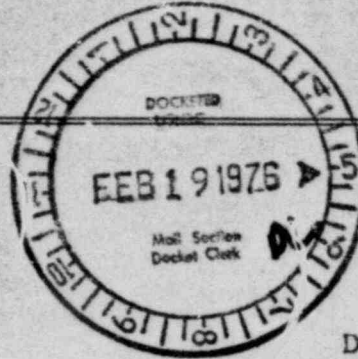


NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY AND
CLEVELAND ELECTRIC ILLUMINATING
CO.

Docket Nos.

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

50-346A
50-500A
50-501A

and

CLEVELAND ELECTRIC ILLUMINATING
CO., et al.

50-440A
50-~~441~~A

(Perry Nuclear Power Plant, Units 1 & 2

Place - Silver Spring, Maryland

Date - Tuesday, 17 February 1976

Pages 4957-
5108

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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.	50-500A
	50-501A
(Davis-Besse Nuclear Power Station, Units 1, 2 and 3)	
and	
CLEVELAND ELECTRIC ILLUMINATING CO.	50-440A
<u>et al.</u>	50-441A
(Perry Nuclear Power Plant, Units 1 and 2)	
-----X	

First Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland

Tuesday, February 17, 1976

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

BEFORE:

MR. DOUGLAS RIGLER, Chairman

MR. JOHN FRYSIK, Member

MR. IVAN SMITH, Member

APPEARANCES:

As heretofore noted.

C O N T E N T S

<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Robert D. Urian	4965	4982		

<u>EXHIBITS</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
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Applicants Exhibits No. 87(OE-PP) (Document No. PP-1, ltr. dated June 5, 1975, from Mr. Urian to Mr. Semmler.)	4988	5000
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Applicants Exhibit No. 88(OE-PP) (Document No. PP-2, ltr. dated June 12, 1975, from Mr. Dunleavy to Mr. Urian.)	4989	5000
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Applicants Exhibit No. 89(OE-PP) (Doc. No. PP-1, ltr. dated July 23, 1975 from Mr. Dunleavy to Mr. Urian)	4990	5000
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DJ Exhibit 199(DJ118546-547)	5107	
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DJ 200(Affidavit of Albert Bader plus attachments)	5107	
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DJ201(118541-545)	5107
DJ 202(105093-95)	
DJ 203(DJ105096)	
DJ 204(DJ105081-082)	
DJ 205(DJ105087-089)	
DJ 206(DJ105080)	
DJ 207(DJ105060;	
DJ 208(DJ119705, 119709)	
DJ 209(DJ105059)	

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EXHIBITS

FOR IDENTIFICATION

IN EVIDENCE

- DJ 210 (DJ105056-057)
- DJ 211 (DJ119679)
- DJ 212 (DJ105053)
- DJ 213 (DJ105052)
- DJ 214 (DJ119682)
- DJ 215 (DJ105042)
- DJ 216 (DJ105038-40)
- DJ 217 (DJ105037)
- DJ 218 (DJ105085-86)
- DJ 219 (DJ119707)
- DJ 220 (DJ105072-73)
- DJ 221 (DJ105043)
- DJ 222 (DJ119689)
- DJ 223 (DJ119692)
- DJ 224 (DJ119717)
- DJ 225 (DJ119716)
- DJ 226 (DJ105074-75)
- DJ 227 (DJ105066)
- DJ 228 (DJ105050-51)
- DJ 229 (DJ119690)
- DJ 230 (DJ119691)
- DJ 231 (DJ119175)
- DJ 232 (DJ105071)
- DJ 233 (DJ105067-70)

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EXHIBITSFOR IDENTIFICATIONIN EVIDENCE

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DJ 234 (DJ105064-65)

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DJ 235 (DJ105034-35)

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DJ 236 (DJ116910, 119695)

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DJ 237 (DJ105090-92)

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DJ 238 (DJ116978)

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DJ 239 (DJ116974-75)

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DJ 240 (DJ116973)

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DJ 241 (DJ116971)

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DJ 242 (DJ116968, 116972)

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DJ 243 (DJ105114, 105116)

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DJ 244 (DJ105109-113)

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DJ 245 (DJ105106-108)

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DJ 246 (DJ116960)

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DJ 247 (DJ105102-104)

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DJ 248 (DJ116940)

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DJ 249 (DJ105008)

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DJ 250 (DJ118044-051)

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DJ 251 (DJ116892-94)

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DJ 252 (DJ118341-342)

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DJ 253 (DJ118329)

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DJ 254 (DJ116884-886)

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DJ 255 (DJ118287-288)

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DJ 256 (DJ134478-484)

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DJ 257 (DJ134408-410)

DJ 258 (DJ134411)

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EXHIBITS

FOR IDENTIFICATION IN EVIDENCE

- DJ 259(DJ134414)
- DJ 260(DJ118843)
- DJ 261(DJ114944-46)
- DJ 262(DJ114925-927)
- DJ 263(DJ114793)
- DJ 264(DJ114908, 924, 925)
- DJ 265(DJ114896-907)
- DJ 266(DJ114889-890)
- DJ 267(DJ114887-888)

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P R O C E E D I N G S

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2 CHAIRMAN RIGLER: Mr. Frysiak finds he had a con-
3 flict next week. His Seebrook hearings will resume for a
4 few days. I believe that what we will do is sit with two
5 members of the Board, probably, in any event. But if there
6 were objections from any party, we would take that into
7 consideration.

8 Let the record reflect that no objection has been
9 entered.

10 Mr. Frysiak will, of course, read the transcript
11 so that he is aware of what went on on any day which he is
12 absent.

13 MR. CHARNO: Before beginning with witnesses this
14 morning, we have passed out a copy of 28 CFR Section 50.6,
15 which are the Department of Justice regulations concerning
16 business review letters. I secured a copy of this after an
17 argument last week concerning the extent and applicability
18 of the business review procedure.

19 I found I was in error with respect to one of my
20 statements. That for certain types of arrangements the
21 Department of Justice does grant a civil clearance rather
22 than just a criminal clearances. This is reflected in
23 paragraph 7.

24 The other points that I made my argument on are
25 reflected in paragraphs 8 and 9.

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1 I did want to take this opportunity to correct
2 the record, insofar as I had misinformed the Board and the
3 parties..

4 MR. STEVEN BERGER: Mr. Chairman, might I just
5 have a clarification from Mr. Charno as to whether or not his
6 statement with regard to the earlier arguments made on this,
7 that what the Department is now saying is that the clearance
8 that was received on the Buckeye transaction was civil, as
9 well?

10 MR. CHARNO: The extent of what I'm saying is that
11 the regulations provide for a civil clearance. I still don't
12 have a copy of the letter. I would presume that the letter
13 would speak for itself as to the nature of the clearance
14 given.

15 MR. REYNOLDS: Mr. Chairman, last week I advised
16 the Board of the possibility that certain documents
17 responsive to discovery requests of the other parties might
18 exist in the archives or the dead storage files of one or
19 more of the Applicants and that I would report back after
20 I had the few days that the Board gave me to look into the
21 matter.

22 I have now had that opportunity and I can give
23 the Board an updated status report.

24 Let me preface my remarks by saying that I'm
25 still satisfied that the discovery requests in this

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1 proceeding were answered carefully by each of the companies
2 on the basis of the knowledge they had at the time.
3 Unfortunately, the time period that everybody had to
4 accomplish the massive task of screening and producing
5 documents was a limited one. And in an effort to meet
6 the deadlines, it is apparent that some of the responses
7 of the Applicants were less than complete.

8 In preparing for the Department's case during the
9 break that we had at the beginning of February and also
10 in connection with discovery requests that were served
11 in the civil suit in the United States District Court
12 in Cleveland, which was initiated by the City of Cleveland
13 against the Applicants, material has surfaced which reflects
14 efforts to establish in a more definitive manner, the
15 respective service areas of Ohio Edison and Toledo Edison,
16 Ohio Edison and Ohio Power, Ohio Edison and Dayton Power
17 and Light Company, and Toledo Edison and Ohio Power Company.

18 This material consists of some maps in at least
19 one instance, and some correspondence and memoranda in
20 other instances.

21 None of the material was located in the central
22 offices of the respective companies, but rather in the case
23 of Ohio Edison, it was located in dead storage files or,
24 I believe, last week I referred to them as "archives," that
25 are located in a wholly separate building.

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1 In the case of Toledo Edison Company, materials
2 found some old miscellaneous files out in the field
3 offices of the district managers. In addition, there is some
4 other documentation, not much, but some, which relates to
5 TE relationships with its -- some of its municipalities
6 and with Ohio Edison's relationships with rural electric
7 cooperatives located in its area.

8 And on the basis of my knowledge at the present
9 time, I also should state that there is other material that
10 relates generally to the same subject matter which was in
11 existence at an earlier time and prior to the discovery here, and
12 has been disposed of or discarded or destroyed, what
13 have you.

14 I'm undertaking still to determine the exact
15 identity of the documentation that is no longer in existence.
16 The discovery requests of the other parties ask that a
17 statement be furnished identifying that material, and I
18 intend to do that as soon as I can satisfy myself as to the
19 exact nature of it.

20 That is something that we are still moving ahead
21 on.

22 The material we are talking about that we intend
23 to reproduce is in transit in part. Some of it can be made
24 available very shortly, as soon as we can copy it. That,
25 along with the statement as to the material that is no

1 longer in existence, I would anticipate we could have into
2 the hands of the other parties by certainly no later than
3 next Monday. Hopefully, we can move this through as we
4 go along at an earlier time this week.

5 CHAIRMAN RIGLER: What is the general time period
6 covered by the documents themselves?

7 MR. REYNOLDS: The documents we are talking about
8 are generally in the time frame of 1965 forward.

9 I would say that primarily it is in a 1965, 66,
10 67 time frame. That is not to say that there aren't also
11 some documents a little later, but I think the bulk of it
12 is around 65 -- almost all of it is pre-'70.

13 I think that is accurate. The bulk of it is '65,
14 '67 time frame.

15 Let me just ad that when this term came to light,
16 all of the Applicants undertook a renewed effort to verify
17 the completeness and accuracy of their earlier discovery
18 requests.

19 At the present time Duquesne Light and Pn
20 Pennsylvania Power Company and the Cleveland Electrical
21 Illuminating Company found no additional material in their
22 files that was called for on production and through a
23 mistake or oversight it had not been furnished.

24 Ohio Edison and Toledo Edison's examination of
25 these matters is continuining and if any further material
does come to light it will be furnished very promptly to the

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1 other parties.

2 CHAIRMAN RIGLER: Has any subpoena for this type
3 of material every been filed on the Ohio Power Company,
4 Mr. Charno?

5 MR. CHARNO: We filed subpoenas for certain material
6 during the American Electric Power case before the
7 Securities and Exchange Commission and elicited material of
8 this type.

9 But from the description by Mr. Reynolds of the
10 dates of this material, what Applicants have found post-dates
11 that which is presently available to the Department.

12 In addition, it involves considerably more
13 companies. Obviously, the Ohio Power materials would have
14 been involving only agreements between Ohio Power and other
15 utilities.

16 CHAIRMAN RIGLER: Okay. I can see that there is
17 an additional problem that may be created by this late
18 production which is that after the Staff has had an
19 opportunity to review these documents, I suppose they will
20 make a judgment as to whether they wish to reopen their case
21 for the limited purpose of taking into account whatever
22 evidentiary materials have been disclosed, in their opinion,
23 by these documents.

24 MR. REYNOLDS: Right.

25 MR. CHARNO: The Department would have similar

1 problems in that --

bw7

2 CHAIRMAN RIGLER: Obviously, no party will
3 be prejudiced by the late production. That is, if this
4 cases you to have to expand your case, rethink your case,
5 recall a witness, or ask for additional time, that would
6 be granted.

7 MR. CHARNO: Thank you.

8 MS. URBAN: Chairman Rigler, the Department
9 had intended to call Mr. Marvin Luxemburg today. We were
10 informed yesterday that he is ill with the flue, and he
11 will be rescheduled.

12 I would like to call Mr. Robert Urian.

13 Whereupon,

14 ROBERT D. URIAN

15 was called as a witness on behalf of the Department of
16 Justice and, having been first duly sworn, was examined
17 and testified as follows:

18 DIRECT EXAMINATION

19 BY MS. URBAN:

20 Q Will you state your full name.

21 A Robert Dale Urian.

22 Q What is your address?

23 A 921 Sunset Boulevard, Ellwood City, Pennsylvania.

24 Q What is your present occupation?

25 A Borough manager of Ellwood City, Pennsylvania.

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Q How long have you been in this position?

A Since August 1974.

Q Would you give a brief rundown of your education and work experiences after high school?

A I'm an undergraduate student at Slippery Rock State College at present, part-time.

My experience since high school, I entered the Military in 1962. I spent nine years in the Military as a bomb and arson specialists. Left the Military 1970 and gained employment with the City of Newcastle, Pennsylvania, where I was appointed as the assistant administrator, again, while attending college at the time.

I spent approximately three years there and in August was appointed to the position in Ellwood City.

Q Would you briefly describe your present duties and responsibilities?

A I am the chief executive officer of the Borough of Ellwood City. My responsibilities entail general public -- management of the general public works operations, public safety operations, administrative control of the community, and, in addition, operate a municipal electric utility.

The entire operation from a budgetary standpoint is \$2.9 million.

Q Would you describe the Ellwood City electrical system?

A We are a distribution system. We receive power at

1 4,160 volts. We distribute to residential and commercial
2 customers throughout the Borough, approximately 4,00
3 customers, total.

4 Q Do you have any generation?

5 A We do not generate electricity, no.

6 Q Whom did you purchase this power from?

7 A Pennsylvania Power Company.

8 Q What is the condition of the distribution system?

9 A In very good shape, excellent, in some portions.

10 Q Could you tell me what the last peak of the
11 distribution system was?

12 A Our load is ten megawatts.

13 Q Do you know whether the Borough every generated
14 its own power?

15 A to my knowledge, I think at one time they did.
16 But I can't be sure. That was way, way back.

17 Q Does Pennsylvania Power Company serve any
18 industrial customers within the Borough?

19 A Yes, they serve all of the customers within the
20 Borough.

21 Q Do you know the approximate size of the loads of
22 these customers?

23 A We have done some reviews to find out what the
24 loads would be for future planning. And the loads were
25 estimated to be one and a half times what our present load is.

bw10

1 Q Is this the -- this is the total loads of those
2 customers?

3 A Right.

4 Q Does service to your present customers use
5 all of the capacity of the Ellwood City distribution system?

6 A No, our load is ten megawatts, but our capacity
7 is 20 megawatts.

8 Q Are you currently expanding your system?

9 A Right now we are in an expansion stage. We have
10 just purchased some additional switching equipment which
11 will increase our capacity, our capability, to 50 megawatts.

12 Q Why are you expanding your capability?

13 A Primarily to better serve our customers and
14 in anticipation of expansion in the future.

15 Q When did you start this expansion program?

16 A The Borough -- well, since I have been there
17 the last 17 months, we have done considerable expansion
18 in terms of planning and rehabilitation of the present
19 system. We have -- expansion falls in several categories,
20 one of which, in terms of general operations, we have added
21 on a full-time electrical engineer, which in management
22 perspective, would be a form of expansion.

23 Q To your knowledge, did this expansion program
24 start before you became borough manager?

25 A Yes, the prior borough manager had left a lot of

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1 projects on the boards where they were planning to expand.

2 Q What is the financial condition of the Ellwood
3 City electrical system?

4 A Excellent.

5 Q In 1975 did the electrical system re-invest any
6 of its proceedings into capital improvement?

7 A In 1975?

8 Q Yes.

9 A Yes.

10 Q Do you know the amount of this investment?

11 A Yes, approximagely \$142,000.

12 Q Does the electrical system contribute to the
13 general fund?

14 A Yes.

15 Q Do you know the amount of this contribution
16 in 1975?

17 A Yes, \$400,000.

18 Q Do you know what percentage of the net revenue of
19 the electrical system that is?

20 A The net. Yes, it is about 30 percent of the
21 net.

22 Q what percentage of the gross revenues of the
23 Borough is that?

24 A Percentage of the gross revenues of the Borough?

25 Q Yes, sir.

bw12

1 A In the 40 percent range.

2 Q Since 1960 has the electrical system contributed
3 comparable percentages to the general fund?

4 A Yes. In some cases, more.

5 Q Does the electrical system provide any free
6 service to the Borough?

7 A Yes, in addition to the cash contribution, we
8 provide free electric power to the recreational facilities,
9 the public library receives power, all of the street lighting
10 falls under this category.

11 Q How do the present retail rates of Ellwood City
12 compare to those of Pennsylvania Power Company?

13 A In some points of the scale, it is as much as
14 eight percent under, and on some points of the scale they
15 almost meet. At no time are our rates higher than
16 Pennsylvania Power's rates.

17 Q Do you know whether Pennsylvania Power Company
18 has an industrial rate?

19 A Yes, they do.

20 Q Does Ellwood City have an industrial rate?

21 A We have -- we do not have a formal industrial
22 rate. We have an industrial rate which council has given their
23 nod to. There was no need for a formal rate.

24 We had no industrial customers, but we have one we
25 use as a planning or negotiating item.

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1 Q And how does this rate that Ellwood City uses as
2 a negotiating item compare with the industrial rate of
3 Pennsylvania Power Company?

4 A It is less, something in the vicinity of five
5 percent.

6 Q Since you became Borough manager, has Ellwood
7 City served any industrial customers located within the
8 Borough that were formerly served by Pennsylvania Power
9 Company?

10 A No.

11 Q Why?

12 A There is in our present ten-year contract with
13 Pennsylvania Power that was signed in 1966, a paragraph
14 which states that we cannot serve any customers presently
15 served by Pennsylvania Power.

16 Q I would like to show you DJ Exhibit 75, which is
17 currently in evidence. Would you look that over and tell me
18 whether that is the current contract between Pennsylvania
19 Power Company and Ellwood City?

20 A Yes, it is. The dates are appropriate.

21 Q Is the rate schedule attached to this contract
22 the current schedule?

23 A No, it is not.

24 Q would you point out the portion of the contract
25 which prevents you from competing with Pennsylvania Power

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1 Company for its present customers?

2 A Yes, paragraph 4.

3 Q Would Ellwood City have the capacity to serve
4 some of the Pennsylvania Power Company's present customers,
5 if it were permitted to compete for them?

