7 present transcripts and the reporter will arrange to have the  
8 record copy corrected.

9 Mr. Reynolds, did you locate your transcript  
10 corrections?

11 MR. REYNOLDS: There are several. I think most  
12 of them --

13 CHAIRMAN RIGLER: Let's not worry about the  
14 inconsequential one.

15 MR. REYNOLDS: There is one I would like to make  
16 now because I don't think the context leads itself to  
17 picking it up later. It is on 11,572, line 23, it is a  
18 question by Mr. Charno, and I believe that the figure there was  
19 \$1.05 rather than \$1.75.

20 MR. LESSY: Is there a question mark after less in  
21 in the last question we went over?

22 CHAIRMAN RIGLER: Mr. Charno.

23 RECROSS-EXAMINATION

24 BY MR. CHARNO:

25 Q I would like to address your attention to your

1 testimony of yesterday, pages 11,623, lines 3 through 9.

2 A Yes.

3 Q Mr. Gerber, is it your testimony that you  
4 consulted the materials listed in that answer prior to the  
5 submission of your direct testimony?

6 A To the best of my recollection. Although  
7 there may be some things that I looked at afterwards, I didn't  
8 stop looking once my testimony was submitted. I would like  
9 to, as long as we are at that, point out on line 8, it is  
10 not the facts council of the Borough of Aspinwall, it is  
11 facts by the Council of the Borough of Aspinwall. It is a  
12 two-page publication issued by the Borough of Aspinwall  
13 indicating why they decided to sell the system to Duquesne.

14 Q Do you recall being requested on or about November  
15 24, 1975 to provide your back-up materials for your testimony  
16 including "all documents, data, memoranda, studies, et cetera,  
17 leading to the conclusions with respect to the reasons  
18 municipalities sell their electric systems"?

19 A I recall the request, although I don't recall the  
20 exact dates.

21 Q Would you believe that the materials listed on  
22 page 11,623 would fall within the request for back-up  
23 materials that I just read?

24 MR. REYNOLDS: Are you calling for a legal  
25 conclusion?

1 MR. CHARNO: I presume he responded to that  
2 request. I'm asking whether he would have included these  
3 materials.

4 THE WITNESS: I would hope that everything I  
5 have indicated there would have been provided if it were  
6 available at that time.

7 BY MR. CHARNO:

8 Q If it were not provided at that time, would that  
9 indicate you had not used it as a basis for your direct  
10 written testimony?

11 A I would think that anything that was not  
12 provided at that time was not available prior to the  
13 preparation of the written testimony. I have an indication  
14 here that there was some newspaper articles referring to  
15 Aspinwall that were received after the request. So  
16 apparently there was some newspaper articles that were not  
17 available at that time that I did not supply.

18 Q Can you testify that you supplied any materials,  
19 any back-up materials other than the report of the Pennsylvania  
20 Economy League relating to Aspinwall?

21 A I just don't recall what it was I supplied.

22 As a matter of fact, as I recall, I didn't even see  
23 what was supplied prior to the time it was sent to you  
24 because I was out of town, away from my office, and it had to  
25 be put together and sent to you without my having had an



1 opportunity to receive it.

2 MR. CHARNO: I would like to request that  
3 counsel of the Applicants make a determination of the  
4 materials that were supplied concerning Aspinwall so that  
5 we can clarify the record as to what the witness relied  
6 upon with respect to his conclusions concerning Aspinwall.

7 MR. REYNOLDS: I would be glad to do that. I can  
8 state now that the reference to facts, that document was among  
9 the material turned over, the report was turned over.  
10 There was other material in the pile that was turned  
11 over and I will provide additional copies or second copies  
12 to the Department of Justice again. We have the file here  
13 and it is a question of leafing through it.

14 We have a duplicate set of what we turned over.  
15 Looking through it, the document entitled "Facts" is  
16 one of the documents among it. There are some other clippings  
17 as well as the report of the Pennsylvania Economy League.  
18 We can get a full submission for you and we will get you  
19 second copies of that material.

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CHAIRMAN RIGLER: Do you have a supplement to  
your answer?

THE WITNESS: As I say, I continued to gather  
whatever materials I could following the preparation of  
my direct testimony,

A  
Before appearing here yesterday, I asked my  
associates to put together a list of all of the materials  
that we had gathered in connection with this matter  
subsequent to the request for backup materials and subsequent  
to our supplying that -- those backup materials to you.

The only thing listed as having been received  
following the date we supplied you with the material with  
regard to Aspinwall were newspaper articles from various  
newspapers.

I assume that is an accurate statement, so that  
all of the other materials that I indicated on page 11623,  
were available and were supplied to you in response to your  
request.

BY MR. CHARNO:

Q It is your testimony that we did receive  
reports on the amount of money to be spent by Duquesne  
to rehabilitate the distribution system.

We did receive the Pennsylvania Economy League  
study and we did receive facts by the Council of the Borough  
of Aspinwall; is that correct?

A As best as I can determine, that is correct. 11,667

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Q That would be a summary of the materials upon which you relied?

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A Yes.

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Q What was the date of the earliest

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Pennsylvania Economy League study on which you relied, sir?

6

Let me withdraw that.

7

Would there be any study earlier than

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1959?

9

A I don't recall the earliest, but some of them went back beyond the 1965 cut-off date, and the reason I did not restrict my examination of reports of the Pennsylvania Economy League is that I was trying to develop material relevant to the general principles that I was testifying to, whether or not it was particularly concerned within the time period that this hearing is concerned with.

16

So I did look back further. I don't recall.

17

I can look it up, but I don't recall how far back the earliest of those reports went.

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Q Sir, I would like to hand you for purposes of refreshing your recollection, one of your backup materials which is dated September '59 and purports to be a study of the Pennsylvania Economy League, and ask you if that refreshes your recollection as to whether you used the study in 1959.

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A I did use this particular study. I did not

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1 remember that it was as early as 1959.

2 Q Mr. Gerber, is it your testimony --

3 MR. REYNOLDS: Could we have an identification  
4 of that study that you showed the Witness?

5 MR. CHARNO: The title is "Financial and Operating  
6 Analysis, Etna, Borough, Electric Plant."

7 MR. REYNOLDS: Thank you.

8 BY MR. CHARNO:

9 Q Mr. Gerber, earlier today you testified concerning  
10 the possibility of a utility purchasing its requirements  
11 and some surplus at wholesale and then reselling that  
12 power at wholesale.

13 Is it your testimony that that would be  
14 impossible?

15 MR. REYNOLDS: Let me have that back.

16 (Whereupon, the reporter read from the  
17 record as requested.)

18 THE WITNESS: You mean physically impossible?

19 MR. CHARNO: Economically infeasible.

20 MR. REYNOLDS: Which do we mean?

21 MR. CHARNO: I mean economically infeasible.

22 THE WITNESS: Given appropriate pricing, I would  
23 think it would be economically infeasible.

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BY MR. CHARNO:

2 Q Do you know if such a situation exists today in  
3 the CCCT?

4 A Yes.

5 Q Does such a situation exist?

6 A Yes.

7 Q Would it be possible to have price competition  
8 at wholesale where a small utility was purchasing either  
9 unit power or participated in ownership of a nuclear unit  
10 at a time when the incremental costs of power from the  
11 nuclear unit were less than the average imbedded costs of the  
12 alternative source of bulk power supply for that small  
13 system?

14 A If pricing were appropriate, no. I would be  
15 glad to explain.

16 Q Is there a time at which the incremental costs of  
17 a nuclear unit is lower in cost than the average system  
18 costs of a utility?

19 Let me withdraw that and try to rephrase it more  
20 coherently.

21 At some time during the life of a nuclear unit,  
22 don't the average system costs rise above the incremental  
23 costs of that unit, as a general rule?

24 A We don't have enough experience to know that as to  
25 whether that is a general rule. If we assume inflation, a

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1 continuation of inflation, at some point in the future,  
2 depending on the rate of inflation, the average cost of a  
3 utility are likely rise to the point where they would  
4 exceed the cost of a nuclear unit that went into service  
5 today. And how long that would take would depend on  
6 the rate of inflation and the rate of growth.

7 The more rapid the growth, combined with a  
8 given rate of inflation, the more rapidly you would reach  
9 that point.

10 MR. CHARNO: No further questions.

11 MR. SMITH: Mr. Gerber, going back to your  
12 testimony that it would be economically unfeasible for a  
13 wholesaler to purchase from a generator power for resale  
14 to a wholesaler, what would be your opinion if the first  
15 wholesaler controlled the transmission to the second whole-  
16 saler?

17 THE WITNESS: I'm sorry, I'm trying to understand  
18 the question. Are you postulating a situation where wholesaler  
19 A controls the transmission to wholesale customer B, who in  
20 turns want to wholesale to C?

21 MR. SMITH: Let's say that A is a generator; B  
22 is a wholesale customer; C is a potential wholesale customer;  
23 and C could not buy from A except through B transmission.

24 THE WITNESS: Again I think the question here is  
25 one of costs. I'm assuming now that the use of facilities is

1 available and it would be available for whatever would be  
2 the appropriate compensation of the full costs.

3 MR. SMITH: Or the transmission facilities are  
4 assumed to be available if they are compensated for?

5 THE WITNESS: Yes.

6 MR. SMITH: It --

7 THE WITNESS: Yes. When I say there would be  
8 no basis for competition of that kind, it has nothing to do  
9 with the control of the facilities. It has to do with  
10 the economics of the situation. If the costs are all  
11 determined by wholesaler A, there is no basis for wholesaler  
12 B reselling power provided by A through his facilities at a  
13 lower cost than A could do it.

14 MR. SMITH: It doesn't have to be at a lower  
15 cost. What choice does C have?

16 THE WITNESS: Then you need another  
17 assumption, and that assumption has to be that C would not  
18 have access to a purchase directly from A.

19 MR. SMITH: That is my assumption.

20 THE WITNESS: If you assume that C has no other  
21 alternative, then, of course, C -- you are postulating a  
22 situation where C would be compelled to buy from B,  
23 irrespective of whether there is any cost advantage or  
24 cost penalty.

25 MR. SMITH: So then there would be an

1 economically feasible basis for the sale?

2 THE WITNESS: Yes, there would be a basis, an  
3 economically feasible basis for the sale only because  
4 you are postulating a circumstance in which there is no  
5 preferable economical alternative. That is C has no  
6 alternative means of getting direct access to A facilities.  
7 But if they did have that access, B in that case would be  
8 providing no economic function other than writing out a bill.  
9 But they would take power generated by A in A's facilities,  
10 carried over A's transmission lines, and all they would do  
11 would be to meter it to C and write out a bill.

12 But if C has no other alternative, then by  
13 definition it has no other alternative and it is feasible.

14 MR. LESSY: No further questions.

15 MR. HJELMFELT: No questions.

16 CHAIRMAN RIGLER: Thank you, Mr. Gerber.

17 THE WITNESS: Thank you.

18 (Witness excused.)

19 CHAIRMAN RIGLER: The Board has not had an  
20 opportunity yet to discuss the possibility of allowing a  
21 witness to come in and testify with respect to the  
22 Pennsylvania Economy League Study. Before we do that,  
23 I asked Mr. Rieser to be present because this obviously  
24 affects Duquesne.

25 I had two questions I wanted to ask:



1 First, what is the situation of the study, the  
2 maximum situation of the study; and second, assuming you were  
3 to get it in, what is the broadest finding of fact that  
4 the Board could make based upon the content of the study?

5 MR. RIESER: Could I have a moment to confer?  
6 This affects Applicants generally, I believe, since it  
7 also involved Mr. Garber's testimony.