6 A Yes.

7 Q When does your current contract with Pennsylvania
8 Power Company expire?

9 A August of this eyar.

10 CHAIRMAN RIGLER: Mr. Reynolds?

11 MR. REYNOLDS: I would like to make the continuing
12 objection on behalf of all Applicants, other than
13 Pennsylvania Power, to the testimony of this witness.

14 CHAIRMAN RIGLER: Okay. That will be overruled.

15 BY MS. URBAN:

16 Q When the contract expires in August, does
17 Ellwood City intend to attempt to serve industrial customers
18 located within the Borough which are presently
19 served by Pennsylvania Power Company?

20 A We would like to compete for that service, sure.

21 Q Have any new industries located within the
22 Borough since you became borough manager?

23 A Yes.

24 Q Has Ellwood City attempted to serve the load of
25 these new industries?

1 A Yes, we are in the negotiating stage with one
2 right now.

3 Q What is the load of the customer for which you
4 are negotiating?

5 A Approximately two megawatts.

6 Q Do you expect that load to remain constant?

7 A No, they are in an expansion phase now while
8 pending some major financing, which would double their load
9 or put their load at four megawatts.

10 Q In the course of your negotiations, have you
11 proposed an industrial rate that Ellwood City would charge?

12 A Yes.

13 Q Is this industrial rate lower than that of
14 Pennsylvania Power Company for service to that class of
15 customer?

16 A Yes.

17 Q Does the rate at which Ellwood City purchases
18 wholesale power from Pennsylvania Power Company
19 have any effect on your ability to establish retail industrial
20 rates lower than Pennsylvania Power Company's?

21 A Would you repeat that, please?

22 (The reporter read the pending question.)

23 THE WITNESS: Yes.

24 BY MS. URBAN:

25 Q Do you know whether Pennsylvania Power Company

1 offers a high voltage discount rate to retail customers?

2 A I know that, in reviewing some of the other
3 rates that the industry are paying, the industries are
4 in some cases and points and sections of the blocks are
5 receiving electricity at a lesser rate than we are.

6 I assume that would mean they are receiving some sort of dis-
7 counts or a discount rate, sure.

8 Q Are these industries that you have just described,
9 retail industries located within the Borough of Ellwood
10 City?

11 A Yes.

12 Q Do you know whether Pennsylvania Power Company
13 offers a high voltage discount rate to wholesale customers?

14 A I may be mixed up on your terms, but, yes, the
15 answer would apply.

16 I'm sorry. No, I got lost there for a minute.
17 No.

18 Q Did Ellwood City ever ask Pennsylvania Power
19 Company if a high voltage discount rate was available?

20 A Yes, in 1972 the Borough of Ellwood City contracted
21 and I'm going by reports -- in 1972 the Borough of Ellwood
22 City contracted a review of our present system with
23 Michael Baker, Jr., Inc. - an engineering consultant firm of
24 Beaver, Pa., to do an evaluation of our study. The report
25 I have states that one of the items that was -- one of the
points that was reviewed by the consultants was whether or not

bw17

1 we should receive voltage at a high voltage rage. The
2 question, in fact, was, would there be any savings to the
3 Borough by going to a high voltage rate. Would we benefit
4 from it?

5 The response was from Penn Power that there would be
6 no savings, because the rate schedule was there and there
7 wouldn't be any difference.

8 CHAIRMAN RIGLER: What do you mean by high voltage,
9 Miss Urban?

10 MS. URBAN: Voltage at 69 kv and above.

11 CHAIRMAN RIGLER: Is that how you understood
12 the question?

13 THE WITNESS: I wouldn't agree directly at 69.
14 There are other high voltage rates or high voltage
15 capacity above the 4160 that we are now receiving at.

16 BY MS. URBAN:

17 Q At that time in 1972, did Pennsylvania Power
18 Company tell Ellwood City that there was no high voltage
19 rate available?

20 MR. STEVEN BERGER: Excuse me, Mr. Chairman, I
21 believe in response to the last question, Mr. Urban indicated
22 he was nsot testifying from personal knowledge. The
23 Department is now further questioning the Witness on this
24 period of time that the Witness is not testifying as to his
25 personal knowledge.

bw18

1 MS. URBAN: Mr. Urian has spoken to the
2 consultant that was involved --

3 MR. STEVEN BERGER: I would prefer to hear that
4 information from the Witness.

5 BY MS. URBAN:

6 Q How did you become aware of the information you
7 just testified to?

8 A Two methods. One is that the report from the
9 consultant indicates that.

10 CHAIRMAN RIGLER: This was a written report?

11 THE WITNESS: It was a written report, your HONOR.
12 It was a complete review of our presentation and what we --
13 indicating what we should do as far as future planning and
14 presentation, present position of the utility.

15 In addition, I have direct contact with that
16 consultant, who is now an engineer for the Borough,
17 electrical engineer for the Borough.

18 MS. URBAN: Do I have a question pending?

19 THE WITNESS: Do you want a response to that?

20 BY MS. URBAN:

21 Q Could you answer that question, please?

22 A Again, I can only go by the report. I understand
23 according to the report that the consultant was told that
24 there was no high voltage discount rate available or that
25 the present rate schedule didnot include one, therefore,

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1 there would be no difference in rate.

2 Q Did Ellwood City ever request that Pennsylvania
3 Power Company establish a high voltage discount rate for
4 wholesale sales to municipalities?

5 A Yes.

6 Q When was this request made?

7 A 1973, Pennsylvania Power filed with the FPC
8 a request for rate increase. At that time the Borough of
9 Ellwood City and four other municipalities filed against
10 that action, that rate increase action.

11 As part of that action we requested a high voltage
12 rate to be included with the new rate schedule.

13 Q Why was Ellwood City interested in taking power
14 at 69 kv?

15 MR. REYNOLDS: I object to that question. There has
16 been no indication yet from the testimony of any statement
17 in that regard at all.

18 CHAIRMAN RIGLER: Sustained.

19 BY MS. URBAN:

20 Q Why was Ellwood City interested in taking power
21 at a higher voltage?

22 MR. STEVEN BERGER: I object on the same basis.

23 BY MS. URBAN:

24 Q Why did Ellwood City request that a high voltage
25 discount rate be filed?

1 A There were several internal things; one from
2 an operation standpoint, we could better serve our customers
3 or plan future customers. We assumed we want to expand,
4 wanted to at that time. One of the customers at that
5 point, two of the customers at that point, the industrial
6 customers were not receiving their electricity or serve
7 at 69. In order to be competitive we needed to have
8 the 69 service.

9 In addition, it is an engineering fact that it is
10 cheaper to buy voltage at a higher voltage, because of many
11 reasons. One is less line loss and less cost for delivery.
12 We assumed that we could be more competitive and establish
13 a better rate for our customers by receiving at a higher
14 voltage.

15 Q You said that some of these customers were taking
16 power at the higher voltage. By whom are those customers
17 served?

18 A Pennsylvania Power Company.

19 Q Are those customers located within the Borough?

20 A Yes.

21 Q At the time you requested the high voltage discount
22 rate, did Ellwood City have the facilities to take power at
23 a high voltage?

24 A No.

25 Q What was Pennsylvania Power Company's response to

bw21

1 your request for high voltage discount rate?

2 A At a hearing at PUC which I testified at in
3 February of 1974, when we requested -- this was during the
4 process of debating whether or now we should get a high
5 voltage discount rate -- Penn Power's response in my
6 presence was that we were not ready to receive at a 69
7 voltage rate or high voltage rate.

8 Q You said at a hearing at the PUC; is that correct?

9 A No, at the FPC. We are regulated by the FPC.

10 Q Why did you request the high voltage discount
11 rate before you were able to take power at the high voltage?

12 A Pure economics. We needed to know what the return
13 was going to be for our investment. Maybe I should clarify
14 that a bit more. It is a matter of record, and I did testify
15 to this fact. We are restricted by Pennsylvania State
16 law to enter into any debt that we can't prove that we can
17 support. In case of a utility, and I'm quoting Act 87,
18 Pennsylvania State law which governs how we can borrow,
19 on the basis of it being a utility and having our ability
20 to go into debt limited by restrictions of state law, we
21 must show support of that debt guaranteed to the State before
22 we can enter into -- we assumed we would enter a bond issue
23 to afford an expansion program.

24 We have to show we can support that debt from the
25 revenues received from the electric utility, in order to

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1 go into that debt. We were handicapped at the time. If we
2 didn't know what the profit obviously was going to be from
3 the resell of the electricity, we couldn't enter into the
4 debt.

5 Q Was this issue litigated in the Federal Power
6 Commission?

7 A Yes.

8 Q As a result of this litigation was a high
9 voltage discount rate established?

10 A Judge Kaplan, hearing the case, ruled that a
11 high voltage discount rate would be issued. We agreed
12 on the formula at the time. And the high voltage discount
13 rate would be part of the rate schedule.

14 Q Has Pennsylvania Power Company filed such a
15 rate?

16 A No.

17 Q why not?

18 A One of the stipulations in the Judge's ruling is
19 that we must request the rate 45 days in advance of the
20 need, and they would issue it to us within 45 days of the
21 advance of the service.

22 Q Does the establishment of such a rate without
23 filing, allow you to determine whether taking 69 kv service
24 is economically feasible?

25 A Repeat that please?

1 (The reporter read the pending question.)

2 THE WITNESS: I said that before that we agreed to
3 the formula, and we know what the rate would be. We can
4 calculate that. It was 30 cents discount per kilovolt.

5 I'm being vague on this. I know the rate or
6 discount is established, the formula is established and our
7 engineer can calculate and has calculated what that rate
8 would be.

9 BY MS. URBAN:

10 Q Are you planning to buy power at 69 kv?

11 A Yes.

12 MS. URBAN: We have no further questions.

13 CHAIRMAN RIGLER: Mr. Goldberg?

14 MR. GOLDBERG: No questions.

15 CHAIRMAN RIGLER: Mr. Hjelmfelt apparently isn't
16 with us today. Mr. Berger?

17 MR. STEVEN BERGER: I would like a ten minute break,
18 if I may.

19 (Recess.)

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CROSS-EXAMINATION

BY MR. STEVEN BERGER:

Q Mr. Urian, you testified that the borough does not serve any industrial customers, only serves residential and commercial customers, and that all industrial customers inside the borough are served by Pennsylvania Power. Is that correct?

A Right.

Q How do you define "industrial customer"?

A Primarily by load, and that I would term them from a professional management standpoint as a manufacturer.

The very, very large loads are the industrial loads. There is a pretty definite line in determination of what is an industry and what is commercial in terms of designing and everything else.

Q It is true there are manufacturing establishments inside the borough of Ellwood City that are being served by Ellwood City; is that not correct?

A I can't recall any.

Q You can't recall of any manufacturing establishments inside the borough that are being served by the borough rather than the Pennsylvania Power Company?

A No, I can't.

Q As to the industrial customers inside the borough that are presently being served by Pennsylvania Power Company,

blt 2

are you aware that in order for Pennsylvania Power Company to provide service to those customers that they would first have had to obtain from the Borough of Ellwood City a franchise in order to serve those customers?

A I would like you to repeat that.

(Whereupon, the Reporter read from the record as requested.)

THE WITNESS: I try to look at it from a legal standpoint. I really can't answer that and be sure.

That is something that I would relate directly to our solicitor.

BY MR. STEVEN BERGER:

Q Let me simplify it, if I can.

Is it your understanding that Pennsylvania Power Company has a right to be inside the Borough of Ellwood City with its facilities without the permission of the borough?

A Without the permission of the borough?

Q Correct.

A Yes, I would say in some cases you could be within the borough without the permission of the borough.

Q What is the basis for that statement?

A Providing a public utility. If we didn't serve or refused to serve someone needing a utility, whether it be water, electricity, or sewage, it would be obvious that it

blt 3

would be a legal matter. Someone else could come in and serve them or would have the right to come in and serve them.

Q To your knowledge, would Pennsylvania Power Company have a right to extend service to such a customer in such a situation without first obtaining the borough's approval?

A I doubt that. I doubt that they would be able to.

Q Mr. Urian, you mentioned a 1972 report from your consulting engineer. Is that correct?

A Yes, I did.

Q Do you have a copy of that report?

A No, I don't. I have it on file, not with me.

MR. STEVEN BERGER: I would like to ask the Department to furnish Applicants with a copy of that report, if I may.

MR. CHARNO: Certainly.

BY MR. STEVEN BERGER:

Q Now, Mr. Urian, you testified that the reason that the Borough of Ellwood City -- strike that.

Mr. Urian, you referred to paragraph 4 of the contract between Pennsylvania Power Company and the Borough of Ellwood City as serving in some way as to prevent the borough from providing service to certain customers. Is that correct?

blt 4

A Yes, I did.

Q Do you have a copy of that in front of you?

A Yes, I do.

Q Would you read the first sentence of it?

A Of paragraph 4?

Q Yes.

A "Except with the written consent of the Company, service furnished hereunder shall not be resold for use at any premises now or hereafter being furnished electric service directly by the Company."

Q Did a time ever come during the operation of this provision in the contract when the Borough of Ellwood City was desirous of extending service to any customer then being served by Pennsylvania Power Company?

MR. CHARNO: If I may ask, I take it you waive any objection to the hearsay you may receive through this witness?

MR. STEVEN BERGER: I don't follow what you are talking about, Mr. Charno.

MR. CHARNO: You are asking at any time rather than at any time during his tenure.

MR. STEVEN BERGER: Are you interposing an objection to hearsay? Is that what this is for?

MR. CHARNO: I have no objection.

blt 5

BY MR. STEVEN BERGER:

Q From August of 1966 until the present time, are you aware of any situation in which the Borough of Ellwood City was desirous of extending service to customers being served inside the borough by Pennsylvania Power Company?

A Yes, I came into a situation where they were desirous. We continue to be desirous, and they were, at the time I took the position, were in litigation at that point over the discount rate.

Q Did you ever evidence your desire to Pennsylvania Power Company that the borough would like to serve a particular customer being served by Pennsylvania Power Company at the time?

A I believe at this point this would definitely be hearsay, but I was under the advice of our attorney, who had in fact stated to me that in the past and on occasions, which he pinpointed, that Pennsylvania Power was asked and they did not receive the approval of Pennsylvania Power to serve that customer.

Q You are talking about Mr. Luxomberg now?

A Yes, I am.

Q Did Mr. Luxomberg tell you which customers were involved and what in fact had been done in the way of communication?

A There were meetings with officials from Penn Power,

blt 6

and I'm relating what Mr. Luxomberg told to me. There were meetings with members of Penn Power, representatives of Penn Power, and the serving of industrial customers was requested and discussed. And Mr. Luxomberg's word to me was there was an absolute no.

I do not know of the specific customers they discussed.

Q Do you know to your knowledge, or have you seen to your knowledge, or have you been made aware of anything in the way of a written request to Pennsylvania Power Company by the Borough of Ellwood City to serve customers then being served by Pennsylvania Power Company?

A No.

Q Would you return to paragraph 4 of the Department's Exhibit No. 75 and read from the middle of paragraph 4, beginning with the word "any"?

A "Any request from the Company or the municipality for the consent of the other to serve premises now or hereafter being served by the other shall be in writing.

"The Company or the municipality shall respond in writing within 15 days after receipt of such request. If no response is made within such a period, consent shall be presumed given."

Q I take it from your response to the last question

blt 7

that you know of no such requests having been made in conformity with paragraph 4?

A I know of none.

Q And none was communicated to you?

A No, not to my recollection.

Q To your knowledge, has the borough ever requested Pennsylvania Power Company to give to the borough the right to serve customers then being served by Pennsylvania Power Company?

A Not in conformance with the contract. Is that the question?

MR. STEVEN BERGER: Your Honor, I ask marked for identification as Applicants' Exhibit No. 87(OE-PP) document number PP-1, a letter dated June 5, 1975, from Mr. Urian to Mr. Semmler.

xxxxx

(The document referred to was marked for identification as Applicants' Exhibit No. 87(OE-PP).)

End 3

THE WITNESS: I have it.

blt 1
Begin 4

BY MR. STEVEN BERGER:

Q Mr. Urian, did you send this letter to Mr. Semmler?

A Yes, I did.

Q What was that response?

A The response directed the action to Mr. Dunleavy, the vice president, who in turn contacted us and through the process approval was given.

Q Approval was given?

A Yes.

MR. STEVEN BERGER: I would have marked for identification as Applicants Exhibit 88(OE-PP) document number PP-2, a letter from Mr. Dunleavy to Mr. Urian, dated June 12, 1975.

CHAIRMAN RIGLER: All right.

The Board's copy is unsigned.

Are you asking for a stipulation?

XXXX

(The document referred to was marked for identification as Applicants Exhibit No. 88(OE-PP).)

CHAIRMAN RIGLER: Are you asking for a stipulation that Mr. Dunleavy is the author of this?

MR. STEVEN BERGER: I will stipulate to that.

BLT

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BY MR. STEVEN BERGER:

Q Do you recall receiving a copy of this letter, Mr. Urian?

A Yes, I do.

Q And this letter was a letter in response to your letter of June 5?

A To my letter, right.

MR. STEVEN BERGER: I mark for identification as Applicants Exhibit 89(OE-PP) document number PP-1, a letter from Mr. Dunleavy to Mr. Urian, dated July 23, 1975. .

And I will certainly enter into the same stipulation with regard to Mr. Dunleavy being the author of the letter.

CHAIRMAN RIGLER: I take it Justice doesn't challenge the authorship of those letters?

MR. CHARNO: We do not.

xxxxx

(The document referred to was marked for identification as Applicants Exhibit No. 89(OE-PP).)

BY MR. STEVEN BERGER:

Q Mr. Urian, did you receive a copy of the July 23, 1975, letter from Mr. Dunleavy?

A Yes, sir.

Q Have you in fact attempted to transfer the customers referred to in these letters to the borough --

blt 3

A We are in the process at this point. We have acquired all of the approvals -- I can't be exactly sure -- there was one or two in the balance at the time -- approvals, written consent of the residents. And we will be proceeding very shortly to contact Penn Power and proceed with the changeover.

Q Mr. Urian, are you aware -- let me ask this question.

Does the Borough of Ellwood City serve outside of its incorporated limits?

A No.

Q Does it serve residential or --

A I vaguely remember that there -- I don't vaguely. There are several residential customers that through consent of Penn Power we do serve them because there is no logical approach for Penn Power to serve them, if that is a good way to approach that point.

They are in a unique restricted, if you will, area outside the borough that is not easy for Pennsylvania Power to serve. Therefore, they have -- and I assume there was an agreement which they had requested in the past that Ellwood City serve them as a matter of convenience.

And in the case of this -- it relates to this particular situation where at the time it was convenient for Penn Power to serve those customers. As a result, there was

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a letter agreement entered into from -- with Penn Power which, in addition to the contract, stipulated that upon request certain residential and commercial facilities could be taken over upon request. It was in addition to the agreement.

There was no request really required. It was a matter of just you say you want them and you can have them. It was a letter agreement.

MR. STEVEN BERGER: Could you possibly take Mr. Urian's last answer and reread it? I think the Board might follow the next line of questioning better if we had it reread.

(Whereupon, the Reporter read from the record as requested.)

BY MR. STEVEN BERGER:

Q Mr. Urian, are you aware that in order for the borough to provide service to any customer outside the incorporated limits of the borough it would first have to obtain the approval of the Public Utilities Commission of Pennsylvania?

A With the knowledge I have right now, I would say yes.

Q Would it also be true that, if such approval were obtained from the Public Utilities Commission of Pennsylvania, that the rates that the borough would charge to those particular customers located outside the borough would be

blt 5

subject to the regulation of the Public Utilities Commission?

A I can't be sure of that. I know our present rate is regulated by the FPC, but considering the boundary situation I really can't be sure.

Q I don't want to confuse the record at this point, but before I go on with this line, when you say your present rates are regulated by the FPC, you are not talking about the borough rates to its residential or commercial or whatever other customers they may have. You are speaking in terms only of the regulation of Pennsylvania Power by the Federal Power Commission in the rate it charges Ellwood City. Is that not correct?

A That is right.

Q To your knowledge as to the customers you just described which are located outside the borough and are served by the Borough of Ellwood City, has the Borough of Ellwood City ever obtained approval or ever even sought approval from the Public Utilities Commission of Pennsylvania to serve those customers?

A Not to my knowledge.

Q Are those customers being charged the rates that the other customers of the Borough of Ellwood City are being charged?

A Yes, they are.

Q Who establishes those rates?

blt 6

A The borough council.

Q Do you -- isn't there a move afoot right now in the Pennsylvania Legislature to make all rates charged by boroughs such as the Borough of Ellwood City, municipalities, subject to Public Utilities Commission approval?

End 4

A Senate Bill 1221.

bwl

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1 Q You are pretty familiar with that, are you not?

2 A Yes, fairly.

3 Q Are you opposed to that bill?

4 A From our standpoint, yes, it would take local
5 control away from the people. From a managerial standpoint
6 the local residents have the power to regulate their own
7 rate through their local elected officials. On that basis,
8 I would say we would be talking the control away from the
9 people, Yes, I would be opposed to that.

10 Q Do you recall making this statement in connection
11 with what you said was Senate Bill 1221, recently?

12 A I'm sure I have on several occasions.

13 CHAIRMAN RIGLER: I'm having trouble with the rele-
14 vance of this.

15 MR. BERGER: Well, your Honor, I think that the
16 relationship between rates inside and outside the Borough
17 and how they go about being established has relevance, as
18 a result of the direct testimony of the Witness.

19 CHAIRMAN RIGLER: I would separate inside and
20 outside the borrower.

21 The borrower's position with respect to matters
22 pending in the Pennsylvania Legislature strikes me as outside
23 the purview --

24 MR. STEVEN BERGER: I'm directed myself to a
25 statement made by Mr. Urian specifically in regard to this, and
it goes to Mr. Urian's testimony. Perhaps you will let me

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1 finish the question and then make a ruling as you see fit.

2 BY MR. STEVEN BERGER:

3 Q Do you recall making a statement recently that it
4 has been an open secret for years that most boroughs that
5 have their own electric departments have been able to
6 offer competitive and lower rates to their residents and,
7 at the same time, have been able to keep taxes lower in the
8 bargain, by using profits from electricity sales to pay for
9 government expenses?

10 A I did not make that statement. I quoted a
11 document received from the Pennsylvania Municipal Electrical
12 Association. I do not have the knowledge of all of the
13 Pennsylvania municipalities and, therefore, could not make such
14 a statement. I did quote the document.

15 Q Do you subscribe to it?

16 A We are members of the Pennsylvania municipal
17 electrical system.

18 Q No, do you personally subscribe to that, that
19 statement that was attributed to you?

20 A I only know our own situation. I say our rates
21 are lower and that we do benefit from it or the people benefit
22 from it.

23 Q Let me ask you this, Mr. Urian, are you aware
24 that under Pennsylvania law, as it exists right now, that as to
25 all areas outside the incorporated limits of the Borough of

bw3

1 Ellwood City that Pennsylvania Power Company is certified
2 by the Public Utilities Commission of Pennsylvania as the
3 sole electric supplier to those areas?

4 A I assume that to be the case. I am not that --
5 You know.

6 MR. SMITH: May I interpose here? Does this mean
7 not only that they may, but they must serve?

8 MR. STEVEN BERGER: I believe that is the case,
9 your HONOR.

10 MR. SMITH: Unless somebody else does?

11 MR. STEVEN BERGER: I believe that they are
12 required to serve under Pennsylvania law.

13 MR. REYNOLDS: Could I get back the witness'
14 answer before Mr. Smith's question?

15 (The reporter read the record as requested.)

16 MR. REYNOLDS: The reason I asked for the
17 question back was that the Witness that time and on a couple
18 of other occasions shrugged his shoulders and it doesn't
19 appear on the record what the response is. I think it might
20 be helpful if he completes the answer, and it gets reflected
21 on the record, because there is no way to pick it up
22 otherwise.

23 THE WITNESS: Shall I answer that, your Honor?

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CHAIRMAN RIGLER: Wait until Mr. Berger comes back.

The witness has a further answer to the pending question.

MR. STEVEN BERGER: I don't know what the pending question is.

(Whereupon, the Reporter read from the record as requested.)

THE WITNESS: No, I don't specifically know that. If you say that, I assume that to be true.

We are not involved -- we are not involved in serving outside the borough. In the limited cases that we are, that is certainly not our interest. I think they are very few and far between, and that per agreement with Penn Power.

We personally -- and I am speaking as a municipal official -- we could care less. We would terminate those in a minute if that were the situation.

I don't know of specifics whereby we couldn't do that, because if we could we wouldn't serve them.

MR. STEVEN BERGER: I would like to move into evidence Applicants 87, 88, and 89 at this point, before moving on to another line.

CHAIRMAN RIGLER: Hearing no objection, they will be received into evidence at this time.)

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(The documents previously marked for identification as Applicants Exhibits Nos. 87, 88, and 89 were received in evidence.)

BY MR. STEVEN BERGER:

Q Before moving on, Mr. Urian, it is true you came with the borough in --

A August of 1974.

Q August of 1974.

And, if there were requests by the Borough of Ellwood City to serve customers that were being served by Pennsylvania Power Company inside the borough prior to the time of your coming with the borough, it is possible that they would not have come to your attention. Is that not correct?

A That is always a possibility. There is a lot of paperwork. But I did review as much as I could of the past operations of the utility in order to be able to operate it efficiently.

Q Let's go to the question of kv service and the FPC proceeding and see if we can discuss that for a few minutes.

Isn't it correct that the question with regard to the extension of 69-kv service to the Borough of Ellwood

blt 3

1 City has really never been in terms of whether Pennsylvania
2 Power Company would provide service but solely whether or
3 not Pennsylvania Power Company would file a rate for such
4 service?

5 A I will agree to that.

6 Q As to the question of Pennsylvania Power Company's
7 refusal to file a rate for 69-kv service, would it not be
8 a correct statement to your knowledge because of your in-
9 volvement in the FPC or otherwise that the position taken by
10 Pennsylvania Power Company was that they would not file a
11 rate for 68-kv service until such time as the municipality
12 demonstrated that it was financially capable of receiving
13 such service within 90 days from the time of the request?

14 A Yes. And can I clarify that?

15 In my position that is the same as refusing to
16 give the service. That goes back to my previous testimony,
17 where I stated that we cannot -- obviously, it is going to
18 cost us money to convert to any level of high-voltage dis-
19 tribution. We could not in fact incur the debt that would
20 be required to build a system, to build the substation, if
21 we didn't know what the rate was.

22 This was part of the proceeding with the FPC. It
23 was debated as to -- between Penn Power, who said they would
24 give us service, but they weren't ready to give the rate,
25 and us saying that we needed the rate in order to determine

blt 4

1 what the profit margin was and if we could support the debt.

2 Q Wasn't part of the position that Pennsylvania
3 Power took to your knowledge to the effect that the FPC
4 deals with rates that are real and not hypothetical and
5 until such time as a municipality could demonstrate that
6 it was financially capable of receiving service the FPC
7 shouldn't be involved in such matters?

8 A Yes. And that is when I was asked to testify,
9 and we questioned -- I was questioned as to the position
10 of the borough and the capability of the borough, and that
11 is when the FPC ruled in favor of it.

End 6

Begin 7

12 Q You say the principal reason you needed to know
13 what the rate was was so you could determine the economic
14 feasibility of going to 69-kv service?

15 A Right.

16 Q Isn't it true that, although Pennsylvania Power
17 refused to file a rate, that they on a number of occasions,
18 that they, to you or Mr. Luxomberg or to anybody else you
19 may know of, gave the borough an indication as to what the
20 discount would be for 69-kv service?

21 A I'm absolutely totally unaware of that.

22 Q You are not aware that the Borough of Ellwood
23 City, when they first raised this question, where it re-
24 ceived from Pennsylvania Power an answer that "We can't
25 establish a rate to a certainty now because we don't know

blt 5

1 know what physical properties would be involved, but we
2 do have a discount to our industrial customers and you
3 could generally take a look at that industrial rate and
4 figure approximately what the discount would be?"

5 A That is the first I heard of that.

6 The formula was worked up and agreed upon in my
7 presence at the FPC hearing. That was the first I was aware
8 of it.

9 That went through quite a bit of debate as to
10 whether Penn Power would even agree to the formula.

11 Q Are you aware of a regulation of the Federal
12 Power Commission which in effect states that a company can-
13 not file a rate more than 90 days prior to the time that
14 service is to be established?

15 A I may have been told that. I don't recall it.

16 Q Were you told that that was basically the reason
17 why Penn Power refused to file the rate?

18 A I don't recall.

19 Q You were present during the FPC hearings. Do you
20 recall that position having been stated?

21 A It may have been, but I really don't recall it.

22 CHAIRMAN RIGLER: Mr. Berger, can you make a
23 copy of that regulation available to the Board, please?

24 MR. STEVEN BERGER: Certainly.

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BY MR. STEVEN BERGER:

Q To your knowledge, Mr. Urjan, has Pennsylvania Power been required to file a rate for 69-kv service with the Federal Power Commission, that is, 69-kv service to municipalities?

A They have -- okay, and this goes back to the proceeding. Judge Chaplin had ruled that the rate would be given, and the term is 45 days from the time of request by the municipality.

So I assume that would be -- had been directed to issue one upon request.

Q Isn't it true that the municipality can't ask that the rate be filed until they have a date certain when service will be established at 69-kv?

A It wouldn't be logical to apply for it until we were certain of the service.

Q Don't you view that as being somewhat sustaining the position that Pennsylvania Power Company took before the Federal Power Commission?

A Yes, in one perspective. Then again we were just talking about the rate and the fact that we needed to know the economics of the situation, and this is the same thing that we debated at the time of the hearing.

And the fact of the matter is that we must or we would have had to know at the time and now what that

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rate was in order to determine what we would do in the next step or expansion.

End 7

Q Is it true that Ellwood City now takes all of its power from Pennsylvania Power at a voltage level of 416 --

bwl

1 A Right.

sb

2 Q And in order for you to take service from
3 Pennsylvania Power Company at 69 kv, that you would have to
4 build some kind of a facility in order to step it down to
5 4160 and below that?

6 A Right.

7 Q What efforts is the Borough of Ellwood City
8 presently undertaking in order to have service established
9 at 69 kv?

10 A We have, first off -- we were working under
11 consulting arrangements for engineering services.
12 Our first major step was to hire a full-time electrical
13 engineer who has since been designing a system, lined up
14 the appropriate substantial equipment, transforming
15 equipment, if you will, reviewed our present system,
16 refurbished, built, added to our present substantial
17 facilities, all in line with the efforts to create a system
18 capable of receiving at high voltage rates or high voltage
19 service.

20 Q What needs to be done that hasn't been done in terms
21 of establishing service at 69 kv?

22 A Actually build a substation.

23 Q Is the Borough committed to building a
24 substation right now?

25 A Committed to building a substation?

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Q Yes.

A By formal document of Council, no. They are the ones, however, who hired the engineer and directed him to proceed with the development of such an item.

Q They are investigating whether they should build a substation. Isn't that the status of it?

A No, that is not the case. We know what we want to do and we know what we are going to do. The determination as to, in fact, what high voltage rate we should be discussing directly with Penn Power, I'm sure that is appropriate from an engineering standpoint.

In talking with the customers that we will be serving hopefully or will be competing to serve in determining what they would be receiving at.

Let me clarify that just a little bit. Prior to my coming to Ellwood City, there was a U. S. Steel industrial facility. They received power directly from Penn Power at 69 kv. They have since moved out and converted that to an industrial park. Whether they received directly at 69 or not in the future is questioned. That has to be negotiated with the customers.

CHAIRMAN RIGLER: Who is "they"?

THE WITNESS: The people renting or the facilities renting -- the agencies, industries renting the part of all of the industrial complex, U. S. Steel

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1 industrial park. It is, again, back to economics. What
2 we discussed with Penn Power in terms of the high voltage
3 rate, depending on recommendation of our engineer that would
4 be a question.

5 BY MR. STEVEN BERGER:

6 + You talk about competing. Let me probe this, if
7 I may, just a little bit, Mr. Urian.

8 After this year, the contract expires; is that
9 correct?

10 A right.

11 Q After the contract expires, is it not true
12 that the Borough has the absolute right to serve all
13 customers inside the Borough?

14 A That is right.

15 Q If you have that right, who would you be competing
16 with?

17 A You have just clarified that by saying it is a
18 right. I don't believe, and I have documented and projected
19 by feelings to Borough Council, that to be the sole source
20 of power, they are defeating the whole purpose of our plan.
21 Why shouldn't Penn Power be able to compete for service with
22 the industries, and I'm using the word "compete." I don't
23 think that the Borough of Ellwood City should take over.
24 I personally don't think that is good management practice,
25 and it is not practical.

1 We should be competitive and capable of serving
2 the industrial or all customers in Ellwood City, but they
3 should have a choice. That is not practical, I assume,
4 at the residential level, because of the cost of running lines
5 and all that, the complicated system and duplicative
6 system.

7 In terms of utilities, it would be very practical.

8 Q You mentioned the United States Steel Company.
9 The United States Steel was served at 69 kv; is that not
10 correct?

11 A Yes, they were.

12 Q They had their own substation?

13 A Yes, they did.

14 Q The Borough of Ellwood City attempted to purchase
15 that substation for purposes of its own. That is to
16 receive service at 69 kv?

17 A We have discussed that.

18 Q Can you give me a time frame as to when that was
19 discussed and who you discussed it with?

20 A Oh, it was discussed prior to my coming to
21 Ellwood City, all the way through our engineer and myself
22 had a meeting with Mr. Bill Miller, the real estate officer
23 of the U. S. Steel Industrial Park Complex, just prior to
24 the end of 1975. I don't remember the exact date, but
25 it has been recently that we discussed it. We just

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1 recently did an evaluation of that facility to
2 determine what could be used and if it was even feasible to
3 purchase that substation.

4 Q Is that the first time you met with Mr. Miller?

5 A No. I have known Mr. Miller since I have gotten
6 to Ellwood City.

7 Q What was the result of your evaluation of the
8 U.S. Steel substation?

9 A Our engineer has recommended that parts of that
10 substation can be used, but we would be better to build our
11 own system, own substation, a more practical, usable system.

12 Q Did Mr. Miller indicate to you that that
13 substation would have to be moved if it was going to
14 be used?

15 A Yes.

16 Q Substantial expenses would be involved in the
17 moving of that substation?

18 A Sure.

19 Q Did Mr. Miller also tell you that Pennsylvania
20 Power Company has stated that they have no interest in
21 that substation?

22 A Mr. Miller has stated to me, yes, that he --
23 in discussions with Penn Power, they say they have no direct
24 interest in that. However, we don't either at this point,
25 either.

Q Are you aware that at the time that these KPC

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1 hearings were going on that it was a major allegation of
2 the Borough of Ellwood City that refusal of Pennsylvania
3 Power Company to file a rate was tied to the fact that they
4 wanted to buy the substation and didn't want you to buy
5 the substation?

6 A Yes. I wasn't involved init. This was prior to
7 my arrival in Ellwood City. If my memory serves me, there
8 was some proof to that point.

9 I'm relying on memory and I'm sure that
10 Luxemburg can clarify that.

11 Q Are you relying principally on Mr. Luxemburg?

12 A Y3s.

13 Q And whatever proof you speak of may be the
14 speculation of Mr. Luxemburg?

15 A Mr. Luxemburg and the previous manager,
16 Mr. Borgstor who was involved. I have information from
17 both of them.

18 Q Can you tell us what proof you are talking about?

19 A It should be a matter of record. Mr. Luxemburg
20 has talked about it on serveral occasions, but it didn't
21 seem to apply to something I needed. I just dropped it.
22 That was a matter of discussion with the FPC.

ES8

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1 I saw no reason for me to worry about it at that time.

2 Q When you spoke in terms of Ellwood City having
3 capacity to serve beyond the present 10 megawatts that
4 they have, you were speaking in terms of distribution ca-
5 pacity, were you not?

6 A Yes.

7 MR. STEVEN BERGER: Just a moment, your Honor.

8 BY MR. STEVEN BERGER:

9 Q You spoke in terms of a letter agreement between
10 the borough and Pennsylvania Power Company. What letter
11 agreement are you speaking of?

12 A There was a letter agreement that stated that
13 there were several residential customers and a number of
14 commercial customers now being served by Penn Power, then
15 being served by Penn Power, that could be served by the borough
16 upon request.

17 They were there and they were established by
18 name and address, facility. And as a result this letter was
19 compiled requesting that we do in fact take service of the
20 residential customers.