8 CHAIRMAN RIGLER: I had a feeling that it was  
9 Duquesne that had the strongest interest in getting it in,  
10 but why don't we let you address that, or the Applicants  
11 also address that after we come back from the break?

12 (Recess.)  
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MR. REYNOLDS: I can respond to your question, Mr. Chairman, if he can wait for one second.

Mr. Rieser is on the phone.

CHAIRMAN RIGLER: Let's go ahead, if he wants to be here.

MR. REYNOLDS: No, we discussed it. I can proceed. In response to your question, the broadest finding that the that the Applicants would submit might flow from the evidence that we have -- testimony of the Witness we are talking about, is that the -- there is no evidence of anti-competitive behavior or of behavior inconsistent with the antitrust laws in the service area of Duquesne Light Company, that Duquesne Light Company has neither acquired nor maintained its position by unlawful predatory practices or by any activity that would be a situation inconsistent with the antitrust laws.

CHAIRMAN RIGLER: He didn't study the Duquesne Light Company. He studied the acquisition of the Aspinwall system or rather the continued operation of the system.

MR. REYNOLDS: That is right.

CHAIRMAN RIGLER: Obviously, we can't draw a finding that Duquesne's behavior has not violated the antitrust laws.

MR. REYNOLDS: If that is the only acquisition

bw2 1 before this Board in connection with the Duquesne Light  
2 Company in the period that the Board has set and, if  
3 there is evidence that that acquisition which would be  
4 another, maybe less broad finding, but the second  
5 possible finding, that that acquisition was the result  
6 of the inefficiencies and mismanagement of Aspinwall and  
7 had nothing to do whatsoever with any activity of Duquesne  
8 Light Company or any practices of Duquesne Light Company, then  
9 it seems to me that the broader finding might well flow from  
10 that.

11 I think your question was, what would be the  
12 broadest possible finding.  
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arl,  
2 CHAIRMAN RIGLER: I'm not sure you can arrive at  
3 your fall-back finding. I wonder whether the broadest  
4 finding wouldn't be whether there were legitimate reasons  
5 why Aspinwall chose to sell rather than continue in  
6 independent operation.

7 If there were business or operational reasons  
8 which supported that acquisition.

9 MR. REYNOLDS: And that there were no activities  
10 of Duquesne Light Company that impacted or associated with  
11 that decision whatsoever.

12 CHAIRMAN RIGLER: How would your witness know  
13 that, or how would the Pennsylvania Economy League know that?

14 MR. REYNOLDS: The witness we would propose  
15 studied the situation in Aspinwall at the request of the  
16 Borough of Aspinwall to ascertain whether or not it would  
17 be preferable to remain in the business or to sell.

18 CHAIRMAN RIGLER: Exactly. That has nothing to do  
19 with whether Duquesne --

20 MR. REYNOLDS: It depends on the basis of his  
21 conclusion.

22 CHAIRMAN RIGLER: -- is contributing through a  
23 violation of the antitrust laws, they are an incipient  
24 violation. It has nothing to do with Duquesne's behavior.

25 MR. REYNOLDS: If part of what he studies is the  
relationship between Aspinwall and Duquesne, and part of the

1 study contains a recommendation to sell the facilities  
2 to Duquesne and that recommendation is founded on the  
3 analysis of the Aspinwall situation and the conclusion that  
4 the situation in Aspinwall is such due to its facilities,  
5 and its own internal problems is such that it should  
6 sell its facilities to Duquesne Light Company, the inference,  
7 if you will, that might be drawn or suggested by the other  
8 parties that the acquisition of Aspinwall was the result of  
9 anticompetitive behavior of Duquesne or any inference of a  
10 predatory intent on the part of Duquesne that might be  
11 inferred in the absence of such evidence, it seems to me,  
12 is eliminated.

13 It seems to me you remove the inference, if you  
14 will, of predatory intent to the extent that you can  
15 demonstrate that the City made an internal evaluation of its  
16 own and approached an investor-owned utility with a  
17 request that it buy the facilities of the municipality.

18 I believe the allegations of the other side are  
19 that we can infer by virtue of the acquisition itself  
20 that there was a predatory intent on the part of Duquesne  
21 Light Company.

22 CHAIRMAN RIGLER: With that I agree, that if there  
23 are independent business reasons, you have undercut that  
24 inference.

25 On the other hand, I can see even if

1 Aspinwall were of the view that their situation came about  
2 entirely as a result of Duquesne's practices, they still  
3 might conclude that their operational, economic situation  
4 required them to sell, and there was only one buyer.

5 I am having trouble reading -- I'm having  
6 trouble seeing how we can draw the broad type of conclusions  
7 you suggest, even if we were to admit this evidence.

8 MR. REYNOLDS: The reason we are proposing to  
9 bring the witness in is to erase, if you will, the possibility  
10 you just suggested.

11 CHAIRMAN RIGLER: That we make an inference that  
12 the acquisition in and of itself suggests some predatory  
13 conduct on the part of Duquesne?

14 MR. REYNOLDS: That, plus the suggestion, if you  
15 will, by the other side that a -- using their words, a  
16 refusal to sell wholesale power to Aspinwall had any impact  
17 whatsoever on the decision of Aspinwall to sell its  
18 facilities.

19 It seems if we can bring a witness in who can  
20 testify that he has in fact studied the situation and studied  
21 it in the context of the allegations in this proceeding,  
22 that is an alleged refusal to sell wholesale power and also  
23 on the other side allegations as to the conditions of  
24 Aspinwall and on the basis of his evaluation and study, the  
25 recommendation was made and it was made solely or -- was made,

1 I'm sorry, without regard to the refusal to sell wholesale.

2 It seems to me that is an important element in  
3 erasing, if you will, or eliminating the inference that  
4 the other side is suggesting.

5 And I guess I would further submit that the  
6 witness, it seems to us, is important to the extent that  
7 this Board might be inclined to attach any less weight to  
8 Mr. Gerber's testimony because he relied on a document  
9 which the other side has characterized as hearsay in order  
10 to demonstrate the accuracy of the report.

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1 CHAIRMAN RIGLER: You will not prevail on that.  
2 We argued that extensively yesterday, and you lost on  
3 that.

4 No matter what this witness says, that will  
5 not affect our conclusions with respect to Mr. Gerber.

6 If it is hearsay, you can put on the  
7 entire economic association of the United States and they  
8 can all swear they read the report and they know the  
9 people who made the report, and that doesn't add one shred of  
10 validity to the conclusions.

11 The report has to stand on its own.

12 That is why we are thinking of having a witness  
13 come.

14 MR. REYNOLDS: If I put on the person who  
15 prepared the report —

16 CHAIRMAN RIGLER: That is different.

17 MR. REYNOLDS: I'm saying if he can come in  
18 and attest to the validity of the report, I'm suggesting  
19 to you that it then removes the suggestion, if you will, that  
20 we can disregard or discount or weigh any less the  
21 testimony of Mr. Gerber as being based on nothing but  
22 hearsay testimony. Or hearsay reports or reports that  
23 may be suspect, because we have not been in a position to  
24 show their accuracy or validity.

25 That was the point I was making.



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1 Q Do you have any corrections or modifications  
2 to that testimony, other than the corrections that are  
3 set forth in the attached errata sheet?

4 A No.

5 Q If I were to ask you the same questions today  
6 that are set forth in that document, would you give me  
7 the same answers?

8 A I would.

9 MR. PEYNOLDS: I would like to move into evidence  
10 Applicants Exhibit 190.

11 CHAIRMAN RIGLER: Hearing no objection, we  
12 will receive into evidence Applicants Exhibit 190.

13 (Whereupon, the document heretofore  
14 marked Applicants Exhibit Number  
15 190 for identification, was  
16 received in evidence.)

17 BY MR. REYNOLDS:

18 Q Dr. Pace, when Dr. Wein was here earlier in  
19 this proceeding he was asked at page 7313 of the  
20 transcript, "Do you know of any other economists who  
21 agree with this classification?" In other words, the  
22 lumping together of the noncaptive and captive wholesale  
23 market in the electric utility industry, and his answer  
24 was, "Dr. Pace for one, who is an economist for  
25 Applicants."

1           And the Chairman asked Dr. Wein where did  
2 he agree. And the witness, who was Dr. Wein, replied,  
3 "Alabama Power Company," at which point I asked for  
4 a reference and Dr. Wein indicated that it was Dr. Pace's  
5 testimony, direct testimony submitted in Alabama Power  
6 Company.

7           My question to you, Dr. Pace, is whether or not  
8 it is an accurate statement of Dr. Wein's that you did  
9 agree with his classification as to the lumping together  
10 of the nonCaptive and captive wholesale markets in  
11 the electric utility industry, in your direct testimony  
12 in Alabama Power?

13           MR. CHARNO: Objection.

14           MR. HJELMFELT: I join in the objection.

15           MR. CHARNO: This Board has made it very  
16 clear that expert testimony is to be prepared in advance  
17 in writing.

18           It was so prepared and submitted.

19           Under the Board's order, thus supplemental  
20 direct is clearly unallowable. In any event, the Board's  
21 ruling in conjunction with Section 2.7143 of the Commission  
22 rules of practice would give the Department a minimum of  
23 five days to have this testimony in writing in advance  
24 of cross-examination.

25           I would object to any further supplemental

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1 direct examination of the Witness at this time.

2 CHAIRMAN RIGLER: Is this the sole area?

3 MR. REYNOLDS: It is limited to this question,  
4 and perhaps one other, and it is directly related to testimony  
5 that we heard for the first time from Dr. Wein, when  
6 he was here on the stand, and this goes to clearing up  
7 for the Board a matter Dr. Pace can clarify.

8 MR. HJELMFELT: Dr. Wein testified several months  
9 ago, and there was ample time for Applicants to file  
10 supplemental written testimony, if he wanted to.

11 They made no effort to.

12 CHAIRMAN RIGLER: The problem is, of course,  
13 this is more in the nature of fact testimony rather than  
14 expert testimony.

15 It really would be cumbersome and  
16 practically ridiculous to call Dr. Pace as a fact witness  
17 with respect to this one question.

18 The better procedure is to allow him to make  
19 a direct response here to something where he has been  
20 directly named as the author of the statement.

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arl 1 MR. LESSY: Could I see the transcript reference  
2 and have the question read back?

3 MR. REYNOLDS: The question was whether, Dr.  
4 Pace, you did agree with the classification of Dr. Wein as to  
5 the lumping of the captive and noncaptive wholesale sales in  
6 your Alabama testimony?

7 In fact, in your Alabama testimony or in any  
8 other testimony.

9 MR. HJELMFELT: I would like to note for the  
10 record that had we had this in advance, we could be  
11 prepared with Mr. Pace's Farley testimony here to cross-  
12 examine on this point.

13 MR. REYNOLDS: We will provide it to you.

14 MR. HJELMFELT: Can you provide me several hours  
15 to look through it?

16 CHAIRMAN RIGLER: The objection is well taken,  
17 but it would be ridiculous to exclude the testimony at this  
18 point. So we will overrule the objection.

19 THE WITNESS: The answer is no, I never suggested  
20 in my Alabama testimony that those two markets should be  
21 characterized and lumped together, as Dr. Wein said here.

22 BY MR. REYNOLDS:

23 Q In fact, you testified that that would be  
24 inappropriate, didn't you?

25 A Yes.

1 MR. REYNOLDS: I don't have any further questions.

2 CROSS-EXAMINATION

3 BY MR. LESSY:

4 Q Dr. Pace, --

5 MR. REYNOLDS: I would like to move Applicant's  
6 Exhibit 44, Applicant's proposed license conditions, into  
7 evidence. It has been previously marked and has been  
8 referred to and testified to by Dr. Pace on page 23,  
9 specifically.