21 Some of the commercial customers, I believe, in
22 the past have already been taken over by it. They were
23 specifically noted in that letter agreement that we could
24 serve them upon our desire to serve them.

25 Q Is there a specific letter agreement that provides

blt 2

1 that the Pennsylvania Power Company is giving permission to
2 the Borough of Ellwood City to serve outside of its in-
3 corporated limits?

4 A I don't know of any.

5 Q I thought that is what you referred to earlier.

6 Let me return for a moment to the proceeding
7 before the Federal Power Commission, the 45-day notification
8 provision that we have been talking about that was set by the
9 Federal Power Commission.

10 First of all, are you aware that that was affirmed
11 by the full Commission?

12 A Right. Okay, right.

13 Q Secondly, that 45 days was established by the
14 administrative law judge; is that not correct?

15 A Right.

16 Q Is it not also the case that between now and the
17 time that the Borough of Ellwood City, if it ever comes,
18 requests service at 69-kv that it is the right of Pennsylvania
19 Power Company to come in and try to establish a rate dif-
20 ferent than the rate that was discussed in that case on the
21 basis of what physical properties actually are involved in
22 the providing of 69-kv service at the time that service is
23 established?

24 A That I really don't know.

25 Q Let me try to simplify it for you.

blt 3

1 At the FPC they talked about what the rate should
2 be if service was established today.

3 A Right.

4 Q But we know that service is not going to be
5 established today and in fact service will not be established
6 until the borough gives notice, 45 days written notice, that
7 it is capable of receiving service on a certain date.

8 A Right.

9 Q Is it not also true that Penn Power has the
10 right after the receiving of that notice to go in and in
11 effect try to show that there are properties that will be
12 involved in the providing of 69-kv service to the borough that
13 will increase their cost to serve?

14 A It sounds very practical, and I would agree with
15 you. I don't know that as being fact, but it seems realis-
16 tic.

17 Q Wasn't it really the position of Pennsylvania
18 Power Company in the proceeding that "We can't design and
19 file a rate for the establishment of a hypothetical service
20 because we don't know what properties are actually going to
21 be involved in providing that service; therefore, we can't
22 establish the cost to serve"?

23 A I don't remember the specific words of "property"
24 being used.

25 Q Facilities.

blt 4

1 A Yes, sure. There was so much discussion regarding
2 that particular matter that I assume that to be true.

3 MR. STEVEN BERGER: I have no further questions,
4 your Honor.

5 CHAIRMAN RIGLER: Mr. Reynolds.

6 MR. REYNOLDS: No questions on behalf of the
7 other Applicants.

8 MS. URBAN: We have a small amount of redirect,
9 if we may have a couple of minutes.

10 CHAIRMAN RIGLER: We will take 5 minutes at this
11 time.

End 9

12 (Recess.)

Begin 10
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13 CHAIRMAN RIGLER: Are you ready to proceed,
14 Miss Urban?

REDIRECT EXAMINATION

15 BY MS. URBAN:

16 Q Mr. Urian, I would like to show you a contract
17 between Pennsylvania Power Company and Ellwood City, and
18 this is the 1966 filing of your contract and it is marked
19 as Department of Justice Exhibit 71.
20

21 In connection with Applicants Exhibits 87 through
22 89, you mentioned a letter agreement. I would like to
23 direct your attention to the sixty page of that document,
24 and that is a letter dated July 30, 1966.

25 Is that the letter agreement to which you were

blt 15

1 referring?

2 A Yes, it is.

3 Q During your cross-examination, you were speaking
4 about your view that the borough should continue to compete
5 for industrial customers after the contract expires, and
6 you were also speaking about the fact that this competition
7 might not be practical as to residential customers.

8 At that point, referring to industrials, you said
9 in terms of utilities it should be practical. Did you
10 mean utilities or did you mean to say in terms of industrial?

11 MR. STEVEN BERGER: I must ask Miss Urban to re-
12 phrase the question. There were so many statements in re-
13 gard to what the witness said, some of which I may take
14 issue with.

15 CHAIRMAN RIGLER: It is a point of clarification.
16 The witness said "utilities" when he meant "industries."

17 THE WITNESS: I agree I was referring to in-
18 dustry.

19 MR. STEVEN BERGER: As to everything else that
20 was said in Miss Urban's question, I assume that will not
21 be a matter of testimony?

22 CHAIRMAN RIGLER: The remark will not be
23 attributed to the witness.

24 BY MS. URBAN:

25 Q If we can go back to the discussion concerning

blt 6

1 the FPC proceeding on the high-voltage rate, I believe in
2 your earlier testimony you mentioned that a formula was
3 established as well as a rate for the discount.

4 Do you know what the formula that was established
5 was?

6 A The formula in itself was a very, very complicated
7 process which we spent a considerable amount of time -- not
8 we -- our attorneys, the FPC staff, and Pennsylvania Power
9 had their one specialist there. And they broke on several
10 occasions to work on the formula, and then they agreed on
11 that formula.

12 The means of getting to that point was that
13 there was 30 cents a -- I'm not going to trust my memory
14 at this point, because I know it is in writing as part of
15 the order from Judge Caplin.

16 MS. URBAN: We have no further questions.

17 CHAIRMAN RIGLER: The Board has a question at
18 this point.

19 Directing your attention to Applicants Exhibit
20 87, the June 5 letter from you to Mr. Semmler of Pennsylvania
21 Power, had you had any conversations relating to this
22 proposed transfer prior to writing the letter on June 5 with
23 Mr. Semmler?

24 THE WITNESS: No. We were referring to the
25 letter agreement and chose to request the service at that

blt 7

1 time. This was just after I came on board and had in-
2 stituted --

3 CHAIRMAN RIGLER: You hit Pennsylvania Power
4 cold, so to speak, with your letter of June 5?

5 THE WITNESS: I agree to that, in referring to
6 the letter agreement that they stated many years before that
7 they were ours for the taking when we chose to serve them.

8 I didn't really feel that was cold. They had
9 given them up ten years ago.

10 CHAIRMAN RIGLER: I'm trying to find out were
11 there any discussions that preceded the letter.

12 THE WITNESS: Not from me. There may have been
13 prior to that, but I'm not aware of them.

14 CHAIRMAN RIGLER: Mr. Berger.

15 MR. STEVEN BERGER: I have no questions, your
16 Honor.

17 CHAIRMAN RIGLER: All right.

18 Thank you, Mr. Urian.

19 THE WITNESS: Thank you.

20 (Witness excused.)

21 MR. CHARNO: At this time the Department would
22 like to continue with the introduction of documents that
23 have been previously distributed.

24 CHAIRMAN RIGLER: Do you have no other witness
25 available?

blt 8

1 MR. CHARNO: No, we do not.

2 CHAIRMAN RIGLER: I understand that your other
3 witness had to be rescheduled because of the flu.

4 At the rate we are going, I wish you would have
5 three available for each day. The parties are beginning
6 to understand what is important, and we have been able to
7 condense the testimony.

8 MR. CHARNO: We had been planning today and to-
9 morrow to introduce the substantial portion of our exhibits
10 or documents. After that, we will have a full schedule of
11 witnesses.

12 CHAIRMAN RIGLER: How many fact witnesses do
13 you have on your list?

14 You started out with thirty-three. Did I under-
15 stand that you condensed that list to seventeen fact wit-
16 nesses?

17 MR. CHARNO: It would be commensurate with the
18 number of subpoenas we requested. I think that is approxi-
19 mately seventeen.

20 CHAIRMAN RIGLER: Because based on the experience
21 with your last two witnesses, where the Department obviously
22 has thought about the questions it wants to ask and really
23 has done a fine job of presenting its direct examination in
24 a limited time period, I think we can handle at least three
25 a day.

blt 9

1 So for planning purposes maybe you can work
2 out that way with your witnesses.

3 MR. CHARNO: The Department would offer as DJ-199
4 for identification a 2-page document bearing the numbers
5 118546 and -47. The Department would offer --

6 MR. LERACH: Give me a chance to look at them
7 before you move on.

8 What if any portion of the second page of DJ-199,
9 document 118547, do you offer to prove the truth of the
10 matters asserted therein?

11 MR. CHARNO: The first and next to the last
12 paragraphs, which are red-lined.

13 MR. LERACH: It might be better to discuss this
14 on the record now so I will know in what fashion to proceed.
15 It will save us all perhaps some disagreements later.

16 It seems to me to be improper to offer -- "for the
17 Justice Department to be putting an entire document into
18 evidence which is as I understand how the document puts in,
19 even though only portions of it are red-lined, and then to
20 say, "We offer this paragraph and not another paragraph for
21 the truth of the matters asserted therein."

22 It is going to render the determination of the
23 admissibility in consideration of these items exceedingly
24 complicated, it seems to me.

25 For instance, on this document we have in front

blt 10

1 of us now, the first paragraph purports to reflect what
2 attorney Donaldson said, and they want that to come in for the
3 truth.

4 Well, the second paragraph purports to reflect
5 what attorney Donaldson says, but they don't want that to
6 come in for the truth.

7 I don't know how to solve this problem other
8 than to say from my perspective it creates a substantial
9 problem of admissibility and will complicate matters.

10 If the Justice Department is going to offer a
11 document for its truth, it ought to offer the entire docu-
12 ment.

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1 MR. STEVEN BERGER: May I make one comment in
2 regard to what Mr. Lerach said?

3 If what Mr. Lerach said is the correct under-
4 standing of where the Board is at now, then I have a
5 misunderstanding as to where you have been up to the
6 present time. It is my understanding that where the
7 Department of Justice is offering a document and they
8 red-line a portion of that document, not only is it for the
9 convenience of the Board and the Board will be directed
10 towards that, but it is my understanding that for purposes
11 of findings and conclusions, all that would be allowed for
12 the Department to refer to as far as that document is
13 concerned is that which is red-lined, i.e., they could only
14 use those portions of the document red-lined, so that you
15 were really treating it as an evidentiary matter and not as a
16 matter of convenience.

17 Now, I would subscribe to what Mr. Lerach said,
18 and I think if a document comes into evidence, it comes
19 into evidence and, if the Board in a lengthy document for
20 their own convenience, would prefer the parties to red-line
21 portions of it for their convenience, I think that is per-
22 fectly appropriate and with the mammoth amount of documents
23 we have here, I think it is the right way to go. As far as
24 the question of admissibility of the document, I think you
25 get into a confusing situation there.

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1 CHAIRMAN RIGLER: I don't think that we have
2 the problem that Applicants' attorneys seem to think we
3 have , in that we have indicated that they could direct
4 our attention to any other portion of the document, and I'm
5 sure that if Mr. Lerach wanted to assert that, we
6 should consider the second paragraph of the document for the
7 truth of the matter asserted there in that; absent objection
8 from the Department, we would do so.

9 If there is objection, we may have a problem,
10 but I don't anticipate we will, in many instances.

11 MR. STEVEN BERGER: We started also to talk about,
12 well, if the Department red-lines, and then the Applicants
13 want to, if you will, blue-line a portion of the document,
14 you said that the failure of the Applicants to blue-line
15 other portions of it will not prejudice the Applicants,
16 as far as the document that the Department introduced,
17 and they would have a right at some subsequent time to
18 refer to unlined portions of that exhibit for purposes
19 of findings and conclusions.

20 I know that will be turned around when the
21 Applicants start their case, and we will have the same
22 problem.

23 CHAIRMAN RIGLER: All right.

24 MR. STEVEN BERGER: I'm suggesting, I think, if
25 a document comes in, it comes in. If somebody raises an

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1 argument as to whether or not it is coming in for the truth
2 of the facts asserted therein or otherwise, that is how
3 we would deal with certain portions of the document, but not
4 in terms of attaching evidentiary significance to lining
5 of documents.

6 CHAIRMAN RIGLER: There is no evidentiary
7 significance as such. The purpose of the red-lining is to
8 direct our attention to that portion of the document which
9 the introducing party feels is appropriate for us to consider
10 in making findings related to the issues in controversy.

11 And unred-lined portions, I suppose, may be thought
12 to have no relevance to any issue that the Board is called
13 upon to decide.

14 MR. STEVEN BERGER: Well, I think we could go on with
15 this in terms of what is going to happen, in terms of what happens
16 when the Board sits down with all of the documents, in order
17 to make findings and conclusions. You could be directed to
18 a portion lined by the other party, and you think it is
19 inculpatory, and it is exculpatory.

20 The Department didn't point it out to you in that
21 context. What do you do in that situation? Do you rely on
22 it in making an adverse decision against the Applicants?

23 CHAIRMAN RIGLER: We have indicated our concern
24 on the record.

25 MR. STEVEN BERGER: Could it be established that the

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1 rule would be that certainly for the convenience of the
2 Board and parties as we go through the proceedings, red-
3 lining should be the rule with regard to lengthy documents,
4 but as to the admissibility of documents, the document is
5 admitted and admitted for all purposes, unless an objection
6 is made with regard to whether it is being admitted for the
7 truth of the fact or otherwise, and that it shouldn't be
8 incumbent on the other part to come around and isolate those
9 portions that specifically the Board should direct their
10 attention to.

11 For the terms of admissibility and admission into
12 evidence, I don't know that the red-lining should have
13 significance in terms of ultimate findings or conclusions.

14 MR. SMITH: My concern is the sandbagging effect
15 that unlined documents have.

16 MR. STEVEN BERGER: That is my concern as well.

17 MR. SMITH: I think no matter what you do,
18 if there are portions of a document that are -- if a document
19 is received into evidence and portions are not lined and
20 the other party has not had opportunity to address himself
21 to that portion, that portion should be given less weight
22 at the minimum by the Board. I would say that the party
23 offering the document should, if he wants to have full weight
24 given to all portions of it, should bring those up at the
25 time they are coming in.

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1 CHAIRMAN RIGLER: Do you have any trouble with
2 what Mr. Smith said? That that should be the burden of the
3 party introducing the document.

4 MR. LERACH: The problem with that --

5 MR. STEVEN BERGER: I have no problem as far as
6 that being the burden for purposes of convenience and for
7 purposes of directing the Board to that, which is really
8 important to the issues that they have before them.

9 Now, if you are making that a rule, that unless
10 good cause is shown at some future time nobody has a right
11 to refer to another portion of the document that they have
12 not red-lined --

13 CHAIRMAN RIGLER: We are talking in terms of the
14 introducing party. I'm asking what is unreasonable before
15 having the introducing party red-line the portions that he
16 wishes the Board to consider as bearing on the issues in
17 controversy and the Board then ignoring nonred-lined
18 portions, unless some other party calls them to the Board's
19 attention.

20 MR. STEVEN BERGER: You are setting up an
21 estoppel situation in terms of estopping a party from relying
22 upon any portions of a document that had not been lined by
23 him that he introduced.

24 CHAIRMAN RIGLER: Right, what is the objection to
25 requiring the other party then to telling the Board what

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1 portions of the document we should consider?

2 MR. STEVEN BERGER: As things evolve during a hearing
3 there are portions of documents that may not have been
4 relevant at the time which become relevant as the proceeding
5 unfolds. What you are placing on the parties is a continuing
6 obligation to review --

7 CHAIRMAN RIGLER: Why can't you go back to the document
8 and point that out?

9 MR. STEVEN BERGER: You could, but I think that is
10 an amazing task you are placing on the party.

11 (Board conference.)

12 MR. REYNOLDS: I have tried to stay out of this,
13 because I'm not sure what it is, where it is we have been
14 and where we are going. I have a problem, because as I have
15 understood the Board's procedure up to this point, if a
16 lengthy document comes in with no red-lining, then everything
17 is significant, and the Board has now indicated if it has a
18 document with no lines on it that -- or that some red lines
19 and some no red lines, it looks at the red-lining.

20 We have gotten introduced into the proceeding
21 both on direct and cross a number of documents which are
22 lengthy and the question has been raised as to why there is
23 no red-lining and the response has been, because the whole
24 document is significant. I'm not sure now where we are with
25 respect to red-lining and the significance or insignificance

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1 of the material that is red-lined.

2 CHAIRMAN RIGLER: The Board has placed an
3 obligation on the parties not to just introduce a lengthy
4 document which is 90 percent irrelevant to any issue
5 under consideration. That is why we went to a red-lining
6 rule, in order to make these hearings workable and efficient.

7 I' seems to me if a party affirmatively represents
8 that the entire document is relevant, we would take that as
9 a representation of Counsel and then we would consider the
10 entire document.

11 But that can't be used as a device to avoid red-
12 lining where only a portion is thought to be relevant.

13 I don't understand your problem completely.

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MR. REYNOLDS: My only problem is that we are all on the same wavelenght as to what we are saying is important or not important, as to what the Board is going to consider or not consider.

We are probably going to have documents in this case running into the thousands. I don't know the extent to which the Board will be able to go back and pick out in the transcript the testimony where a statement was made with respect to each of these documents and why there is no red line on it or why where is a red line on it or what significance is to attache to the fact that there is no red lining or there is red lining.

That is what I am concerned with. If we are talking about red lining for purposes of relevance, that the documents are coming into evidence on an unsponsored basis or sponsored basis where those protions which the introducing parties deem to be relevant are red lined and that other portions that the other parties deem to be significant can be brought to the attention of the Board at the appropriate time or at any time when they are able to do it.

I think I understand the rule or the procedure and I don't really feel that it does cause a problem. I think where we get into a problem is if we attach special evidentiary weight to certain red lined portions and no evidentiary weight to any of the rest of the document.

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2 Then, it is incumbent on the non-introducing
3 party to flag at some point in the hearing those portions
4 which are significant and to keep tabs on that as we go
5 along so that the Board has a color scheme in front of it
6 when it reads a document at the end of the hearing and every-
7 body is satisfied that they have picked up all of the relevant
8 portions of the document.

9 That is a terribly onerous task to do that. If
10 the Board directs us to do that, we will obviously have to do
11 it. To me, it is cleaner and neater if we are talking
12 about red lining, to have the document introduced and rule
13 on the admissibility of the document in its entirety and to
14 have the introducing party do the red lining for purposes
15 of bringing the attention of the Board to the relevant
16 portions of that document that they think are relevant
17 to their case and then for the other parties to direct
18 other portions of the document to the Board's attention
19 in their proposed findings.

20 CHAIRMAN RIGLER: The only problem I have with
21 that is --

22 MR. REYNOLDS: That would work on both sides of
23 the fence obviously. When our turn came to put on direct,
24 it would work the same way.