10 It has been identified earlier, but we did not  
11 move it in. Page 23, starting at line 18.

12 MR. LESSY: You are moving it in pursuant to  
13 the rules, of something relied upon by an expert as the  
14 basis of his testimony, and not for the truth of the matter, if  
15 any, in the exhibit? That is what I understand to be  
16 the nature of your motion.

17 If it is on any other basis than that, I object.

18 MR. REYNOLDS: I'm not sure I understand that,  
19 but I'm putting it in for the fact it is <sup>source</sup> material relied on by  
20 this witness and it has a direct bearing on his testimony.

21 MR. LESSY: Pursuant to Rule 703. If it is moved  
22 in pursuant to Rule 703, I have no objection.

23 CHAIRMAN RIGLER: He stated the purpose for which  
24 he is moving it. 703 does not provide for the admission  
25 into evidence of particular documents. The terms of the

1 rule strictly construed don't relate to the admission or non-  
2 admission of a particular piece of evidence.

3 On the other hand, I believe that Applicants  
4 have indicated the purposes for which it's being introduced.

5 MR. CHARNO: The Department would join the Staff  
6 in their objection to the document.

7 CHAIRMAN RIGLER: I'm not sure there is to be a  
8 pending objection in light of the Applicant's response.  
9 The only observation the Board was making is that Rule 703  
10 is not a rule addressed strictly to the admissibility of  
11 a particular document.

12 We will admit Applicant's 44 at this time.

13 (The document previously marked  
14 Applicant's Exhibit 44 for  
15 identification, was received  
16 in evidence.)

17 BY MR. LESSY:

18 Q Dr. Pace, in your testimony in the New England  
19 Electric System SEC matter, who was the client on whose  
20 behalf you were testifying?

21 A I gave no such testimony.

22 Q Did you make an economic study of the New England  
23 Electric System in that SEC matter?

24 A I don't know that you would characterize it that  
25 way. I participated in the development of some testimony

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1 by Mr. Gerber in that matter.

2 Q You assisted Mr. Gerber in his testimony in that  
3 matter?

4 A Yes, helping him with basic research and so forth.

5 Q Do you report to Mr. Gerber?

6 A No. I did at that time.

7 Q And what time was that, sir?

8 A 1970 or '71, I believe.

9 Q And when did it occur that you did not report to  
10 Mr. Gerber?

11 A I'm not 100 percent of this but I believe that it  
12 would have been some time in 1971 that I stopped reporting  
13 directly to Mr. Gerber.

14 Q Who do you report to now, sir?

15 A I suppose, technically speaking, the president of  
16 the firm.

17 Q In Mr. Gerber's testimony before the SEC in the  
18 New England Electric System matter, on whose behalf was he  
19 testifying?

20 A I believe he was testifying on behalf of the New  
21 England Electric System.

22 Q When you prepare an analysis of the economic  
23 testimony in the AEP-Columbus and Southern SEC matter, who  
24 was the client?

25 A AEP.

1 Q Your studies of the appropriateness of  
2 separating control of combined gas and electric operations,  
3 who was the client for those studies?

4 A That was a group of -- I don't recall the exact  
5 number, some 20 or maybe 30 combination gas and electric  
6 companies.

7 Q Can you remember any of those 20 or 30? Just list  
8 a few. It would be helpful.

9 A Yes. Long Island Lighting Company, I recall, was  
10 a member. I honestly don't recall specifics beyond that.  
11 I happen to remember Long Island Lighting because we had  
12 some discussions, some detailed discussions with them directly.

13 There were many other fairly sizeable combination  
14 utility companies, but I couldn't name them for you.

15 CHAIRMAN RIGLER: They were all combination  
16 companies?

17 THE WITNESS: Yes.

18 CHAIRMAN RIGLER: Just as a matter of curiosity,  
19 what conclusion did you come to?

20 THE WITNESS: I concluded that the cost of serving  
21 them and disrupting them at this point, ones that are already  
22 combined, was not worth the competitive benefit likely to be  
23 gained for that severing.

24 BY MR. LESSY:

25 Q You testified or prepared testimony at the Nuclear



1 Regulatory Commission in front of Atomic Safety and  
2 Licensing Boards in antitrust matters on behalf of Consumers  
3 Power Company, Duke Power Company, and Alabama Power  
4 Company; isn't that correct?

5 A No.

6 Q Would you tell me how that is not correct?

7 A If I understand you correctly, you said I  
8 testified on behalf of Duke. I did not. The Duke case never  
9 came to a hearing.

10 MR. LESSY: Would you read the original question  
11 back to the witness, please?

12 (Whereupon, the reporter read from the  
13 record, as requested.)

14 BY MR. LESSY:

15 Q Did you prepare testimony on behalf of Duke  
16 Power Company in a matter in front of the Atomic Safety and  
17 Licensing Board?

18 A No.

19 Q Would you tell us what your involvement with  
20 Duke Power Company was in front of the NRC?

21 A I was involved at the preliminary stages in  
22 trying to flesh out the issues. I think I was also involved  
23 in helping them to frame discovery. For that matter, I think  
24 I was involved in helping them directly negotiate discovery  
25 problems with the other side, and to assess the compliance

1 with discovery. Up to that point -- I did not get to the  
2 point of preparing any direct testimony, I'm reasonably  
3 certain of that.

4 Q You testified on behalf of the Georgia Power  
5 Company at the Federal Power Commission?

6 A Yes.

7 Q When you testified before the Arizona PUC, who was  
8 the client in that matter?

9 A The Arizona Public Service Company.

10 Q Is that an investor-owned utility?

11 A Yes.

12 Q When you testified before the Wisconsin PUC, who  
13 was the client?

14 A I have testified there on behalf of both the  
15 Madison Gas & Electric Company, and the Wisconsin Electric  
16 Power Company.

17 Q And when you testified before the Oregon PUC,  
18 who was the client?

19 A Pacific Power & Light.

20 Q In what percentage of your testimony or economic  
21 studies we have gone over -- scratch that.

22 In what percentage of your testimony or economic  
23 studies that you have listed in your testimony have you  
24 testified or prepared such economic studies for cooperative  
25 or municipal electric systems?

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1           A       Let me answer that by saying that I have not  
2 testified on behalf of a cooperative or publicly-owned  
3 utility at all, to my knowledge.

4           I have conducted studies and analyses for such  
5 utilities.

6           Q       Now the question was in what percentage of your  
7 work have you made such studies or analyses?

8           A       I couldn't give you a hard number. It would be a  
9 relatively small percentage.

10          Q       Less than 5 percent?

11          A       Probably, but I do not recall,  
12 probably less than 5 percent. I'm not sure.

13          Q       Less than 2 percent?

14          A       I can't get any more precise than that for you.  
15 It is a small number.

16          Q       When were you initially retained, or if that is  
17 not relevant, when was NERA, to your knowledge, initially  
18 retained by the CAPCO companies with respect to this  
19 proceeding?

20               MR. REYNOLDS: Which question are we asking?

21               MR. LESSY: I think it is an and/or question.  
22 To save time, it can easily be answered.

23               THE WITNESS: I wouldn't be personally retained.  
24 That is obvious. I don't know the precise answer to your  
25 question. It has been several years. I did not bother to

1 look up when the thing was initiated officially.

2 BY MR. LESSY:

3 Q When did you personally, pursuant to an under-  
4 standing between NERA and the CAPCO companies, become  
5 involved with this proceeding?

6 A I think I would have become involved immediately.  
7 I believe that is so.

8 Q Can you pick an approximate time when that was?

9 A I really can't. I would be happy to find that out  
10 at a break for you, but I don't have the figure in mind.  
11 It has been a very long time, and I have worked on a number  
12 of these cases. It has been several years here. Beyond that,  
13 I haven't bothered to look back and see when we first became  
14 involved.

15 Q Could you tell me how you did become assigned  
16 to the CAPCO proceeding? Did Mr. Gerber say, "You are  
17 working on CAPCO, Dr. Pace," or can you tell me how it was  
18 you were assigned to work on CAPCO?

19 A Those things tend to naturally happen within our  
20 firm. When you are working in an area that involves your  
21 expertise, you obviously are going to be invited in. I  
22 can't tell you the direct way by which I got the news. Mr.  
23 Gerber may have walked in and said, "We have been contacted  
24 by counsel and we are going to have a meeting, join us," or  
25 whether Dr. Stelzer said that to me, or whether I learned by

1 some other route, I can't tell you.

2 MR. LESSY: I want to go off the record.

3 (Discussion off the record.)

4 MR. REYNOLDS: I can provide the information that  
5 was just requested now, rather than waiting for the break.

6 Though I can't be precise, it was in December of '73 or

7 January of '74 when counsel for the Applicants retained

8 NERA to assist in this proceeding.

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1 BY MR. LESSY:

2 Q Is that approximately the time you personally  
3 became involved in this proceeding or on behalf of the  
4 CAPCO companies, according to your recollection, Dr. Pace?

5 A It doesn't sound wrong, but as I previously  
6 stated to you, I don't have a specific recollection  
7 of when I became involved.

8 A couple of years is what I said, and January  
9 of '74 is not that far from a couple of years.

10 Q Do you have any idea how many hours of time  
11 you spent working on the CAPCO matter personally, or a  
12 range of hours?

13 A No.

14 Q Do you have a ballpark idea of the number of  
15 hours you spent working on this matter, including  
16 preparation of this testimony?

17 A No. Anything I would give you would be sheer  
18 speculation.

19 I don't look these numbers up. I didn't  
20 see any particular purpose. I haven't gone through a ch  
21 ronology of our participation in the case.

22 I would be guessing, purely.

23 Q Are these numbers recorded anywhere?

24 A Certainly.

25 Q Can you ascertain for us

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1 the approximate range of hours of work in this proceeding,  
2 if you were given time to do so?

3 A Yes, that is an ascertainable fact.

4 CHAIRMAN RIGLER: During the off-the-record  
5 portion you asked the Witness to be excused, and we  
6 note for the record he is no longer in the room.

7 (Witness temporarily excused.)

8 MR. LESSY: Based on the nature of the testimony,  
9 the extent to which it is consistent or inconsistent  
10 with antitrust law, the extent to which it is consistent  
11 or inconsistent with the record already established in this  
12 proceeding, the line of questioning I'm on right now is  
13 the principal line that is going to be -- that the Witness  
14 is going to be examined on.

15 Therefore, I think that before I go any further,  
16 I would like to get this information, because much additional  
17 examination, in our view, might not be necessary.

18 I mean maybe an hour or two.

19 CHAIRMAN RIGLER: How long would it take to  
20 provide the information?

21 MR. REYNOLDS: I have no hesitation. I think we  
22 had a colloquy with Mr. Smith yesterday --

23 CHAIRMAN RIGLER: There is no objection. It is  
24 a question of getting the information.

25 How long will it take to get it?

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MR. REYNOLDS: I can give you a ballpark figure for NERA right now.

Dr. Pace, I'm sure, can give you a ballpark figure of his hours in fairly short order.

I'm not sure what Mr. Lessy meant by principal line or how definitive the information needs to be for him to pursue his principal line. If we want to go back to all of the monthly records, it may take some time to do it.

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1 CHAIRMAN RIGLER: What is the ball park figure  
2 for NERA?