25 CHAIRMAN RIGLER: The only problem I have with that
is if it is only when you submit proposed findings of fact
that you point out what you consider to be the countervailing

eak3 1 considerations, in that document.

2 Then the introducing party has been cut off
3 from any opportunity to argue the significance of that
4 countervailing consideration.

5 MR. REYNOLDS: Okay, I understand your concern.
6 I guess that the problem I have is that a procedure that
7 we are following here of unsponsored documents, where
8 everything is going in without witnesses or opportunity
9 to cross-examine or what have you, I have a difficult time
10 trying to determine when it is that somebody is to go through
11 and flag what are significant or potentially significant
12 portions of this material that have been introduced by in
13 this case, the Department of Justice.

14 I think that as the case unfolds, and develops
15 and as the evidence comes in, it may be that going back over
16 a good deal of this material at a time when we are to sit
17 down and try to pull the record together which is really the
18 responsibility of developing proposed findings and so on, that
19 that may be the first opportunity when we do focus on
20 certain portions of this material, that we feel are relevant.

21 I think if the Department is going to introduce
22 this as evidence and is going to determine what part it
23 feels is relevant for its case, it has to live with the
24 situation that we are talking about of having that document
25 which it has put in evidence being something that may well

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be used against it at some point down the road in the
context of proposed findings.

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1 MR. CHARNO: Mr. Chairman, my concerns are
2 similar to those that you expressed. I don't think the
3 Department has any problem with being held to its red-lining
4 if somebody else is going to indicate the relevant portions.

5 It may well be that there would be objections to
6 the admissibility of certain portions which might be desig-
7 nated by the Applicants.

8 For the instance where part of the document might
9 come in as an admission when it is adverse to their in-
10 terests, it might not be admissible by virtue of its hearsay
11 nature and we might feel that by virtue of its self-serving
12 content that it shouldn't become part of the record.

13 CHAIRMAN RIGLER: Here we do stumble on the rule.
14 I do agree with Applicants that ordinarily if a document is
15 admitted the entire document is admitted.

16 MR. CHARNO: I certainly would have no objection --

17 CHAIRMAN RIGLER: They are urging that the docu-
18 ment come into evidence and then the step is to red-line
19 the relevant portion.

20 I believe that is what Mr. Reynolds expressed,
21 although we would have that retyped so we can see exactly
22 what his proposal was and then we can examine it after the
23 lunch hour.

24 I think I was with him up to that point.

25 MR. CHARNO: I don't think we have objection to

blt 2

1 doing it either way. Either the document is entirely in
2 and the red-lining is for purposes of aiding the Board or
3 the red-lining is a restrictive rule and it should be re-
4 strictive on both sides.

5 CHAIRMAN RIGLER: It is for the purpose of aid-
6 ing the Board, but it is more than that. It is to make the
7 entire hearing process managable here where we have thou-
8 sands and thousands of pages of documents.

9 It is more than a convenience in this type of
10 case.

11 MR. CHARNO: Our only objective is that we
12 receive exactly the same treatment. We find it immaterial
13 which method the Board adopts as long as if one side red-
14 lines the other side should call the portions it considers
15 relevant to the Board's attention and be bound by those, or,
16 if the red-lining is an aid, then the entire document goes
17 in and may be used by anyone as being relevant.

18 If the City of Cleveland puts on its case, we
19 may find new elements of our documents that we feel are
20 significant that are brought out by the City's case.

21 I'm not sure we would find that in time to call it
22 to the Board's attention, just as the Applicants are not sure
23 they could find it in time to draw it to the Board's at-
24 tention.

25 CHAIRMAN RIGLER: All parties -- at the end of these

blt 3

1 hearings we intend to get right to work on the decision. It
2 would be the Board's current objective not to have a
3 lengthy delay between the conclusion of hearings and the
4 rendering of the decision.

5 The Board will go to work on the record immediately.
6 We are not going to wait for the parties to file their pro-
7 posed findings. That is an advance word of warning to all
8 parties.

9 I think that probably we can develop some uniform
10 way of handling these documents that will be nonobjectionable
11 to any party through the red-lining and through the blue-
12 lining.

13 The only problem I see is the problem of a non-
14 introducing party subsequently pointing in its findings to
15 a non-blue-lined portion of the document. That is what
16 Mr. Smith had in mind when he was referring to sandbagging.
17 That would be a party who knows it wants to use a paragraph
18 in support of one of its proposed findings but doesn't
19 blue-line it and thereby deprives the introducing and red-
20 lining party of the opportunity to argue with respect to
21 that paragraph.

22 I will come back to this after the lunch hour,
23 and I will ask all parties maybe to discuss it.

24 I'm not sure all of Applicants counsel are in
25 total agreement with respect to how they would propose to

blt 4

1 treat these documents. I think everyone recognizes what the
2 objective is, just as responsible counsel we all have an
3 obligation to make the record workable.

4 I assume it is understood that the Board's objec-
5 tive is not to put a burden on any party but really to place
6 the case in a managable framework, and any proposals that any
7 of the parties have with respect to the treatment of docu-
8 ments would assist us.

9 As you can see, my current leaning is to go
10 along with Mr. Reynolds' statement of the use of red-lining,
11 up to the point where a party subsequently wants to point
12 to some portion of the document which had never been red-
13 lined or blue-lined. That is the troublesome aspect, and
14 I would appreciate the assistance of the parties in helping
15 us decide how we should resolve that one remaining issue.

16 If we do that, we could have a uniform rule that
17 would be agreeable to all parties, I hope.

18 Is anyone in immediate and violent disagreement
19 with Mr. Reynolds' statement as to the procedure and the
20 use of the red-lining or blue-lining, up to the point
21 where some paragraph is not designated which then appears
22 in proposed findings?

23 MR. STEVEN BERGER: I would like to see the
24 statement myself and look at it over lunch, but I think
25 Mr. Reynolds started off by saying the whole document comes

blt 5 1 into evidence.

2 CHAIRMAN RIGLER: That is correct.

3 MR. STEVEN BERGER: On that basis, I would assume,
4 if it is in evidence, the party has the right to refer to
5 that which is in evidence in making proposed findings,
6 unless the Board tells them otherwise.

End 13

Begin 14

7 CHAIRMAN RIGLER: But that is the point. Should
8 the Board tell him otherwise and should we all have an under-
9 standing so that the party is not surprised? And what
10 should the terms of that understanding be to be fair to the
11 parties and fair to the opposition party at that time?

12 MR. STEVEN BERGER: I think the problem goes to
13 the question of admissibility.

14 What you are trying to establish is a rule
15 where an entire document comes into evidence but it doesn't --

16 CHAIRMAN RIGLER: But we would let the entire
17 document into evidence. All we would be requiring is that
18 the parties tell us which portions of the document they want
19 us to consider.

20 MR. STEVEN BERGER: If they don't --

21 CHAIRMAN RIGLER: We have no objection to admitting
22 the entire document into evidence, and we would give the
23 parties the right to designate any part they want for our
24 consideration. But at some point I think that the parties
25 should be obliged to designate the portions they want us to

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consider.

That obviously has not completely answered your question, Mr. Lerach. Since we are coming back to it, we should proceed with the introduction.

MR. LERACH: I object to that. I started the discussion, and I have more to say about it. And I would like the Board to consider my thoughts.

If I am not able to speak, it will require me to continue to ask questions as we continue to go through them.

CHAIRMAN RIGLER: You are able to continue your presentation. We didn't mean to cut you off.

I thought you were finished.

MR. LERACH: The whole red-lining business started solely with reference to lengthy documents. The Justice Department has in front of us a great number of 1- and 2-page documents. The effect of the red-lining is to rip one sentence out of context, or two sentences, or one paragraph. It is not deliberate. It is the obvious impact of it.

CHAIRMAN RIGLER: Why don't you ask us to consider the entire document in those instances now as they are being identified?

MR. LERACH: Any short document, it seems to me, should come in for the whole document. We shouldn't have the red-lining on a 1- or 2-page document.

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CHAIRMAN RIGLER: I thought that was part of the rule.

MR. LERACH: I didn't understand it that way. And if that is the rule it will solve a substantial part of the problem.

CHAIRMAN RIGLER: Wasn't that the understanding? Mr. Charno is nodding "No," and Mr. Goldberg, "Yes."

MR. CHARNO: It is understood that was the way they were to be introduced.

These were introduced in a fashion as if they were multiple-page documents. As we explained, that is the reason for the red-lining.

Is it your ruling that, with respect to short documents, the red-lining will be disregarded?

CHAIRMAN RIGLER: It would be more of a convenience because there we would permit -- the Board could consider and would consider the entire document, and it would not be necessary to blue-line it.

I believe that is the relief you are seeking, Mr. Lerach.

MR. LERACH: Yes. And I'm afraid I have to ask that new documents be substituted or that we should get out red markers and mark the whole document.

It is not fair to have 1- and 2-page memos with

blt 8

1 certain portions of it red-lined. I don't think that is
2 fair to my client. I would like to express the same con-
3 cern that motivated Mr. Smith regarding the sandbagging
4 issue. If a party puts a document into evidence, he has to
5 have read the whole document and understood it, even if
6 he has chosen to red-line only a portion of it. It doesn't
7 strike me that subsequent relying on another part of the
8 document is sandbagging that party.

9 When I put in the Loftus letter regarding
10 Pitcairn, I recall Chairman Rigler asking, "Will this state-
11 ment, one not red-lined, come in for the truth of the state-
12 ment?" That statement was not particularly favorable to my
13 client, but I think we have to take the good with the bad,
14 support what we see as good and rebut the bad.

15 Other than the practicality of how to handle the
16 blue-lining with regard to documents -- would we have to
17 have an hour every day and say, "All right. We have read
18 the transcript, and everybody get out your blue marker"?
19 It creates practical difficulties.

20 To the extent you put your focus on the intro-
21 ducing party, does that mean that the document has to be
22 subsequently reintroduced with a blue mark on it, or, again,
23 do we all go back to that document and get a blue marker
24 out and find the sections we want to mark?

25 CHAIRMAN RIGLER: For lengthy documents, we

blt 9

1 would require a designation by the non-introducing party.

2 MR. LERACH: That would be all right. There
3 won't be many of those, and the burden won't be as great.

4 My line of concern flows from using it on the
5 shorter documents which comprise the great bulk of the evi-
6 dence we are seeing.

7 CHAIRMAN RIGLER: I had thought it was understood
8 with respect to 1- and 2-page documents that red-lining was
9 not necessary and that the entire document would be con-
10 sidered. And I see that, although the Staff recognized
11 that rule, that apparently some of the other parties were
12 confused.

13 Let me reiterate that rule.

14 MR. STEVEN BERGER: Might we expand it, your
15 Honor? Is it 1- and 2-page documents, or do we want to
16 increase the page limitation to 5 or 10 pages, perhaps?

17 MR. GOLDBERG: May I interject?

18 I would like to disagree with your characteriza-
19 tion of the Staff's nodding. It was not 1-page documents.
20 Our understanding was that the definition of short document
21 was a 1-page document. Anything beyond that would have to
22 be red-lined.

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1 MR. LERACH: We are reasonable men and we are all
2 attorneys in the room. Certain documents by their very nature
3 must be viewed in their entire context to understand them,
4 letters, memoranda of meetings, memoranda of phone calls,
5 whatever. That is not the same as the CAPCO basic operating
6 agreement or the Lewis Report or something that is divided
7 into specification and may have a lot of categories that are
8 irrelevant.

9 CHAIRMAN RIGLER: What about minutes of meeting
10 that run ten and twelve pages?

11 MR. LERACH: If it is a chronological minutes --
12 something maybe in paragraph 1 and the fellow may come back
13 to it in paragraph 40 of the same memo. If the person
14 has gone to his notes and typed the minutes up, it is not
15 necessarily clear that you can have the full flavor and
16 context of that meeting by looking at one paragraph of that
17 meeting. I don't think an arbitrary rule will work.

18 CHAIRMAN RIGLER: On the other hand I think a precise
19 rule is necessary, because I don't want argument down the
20 line about misunderstandings relating to whether the entire
21 document should have been subject to the red-line rule. That
22 is why a page count struck me as a practical approach to
23 that problem.

24 MR. LERACH: With exceptions from time to time,
25 if the parties raise it, perhaps.

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1 MR. STEVEN BERGER: I take it the discussion we
2 are having is trying to air everything so that after lunch,
3 after we have had a chance to look at that portion of the
4 transcript that will be typed for us, we will be able to hone
5 in on it more specifically.

6 Mr. Charno was talking about introducing a
7 document that comes in because it is an admission, then
8 another portion of the document is sought to be blue-lined
9 and it does not come in, because it is self-serving. That
10 raises to me basic problems, whether you are talking about it
11 coming in, that other portion, self-serving one, whether it
12 comes in, because in order to understand the red-lined
13 portion you need it for contextual purposes or a party
14 has to establish its own basis for admissibility to a
15 document already in evidence, beyond it being as a matter
16 of context.

17 CHAIRMAN RIGLER: We wouldn't favor requiring the
18 party to, in essence, get the document readmitted.

19 MR. CHARNO: If I may, I think what I had in
20 mind was we had multiple document documents, attachments to
21 initial documents. While we might request the admission of
22 a cover memorandum which for completeness will carry a group
23 of attachments which indicates something we feel shows, say,
24 joint action by the parties who were addressed on the
25 cover memorandum, and the attachments, unlike the cover

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1 memorandum, we are intending for general circulation and
2 distribution outside the immediate scope of the parties.

3 That would be a case where for the truth of the
4 assertions contained in those documents intended for general
5 distribution, we might have problems.

6 CHAIRMAN RIGLER: Anything else to be aired?

7 (Board Conference.)

8 CHAIRMAN RIGLER: Over the lunch hour we
9 want you also to consider whether if a document is
10 admissible in its entirety as we have indicated, it would
11 be understood admitted, and if we come to a sandbagging
12 situation in which, in a proposed finding, a party refers
13 our attention in support of its position to an unmarked
14 paragraph, if that should affect the weight the Board
15 gives to the context of that unmarked paragraph, since
16 no party has had opportunity to rebut whatever factual
17 material is asserted in that paragraph.

18 The other thing I would like you to do is
19 talk not only among Applicants, but I want the Applicants to
20 talk with Justice and Staff to see if the parties can come
21 up with a uniform proposal. Our initial leaning is that
22 we will continue to require both red-lining and blue-lining.
23 That no red-lining would be necessary with respect to short
24 documents.

25 I thought that was an established rule, at least

1 with respect to one-page documents. As a practical matter
2 it should apply to two and maybe even three-page documents.

3 I tend to agree with Mr. Lerach's point that
4 brief letters should be considered in their entirety,
5 brief minutes should be considered in their entirety, but I
6 think that we do need some practical cut-off point so that
7 we all know what is meant by brief.

8 I want the parties to take a look at the transcript
9 pages, because the Board was, I think, generally in accord
10 with Mr. Reynold's statement of the understanding of the
11 use and purpose of red-lining.

12 And we would appreciate it if you could come back
13 to us with a joint proposal with respect to our treatment
14 of lengthy documents, if you can't we will go ahead and
15 issue our own rule.

16 The Board will be conferring over the lunch hour.
17 The objective should be the same for all of us, which is to
18 make the hearing manageable.

19 We will take a short lunch hour today.

20 MR. CHARNO: One question. It seems with respect
21 to sandbagging, a relevant consideration is what kind of
22 briefing schedule are we going to have.

23 I there are going to be reply briefs, there will
24 be sandbagging, regardless.

25 CHAIRMAN RIGLER: First of all, I am not sure that
we are going to take posthearing briefs, as such.

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1 There may be a difference between posthearing briefs
2 and proposed findings and conclusions of law. Those
3 would have to come in on an accelerated schedule. By that
4 I'm talking as little as four weeks. I was perfectly
5 serious, when I said that the Board is going right to work
6 on our proposed findings.

7 The proposed findings from the parties will be
8 filed simultaneously. Let's solve that right now.

9 We are not going to have one side, then the other
10 side and then replies. We will pick some date at which
11 time all parties will put in their proposed findings.

12 We have not decided yet whether reply findings
13 will be permitted. Probably not. But we will at least
14 listen to the parties viewpoints with respect to reply
15 findings.

16 MR. REYNOLDS: If I could wait until after lunch,
17 I would like to make comment briefly on the schedule you
18 just outlined.

19 After I have had opportunity to look at the
20 rules of the Commission and also the Administrative
21 Procedure Act, because I'm not clear in my own mind what
22 procedures are set forth there, but I have a fuzzy
23 recollection that it may outline something different.

24 I want to be clear before I do comment on that.

25 CHAIRMAN RIGLER: Right. Obviously, we intend to

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1 comply with the rules, absent a stipulation among all
2 parties that would enable us to reach the issues more
3 rapidly.

4 But unless there is some rules impediment, our
5 thought would be for simultaneous filings and for
6 a minimum time period before these findings are filed.

7 Okay. Shall we come back at 1:40?

8 (Whereupon, 12:00 p.m., the hearing was
9 recessed, to reconvene at 1:40 p.m., this same day.)

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AFTERNOON SESSION

(1:55 p.m.)

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3 MR. STEVEN BERGER: Before we go back to the
4 question of handling of bulky documents, you asked me this
5 morning for a copy of the regulation of the Federal Power
6 Commission relevant to testimony that Mr. Urian had given
7 with regard to the filing of a rate for 69-kv service.

8 I will make available certainly to the Board a
9 copy of the regulation, but I would note that the relevant
10 portion of that regulation was set forth in our prehearing
11 fact brief at page 65 in case the Board wanted an earlier
12 opportunity to review it.

13 CHAIRMAN RIGLER: Okay.

14 MR. REYNOLDS: Mr. Chairman, you asked that we
15 confer over the luncheon break concerning the marking of
16 documents, and we have undertaken to do that. And I'm going
17 to try to state what I believe to be a procedure that we are
18 all substantially in agreement with and then, to the extent
19 there may be some difference or variation, the other parties
20 can clarify it.

21 I will note that Mr. Hjelmfelt for the City was
22 not here this morning, and we have not conferred with him.
23 So after we get through with all of this, we may have to go
24 around again if he doesn't agree with it.

25 But I think that the understanding or the general

blt 2

1 understanding that we have reached as a workable solution
2 to this problem, with the Board's concurrence, would be to
3 follow the procedure of red-lining in the margin with re-
4 spect to documents that are more than five pages and, as
5 to those that are less than five pages, to proceed without
6 anybody marking the document.