3 MR. REYNOLDS: I'm advised it is 5000 man-  
4 hours.

5 CHAIRMAN RIGLER: If we supplied Dr. Pace that  
6 information --

7 MR. REYNOLDS: We have already done that, and we  
8 anticipate he would have to make some phone calls, but could  
9 arrive at an estimate as to what the ball park figure would be  
10 for his involvement in the proceeding.

11 I don't know how specific Mr. Lessy wants it and  
12 what he meant by his principal line. I'm lost on that.

13 CHAIRMAN RIGLER: Let's recall Dr. Pace.

14 (Witness resumed stand.)

15 CHAIRMAN RIGLER: Dr. Pace, it is my understanding  
16 you have been provided with information that the approximate  
17 number of NERA manhours are in the magnitude of 5000; is  
18 that correct?

19 THE WITNESS: Yes.

20 CHAIRMAN RIGLER: Does that enable you to give a  
21 ball park figure with respect to the extent of your involve-  
22 ment?

23 THE WITNESS: I need to ask a question first as  
24 to whether the 5000 is total.

25 MR. REYNOLDS: Yes.

1 THE WITNESS: I would say in grossly round numbers,  
2 maybe that applies possibly six or seven hundred hours on  
3 my part. That is the purest of speculation.

4 CHAIRMAN RIGLER: You estimate your involvement to be  
5 more than 500, but less than 1000 hours, perhaps?

6 THE WITNESS: I believe that is true.

7 CHAIRMAN RIGLER: Is that sufficient for your  
8 purposes, Mr. Lessy?

9 MR. LESSY: Yes, sir.

10 BY MR. LESSY:

11 Q Do you have a current hourly billing rate at  
12 which you bill the CAPCO companies for your work, sir?

13 A NERA has a rate at which they bill my services to  
14 anyone.

15 Q Could you tell us what that is?

16 MR. REYNOLDS: I object to that. We have already  
17 gone through that earlier with Mr. Gerber?

18 CHAIRMAN RIGLER: Is it a uniform rate?

19 THE WITNESS: Yes.

20 CHAIRMAN RIGLER: Is it available to any customer  
21 of NERA if they make an inquiry?

22 THE WITNESS: If they make a specific inquiry,  
23 yes.

24 CHAIRMAN RIGLER: I see no reason to protect the  
25 information in that case.

1 MR. REYNOLDS: My question goes to relevance.  
2 I don't see but for the information we have already  
3 talked about on billing, I'm lost as to how this is relevant.  
4 I'm not trying to protect it from the public domain.

5 CHAIRMAN RIGLER: We will permit it.

6 THE WITNESS: My current billing rate is \$75 an  
7 hour.

8 BY MR. LESSY:

9 Q During the course of the preparation of your  
10 testimony -- scratch that.

11 When did you first draft your testimony?

12 A I can't give you a direct answer to that  
13 or precise answer to that. I would say it was within the  
14 month before the filing date.

15 Q Was there a previous draft?

16 A Previous to that month?

17 Q Previous to the one you filed?

18 A Yes, there was obviously some draft prior to this.

19 Q Well, when, approximately, was that prepared  
20 approximately in September of '75, is that correct, assuming  
21 that was filed around October 25, 1975?

22 A I believe that is true. I don't have a  
23 specific recollection, but I remember it being some time in  
24 that time frame.

25 Q How many drafts did it go through between what

1 you initially wrote and between what we have in front of us  
2 today?

3 A One, I believe.

4 Q One previous draft?

5 A Yes, I think that is right.

6 Q Who reviewed that draft?

7 A The draft, I'm sure, was discussed with -- I'm  
8 sure it would have been discussed with Mr. Gerber. And,  
9 let's see, the draft was also discussed with another member  
10 of our firm, Mr. Howard Kitt. It was, of course, discussed  
11 with counsel.

12 Q When you say counsel, whom do you mean, specifically?

13 A Mr. Reynolds and I believe possibly Mr. Berger.

14 Q Steven Berger?

15 A Yes.

16 Q There are two Mr. Bergers.

17 How about the Reid, Smith law firm in Pittsburgh?

18 A No, not that I recollect, at any rate.

19 Q Squire, Sanders & Dempsey firm in Cleveland or  
20 Washington?

21 A I think not.

22 Q Did you attend any CAPCO meetings or CAPCO  
23 counsel meetings at which your testimony, draft or outline  
24 of your testimony was discussed?

25 A Not that I specifically recollect. I won't tell

1 you that such an event didn't happen, with at least an  
2 idea of basic concepts or areas that might be covered, but  
3 I don't have a specific recollection of that.

4 Q Did you attend any CAPCO or counsel meeting?

5 A I'm sure I attended meetings at which counsel  
6 for other CAPCO companies were present. I have never  
7 attended a CAPCO meeting if by that you mean the meeting of  
8 the people running the pool.

9 Q No, by that I mean the CAPCO executives or the  
10 CAPCO counsel.

11 A Yes, I'm sure I have been involved in meetings  
12 where the CAPCO counsel have been present. At least some of  
13 them.

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1 Q How about CAPCO executives or officers, company  
2 officers who are members of CAPCO?

3 A Again, I think the answer to that is probably  
4 yes. I'm sure at some point in these meetings they  
5 floated in and out.

6 I don't have a specific recollection on that.  
7 But I'm sure it is so, that they have been involved  
8 to some extent in some of the meetings.

9 Q About how many of these did you attend,  
10 wherein drafts or outlines or scope of your testimony was  
11 discussed at any such meetings, either counsel meetings  
12 or CAPCO executive meetings?

13 A If you will recall, I said that I don't think there  
14 was any meeting with all CAPCO counsel around the  
15 table at which a draft of my testimony was discussed.

16 I may be wrong on that, but I don't recall  
17 such a meeting.

18 All I said was at some prior meetings  
19 there were probably general discussions of areas that  
20 might be covered.

21 Q Were there general discussions of areas that  
22 shouldn't be covered?

23 A Not that I recollect.

24 Q Well, when you testified on page 4, line 21,  
25 that I have been asked by counsel for the  
CAPCO companies to address two distinct areas,

1 that implies to me that your assignment was rather  
2 specific. Is it your testimony that you were not told  
3 to address other areas or told that you shouldn't address  
4 certain areas?

5 A No, it is my testimony that when it came to  
6 the point of sitting down and specifically putting the case  
7 together for presentation, we discussed and by counsel  
8 for CAPCO companies I refer to Mr. Reynolds and  
9 his firm -- and we discussed and agreed these were two areas  
10 that I would cover.

11 The scope of my testimony was naturally  
12 limited.

13 Q The scope of your testimony was naturally  
14 limited to these two areas the CAPCO counsel told you to  
15 address.

16 Is that a correct understanding of your testimony?

17 A I think you put that sentence together in a funny  
18 way. What I meant is that all testimony is limited in  
19 scope.

20 When you put together a case you obviously  
21 try to put together a package.

22 The lawyers make decisions as to what they  
23 need to introduce and the areas they would like to have  
24 evidence on.

25 This is a product of the discussions of that

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1 nature.

2 Q When I was working with Dr. Hughes, he said  
3 if you want me to address such and such, I have to also  
4 talk about this other area.

5 Did you offer anything like that?

6 A Not that I recall. If you are asking me do I  
7 think my testimony covers complete subjects, yes, I do.

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2 Q When I asked you who reviewed your testimony,  
3 you said surely Mr. Gerber. Why surely Mr. Gerber?

4 A Surely, because Mr. Gerber and I worked together a  
5 great deal and we have been involved together in a number  
6 of these kinds of proceedings.

7 Q Which ones?

8 A Mr. Gerber was involved in Consumers, he was  
9 involved in Duke. He was involved to a lesser extent,  
10 in Alabama, and obviously he was involved in this one.

11 Q Can you imagine a situation where your testimony  
12 and that of Mr. Gerber might arrive at inconsistent results  
13 or not be compatible?

14 MR. REYNOLDS: Can I have the question back?

15 (Whereupon, the reporter read the pending  
16 question, as requested.)

17 MR. REYNOLDS: I will object to that. I don't  
18 see what relevance the imagination of this witness has  
19 to this proceeding.

20 CHAIRMAN RIGLER: Overruled.

21 THE WITNESS: I don't mean to be flip, but I can  
22 imagine anything. In the event that two people at  
23 NERA put together testimony that would seem on the face contra-  
24 dictory, I would hope they would review each other's  
25 position and I would hope they would sit down and talk very  
hard and try to work out their position and find the correct

1 position and support the correct position.

2 BY MR. LESSY:

3 Q Has that happened yet between you and Mr. Gerber  
4 in the proceedings -- the four matters you outlined you  
5 work closely on? Consumers, Alabama, and et cetera.

6 A Not that I can recall.

7 Q Has that happened in your other work not  
8 involving Mr. Gerber with other NERA economists that  
9 you came to an inconsistent result where you had to sit  
10 down and work the differences out?

11 A I would have to say probably many times. I don't  
12 know many times that it gets reduced to testimony that far.  
13 But if you are saying do we ever disagree with one another,  
14 yes, I have been in plenty of shouting matches.

15 Q Now I'm talking about testimony.

16 A I can't give you a firm answer on that. Again  
17 what you would tend to do is before you reduce the thing to  
18 formal testimony, you would be quite likely to have discussed  
19 the problem with other people in the firm who would have  
20 expertise in that area as well.

21 It is unlikely that you would put out a  
22 formal draft of a piece of testimony which would be in total  
23 disagreement with the position of other people, but I  
24 wouldn't maintain that doesn't happen, either.  
25 It may happen within NERA.

1 Q Why shouldn't it happen if you are individual,  
2 professional economists?

3 A Because you would sit down and discuss and  
4 hopefully you are all reasonable people and reasonably good  
5 economists and in all probability you would reach at least  
6 on the major issues agreement. I think you will find disagreement  
7 among NERA economists possibly in testimony on minor matters.  
8 The major economic thinking on the problem, it seems very  
9 likely you would come out with a similar position.

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1 Q In addition to the amount of hourly billings between  
2 NERA and CAPCO, are you aware whether or not there exists  
3 any arrangement for additional compensation for either  
4 monetary or otherwise in the event that the result in this  
5 proceeding is deemed acceptable to Applicants?

6 MR. REYNOLDS: Excuse me.

7 I would like to correct one thing. You indicated  
8 billing arrangements between NERA and CAPCO.

9 There are no such arrangements. It is between  
10 NERA and CAPCO counsel.

11 BY MR. LESSY:

12 Q Yes, sir.

13 A I can tell you unambiguously, there are no  
14 such agreements, never have been and I doubt there ever  
15 will be in any case.

16 We are paid a uniform hourly rate to perform  
17 our job as best we can, and we are paid for it.

18 Q When you say uniform hourly rate, what do you  
19 mean?

20 A I mean uniform for all clients and uniform  
21 regardless of win or lose.

22 Q How long did it take you to prepare your testimony  
23 that we talked about earlier in this proceeding?

24 A Couldn't give you a very precise estimate on  
25 that number either. Obviously, it is less than the total

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1 700 or so hours we talked about before, because I  
2 have been involved in other aspects.

3 If I had to make a round guess and take it  
4 for what it is, sheer speculation, I would say maybe a  
5 couple hundred hours.

6 But that is really speculation. I can't  
7 tell you too carefully.

8 We don't have any separate billing  
9 designation or anything of the sort for time spent  
10 in preparation of testimony per se.

11 Q So in approximately the month of October 25th  
12 of '75, it took you approximately, during that month, a  
13 couple hundred hours to prepare your testimony; is that  
14 correct?

15 A No, I don't think I said that. When you asked  
16 me about preparing testimony -- if you mean the literal  
17 drafting of the piece, that is one thing.