7 On the larger documents, those in excess of
8 five pages, the proposal is that the sponsoring party will
9 red-line those portions of the document that it believes are
10 relevant, that the entire document would come into evidence,
11 subject, of course, to the ruling on admissibility, and
12 that the non-sponsoring parties or the other parties in the
13 proceeding would have an opportunity to designate other
14 portions of the document that they deemed relevant, also,
15 by using a red-line.

16 The proposal would not be to go to a two-color
17 scheme but, both for Xeroxing purposes and also for the
18 purpose of the Board's evaluation, that the better procedure
19 would be to have a single colored line to be applied by the
20 parties but that the non-sponsoring parties would have an
21 opportunity to designate relevant portions and that that
22 should be done certainly as soon as possible but no later
23 than the closing of the record in the proceeding.

24 I believe that Staff wants to suggest a shorter
25 deadline than the one at the close of the record. My

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1 feeling is that, since it may well be necessary with
2 respect to certain documents to use them at a later date
3 with witnesses down the line, that the closing of the
4 record is at least a general rule that could be applied
5 in a workable fashion.

6 As to documents that are in the order, at the
7 close of the proceeding, and have portions that are not
8 marked, this is the documents in excess of five pages, it
9 would be Applicants' view -- and I believe that this is
10 shared by everybody, but I will let Justice and the Staff
11 comment on it -- that, if the Board's attention is directed
12 to non-marked portions of those larger documents in proposed
13 findings or other post-hearing filings, that the Board would
14 then attach whatever weight it felt appropriate, taking into
15 consideration the sandbagging concern that Mr. Smith sug-
16 gested or other considerations that it felt might go to the
17 weight.

18 CHAIRMAN RIGLER: You agree that it would be
19 appropriate for the Board to perhaps give different weight
20 to portions not previously marked?

21 MR. REYNOLDS: After the opportunity has been given
22 up through the close of the record for all parties to mark
23 those portions of the larger documents that were deemed
24 relevant. Then I think it would be appropriate for the
25 Board to consider non-marked portions of larger documents,

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1 but the weight that it would attach to them would, it seems
2 to me, at least in part depend on whether there had
3 been a marking or not been a marking.

4 So that would be an appropriate consideration
5 to make at that time. I think that is the general under-
6 standing.

7 CHAIRMAN RIGLER: That is the understanding of
8 all Applicants?

9 MR. Reynolds; I have talked to all Applicants
10 and Mr. Charno and the Staff, and I think that what I have
11 represented or tried to represent is a consensus that the
12 Board asked us to come back with.

13 CHAIRMAN RIGLER: It definitely is the consensus
14 of all Applicants?

15 MR. REYNOLDS: That is correct, sir.

16 CHAIRMAN RIGLER: Now, we go to Mr. Charno.

17 Is that your understanding of the consensus?

18 MR. CHARNO: Well, I have one clarification.

19 It is my understanding that, with respect to
20 documents of five pages or less in length, that they will be
21 regarded as relevant in their entirety and any red-lining
22 will be ignored, and there will be no further addition of
23 lines by anyone else.

24 MR. REYNOLDS: That would be my understanding.

25 I propose we substitute those documents that

blt 5

1 are already in the record that are under five pages and
2 have red-lining. It may well be that the Board at this
3 point won't be bothered, but if we have a record we have
4 to send up on appeal this will not be one of the easiest
5 issues to brief.

6 CHAIRMAN RIGLER: We would not encourage you
7 to do it, because I can assure you that the Board would be
8 capable on short documents of disregarding the red lines
9 if we adopt this rule.

10 We will not foreclose you that opportunity, but
11 I'm trying to save you unnecessary burden.

12 Other than that, is that your agreement, Mr.
13 Charno?

14 MR. CHARNO: I think Staff is going to say some-
15 thing about the timing. We are in substantial agreement
16 with Staff's problem.

17 MR. GOLDBERG: I certainly agree with the state-
18 ment by Mr. Reynolds that there should be no red-lining by
19 a non-sponsoring party any later than the close of the
20 record.

21 I won't go so far as to permit a non-sponsoring
22 party to be afforded that entire period of time in which
23 to red-line documents. I think --

24 CHAIRMAN RIGLER: Wait a minute.

25 you agree that non-sponsoring parties do have

blt 6

1 the obligation to red-line what they consider to be rele-
2 vant or significant portions of the document. Your only
3 quarrel is to when that red-lining should be done. Is
4 that correct?

5 MR. GOLDBERG: Yes. It certainly should not be
6 done after the close of the record. That is something we
7 can agree on.

8 I would propose a shorter period of time, how-
9 ever, in which to allow a non-sponsoring party to red-line
10 a document.

11 CHAIRMAN RIGLER: What is your proposal?

12 MR. GOLDBERG: First, I propose if a document
13 is introduced through a witness the red-lining by the non-
14 sponsoring parties should be done while that witness is
15 available.

16 There is a serious problem if a document comes
17 in through a witness and after the witness is dismissed a
18 non-sponsoring party red-lines a portion of that document.
19 It may necessitate recalling a witness or creating all kinds
20 of documents.

21 I urge that a non-sponsoring party red-line a
22 document introduced through a witness while the witness is
23 available.

24 Furthermore, if we have a document which is an
25 unsponsored exhibit, I think that much more reasonable time

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1 should be set forth which is not nearly as long as the
2 close of the record, namely, a week, perhaps, after that
3 document is introduced the non-sponsoring parties should,
4 I believe, red-line the document.

5 The document is made available to all parties in
6 advance of its introduction into evidence, and I see no
7 problem with the non-sponsoring parties reviewing the
8 document at that time and determining what portions they
9 wish to red-line.

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1 MR. STEVEN BERGER: Your Honor, perhaps I can have a
2 point of clarification. I didn't understand really the
3 necessity for red-lining of documents where you have a
4 witness on the stand. I thought our principal problem was
5 with regard to unsponsored documents and the red-lining of
6 those documents. Where you have a witness on the stand, I
7 think the importance of a document and the extent to which
8 the witness can speak to the question, is what we are
9 involved with.

10 CHAIRMAN RIGLER: I disagree, if the witness is
11 addressing a 100-page schedule, for example, of the Federal
12 Power Commission or a 55-page memorandum of understanding among
13 CAPCO companies, although that document probably would be
14 introduced in its entirety. I think the rule should apply
15 to lengthy documents whether or not they are introduced
16 through a witness, Mr. Berger.

17 MR. STEVEN BERGER: Let me raise the question of, if
18 you have a 55-page document and a witness is questioned
19 about a single paragraph of that document and other portions
20 of that document are redlined and not addressed to that
21 witness, are we going to have offers of proof in regard to
22 other portions of the large document which have not been
23 addressed by the witness, and they have nonetheless been
24 brought to the attention of the Board and are being supported?

25 CHAIRMAN RIGLER: It seems to me that would be up to

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1 the opposing party to raise at the time of cross-examination.
2 Because the party calling the witness would be the party
3 obligated to do the red-lining.

4 MR. REYNOLDS: It may well be that there are
5 portions of a document that the party calling the witness
6 deemed significant and portions that I might feel are more
7 significant, but I don't want to go into them with this
8 witness.

9 I may want to go into it with another witness
10 I may call two months from now. A time limit on when I am
11 to come in and red-line other portions of it would, I think
12 be detrimental in that situation to my putting
13 on my case. I have -- I really don't think we are getting
14 into a situation where we are going to play games on timing
15 of red-lining and so on. We obviously on unsponsored
16 documents-- I have had a pile which is very large, which
17 I have been trying to get through, and I haven't been able to
18 read through them initially, and to put a time limit on doing
19 that with everything else that is going on in this hearing
20 is something I am going to have a difficult time meeting,
21 which is why I propose as an outside date, the close of the
22 record.

23 I think we are all responsible lawyers and we are
24 going to try to get this information to the Board and get
25 our case on on an orderly fashion, as promptly as we can and

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1 move this thing along as quickly as possible.

2 I'm not going to suggest that in order to hold out
3 anything from the Board or other parties, but it is on the
4 outside limit of what I think is manageable and necessary.

5 MR. GOLDBERG: I'm concerned about introducing
6 a document through a witness and having a later party
7 after the witness had been excused, saying a certain
8 portion of that document is significant and relevant and wants
9 to red-line that document. Even though he may believe t
10 is not related to the witness' testimony, we may believe
11 it is an appropriate subject for that witness, and the witness
12 may have been able to explain or counter the argument by the
13 nonsponsoring party in red-lining that portion of the
14 document.

15 That is why I urge there be a reasonable time
16 limit on red-lining portions of documents which come in
17 through witnesses, because we may believe that that witness
18 can clear up matters with respect to the portions that are
19 red-line by the nonsponsoring party.

20 CHAIRMAN RIGLER: Mr. Smith points out that
21 giving you a one-week delay wouldn't solve your problem,
22 because you would have to address your questions to the
23 witness while he was present and on the stand.

24 MR. GOLDBERG: My one week proposal was for
25 unsponsored exhibits. My proposal for documents which

1 came in through witnesses was that the red-lining be done
2 while the witness is here and available.

3 CHAIRMAN RIGLER: That is practically impossible,
4 if you put in a substantial number of schedules through
5 a witness. Let's say you have 1,000 pages introduced
6 through a witness. That means that opposition counsel would
7 have to go through those 1000 pages during the day or so
8 that the witness is on the stand and do all their red-lining.

9 MR. GOLDBERG: But they have to go through the
10 documents to formulate objections to the problems any way.

11 As a matter of fact we have been asked to identify
12 the documents one day and they are admitted into evidence
13 the next day.

14 CHAIRMAN RIGLER: That may not be necessarily.
15 Because they are only concerning themselves with the
16 red-lined portions of the sponsoring party.

17 MR. GOLDBERG: I would then at least ask for
18 a rule which would require the nonsponsoring party to red-
19 line portions of the document which do relate to the testi-
20 mony of the witness insofar as possible.

21 CHAIRMAN RIGLER: Don't you think that is something
22 the Board could take into account? If there were an area
23 as to which the witness obviously was qualified to give
24 information and the other parties didn't raise that until
25 after he had left the stand and tried to red-line it, would

bw5

1 not that affect any weight we would give to the consideration
2 we would give to the red-lined portion?

3 MR. GOLDBERG: We are agreed that there will
4 not be red lining after the close of the hearing.

5 For the first time in the proposed findings
6 parties will not be allowed to point to portions of the
7 documents not red-lined. I would like to avoid the problem
8 of getting to the close of this hearing and having numerous
9 documents, all of a sudden, red-lined and being left in a
10 position where other parties cannot adequately explain their
11 position on those portions.

12 CHAIRMAN RIGLER: You may have just misstated
13 the stipulation.

14 MR. STEVEN BERGER: Mr. Goldberg stated we don't
15 want the situation at the closing of the record to be that
16 any party will be referring to an unlined portion of a
17 document in excess of five pages in making his proposed
18 findings. I believe the stipulation that Mr. Reynolds
19 spoke of earlier allowed for that and that the question of
20 weight that was presented in terms of it not having been lined
21 prior thereto.

22 CHAIRMAN RIGLER: Was that your understanding,
23 Mr. Goldberg?

24 MR. GOLDBERG: Yes, if I misspoke I apologize.
25 That was my understanding.

bw6

1 CHAIRMAN RIGLER: We are just trying to get things
2 clarified.

3 MR. GOLDBERG: I would certainly like the Board
4 to consider the weight to be attached to portions of
5 documents which are brought to the Board's attention for the
6 first time in proposed findings. I hope the Board urges
7 all parties to avoid that whenever possible.

8 (Board conference.)

9 MR. GOLDBERG: Before lunch you mentioned a
10 distinction between post-trial briefs and proposed --

11 CHAIRMAN RIGLER: I misspoke on that. I will
12 speak to that in a minute.

13 MR. GOLDBERG: What I wanted to comment on is
14 when I rethink your statement about simultaneous filings
15 of proposed findings, assuming that will be the case and
16 that there will be no additional briefing by the parties, I
17 really have a problem with a party coming in after the
18 close of the hearing --

ES17

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Begin 18

1 CHAIRMAN RIGLER: All right. I will speak on
2 that point a little bit more.

3 The Board will basically approve the agreement
4 worked out by the parties with minor modifications.

5 First, in substitution for the five pages pro-
6 posed by the parties, we will make the ruling apply to
7 documents three pages or less with respect to the no red-
8 lining provision.

9 MR. REYNOLDS: May I ask by way of clarification,
10 is that documents three pages or less -- exhibits -- do we
11 include the attachments in our page count, or are we talking
12 about correspondence?

13 CHAIRMAN RIGLER: It would be an exhibit of three
14 or less pages.

15 MR. REYNOLDS: All right.

16 CHAIRMAN RIGLER: For exhibits of three or less
17 pages, no red-lining would be required.

18 Secondly, we want to assure the parties that we
19 would, for documents already in the record, exhibits al-
20 ready in the record, attach no significance to non-red-lining.
21 That is, we will take the entire document as being devoid
22 of any markings.

23 This goes back to the point about burden. We
24 will reread the entire document for all documents or
25 exhibits three pages or less. The fact that something is

blt 2

1 not red-lined will be no more important than the fact that
2 something is red-lined.

3 The Board will adopt the close of the record time
4 period proposed by the Applicants; however, if there is
5 an abuse of that rule that would be prejudicial we will
6 consider reopening the record or could consider the lack
7 of opportunity to rebut an extensive number of documents
8 treated in that fashion.

9 Other than the fact that we have overruled some
10 of the objections of the Staff or Justice, is there actual
11 objection to the adoption of that rule by the Board?

12 MR. CHARNO: Not by the Department.

13 MR. GOLDBERG: Are you still allowing for a
14 party to come in after the close of the record and point to
15 a portion of a document, considering you may give that
16 less weight?

17 CHAIRMAN RIGLER: That is right.

18 MR. GOLDBERG: If so, in reconsidering what may
19 be the Board rule about simultaneous filing of proposed
20 findings --

21 CHAIRMAN RIGLER: Let me take that up with you
22 now.

23 MR. REYNOLDS: Before we move on to that, I
24 would like to add one further comment to clear this up.

25 There are in the record at the present time

blt 3

documents or exhibits in excess of three pages which have been marked with some red-lining, and I am not sure that at the time the understanding as to the significance of the red-lining was fully appreciated.

I have discussed this with Staff and Justice a few minutes ago, and if we could propose and the Board could agree we would like to have until the close of the City's case for all parties to have an opportunity to go back, all the sponsoring parties to have opportunity to go back and, with respect to those exhibits in excess of three pages, either alter the marking or remove the marking as the case may be, so that now the documents that are in the record are going to be consistent with the present understanding that the Board has announced.

CHAIRMAN RIGLER: Hearing no objection to that proposal, it will be adopted.

Okay. At the end of the morning proceedings we got into discussion with respect to the Board's experiences with respect to filings of findings of fact and conclusions of law. I misspoke with respect to the filing of briefs.

They are permitted by the rules, and we would expect a unified document, or perhaps a uniform date for filing of briefs and findings.

Rule 2.754(A) in some respects does not ride squarely with Rule 2.754(B). Turning to Part (B) of the

rule, we note that the party with the burden of proof has 15 days after the record is closed to file the proposed findings and briefs.

I think we are agreed that that would be the City, the Department of Justice and the Staff for any exceptions that are applicable to the Staff.

The rule then provides that other parties -- which in this case would be Applicants -- would have 25 days to file in essence their findings, which might include answering findings.

It also provides at that point, however, that the Staff has 30 days notwithstanding the fact that the Staff is one of the parties with the burden of proof in this particular proceeding, which would seem to undercut the purpose of the rule in allowing the Applicants to have opportunity to answer any filings that the Staff had made.

Part 3 of the rule provides that parties with the burden of proof have 5 days after they receive what would in this case be the Applicants' findings during which they might file. It applies to Applicants' proposed findings and briefs.

The Board had indicated before lunch that we thought an interval of 4 weeks was appropriate for simultaneous filings by all parties. We believe that would be consistent with this rule, or at least would not do violence

blt 5

1 to this rule. We are not making any ruling today because
2 we want to get the comment and remarks the parties would
3 have.

4 Our tentative approach would be to give all
5 parties 30 days after the close of the record for simul-
6 taneous filing of proposed findings, conclusions and briefs.
7 We would then permit the parties some additional period --
8 we would permit all parties some additional period to
9 reply to the initial filings. Whether that period would be
10 5 or 10 days, I don't know; but that is the interval we
11 are considering right now.

12 I believe that that might answer some of the
13 Staff's objections as we made our ruling on the red-lining
14 of the documents, Mr. Goldberg.

15 MR. GOLDBERG: Yes, sir.

16 MR. REYNOLDS: I appreciate that the Board has
17 just announced a tentative ruling, but I want to announce
18 a tentative objection on behalf of Applicants, just so the
19 record is clear with respect to the Board's inclination to
20 require simultaneous filings of proposed findings at the
21 close of the case.

End18

Begin19

22 CHAIRMAN RIGLER: The Applicants would prefer
23 to have a three-stage process of filing, answer and reply.
24 Is that correct?

25 MR. REYNOLDS: I believe that would be consistent

blt 6

1 with the rules here.

2 CHAIRMAN RIGLER: What we have suggested is not
3 inconsistent with those rules, but we have expanded upon
4 the period.

5 MR. REYNOLDS: I appreciate that, but the dif-
6 ficulty I have with simultaneous filings goes back to the
7 bedrock principle of who has the burden and, therefore,
8 the extent to which Applicants should be setting up strawmen
9 and knocking them down before they hear what it is that
10 the other side proposes to be findings of fact in this pro-
11 ceeding.

12 CHAIRMAN RIGLER: You needn't answer this now,
13 but how do we treat that portion of the rule which apparently
14 allows the Staff to go last in any event?

15 MR. REYNOLDS: I think I know what the problem
16 is with the rule and the problem we are in here, and I
17 believe it is addressed to the fact that the rule was
18 couched with the safety and environmental hearings in mind,
19 where the burden is on the other side, and here we are talk-
20 ing about an antitrust proceeding where the burden is not
21 on the Applicants but on the Staff, Department and the City.

22 I think that is why the rule is framed the way
23 it is and why we run into this kind of problem by strict
24 adherence to the rule.