18 I didn't understand you to ask me that.

19 In the usual sense, in talking about preparing  
20 testimony, one means to get yourself involved in the case,  
21 to come to understand the issues, what is relevant to what  
22 you want to talk about, and that sort of thing. Obviously,  
23 that went on prior to the month before the filing of  
24 the testimony itself.

25 I had that in mind in the hours figure

bw3

1 I gave you.

2 I don't mean to imply it took me 200 hours  
3 to write 36 pages.

4 Q When you testified just now that to become  
5 involved in issues you wanted to talk about, you mean  
6 issues that counsel wanted you to talk about, don't  
7 you, or is that the same?

8 MR. REYNOLDS: Objection.

9 CHAIRMAN RIGLER: Let me hear the question.

10 (Whereupon, the reporter read  
11 the pending question, as requested.)

12 CHAIRMAN RIGLER: Overruled.

13 THE WITNESS: If I testified in my previous  
14 answer, issues that I wanted to talk about, I misstated  
15 it.

16 I meant to say issues that I was to talk  
17 about or issues that I might have an expectation of talking  
18 about.

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BY MR. LESSY:

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Q What would you base that expectation on? Is that based on your assignment in the proceeding?

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A I would base that expectation, I guess, in a general way on the fact that I'm an economist and that I have testified in previous proceedings and then discussions with counsel.

8

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Q Now the amount of hours it took you to write 36 pages?

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A Yes.

12

Q Approximately how long was that?

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A I haven't the slightest idea. I don't know. You are just asking me continuously for pure speculation. I have tried to tell you we don't keep those hours separately. You are talking about something that took place a very long time ago. If you want a round number, 50.

17

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19

Q I'm talking about the month prior to October '75, which isn't really a long time ago, where you sat down and wrote 30-odd pages of testimony. Approximately how many hours?

20

A I will say 150. I'm speculating.

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Q In other words, the testimony we have in front of us today -- I want to make sure it is answered and clear -- it took 150 hours to draft these 36 pages. There was a figure of 50. I want to make sure you know what I'm asking you.

25

A You didn't ask me that. The question you asked me

1 about the total number of billable hours I put in the  
2 month before the testimony.

3 Q How many billable hours did you put into actually  
4 drafting what we have in front of us today?

5 A I've done my best. My best guess is 50 hours.  
6 I'm guessing. I don't keep those hours separately in that  
7 fashion.

8 Q Was your study at Michigan of public utility  
9 economics done in the Department of Economics or the  
10 School of Business?

11 A Department of Economics.

12 Q How many courses does the Department of Economics  
13 have specifically dealing with the public utility economics  
14 and the electric utility industry?

15 A They have none dealing specifically with the  
16 electric utility industry. They have no courses devoted  
17 exclusively to public utility economics. At least they didn't,  
18 to the best I can recall, when I was there.

19 Q Have you ever taught public utility economics?

20 A No.

21 Q Have you ever done work on a national power survey  
22 for the FPC?

23 A No.

24 MR. LESSY: May I have about five minutes?

25 CHAIRMAN RIGLER: For what purpose?



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MR. LESSY: To see what is remaining in my  
examination.

CHAIRMAN RIGLER: All right.

(Recess.)

S31  
bwl

1 CHAIRMAN RIGLER: Does that mean you are  
2 almost concluded?

3 MR. LESSY: Yes, sir.

4 MR. CHARNO: Before we go off the record,  
5 would this be an appropriate time for the Department  
6 to make application for a subpoena duces tecum to the  
7 Pennsylvania Economy League, so that the Board in considering  
8 the question of the Witness will have before it the material  
9 we deem necessary for cross-examination?

10 MR. LESSY: I will not need that time,  
11 Mr. Chairman. I thought I had lost something.

12 BY MR. LESSY:

13 Q Dr. Pace, would you agree that the American  
14 Economic Review, Quarterly Journal of Economics and the  
15 Journal of political Economy are the most prestigious  
16 journals for the publication of articles on the economics  
17 of regulation?

18 A No.

19 Q Could you agree that they are the three or four  
20 most prestigious journals?

21 A As a general proposition those are considered  
22 prestigious journals to publish in, because it takes three  
23 years to get an article in it.

24 Q Have you published anything in those journals?

25 A I wouldn't try. Anything I would write would

bw2 1 be outdated before it was published, even if it were  
2 accepted.

3 Q Did you publish your dissertation thesis?

4 A No, other than technically speaking, all  
5 dissertations are published on university microfilms.

6 Q Did you seek to have it published?

7 A No.

8 Q Can you tell us why you didn't attempt to have  
9 it published?

10 A I think the answer is very simple. I realized  
11 a dissertation is a first effort. It is not the ultimate  
12 study containing all truth that too many students think  
13 it is. It is your first effort, and I felt like although  
14 I had tried my best in the dissertation, I didn't  
15 by any means think that was the best I could do.

16 Given more experience. I didn't feel  
17 it was fair to publish something in that state.  
18 That is precisely why I made no effort.

19 MR. LESSY: I have no further  
20 questions at this time.

21 MR. CHARNO: The Department has no  
22 cross-examination for the witness.

23 MR. HJELMFELT: The City has no cross-examination.

24 CHAIRMAN RIGLER: The Board may have a  
25 question or two.

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MR. REYNOLDS: I have no redirect at this point.

(Whereupon, at 12:30 p. m., the hearing was recessed, to be reconvened at 2:00 p.m., this same day.)

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S32  
bwlAFTERNOON SESSION

(2:30 p.m.)

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3 CHAIRMAN RIGLER: Dr. Pace, I would like to  
4 ask you a question or two.

5 On page 11, lines 16 through 19, you indicate  
6 that unit power transactions are merely pricing devices.

7 And then on page 13, lines 21 through 24,  
8 you indicate that in order to avoid discrimination, the  
9 system seeking to share in the new unit would have to  
10 be limited to obtaining no greater proportion of its require-  
11 ments from the new unit than that which the constructing  
12 system would obtain.

13 My question is, do either of those two  
14 principles apply under the CAPCO arrangement?

ni?  
15 THE WITNESS: Well, I don't know if the present  
16 CAPCO arrangement is comparable in any shape, form or  
17 fashion to what I'm discussing here.

18 What I'm discussing here is someone who in the  
19 first instance is a wholesale customer and is seeking to  
20 purchase a disproportionate share of a unit, and then  
21 blend it with wholesale to get a total package cheaper  
22 than he would if you took a systemwide average.

23 I don't think that is comparable to  
24 a CAPCO situation where each utility is a major utility who  
25 carries prime responsibility for the construction of the

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1 various units.

2 CHAIRMAN RIGLER: You don't think we could view  
3 the system where one takes under responsibility the  
4 construction of a unit and the others share in the output  
5 of the unit as comparable to a unit power transaction?

6 THE WITNESS: Well, it seems to me you are on  
7 a whole different level of -- a whole different plane where  
8 you have each major constructor engaging in a true  
9 staggered construction arrangement, rather than a purchaser  
10 trying to manipulate various sorts of purchases.

11 CHAIRMAN RIGLER: Out at the bottom of page 8  
12 and the top of page 9 you discuss the situation  
13 where the nuclear unit does confer significant cost advantages  
14 on the owners of the plant.

15 And you say that in your view as an economist,  
16 when a resource creates the potential for conferring  
17 this significant competitive advantage and the advantage  
18 can't be obtained otherwise by rivals, in order to eliminate  
19 that special advantage, what we should seek to  
20 do is neutralize the impact of that facility in the  
21 marketplace -- nothing more and nothing less.

22 THE WITNESS: Yes, sir.

23

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CHAIRMAN RIGLER: Suppose -- and that leaves  
2 the parties in a status quo

3 THE WITNESS: With respect to the essential nuclear  
4 facility, yes.

5 CHAIRMAN RIGLER: Suppose we had a situation  
6 inconsistent with the antitrust laws in existence. Wouldn't  
7 that tend to institutionalize prior discrimination?

8 THE WITNESS: Let me respond to it in this way:  
9 The nuclear unit in that situation would contribute in no  
10 meaningful fashion to the existing situation at all.

11 CHAIRMAN RIGLER: How do you reach that conclu-  
12 sion?

13 THE WITNESS: It would be neutralized by definition.  
14 It would be supplying a hunk of capacity to the other side at  
15 the same price, at a cost as good to them as it is to you.

16 CHAIRMAN RIGLER: Except that to the extent it  
17 furnishes power need for the immediate or foreseeable  
18 future or contributes to the supply necessary to provide  
19 for those needs, aren't you then doing just what I said,  
20 institutionalizing the past discrimination?

21 THE WITNESS: I don't think so. It seems the  
22 past discrimination is a different problem. You are keeping  
23 this nuclear unit from contributing in any fashion to the  
24 creation or maintenance because of any direct relationship  
25 of an adverse competitive situation. If anything, in the

1 practical effect in the example you gave me, it would  
2 tend to better the situation by adding a substantial hunk  
3 of capacity on equal terms, but it seems to me the key  
4 thing is to keep this nuclear unit from contributing in a  
5 meaningful fashion to such a situation, such an adverse  
6 competitive situation.

7 I guess what I'm saying in a sense is you could  
8 argue -- if you carried the argument to the limit, you  
9 could almost argue that anything the firm does to keep it  
10 an ongoing, viable entity, the fact it pays its payroll this  
11 Friday maintains the situation.

12 But it seems you need a more meaningful connec-  
13 tion than that.

14 CHAIRMAN RIGLER: Let's return to the testimony  
15 I referred you to earlier on page 13 at lines 21 through 24  
16 where you indicate that new participants should be limited  
17 to obtaining no greater proportion of their requirements  
18 than the constructing system would obtain.

19 Wouldn't this tend to perpetuate past  
20 discriminations?

21 THE WITNESS: What it means is that the nuclear  
22 unit -- what it means is that the nuclear unit will not  
23 solve your past problems. You are not calling on it to solve  
24 it. It is not making them any worse. It is not  
25 continuing it in any meaningful way. It is being neutralized



1 in its impact on the marketplace. It does not solve the old  
2 problems if there are old problems to be solved.

3 MR. SMITH: Dr. Pace, I'm interested in your  
4 reasoning referred to on line 13 -- page 13, beginning with  
5 line 19. I understand that your proposal there is that  
6 because the system seeking the share in the new unit already  
7 has benefitted, you would exclude that new unit from the  
8 wholesale costs if that party should seek to buy wholesale  
9 power.

10 THE WITNESS: Yes, sir.

11 MR. SMITH: Now if the party seeking access to  
12 the new unit pays for it, the new unit, its share of the  
13 new unit, and participates as a common owner, isn't it  
14 sharing with the builder the risks and the possibility of  
15 benefits of an entrepreneur?

16 THE WITNESS: It is certainly sharing a portion of  
17 those risks, yes. It is sharing -- if it participates  
18 directly in access, it is sharing the risk associated with  
19 particular problems, prolonged outages, and so forth,  
20 associated with that unit. That is a general answer to  
21 your question.

22 As a practical matter, in a number of these  
23 instances, the systems are coming into the game kind of late  
24 and asking for access. It is not clear they are sharing  
25 all the risks by any means that the major constructing party

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1 is sharing.

2 But the general answer is, yes, they are sharing some  
3 of the ownership risks.

4 MR. SMITH: You are not prepared to say they are  
5 sharing the benefits?

6 THE WITNESS: Yes, they are obviously sharing  
7 in the benefits of the unit directly in that case.

8 MR. SMITH: Well, if they are paying for it and  
9 they are sharing the risks, why should the benefits of  
10 that transaction be denied them when they come over and wish  
11 to purchase wholesale power?

12 THE WITNESS: My point here is that what you want  
13 to keep them from doing is double-dipping on you. Suppose  
14 you put in an extremely good low-cost unit, and if you  
15 allow a particular rival to come in and take his  
16 proportionate share to remain on a competitive footing  
17 with you, by taking his proportionate share of that low-cost  
18 unit, he has his proportionate share.

19 If he is then permitted to buy the rest of his power  
20 on wholesale rate and part of that rate is the same low-  
21 cost rate in the rate base, he is again getting a benefit  
22 and has double-dipped on the new unit.

23 MR. SMITH: The portion of the unit figured into  
24 the wholesale costs is not what he has paid for.

25 THE WITNESS: That's correct, but he still gets a

1 double dip because it is the remaining portion. The new  
2 low-cost unit will have given him advantage in the sense that  
3 he got a direct access and full proportionate shares of  
4 that access and the vast remainder of the unit goes into  
5 the wholesale rate base and if it is a good, low-cost  
6 essential resource, that is a source of pulling down the  
7 wholesale rate, then he gets the advantage again.

8 MR. SMITH: Aren't you suggesting again when he  
9 buys his share that he is not paying his full weight, he  
10 is not taking his share of the risks and is not paying for  
11 his share of the costs?

12 THE WITNESS: I don't mean to be suggesting that.  
13 I don't quite see the connection you make between those two  
14 things.

15 All I'm really suggesting, and this is why I  
16 put in the mathematical example -- it is easier to see  
17 with the mathematics -- if you allow him to double-dip  
18 in a low-cost unit because he has been able to discriminate  
19 in that fashion, he will get cost advantages over you and your  
20 other customers because he has taken more than his proportionate  
21 share.

22 CHAIRMAN RIGLER: When the large company is setting  
23 its rates to sell wholesale power, do they take into account  
24 the production costs of the small system for such self-  
25 generation as it does have?

1 THE WITNESS: No.

2 CHAIRMAN RIGLER: Yet how does this ownership  
3 share in the nuclear unit differ from any of the other  
4 self-generating costs that this sytem has? Isn't it sub-  
5 tracted?

6 THE WITNESS: It differs because the theory is that  
7 you are hypothesizing you have a particular piece of  
8 equipment coming in. It came in because of the combined  
9 demands of the entire system and that is a particularly  
10 favorable resource.

11 It seems you want to keep any particular customer  
12 from getting a discriminatory portion for no particular  
13 reason.

14 CHAIRMAN RIGLER: You haven't satisfied me  
15 there is a double-dip or discrimination. They are paying  
16 for their share in the nuclear unit. If they buy on  
17 average system costs for what remains, it is only taking  
18 into account the remaining part of the pie in the other units  
19 the big system has on line.

20 Where does the double dip come in?

21 THE WITNESS: He got his full slice of the pie  
22 first and then he came back and bought a package of  
23 other things, but including another slice of pie in those  
24 other things.

25 Ask yourself the question, can all the customers on

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1 the system exercise the same option. It is not  
2 possible. If they all purchase their proportionate  
3 share of the unit directly, there would be no unit whatever  
4 in the remaining rate base.

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1 CHAIRMAN RIGLER: Suppose the unit is a turkey.  
2 Then the costs are higher?

3 THE WITNESS: That is right.

4 CHAIRMAN RIGLER: That is the risk Mr. Smith  
5 referred to. It is the same risk the small system has  
6 with its coal plant or diesel plant or any other plant  
7 on its system?

8 THE WITNESS: The difference is that someone  
9 is coming in and requesting to get a particular low cost slice  
10 of your system.

11 What he wants to do in this case is carve the  
12 turkey twice and get it two difference ways.

13 MR. SMITH: Let's assume it is. Let's assume  
14 you build the thing, and it is down, it is a drag on the  
15 system costs.

16 Would you still isolate those system costs,  
17 average wholesale costs in selling power?

18 THE WITNESS: Yes.

19 MR. SMITH: So it could work as a benefit?

20 THE WITNESS: It could work as a benefit.  
21 I don't think he should be allowed to have a double  
22 proportion. You are postulating, assume in this  
23 particular case it is a turkey, a bomb.

24 It thought it would be a low cost unit, and  
25 an attractive resource and it isn't.

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1 It turns out to be a terrible resource. If he were buying  
2 wholesale and participating directly, he would be stuck with  
3 a double share of the bomb and would be worse off.  
4 It works both ways.

5 MR. SMITH: You would permit that, if he took  
6 his risks and it was a risk he would be relieved of the  
7 burden of those risks as a wholesale customer?

8 THE WITNESS: That is correct. I would not  
9 put that nuclear unit in the wholesale rate determination  
10 for him, if he had already gotten his proportionate  
11 share of it directly. It is kind of an involved argument.  
12 I do think in a way the best way to see it is to follow  
13 through the mathematical example I have presented in  
14 my direct testimony. I really think that shows  
15 in dollars and cents terms how merely by adjusting the  
16 share you get and blending it with wholesale, you can  
17 come up with a discriminatory advantage over the remainder  
18 of the customers.

19 CHAIRMAN RIGLER: You haven't satisfied me  
20 that the small system slice of the nuclear unit should be  
21 treated any differently than any other part of its  
22 generating system.

23 That doesn't really effect your mathematical  
24 example.

25 THE WITNESS: I guess the reason I feel that is

bw3 1 again, because he is coming to you asking for a slice  
2 of your system.

3 He didn't build it. He didn't have anything  
4 to do with building it.

5 He did not develop it on his own.

6 CHAIRMAN RIGLER: That takes us back to your  
7 earlier premise as to whether or not it is an essential  
8 resources that confers economic advantages.

9 Mr. Smith is coming to something further down  
10 the line, namely, who subsidized the unit in the first  
11 place.

12 Did federal money subsidize it to a substantial  
13 degree?

14 THE WITNESS: Not substantial degree. There is  
15 federal money involved.

16 If you look at the dollars and cents, it is  
17 small in comparison with the total unit.

18 I'm not arguing they should be denied their  
19 proportionate share of the unit under any event.

20 I'm saying because they are a municipal system  
21 or cooperative system they shouldn't be allowed to get  
22 it the same as any other retail customer you have.

23  
24 I'm the constructor of the unit. It only serves  
25 ten percent of my load.



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I have no way to artificially pump it up to  
be 15 percent of my load.

arl 1           If the rival is not restricted, it is in a  
2 position to do that.

3           MR. SMITH: Does your proposal assume that all  
4 wholesale customers have been given the equivalent to unit  
5 access to the low-cost unit?

6           THE WITNESS: My proposal -- what I'm discussing  
7 in here says if he is a wholesale customer and he intends  
8 to remain a wholesale customer, there is no reason to go  
9 through this because he will get his proportionate share  
10 through the wholesale rate.

11           If he is in the generating business, I analyze  
12 the effect of giving him his proportionate share and I assume  
13 his proportionate share is made available, and as I under-  
14 stand in this case, it has been made available.

15           If he is a generator in the generating business,  
16 I assume he is given access directly to that unit.

17           As I understand the proposed license conditions  
18 of the Applicant, that is true.

19           CHAIRMAN RIGLER: Does the wholesale rate provide a  
20 reasonable allowance for profit?

21           THE WITNESS: It certainly -- I'm not sure I know  
22 what reasonable allowance for profit is, but certainly when  
23 the wholesale rate is figured, a fair rate of return on the  
24 rate base is envisioned as part of that rate, yes.

25           CHAIRMAN RIGLER: Is there universal agreement as to

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1 what constitutes a fair rate of return?

2 THE WITNESS: I can never say there is universal  
3 agreement. I think in most cases there is not a wide  
4 difference between the range of capital cost estimates you  
5 will get from various different experts.

6 CHAIRMAN RIGLER: Any other questions of Dr. Pace?

7 MR. REYNOLDS: Will you wait just a minute?

8 REDIRECT EXAMINATION

9 BY MR. REYNOLDS:

10 Q Dr. Pace, if participation in one of these nuclear  
11 units is by a unit power purchase, is a fair rate of  
12 return reflected in the cost of power?

13 MR. LESSY: I object. The government feels,  
14 the Staff and Department, that although it is discretionary,  
15 of course, with the Board, under McCormick on Evidence,  
16 redirect examination is normally limited to answering  
17 any new matter drawn out in the next previous examination  
18 of the adversary.

19 That is Section 32.

20 Since the adversaries didn't cross-examine,  
21 although it is discretionary, we object to redirect on  
22 questions by the Board itself.

23 CHAIRMAN RIGLER: Overruled.

24 THE WITNESS: There is a rate of return. The  
25 incurred rate of return by the constructor, which is

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1 included in the unit power transaction cost.

2 BY MR. REYNOLDS:

3 Q And is that the same rate of return that is allocated  
4 in the wholesale power cost?

5 MR. HJELMFELT: Objection. I don't believe  
6 there is any allocation of rate of return.

7 MR. CLARNO: The Department would join in the  
8 objection.

9 MR. LESSY: I join in that objection also.

10 CHAIRMAN RIGLER: Sustained.

11 BY MR. REYNOLDS:

12 Q Is that the rate of return that is reflected  
13 in the wholesale power cost?

14 A Not necessarily. The wholesale power cost  
15 would reflect the composite rate of return for the system.  
16 The unit power might well reflect a rate of return associated  
17 with financing that unit.

18 Q Might the latter be higher than the former?

19 A The unit power?

20 Q Right.

21 A Yes.

22 Q Is it your understanding that the CAPCO  
23 arrangement with respect to participation in the nuclear  
24 units provides for participation of the Applicants in a  
25 manner that is comparable to a unit power purchase, or is it

1 by ownership?

2 A My understanding is that it is by ownership.

3 MR. REYNOLDS: I don't have anything further.

4 CHAIRMAN RIGLER: Thank you, Dr. Pace.

5 (Witness excused.)

6 MR. REYNOLDS: We can now proceed with, I believe,  
7 unsponsored documents to be introduced on behalf of the  
8 Cleveland Electric Illuminating Company.

9 CHAIRMAN RIGLER: All right.

10 (Recess.)

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arl 1 MR. ZAHLER: Mr. Chairman, the first thing I  
2 would like to do is distribute copies of an August 6, 1974  
3 letter from Donald Hauser to Herbert Whiting that had been  
4 previously marked as Applicant's Exhibit 65. CEI. That  
5 document was deferred until we got legible copies.

6 I would like to distribute Applicant's Exhibit 66  
7 (CEI) and that was also deferred because it was illegible.

8 Final document is a November 11, 1974 letter from  
9 Donald Hauser to Ruben Goldberg, which has previously  
10 been identified as Applicant's Exhibit 69, admission of  
11 which was also deferred because it was illegible.

12 At this time I would move for admission of  
13 Applicant's Exhibit 65, 66, 69.

14 MR. CHARNO: The Department would like to question  
15 the absence of red-lining on Applicant's 65. We now see that  
16 there is an addition on the second page of Applicant's 66,  
17 the source for which we don't know, and we question the  
18 admission of that portion of the letter into evidence.

19 MR. ZAHLER: Excuse me, Mr. Charno. Even the most  
20 legible copy we could find had obliteration on the last  
21 two lines and I had it retyped for clarity.

22 MR. LESSY: The Staff joins in the objection on  
23 Applicant's 65 not being red-lined.

24 MR. ZAHLER: As to Applicant's 65, that was an  
25 oversight on my part, and I request that it be red-lined in

1 its entirety.