25 For that reason, it may be that some adjustment

blt 7

1 needs to be made in terms of the Staff's filings in this
2 particular case. But really my point now -- and I am not
3 prepared to argue fully -- I do feel at this particular time
4 quite strongly that a simultaneous filing of proposed findings
5 by the Applicants, at the same time as other parties, is
6 inappropriate in this particular kind of proceeding.

7 I didn't want the record to show, when the
8 Board had first indicated it was leaning in that direction,
9 that Applicants were leaning in the other direction.

10 CHAIRMAN RIGLER: All right.

11 MR. CHARNO: Mr. Chairman, looking at 2.754(B),
12 it seems to me that is wholly discretionary and the only
13 thing mandatory about 2.754 at all is what is contained in
14 (A), which says that all of the parties get a shot at pro-
15 posed findings and conclusions and a posthearing brief.

16 I think the schedule is entirely discretionary
17 with the Board. The Department has no strong feelings one
18 way or the other about whether it should be sequential or
19 simultaneous.

20 CHAIRMAN RIGLER: All right.

21 One reason we have raised this as early as we
22 have is to give all of the parties an opportunity to call
23 to our attention any Appeal Board or Commission rulings which
24 may have a bearing on our treatment.

25 We may be in a first impression situation since

blt 8

1 this is a contested antitrust proceeding and there have been
2 very few of those thus far in this system.

3 Are you ready to proceed, Mr. Charno?

4 MR. CHARNO: Yes.

5 The Department would offer for identification as
6 DJ Exhibit 200 a multi-page document, the first page of
7 which states, after -- and the first line of which says
8 "Albert J. Bader, Jr., being duly sworn."

9 The affidavit consists of sixteen documents
10 which comprise the package.

11 CHAIRMAN RIGLER: The entire package is to be
12 designated as Department Exhibit 200?

13 MR. CHARNO: Yes.

14 We would mark DJ-201 a document with the numbers
15 118541 through -545.

16 MR. RIESER: Mr. Chairman, I think this raises
17 a problem of the implementation of your ruling.

18 This consists of one cover memorandum and two
19 separate 2-page documents, one a letter and the other
20 another 2-page memorandum.

21 Now, in an instance like that, should the thing
22 be red-lined, or do we consider that one of the short documents
23 that don't need to be red-lined?

24 CHAIRMAN RIGLER: I don't know how many times
25 we will have something like this.

blt 9

1 We will treat it under the short document rule,
2 however.

3 MR. RIESER: It is to be treated under the short
4 document rule?

5 CHAIRMAN RIGLER: Exhibit 201 can be treated that
6 way.

7 MR. REYNOLDS: That is why I asked about exhibits
8 versus documents.

9 CHAIRMAN RIGLER: You are right.

10 What we will have to do is break it down into
11 separate exhibits or it will be subject to the red-line rule.

12 You can do it either way. It is either a 5-page
13 exhibit, in which case red-lining applies, or it is three
14 separate exhibits, in which red-lining doesn't apply.

15 MR. CHARNO: The Department has offered a number
16 of documents where there are attachments. We have no
17 interest whatsoever in the attachments and are including
18 them in conformity with the need to make a complete offering
19 on the record.

20 If we are going to have to break it down in
21 three exhibits, we will have a number of dropped exhibits
22 because we will not introduce some of the attachments
23 standing alone.

24 MR. LERACH: Mr. Chairman, I don't think this
25 happens all that frequently. Perhaps it would be better

blt 10

1 to preserve the integrity of the rule and just permit an
2 exception to it as circumstances require.

3 CHAIRMAN RIGLER: Your other Applicants apparently
4 disagree with you.

5 MR. LERACH: I'm not surprised to hear. It is
6 an increasing occurrence.

7 MR. REYNOLDS: I am not sure I disagree. But
8 at this stage, if we have a record here that at some point
9 may be used before the Appeal Board or in a court, it will
10 be hard to find a transcript reference where it would indi-
11 cate that this is an exception.

12 If it is not that frequent, we ought to red-line
13 those exhibits that are over three pages. The Justice
14 Department has already red-lined this one. As a practical
15 matter, we have gone over the hill with this one.

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1 MR. RIESER: If now would an appropriate time to do
2 that, I think Duquesne would request that all of the pages
3 of this exhibit be red-lined.

4 CHAIRMAN RIGLER: All right. With respect to
5 Document 201, the Board will treat all five pages as
6 red-lined.

7 MR. REISER: Exhibit 201.

8 CHAIRMAN RIGLER: Right.

9 MR. CHARNO: The Department would offer as
10 DJ-202, a document bearing the identification numbers
11 105093 through 95. We would offer as DJ-203.--

12 MR. SMITH: Where might we find those?

13 MR. CHARNO: The Department would offer as
14 DJ-203 for identification a one-page document bearing
15 the number 105096.

16 The Department would offer as DJ-204 for
17 identification, a two-page document bearing the numbers
18 105081 through 82.

19 The Department would offer as DJ-205 for
20 identification, a document bearing the numbers 105087
21 through 089.

22 The Department would offer as DJ-206 for
23 identification a one-page document numbered 105080.

24 MR. RIESER: Mr. Chairman, would it be appropriate
25 at the time the documents are identified to ask for offers of

1 proof before they are moved in.

2 CHAIRMAN RIGLER: Yes.

3 MR. RIESER: If it would, could I ask for offers
4 of proof -- I have waited through 202, 203, 204, 205, 206,
5 because they all seemed draft of responses. I wondered
6 if you had a general offer of proof with respect to those?

7 MR. CHARNO: We do. We offer these series of
8 documents as evidence of the fact that draft replies were
9 prepared by Duquesne as of the dates indicated on the replies
10 and use these documents to show the distribution of these
11 letters in draft and the evolution of a consensual
12 response by the different memorandums of CAPCO, amounting
13 to concerted action.

14 CHAIRMAN RIGLER: Continue.

15 MR. CHARNO: The Department would offer as
16 DJ-207 for identification a one-page document numbered
17 105060. We have certain stipulations that we have
18 reached with Applicants or Counsel for Duquesne Light with
19 respect to those documents which, if it's agreeable we will
20 read into the record at the time we move their addition.

21 Department offers as DJ-208 for identification,
22 a three-page document numbered 119705, on the second page
23 the number is illegible and the third page is numbered
24 709.

25 MR. REYNOLDS: What is the date of the second?

bw3

1 MR. CHARNO: December 5, 1967.

2 MR. REYNOLDS: McCabe to Pleger.

3 MR. CHARNO: Yes. We would offer as DJ-209 for
4 identification, a document numbered 105059.

5 We would offer as DJ-210 for identification
6 a three-page document numbered 105056 through 58.

7 We would offer as DJ-211 a one-page document
8 numbered 119679.

9 We note for the record at this time we do not
10 have a Xerox copy or copy of any type available. Absent
11 the Xerox cover note stamped on the lower left-hand corner
12 of this copy of the document.

13 MR. REYNOLDS: What is the difference between
14 Internal 79 and Internal 105053?

15 MR. CHARNO: Difference between Exhibit 211
16 for identification and Document 105053 is that in Exhibit
17 211 the last name in the internal distribution is checked,
18 Mr. G. D. Munsch, Jr.

19 On 105053 none of the carbon-copied parts
20 are checked.

21 MR. REYNOLDS: Okay.

22 MR. CHARNO: We would offer for identification
23 as DJ-212, a one-page document numbered 105053.

24 We would offer as DJ-213 for identification a
25 one-page document numbered 105052.

1 We would offer as DJ-214 for identification,
2 a one-page document numbered 119682.

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3 We would offer as DJ-215 for identification,
4 a one-page document numbered 105042.

5 We would offer as DJ-216 for identification
6 a three-page document numbered 105038 through 40.

7 MR. RIESER: Could I ask for offer of proof
8 on this one?

9 MR. CHARNO: The Department would intend to
10 prove through DJ-216, the similarity of language and
11 timing of the Duquesne Light response in relation to those
12 of the other CAPCO companies.

13 MR. RIESER: Of the Duquesne response?

14 MR. CHARNO: Of the draft letters which were
15 ultimately, we would prove through other documents,
16 finalized until response.

17 The Department would offer as DJ-217 for
18 identification a one-page document numbered 105037.

19 The Department would offer as -- the Department
20 would offer as -- the Department would like to withdraw
21 the next evidence which is in evidence as NRC-4.

22 MR. RIESER: That is your document number 105032.

23 MR. CHARNO: And 33; that is correct.

24 The Department would offer as DJ-218 for
25 identification a two-page document numbered 105085 and 86.

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1 Could we take a short recess and straighten out
2 the ordering?

3 (Recess.)

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1 MR. CHARNO: The Department had just offered
2 as DJ-218 for identification a 2-page document numbered
3 105085 and -86.

4 The Department would offer as DJ-219 for iden-
5 tification a document numbered 119707.

6 MR. REYNOLDS: 119 or 115?

7 MR. CHARNO: 119.

8 It is a January 2, 1968, letter.

9 The Department would offer as DJ-220 for identi-
10 fication a 2-page document numbered 105072 through -73.

11 The Department would offer as DJ-221 for identifi-
12 cation a 1-page document numbered 105043. That would be
13 a -- you can't read the number?

14 MR. STEVEN BERGER: It is a pretty rough copy.

15 MR. CHARNO: We would note for the record that
16 105043, the body of the letter is in evidence as Applicants
17 60, but the carbon copies are only available on the
18 Department's Exhibit 221 for identification.

19 CHAIRMAN RIGLER: I have a question about it.

20 At the top of mine, I see a name, Philip A.
21 Fletcher, Chairman of the Board, written in ink. What is
22 the significance of that notation?

23 MR. CHARNO: The Department cannot place that
24 notation on the document.

25 MR. REYNOLDS: My copy has "Chairman of the Board,

blt 2 1 Duquesne Light Company."

2 CHAIRMAN RIGLER: Yes.

3 MR. CHARNO: We would note that this copy is
4 indicated to go to Mr. Fletcher in the carbons in the
5 lower lefthand corner, and the check is by his name.

6 MR. SMITH: I see what could be a check, just
7 a tail end of it, Mr. Charno, but it is not clear that it
8 is a check.

9 CHAIRMAN RIGLER: I also have some initials about
10 Philip A. Fletcher at the very bottom.

11 (Mr. Charno handing document to Mr. Lerach.)

12 MR. LERACH: It is a better check than our
13 check, but it is still not terribly clear.

14 CHAIRMAN RIGLER: Mr. Lerach, I don't know if
15 you are familiar with your client's corporate officers'
16 handwriting. Are those Mr. Fletcher's initials over his
17 typed name at the very bottom, or can you determine that?

18 MR. LERACH: Mr. Fletcher retired from the
19 company in '68, but I have an agreement with the Justice
20 Department that I will submit certain of the documents to
21 someone at the company who is familiar with his initials
22 and we will get a stipulation up as to his initials.

23 MR. CHARNO: We would offer as DJ Exhibit 222
24 for identification a document numbered 119689. This is
25 a February 6 letter, 1968, from McCabe to Greenslade.

blt 3

1 We would offer as DJ-223 for identification a
2 1-page document bearing the number 119692 --

3 MR. RIESER: Could you identify that for us,
4 please?

5 MR. CHARNO: That would be a 1-page document, let-
6 ter from Victor F. Greenslade, with Mr. Greenslade's
7 initials, to Robert F. McCabe, dated February 21, 1968.

8 MR. RIESER: What identification number did it
9 have?

10 MR. CHARNO: 119692.

11 MR. SMITH: Are those lined carbon indications
12 significant?

13 MR. CHARNO: I would read the third one as
14 "Leslie Henry."

15 MR. LERACH: I think it is "Leslie Henry."
16 "Henry" is the last name.

17 MR. CHARNO: The Department would offer for
18 identification as DJ-224 a 1-page document bearing the number
19 119717.

20 For clarification of the record at this point,
21 we have been unable to reach a stipulation on all of the
22 Department's exhibits with Duquesne Light at this time.
23 Should, for example, with respect to this document we be
24 able to reach a stipulation that a copy of NRC-3, of which
25 this is a copy, was found or is found in Duquesne's files,

blt 4

1 we will withdraw this exhibit to clarify the record.

2 MR. LERACH: You haven't asked me for that one
3 yet.

4 MR. CHARNO: I'm sorry. I thought we had.

5 MR. LERACH: Does NRC-3 show us getting a copy?

6 MR. CHARNO: No. There are no carbons indicated
7 on NRC-3.

8 The Department would offer as DJ-225 for identi-
9 fication a 1-page document bearing the number 119716.

10 The Department would offer as DJ-226 for identifi-
11 cation a 2-page document bearing the numbers 105074 through
12 -75.

13 The Department would offer as DJ-227 for identi-
14 fication a 1-page document bearing the number 105066.

15 The Department would offer as DJ-228 for identifi-
16 cation a 2-page document bearing the numbers 105050 through
17 -51.

18 The Department would offer as DJ-229 for identi-
19 fication a 1-page document numbered 119690.

20 The Department would offer as DJ-230 for identi-
21 fication a 1-page document numbered 119691.

22 The Department would offer as DJ-231 for identi-
23 fication a document numbered 119175.

24 The Department would offer as DJ-232 for identi-
25 fication a document numbered 105071.

blt 5

1 The Department would offer as DJ-233 a document
2 numbered 105067 through -70.

3 MR. RIESER: There is a blank page between your
4 document 105068 and -069. Is that supposed to be there?

5 MR. CHARNO: We don't have a blank page or any-
6 thing between those two pages.

7 You do have a 4-page exhibit?

8 MR. RIESER: Now it is four pages.

9 CHAIRMAN RIGLER: This exhibit is more than
10 three pages long. Is there any portion that should be
11 red-lined?

12 MR. CHARNO: We would consider the entire exhibit
13 relevant.

14 CHAIRMAN RIGLER: I see you have an envelope and
15 postmark in here. What are you going to show as to the
16 dates involved here, Mr. Charno?

17 MR. CHARNO: Nothing more than that was trans-
18 mitted on January 10 rather than January 2.

19 CHAIRMAN RIGLER: You mean that the letter
20 signed by Mr. McCabe on the Borough of Pittcairn stationery
21 dated January 2 in fact was transmitted in the envelope
22 which shows a postmark date of January 10?

23 MR. CHARNO: By the Toledo Edison Company to
24 the Duquesne Light Company.

25 I have no doubt that it was mailed on January 2

blt 6

1 by Mr. McCabe to Mr. Davis.

2 CHAIRMAN RIGLER: All right.

3 MR. CHARNO: The Department would identify as
4 DJ-234 for identification a 2-page document bearing the
5 numbers 105064 and -65.

6 The Department would identify as DJ-236 --
7 pardon me -- 235 a 2-page document bearing the numbers
8 105034 and -35.

9 The Department would identify as DJ-236 a 2-page
10 document bearing the number 116910 and 119695.

11 The Department would identify --

12 MR. RIESER: Slow down for a minute, please.

13 These were attached even though their numbers
14 are quite far apart?

15 MR. CHARNO: It indicates the nature of the
16 attachment.

17 We would identify as DJ-237 a 3-page document
18 numbered 105090 through -92.

19 We would identify as DJ-238 for identification
20 a 1-page document numbered 116978.

21 We would offer as DJ-239 for identification a
22 2-page document numbered 116974 and -75.

23 We would offer as DJ-240 for identification a
24 1-page document numbered 116973.

25 We would offer as DJ-241 for identification a

blt 7

1 1-page document numbered 116971.

2 We would offer as DJ-242 for identification a
3 2-page document bearing the numbers 116968 and 116972.

4 We would offer as DJ-243 for identification a 2-page
5 document numbered 105114 to 105116.

6 MR. RIESER: Could I ask for an offer of proof
7 on that?

8 MR. CHARNO: With respect to Exhibit for identifi-
9 cation 243?

10 MR. RIESER: Yes.

11 MR. CHARNO: The Department would offer Exhibit
12 for identification 243 to demonstrate the relationship in
13 this proceeding between interconnection and purchase of
14 a municipal system to further demonstrate the utilization
15 by Duquesne Light of the Pennsylvania Economy League as a
16 technique which is part of a method of acquisition which
17 is practiced repeatedly and further offer Exhibit 243 to
18 show that the communications contained therein were made
19 by Mr. Gilfillin to the Vice Executive Officer of the
20 Duquesne Light Company.

21 MR. REYNOLDS: May I have -- I'm sorry. I
22 thought you were finished.

23 MR. CHARNO: We would also offer Exhibit for
24 identification 243 for the occurrences which transpired at
25 the August 8, 1966, meetings which are set forth on the

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second page of the exhibit.

MR. REYNOLDS: May I have what is said about this document in connection with an offer of proof regarding the Pennsylvania Economy League?

(Whereupon, the Reporter read from the record as requested.)

End 21

1 MR. CHARNO: The Department would offer as
2 DJ-244 for identification, a six-page document numbered
3 105109 through 113.

4 The Department would offer --

5 MR. GREENSLADE: I only find five pages.

6 MR. SMITH: That can be only five pages.

7 MR. CHARNO: It is a five-page exhibit, yes,
8 sir.

9 MR. RIESER: Mr. Chairman, if this would be
10 an appropriate time, we would like to request that all of
11 this be red-lined. This is an Exhibit more than three
12 pages, and I notice that the Department of Justice has
13 red-lined only portions of it.

14 CHAIRMAN RIGLER: This would be an appropriate
15 time. We will red-line the entire document.

16 MR. CHARNO: The Department would offer as
17 DJ-245 for identification a three-page document numbered
18 105106 through 108.

19 The Department would offer as DJ-246 for
20 identification, a one-page document numbered 116960.

21 The Department would offer as DJ-247 for
22 identification a one-page document numbered 105102.

23 That is a multi-page document and it should be
24 102 through 104.

25 The Department would offer as DJ-248 for

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1 identification a one-page document numbered 116940.

2 The Department would offer as DJ-249 for
3 identification, a one-page document numbered 105006.

4 MR. SMITH: What was 248?

5 MR. CHARNO: 248 was a document numbered
6 116940, and that was a January 3, 1968 letter from John
7 Marrison to Joseph Rizzo.

8 MR. SMITH: What was 105103?

9 MR. CHARNO: I'm sorry, 105102 through 104 should
10 have been a single document. It is cover and attachments.

11 MR. RIESER: Could we have an offer of proof with
12 respect to Department of Justice Exhibit 248?

13 MR. CHARNO: We would offer Exhibit 248
14 for identification to prove the utilization of
15 interconnection negotiations to promote the acquisition
16 of the system and to demonstrate that when a municipal
17 system is in need of purchasing emergency power that the
18 response of Dugessne Light is to attempt to acquire that
19 system.