2 CHAIRMAN RIGLER: Mr. Charno, are you satisfied  
3 now with respect to additions and omissions?

4 MR. CHARNO: Yes, I am.

5 CHAIRMAN RIGLER: Then we will receive into  
6 evidence Applicant's 65, 66, and 69.

7 (The documents previously  
8 marked Applicant (CEI) 65,  
9 66, and 69 for identifica-  
10 tion, were received in  
11 evidence.)

12 MR. ZAHLER: At this time I would like to mark  
13 as Applicants Exhibit 191 (CEI) a two-page letter from  
14 Mr. Giuntini to Mr. Reynolds, dated February 20, 1976, with a  
15 12-page enclosure.

16 I request this document be red-lined in its  
17 entirety.

18 MR. REYNOLDS: I'm beginning to be concerned about  
19 the abuse of the red-lined rule. You hand us 14 pages or more  
20 and ask that it be red-lined in its entirety, begins to suggest  
21 there is substantial noncompliance with that rule.

22 MR. ZAHLER: That exhibit is composed of an affidavit  
23 attached to several different letters. Each of those is less  
24 than three pages. They are related to AMP-O and its relation  
25 to PASNY power.

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CHAIRMAN RIGLER: On the representation of the counsel that each paragraph of this exhibit is important, we will not hold you to the red-line rule.

MR. ZAHLER: I do not mean to abuse the rule.

MR. CHARNO: The exhibit contains documents previously placed in evidence as DJ-8 and DJ-11.

MR. HJELMFELT: Which ones are they?

MR. CHARNO: DJ-11 is the letter from Mr. Engle to Mr. Barry, dated May 10, 1973.

And the last two pages of the exhibit, a resolution, were part of DJ-8.

MR. ZAHLER: I would like to mark as Applicants Exhibit 192, a two-page letter from Reynolds to Hjelmfelt, dated January 14, 1976.

I would like to mark as Applicants Exhibit 193 (CEI) a one-page letter from Reynolds to Hjelmfelt dated April 13, 1976.

I would like to mark as Applicants Exhibit 194 (CEI) a one-page letter from Hjelmfelt to Reynolds dated April 14, 1976.

I would like to mark as Applicants Exhibit 195, the deposition of Wayne R. Milburn, taken in this proceeding, on the date of August 13, 1975.

I note for the record that some of the copies the red-lining did not come through clearly and attached



bw2 1 to the exhibit is an indication of the red-lining  
2 sections of the Milburn deposition.

3 I would like to mark as Applicants Exhibit 196  
4 (CEI) a two-page letter from Wayne Milburn to Howard  
5 Shapar, dated April 18, 1975.

6 MR. CHARNO: Is that document Applicants  
7 196 being offered for the truth of the statements made  
8 therein?

9 MR. ZAHLER: Yes. I would like to mark  
10 as Applicants Exhibit 197, a one-page letter from Lee  
11 Wayne Milburn, dated April 16, 1975, with an attached  
12 enclosure of eight pages from Thomas Cooper to Howard  
13 Shapar.

14 I ask that only the first page of that  
15 document be red-lined.

16 MR. LESSY: Is that document being offered  
17 for the truth of the matters asserted therein?

18 MR. ZAHLER: As to the part that has been  
19 red-lined the answer is yes.

20 I would like to mark as Applicants Exhibit  
21 198 (CEI) a two-page letter from Stefanski to Howley,  
22 dated January 15, 1970.

23 I would like to mark as Applicants Exhibit 199,  
24 a one page memo from Bergman to James dated July 15, 1970.

25 MR. CHARNO: Could you give us an offer on 198?

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MR. ZAHLER: CEI would offer that document to show that the load transfer service was the first part of a three-phase program leading to a permanent interconnection, to show that the City was desirous of a load transfer service and three-phase program leading to a permanent interconneciton and, in fact, the City proposed such a plan to CEI which was later accepted by CEI.

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2 MR. ZAHLER: I mark as Applicant's Exhibit 200  
(CEI) --

3 MR. LESSY: How about 199? Can I have an offer  
4 on 199?

5 MR. ZAHLER: Same as with respect to 193, plus  
6 the fact that studies of the interconnection were still  
7 going on during the summer of 1970.

8 I would mark as Applicant's Exhibit 200 (CEI)  
9 a one-page letter from Gaskill to Garfoli dated October 1,  
10 1970, enclosing a two-page letter from Howley to Bergman  
11 dated September 30, 1970, and a two-page memo from  
12 Bergman to Gaskill dated September 30, 1970, and an eight-  
13 page outage report.

14 MR. LESSY: I object. None of that is red-lined.

15 MR. ZAHLER: It may be the red-lining not come out  
16 in the copy, but the copy I have in front of me is red-  
17 lined.

18 MR. LESSY: Would you go over the red-lining?

19 MR. ZAHLER: This entire document is red-lined.

20 MR. LESSY: Can we have an offer on that  
21 document?

22 MR. ZAHLER: CEI would offer this document to show  
23 that further study of negotiations between CEI and the City  
24 regarding the permanent interconnection were ongoing, that  
25 the outages between May and September of 1970 were due to a

lack of communication and confusion on the part of MELP, and further negligence on the part of MELP employees and that MELP's equipment was in a poor condition as was its fuel supply, and in such bad shape that in many times the fire actually went out all by itself.

I would mark as Applicant's Exhibit 201 (CEI) a three-page FPC Order denying motions requesting investigation dated January 10, 1972.

MR. CHARNO: Could we have an offer on Applicant's 201, please?

MR. ZAHLER: CEI would submit this document to complete the documentation regarding the FPC orders of request by the City for investigation and the jurisdiction taken by the FPC and to show that the FPC allowed the City to amend its complaint to include antitrust allegations.

Such action on the part of FPC was necessary and appropriate and proper exercise of the Commission responsibilities under the Federal Power Act.

I request a document be marked as Exhibit 202 (CEI), a four-page FPC order setting interim rates, dated May 30, 1972.

MR. CHARNO: Could we have an offer on Applicant's 202, please?

MR. ZAHLER: CEI would offer that document to show what the lawful and proper rates were to be charged

1 for the service under the FPC order and to show that the  
2 FPC ordered the 69 kV service to be operated in an  
3 open switch, nonsynchronous manner.

4 I would mark as Applicant's Exhibit 203 (CEI) a one-  
5 page emergency resolution, Cleveland City Council, dated  
6 May 10, 1976.

7 I would mark as Applicant's Exhibit 204 (CEI)  
8 ordinance No. 1389-76, from three pages of the Cleveland  
9 City Record, May 26, 1976.

10 I would mark as Applicant's Exhibit 205 (CEI) a  
11 1973 to 1978 capital improvement program of the Cleveland  
12 City Planning Commission.

13 MR. LESSY: May I have an offer of proof on that,  
14 please?

15 MR. ZAHLER: CEI would offer that document to show  
16 that the City of Cleveland studied the question of the  
17 acquisition of CEI and found that it could legally take  
18 such action and that it could feasibly finance such action.

19 MR. HJELMFELT: Excuse me. Is Applicant's 205  
20 red-lined?

21 MR. ZAHLER: I believe it is, Mr. Hjelmfelt.

22 MR. SMITH: There is another objection on that  
23 red-lining. It is a big chore in itself to find the red-  
24 lining if you want to read the parts red-lined. Otherwise  
25 we have to depend on your proposed findings.

1 MR. LESSY: Our copy is not legibly red-lined.

2 MR. ZAHLER: I will excerpt the pages and submit  
3 those. I did not want to present an incomplete document  
4 to the Board. I can indicate that page 2 has been red-  
5 lined --

6 MR. LESSY: All of page 2?

7 MR. ZAHLER: Page 2 was red-lined, the three  
8 paragraphs following No. 3, and there is a section no. 3  
9 in the report entitled "Expanded Electric Power System for  
10 the City of Cleveland, a Proposal to Acquire Cleveland Elec-  
11 tric Illuminating Company Facilities Within the City of  
12 Cleveland."

13 The additional red-lining of that document is  
14 confined to Section 3. I believe the red-lining is  
15 legible in the copies provided to the parties within  
16 Section 3.

17 MR. CHARNO: Can I ask whether pages 6 through 9  
18 of Section 9 and page 12 of Section 3 have been red-lined?

19 MR. ZAHLER: The answer to your question, Mr.  
20 Charno, is no.

21 MR. CHARNO: The Department would like to request  
22 that pages 6 through 12 of Section 3 be red-lined.  
23 That will complete the red-lining of that section.

24 MR. ZAHLER: I would like to mark as  
25 Applicant's Exhibit (CEI) 206 1975 to 1980 capital

1 improvement program, Cleveland City Planning Commission.

2 MR. CHARNO: Mr. Zahler, does Exhibit Applicant's  
3 206 differ from Section 3 of Applicant's 205?

4 MR. ZAHLER: I believe so, Mr. Charno. This is a  
5 different capital improvement planning program and it  
6 lists the fact that money was proposed to be appropriated  
7 for the acquisition of CEI, rated the proposed acquisition  
8 on a certain scale as essential or required or necessary,  
9 and the document differs entirely from Applicant's Exhibit  
10 205.

11 It is the further indication of the City's  
12 proposal to acquire CEI.

13 MR. LESSY: If 206 is red-lined, ours doesn't  
14 show it.

15 CHAIRMAN RIGLER: Would you tell us where to locate  
16 the red-lining in this?

17 MR. ZAHLER: Mr. Chairman, I believe it begins  
18 on page 5, that is Roman numeral five-one.

19 There was further red-lining on 5-3, 5-4. I  
20 believe that is all of the red-lining. I mark as Applicant's  
21 Exhibit 207 (CEI) a report and reconnaissance of the  
22 Municipal Electric Light Plant (MELP) prepared for the  
23 Cleveland City Council by Cressup, McCormick,  
24 et al., dated April 26, 1976.

25 MR. LESSY: Dated what?

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MR. ZAHLER: April 26, 1976.

MR. CHARNO: Could we have an offer for this document?

MR. ZAHLER: CEI would offer this for the essential data and information it contains on the MELP system, to show that MELP's expenses are out of line with industry averages, including distribution and transmission and not just generation; that they have excessive salary levels; that MELP management is subject to political struggles; that the management is splintered in many departments; that there is a lack of operating expertise on the part of MELP; the financial procedures employed by MELP are inadequate; that operating practices by MELP, including testing and maintenance equipment are nonexistent; that the generating plant is in terrible condition; and that purchase of power from CEI is MELP's best alternative.

I will mark as Applicant's Exhibit 208 (CEI) a three-page letter from Kohrman and Jackson to Forbes, dated May 4, 1976.

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1 MR. LESSY: On 208, can we have an offer?

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2 MR. ZAHLER: CEI offers this document to show the  
3 status of repairs regarding boiler number 6 and the total  
4 and complete negligence on the part of MELP employees  
5 in dealing with boiler number 6 and its associates turbine.

6 I would mark as Applicants Exhibit 209 (CEI),  
7 a three-page letter from Kohrman and Jackson to  
8 Forbes, dated August 28, 1975.

9 MR. LESSY: Our copy only has two pages.

10 MR. ZAHLER: This is the document we ran into  
11 confusion as to the stapling of page 3. I provided  
12 page 3 to Mr. Goldberg or Vogler.

13 Applicants will provide a complete copy to you  
14 later.

15 MR. LESSY: It wasn't Mr. Goldberg.

16 Can we have an offer on that, please?

17 MR. ZAHLER: The offer on that document  
18 document would be the same as for the previous document  
19 and in addition CEI would offer that document to show  
20 that MELP has made compromises on the repair of boiler  
21 number 6, and the administrative inefficiencies of MELP.

22 I mark as Applicants Exhibit 210, a three-page  
23 letter from Glaus, Pyle, Shomer and DeHaven, Inc., to  
24 Labas, as dated July 11, 1975.

25 MR. CHARNO: Is 210 being offered for the truth

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1 of the red-line matter.

2 MR. ZAHREL: Since the document is three pages,  
3 there is no red-lining.

4 The red-lining was done prior to the ruling  
5 by the Board.

6 It is being offered for the truth of the matters  
7 asserted therein.

8 I would mark as 211(CEI) a report by Ernst & Ernst,  
9 entitled Financial Analysis, Division of Light and Power,  
10 Department of Public Utilities, City of Cleveland prepared  
11 for the City Council, dated May 29, 1975.

12 MR. LESSY: Is page 20 supposed to be red-lined?

13 MR. ZAHLER: No.

14 MR. LESSY: Is that being offered for the truth  
15 of the matters contained therein?

16 MR. REYNOLDS: The red-lined portion.

17 MR. LESSY: The redlined portion of 211.

18 MR. ZAHLER: Yes.

19 I would mark as Applicants Exhibit -1212(CEI)  
20 FPC complaint in the case captioned FPC v. City of Cleveland,  
21 Civil Case Number 75-2081, in the District Court of the  
22 District of Columbia.

23 MR. LESSY: Is the complaint being offered  
24 for the truth of the matter?

25 MR. ZAHLER: It is being offered for the fact

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that the FPC found it necessary to go to District Court  
to enforce its order regarding MELP.

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CHAIRMAN RIGLER: What is the date on this?

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MR. CHARNO: It is illegible on the

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Department's copy.

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MR. LESSY: Looks like December something, 1975.

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MR. ZAHLER: It looks like December 11, 1975 on

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our copy, but Applicants will undertake to determine the

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exact date.

8

CHAIRMAN RIGLER: Are we all agreed it is

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December 1975?

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MR. ZAHLER: Yes.

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CHAIRMAN RIGLER: That is sufficient.

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(The documents referred to

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were marked Applicant's

14

(CEI) 191 thru 212 for

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identification.)

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MR. ZAHLER: I would move for the admission of

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Applicant's Exhibit 191 (CEI) to Applicant's Exhibit 212

18

(CEI).

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CHAIRMAN RIGLER: Does that conclude the

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presentation of documentary evidence by CEI?

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MR. ZAHLER: This substantially completes the

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documents CEI Intends to offer. There may be additional

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documents. There will be additional red-lining of

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depositions that have been circulated to the parties

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previously.

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1 MR. CHARNO: The Department would like to  
2 request that this be deferred as was done at the  
3 Applicant's request: until the next time we meet, at which  
4 time we will address ourselves to the documents in  
5 question.

6 MR. LESSY: The Staff joins in that request  
7 of the Department.

8 MR. HJELMFELT: So would the City.

9 CHAIRMAN RIGLER: All right.

10 MR. ZAHLER: Can I understand we will put these  
11 documents in tomorrow then?

12 CHAIRMAN RIGLER: The next time we meet. We are  
13 not meeting tomorrow.

14 MR. REYNOLDS: We are not meeting tomorrow? When  
15 did that happen? I have people coming in from out of town.

16 CHAIRMAN RIGLER: We have had an off-the-record  
17 discussion and we have agreed that we will put all the  
18 remaining documents in on Friday, receiving the offers of  
19 proof and being able to rule on admissibility at that time.

20 That brings us to the end of business today,  
21 with one exception. The Board has had an opportunity to  
22 study the various motions filed at the end of the opposition  
23 case. We will issue no written opinion. We have studied  
24 the motions over a considerable period of time, researched  
25 the record, and the cases, and these will be our rulings.

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First, with respect to the Applicant's motion for an order dismissing all allegations, that motion is denied.

Second, with respect to the motion of CEI for dismissal with respect to allegations litigated before the FPC, that motion is denied.

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1 Third, with respect to the motion of Toledo  
2 Edison for an order dismissing an allegation previously  
3 litigated before the Nuclear Regulatory Commission  
4 that motion is denied.

5 Fourth, the motion of Toledo Edison for  
6 an order dismissing specific allegations against it,  
7 Item one in that motion related to the Waterville allegations,  
8 that motion is denied.

9 Item 2, in the Toledo Edison motion relates to  
10 the price squeeze theory, and that motion is denied.

11 On that, the one additional comment I might make  
12 is that in the very recent past, during the last week or two  
13 we have had additional guidance from the Supreme Court  
14 in the Conway decision, FPC v. Conway, which the Board  
15 took into account in considering this motion.

16 Item 3, the Bryan Power purchase issue, there the  
17 question was whether the Bryan Power purchase which allegedly  
18 was blocked by refusals to transmit related to Buckeye  
19 or Northwest, what we are going to do in this instance is  
20 permit an amendment of the pleadings to conform with the  
21 proof.

22 We see no prejudice in doing so. So that although  
23 we are denying the motion to dismiss, we are additionally  
24 requiring the Department of Justice to restate its  
25 allegations to conform with the evidence.

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1 With respect to Item 4, Toledo Edison refusal  
2 to consider joint ownership with the City of Napoleon,  
3 that is denied.

4 With respect to Item 5, Toledo Edison, as a  
5 party to an anticompetitive agreement relating to  
6 restraints on alienation, the motion to dismiss those  
7 allegations is denied.

8 Finally, the overall motion by Toledo  
9 Edison to dismiss all allegations relating to it  
10 in this proceeding, is denied.

11 With respect to the Ohio Edison, Pennsylvania  
12 Power motion, Part 1, Item A, allegations relating to a  
13 subsidy to the City of Hiram, the motion to dismiss  
14 is granted.

15 Item B, territorial allegations relating to the  
16 Firelands Rural Co-op, the motion to dismiss is granted.

17 However, the Department of Justice's response  
18 indicates that evidence was presented with respect to the  
19 Holmes-Wayne Rural Electric Cooperative.

20 If this allegation now is based on evidence  
21 which was discovered subsequent to December 5, 1975, that  
22 allegation should be stated for the record.

23 However, even despite the Department's response,  
24 we see no relationship between the Firelands allegation  
25 and the Holmes-Wayne allegation.



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1 The motion ot dismiss as to Firelands is  
2 granted.

3 The Item C in that motion, Firelands'  
4 inducement to withdraw from Buckeye, the motion to dismiss  
5 is granted.

6 Item D, OE refusal to sell Newton Falls power  
7 for resale, the motion to dismiss is granted.

8 Item E, Ohio Edison refusal to wheel power  
9 from Buckeye to Norwalk, motion to dismiss is granted.

10 Item F, Ohio Edison failure to establish  
11 new delivery point for Buckeye, motion to dismiss is  
12 granted.

13 Item G, Penn Power refusal to sell —

14 CHAIRMAN RIGLER: Mr. Smith reminds me Item F  
15 in that list is dismissed in its entirety.

16 The question arises as to our shorthand  
17 reference to what the nature of Item F was.

18 That was not taken by way of limitation.

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1 MR. STEVEN BERGER: I don't have the papers in  
2 front of me.

3 CHAIRMAN RIGLER: You win.

4 MR. SMITH: Disregard his use of the word  
5 Buckeye. You win the motion.

6 CHAIRMAN RIGLER: Item G, Penn Power's refusal  
7 to sell partial power to Grove City, the motion to dismiss  
8 is granted.

9 Part 2 of the Ohio Edison-Penn Power motion Item  
10 A relating to refusals to bid on Norwalk denied.

11 Item B, Ohio Edison's refusal to enter into a  
12 short-term municipal contract, i.e., contracts less than  
13 10 years, that motion is granted, and that allegation is  
14 dismissed, but we will permit Justice to amend its allega-  
15 tion with respect to a reasonableness of a 10-year contract  
16 as to which evidence was introduced.

17 Item C, the 1965-'66 Penn Power refusal to supply  
18 Grove City with maintenance and power, that motion is  
19 denied.

20 Item D, Ohio Edison's policy of long-term  
21 capacity restrictions, motion is denied.

22 Item E, CEI's customer allocation, denied.

23 Item F, Ohio Edison-Ohio Power customer allocation  
24 to Buckeye dissolved, denied.

25 Item G, Ohio Edison elimination of competitors.

1 The allegation is dismissed as to East Palestine and others,  
2 the motion is denied.

3 Item H, Ohio Edison, elimination of ability  
4 to compete for industrial customers by refusing rate  
5 filings, the motion is denied.

6 With respect to Duquesne, I, the acquisition of  
7 Aetna-Sharpsburg, the allegations are dismissed and the  
8 motion is granted subject to the observations set forth by the  
9 Board relating to the pattern of acquisition.

10 That was adequately covered, I think, when this  
11 subject came up during the presentation of the opposition  
12 case.

13 II, which relates to the refusal to sell power for  
14 resale to Ellwood City, the motion is denied.

15 And III, the Aspinwall acquisition, the motion  
16 is denied.

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1 Item 4 which relates to a series of allegations  
2 affecting the Borough of Pitcairn, the motion is denied.

3 MR. REYNOLDS: Can I ask one question?  
4 I'm not sure my recollection is clear on it.

5 The reference in connection with the rulings --  
6 your reference in connection with rulings on Duguesne  
7 Light's motion, where you indicated that the Etna and  
8 Sharpsburg ruling was subject to the observations of the  
9 Board regarding the pattern of acquisitions, is that a  
10 reference to the Board's observations in connection with  
11 Dr. Wein's testimony.

12 I'm not trying to now limit the Board. I'm trying  
13 to clarify it for my own purposes.

14 CHAIRMAN RIGLER: Certainly, that is at least the  
15 principal reference we had in mind.

16 Our hesitance is to say that that is the only  
17 time we discussed it.

18 Basically we limited very severely the weight of  
19 any evidence relating to those allegations.

20 I think that is clear from reading the record.

21 MR. REYNOLDS: All right, fine.

22 CHAIRMAN RIGLER: We will see everyone at  
23 9:30 Friday.

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1 CHAIRMAN RIGLER: Justice wants us to  
2 consider the subpoenas.

3 Have you had opportunity to talk to Mr. White  
4 or find out about a stipulation?

5 MR. STEVEN BERGER: I think we can work it  
6 out.

7 CHAIRMAN RIGLER: We will not sign the subpoena  
8 to Mr. White pending resolution.

9 MR. CHARNO: That is agreeable with the  
10 Department. If it is understood there is a possibility  
11 he will be called and presuming a motion to quash was  
12 overruled, he will not be surprised at having less notice  
13 than we would otherwise have had.

14 MR. STEVEN BERGER: That is understood.

15 CHAIRMAN RIGLER: Then we will sign subpoenas  
16 directed to Mr. Tribble and to Mr. Miller and to  
17 Mr. McKnight and to Mr. Meister. All subject to  
18 rescheduling of the dates in accordance with our off-the  
19 record discussion this morning.

20 And that leaves us with the subpoena to the  
21 Pennsylvania Economy League which we will sign.

22 We did have an opportunity to discuss Applicants  
23 calling a witness from the League and we will permit that.

24 Let's try to pick a date prior to July 2 on  
25 which we can get him in.

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MR. REYNOLDS: All right.

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CHAIRMAN RIGLER: However, I would want compliance

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with the subpoena duces tecum at least 48 hours

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in advance of the appearance of the witness.

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MR. CHARNO: That is acceptable to the

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Department.

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(Whereupon, at 4:00 pm., the hearing was

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adjourned, to be reconvened at 9:30 a.m., on Friday,

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June 18, 1976.)

End

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