20 CHAIRMAN RIGLER: Give me that one more time.

21 MR. CHARNO: That when a municipal system is in
22 need of purchasing power that the response of Dugessne
23 Light is to attempt to acquire the system rather than to
24 sell it power.

25 MR. CHARNO: The Department would offer as

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1 DJ-250, a multi-page document numbered 118044
2 through 051.

3 MR. RIESER: Excuse me, Steve. Could you
4 identify that more specifically?

5 MR. CHARNO: It is entitled '57 Annual Meeting,
6 Pennsylvania Association of Boroughs Program, June 23-26.

7 MR. RIESER: What is your offer of proof?

8 CHAIRMAN RIGLER: What are the numbers on it
9 it again?

10 MR. CHARNO: 118044 through 051. This and the
11 following document which makes specific reference to this
12 would be offered to prove that Duquesne Light was at this
13 time monitoring the activities of the representatives of
14 the Borough of Pitcairn; we offered to prove the status
15 of Duquesne Light acquisition attempt at that time.

16 The two exhibits are also offered to demonstrate
17 the possibility of new competition, new competitors in the
18 Duquesne Light service area through expropriation of
19 Duquesne Light's service facilities.

20 Finally, we offer it for the fact that Duquesne
21 Light attended at least this Association of Boroughs annual
22 meeting and operated a hospitality room at that meeting,
23 where it had conversations with members of municipal
24 electric utilities -- representatives of municipal electric
25 utilities.

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1 The Department would offer as DJ-251 a three-page
2 document numbered 116892 through 94.

3 MR. RIESER: This is the document to which you
4 referred in your previous offer of proof?

5 MR. CHARNO: In my answer with respect to our
6 offer of proof on DJ-251.

7 Pardon me, 250.

8 The Department would offer as DJ-252 a five-page
9 document numbered 118341 through 345.

10 MR. RIESER: Could we have an offer of proof on
11 the first two pages and an explanation of what the
12 next three pages are?

13 MR. CHARNO: To answer your questions in
14 reverse order, the last three pages were an attachment
15 to the first two pages upon which the Department places
16 no reliance and included simply because it was an attachment.
17 And the red-line portion of the first two pages the Department
18 would offer to proof that on July 30, 1968, Mr. Gilfillin,
19 Mr. Munsch, had knowledge of the fact that Pitcairn --
20 or had been informed of Pitcairn's excess generating capacity
21 on February 21, 1968, and had exhibited an interest in
22 ascertaining additional details with respect to that
23 generating capacity.

24 We would also take Exhibit 252 in proof of the
25 existence of a meeting on February 21 and that the statement

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1 was made which is attributed to Mr. McCabe in the document.

2 MR. LERACH: Duquesne will have no objection
3 to DJ-252 coming in without the attachment. I would,
4 therefore, suggest that the attachment simply be taken out
5 of the case.

6 MR. CHARNO: The Department has no objection
7 to that.

8 MR. REYNOLDS: The other Applicants have no
9 objection to that.

10 MR. RIGLER: That would be 113843 through 345.

11 We will resume the exhibit to include 113341
12 and 342 and discard the other pages.

13 I'm going to remind counsel for Duquesne that I
14 want just one attorney to be conducting the examination
15 with respect to these documents.

16 I don't care which one it is, but let's not see-
17 saw back and forth.

18 MR. CHARNO: The Department would offer as DJ-
19 253 a one-page document numbered 118329.

20 The Department would offer as DJ-254 for identifi-
21 cation, a three-page document numbered 116984 through 886.

22 MR. RIESER: Could we have an offer of proof on
23 this, please?

24 MR. CHARNO: On Exhibit for identification 2547

25 MR. RIESER: I'm sorry, I was ahead of myself.

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1 Excuse me.

2 MR. CHARNO: The Department would offer for
3 identification as DJ-255 a two-page document numbered
4 118287 through 288.

5 The Department would offer as DJ-256, a multi-
6 page document numbered 134478 through 484.

7 CHAIRMAN RIGLER: Can you identify the document?

8 MR. CHARNO: It being a seven-page letter from
9 Mr. Olds to Mr. Munsch, dated November 21, 1969.

10 MR. STEVEN BERGER: I ask that page 6 of that
11 memorandum, paragraph 4 might be red-lined.

12 CHAIRMAN RIGLER: It will be done.

13 MR. STEVEN BERGER: I add that I did it as much
14 as a matter of levity as anything else. It
15 really didn't matter that much, but hearing no laughter --

16 (Laughter.)

17 MR. CHARNO: For clarification that is the paragraph
18 wit the numeral 4 rather than the fourth paragraph.

19 The Department would offer as DJ-257 a three-page
20 document numbered 134408 through 410.

21 CHAIRMAN RIGLER: You will have to identify
22 those. The reason I ask you to do that is because my
23 number is obscured down at the bottom.

24 MR. CHARNO: The first page is a buck slip that
25 bears the printed name W. F. Gilfillin, Jr., dated

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1 February 4, 1970.

2 The second page is a letter from J. A. Stark
3 to W. F. Gilfillin, Jr., dated February 3, 1970, and the
4 third page is apparently a memo from a W. T. Wardzinski,
5 W-a-r-d-z-i-n-s-k-i, to Jr. A. Stark, dated January 29,
6 1970.

7 The Department would offer as DJ-253, a two-page
8 document numbered 134411 through 422.

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CHAIRMAN RIGLER: 134411?

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MR. CHARNO: Yes, sir.

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CHAIRMAN RIGLER: You will have to identify that,

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too.

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MR. CHARNO: That is a cover letter or m-mo from

6

W. F. Gilfillin, Jr. to Messers, D. J. Dudd and J. A. Stark,

7

dated January 12, 1970, and the second page would be a clip-

8

ping that has a typed caption reprinted from the Wall Street

9

Journal, Tuesday, February 3, 1970.

10

MR. REYNOLDS: Could I have the basis for your

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Exhibit 258 and attachments? The evidentiary basis for

12

identifying these documents?

13

MR. CHARNO: I will --

14

MR. REYNOLDS: What is the exception to the hearsay

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rule that you are using for purposes of seeking admission

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of Exhibit 258 and the attachments to 258?

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CHAIRMAN RIGLER: As you answer that question,

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I will tell you what is bothering me. 257 consists of three

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pages relating to definition of wheeling. 258 appears to do

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the same thing with respect to the first page of that exhibit,

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namely, Department Document No. 134411. The second page

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to Exhibit 258, Department 134412 seems to float.

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I don't see that it relates to 257 or 258.

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MR. CHARNO: The relationship between 257 and 258

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is that 258 is the request that is answered in 257.

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1 MR. REYNOLDS: 258 attachment postdates 258 cover
2 letter. And both of them predate 257. Certainly the attach-
3 ment to 258 postdates the cover letter that is supposedly --

4 CHAIRMAN RIGLER: The attachment doesn't appear to have
5 any relevance, let alone be connected to the first page of
6 the exhibit.

7 MR. CEARNO: I completely agree with that. The
8 Department, as indicated by the absence of red lining,
9 had not intended to rely on the second page and had not
10 introduced it for the truth of the statements contained
11 therein, certainly, and had introduced it from what appears
12 to be from a conflict in dates, the mistaken impression
13 that it was the attachment.

14 CHAIRMAN RIGLER: Why don't you make your exhibit
15 258 consist of documents 134411 and we will destroy document
16 134412.

17 MR. REYNOLDS: On that basis, can I get an offer of
18 proof as to 258 which is a single page of correspondence
19 standing alone?

20 I guess I am confused now because I am not sure
21 what it refers to, looking at it on its face.

22 MR. CEARNO: 257 and 258 would be offered to show
23 the circulation -- for the definition of wheeling therein,
24 to show the circulation of that definition within the company
25 and for Mr. Stark's characterization of what ultimately

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1 became or was adopted by the CAPCO companies as the buy-sell
2 of power rather than the wheeling of power, both of
3 these being terms in quotes. And the relationship between
4 buy-sell and wheeling.

5 And displacement wheeling.

6 MR. REYNOLDS: That goes to 258.

7 MR. CHARNO: 258 is the series of questions
8 requesting what came out in 257.

9 MR. REYNOLDS: My confusion is that it says, "Please
10 review attachment and let me have your comments."

11 I don't have an attachment so I am not sure what
12 it is I am reviewing or where the tie up is between 257 and
13 258. You had another attachment which we have determined
14 is not the proper one and having removed that, I guess
15 the difficulty I am having is making any reference to 258 until
16 such time as you can --

17 MR. CHARNO: I think the reference is clear on the
18 face of the document. My joint talk with Bill Dempster
19 regarding FPC definition of wheeling and whether the displace-
20 ment of power from one company to another could be considered
21 as wheeling.

22 This is addressed to Mr. Stark. Mr. Wardzinski's
23 memo to Mr. Stark with the FPC definition of wheeling is then
24 discussed by Mr. Stark in a memo to Mr. Gilfillin who authored
25 the request in which he relates a discussion with Mr. Dempster

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1 concerning the wheeling of power which was requested by
2 Mr. Gilfillin.

3 This is forwarded to counsel for the company by
4 Mr. Gilfillin.

5 MR. REYNOLDS: Okay, I see how you are using it.
6 That is fine. That is all I wanted to clear up.

7 MR. CHARNO: I will ascertain whether the Department
8 has the January 2, 1970 attachment to what has been
9 identified as DJ 258 and if we do, we will certainly
10 annex to the document.

11 If we don't, we will request that Duquesne
12 supply us with a copy so that we will have a complete document
13 and make it available to all of the parties.

14 MR. CHARNO: The Department would offer as
15 DJ 259 for identification, a one-page document numbered
16 134413.

17 CHAIRMAN RIGLER: Identify it, please.

18 MR. CHARNO: Memorandum apparently from
19 Mr. Munsch to Mr. Gilfillin dated January 20, 1970. We
20 do not have a copy of the attachment to this.

21 CHAIRMAN RIGLER: All right.

22 MR. CHARNO: The Department would offer for
23 identification as DJ Exhibit 260, a one-page document numbered
24 118843.

25 MR. RIESER: Could we have an offer of proof on

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1 260.

2 MR. CHARNO: We would offer this in conjunction
3 with the stipulation that the author is Mr. Gilfillin,
4 Sales Vice President of the Company, to indicate in part his
5 role in the negotiations, his summary of the -- pardon me,
6 his summary of the settlement together with his estimate
7 of the viability of the Pitoukarn litigation against Duquesne
8 Light.

9 The next three documents, 113844 through 846
10 we had originally included under the mistaken impression
11 that they were attached to the prior document.

12 We have been informed by counsel for Duquesne
13 that they were not. The Department will not offer them.
14 We will withdraw them. They can be discarded.

15 MR. CHARNO: The Department would offer as DJ 261,
16 for identification, a three-page document numbered 114944
17 through 46.

18 MR. RIESER: Could we have an offer of proof on
19 this, please?

20 MR. CHARNO: This document would be offered for
21 an awareness by Duquesne Light of the municipal electric
22 utility's ability to participate in the units which are the
23 subject of this proceeding and other aspects of coordinated
24 development.

25 MR. REYNOLDS: May I ask if 261 is being offered

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1 for the truth of the matters asserted therein?

2 MR. CHARNO: The offer was couched in terms of
3 an awareness; whether that awareness was correct or mistaken
4 the Department hasn't taken a position.

5 MR. REYNOLDS: What is the answer to my question,
6 then?

7 CHAIRMAN RIGLER: I think he answered it, Mr.
8 Reynolds.

9 MR. REYNOLDS: Could I get a yes or no? All I
10 am saying is if he did answer it, is it yes or no. For
11 the truth of the matters asserted therein?

12 CHAIRMAN RIGLER: He is saying it is irrelevant.

13 MR. REYNOLDS: What is irrelevant.

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1 CHAIRMAN RIGLER: Whether the information con-
2 tained therein is true or not.

3 MR. REYNOLDS: So it is not.

4 CHAIRMAN RIGLER: The record should reflect that
5 the Chairman suggested, because I'm having trouble with
6 the question.

7 You can respond if you wish, Mr. Charno.

8 MR. CHARNO: It is being submitted for the fact
9 that Duquesne Light believed those statements were true at
10 the time --

11 MR. REYNOLDS: That answers my question.

12 MR. CHARNO: The Department would offer as
13 DJ-262 a 3-page document numbered 114925 through -927.

14 MR. SMITH: Mr. Charno, on your first page of
15 DJ-262, Mr. Rudolph refers to two letters from the Law
16 Director plus his reply. The exhibit I have here only has
17 the one letter, although I think I recall a second letter
18 that was involved at that time.

19 MR. CHARNO: I don't believe that the second
20 letter was produced with this copy of the document to the
21 Department.

22 If the two letters received by Mr. Rudolph are
23 not yet in evidence, they will be in evidence.

24 CHAIRMAN RIGLER: My recollection is that those
25 letters were put in evidence by CEI during the

blt 2

1 cross-examination of Mr. Hart.

2 MR. REYNOLDS: Well, I really have to check, be-
3 cause some of those -- some of that correspondence was put
4 in on direct and the remainder of it is being put in on
5 cross.

6 I know of the letter we are talking about, but
7 unless I go back and check I don't know specifically who
8 put in the missing letter that the cover of April 17 refers
9 to, to which the cover of April 17 refers.

10 I believe that both of the letters by the Law
11 Director of the City of Cleveland have been put in evidence.
12 I'm not sure who did it, and without going back and checking
13 the record I can't tell you now.

14 I don't mind doing that and clearing it up. I
15 think we are referring to two different letters, or at
16 least one different letter than we have attached at present
17 to DJ-262.

18 MR. CHARNO: The first letter appears to be the
19 missing letter, which, according to the face of it, was
20 attached to DJ-262; and it would appear to be DJ-181, which
21 is an April 4 letter from Herbert Whiting to Karl Rudolph.

22 The Department offers as DJ-263 a 1-page document
23 numbered 114793.

24 CHAIRMAN RICLER: What is the first name that
25 appears in this exhibit? Russ somebody.

blt 3

1 MR. REYNOLDS: Spetrino.

2 CHAIRMAN RIGLER: What is his position, and by
3 whom is he employed?

4 MR. STEVEN BERGER: At that time he was Vice
5 Attorney with Ohio Edison. He is currently General Counsel
6 of the company.

7 MR. RIESER: Could we have an offer of proof on
8 DJ-2637

9 MR. CHARNO: The Department would offer Exhibit
10 DJ-263 for identification to show further communication
11 between the Applicants and a concert of action with respect
12 to the requests by the City of Cleveland for participation
13 in the units which are the subject of this proceeding and
14 in the CAPCO pool.

15 CHAIRMAN RIGLER: Could you identify for us the
16 various parties referenced in the document? I think it
17 would assist the record.

18 MR. CHARNO: The second sentence makes reference
19 to Mr. Spetrino and Mr. Greenslade. I'm not sure what
20 his position was with Cleveland Electric Illuminating at
21 that time.

22 MR. GREENSLADE: Principal counsel of Cleveland
23 Electric Illuminating Company.

24 MR. CHARNO: The next paragraph makes reference
25 to Mr. Mansfield, who was President of Ohio Edison at that

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1 time.

2 Mr. Arthur Hume, I believe, was President of
3 Duquesne at that time.

4 MR. LERACH: Chairman.

5 MR. CHARNO: Pardon me. Chairman.

6 It is signed by the recipient of the telephone
7 call, Mr. Munsch, who was General Counsel --

8 MR. RIESER: General Attorney.

9 MR. CHARNO: General Attorney for Duquesne Light.

10 MR. SMITH: Wasn't Mr. Mansfield also President
11 of Pittsburg Power?

12 MR. STEVENS RIGLER: Chairman of the Board of
13 Pennsylvania Power.

14 MR. RIESER: You said a concert of action among
15 the parties with respect to Cleveland's -- I didn't hear
16 what it was of Cleveland's.

17 (Whereupon, the Reporter read from the
18 record as requested.)

19 MR. CHARNO: I will rephrase it.

20 The document shows communication and concert
21 of action with respect to the City of Cleveland's requests
22 for participation in the units which are the subject of
23 the proceeding, benefits of coordinated operation and
24 development and membership in the CAPCO pool.

25 CHAIRMAN RIGLER: Does it also reflect on the

blt 5

1 question we were discussing the other day about the real
2 or apparent agency of CEI to deal with the City of Cleveland
3 on behalf of other members of the CAPCO pool?

4 MR. CHARNO: The Department has no position at
5 this point on the agency of Cleveland Electric Illuminating
6 Company, and we haven't thought about this or the other
7 comparable evidence from that viewpoint.

8 MR. LERACH: Your Honor, I would like to take the
9 most respectful possible exception to your suggesting to a
10 party that a document may prove something other than they
11 have offered it to prove.

12 I do say with the greatest respect, and I under-
13 stand the administrative procedure and the search for truth
14 and matters like that, but I think when a party makes his
15 offer he is bound by his offer.

16 CHAIRMAN RIGLER: If there is an issue outstand-
17 ing to the Board to which the Board has a question, you
18 are right. We are permitted to pursue it, and we will exer-
19 cise our discretion to do so.

20 Your objection is noted.

21 MR. CHARNO: Clearly, Mr. Chairman, the second
22 sentence would be subject to that inference.

23 CHAIRMAN RIGLER: If the Department is not making
24 that assertion, then you have answered my question.

25 MR. CHARNO: We are not.

blt 6 1

CHAIRMAN RIGLER: All right.

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MR. CHARNO: The Department would offer as DJ-264 for identification a 3-page document numbered 114908, 114924, and 114923.

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MR. RIESER: Could we have an offer of proof on DJ-264 for identification?

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MR. CHARNO: The Department would offer DJ-264 to show a continuing orchestration and concert of action with respect to the City of Cleveland's request outstanding to the members of CAPCO.

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MR. REYNOLDS: Mr. Chairman, I would like to ask a question.

12

13

It is my understanding that this document is already in evidence.

14

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CHAIRMAN RIGLER: Which document of the three pages that make up this exhibit?

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MR. REYNOLDS: Certainly 924 for the first page.

18

Maybe my problem is that I'm missing part of the document.

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MR. GREENSLADE: Is 908 part of it?

21

MR. CHARNO: Yes.

22

MR. REYNOLDS: I'm sorry. I got my documents mixed up.

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MR. CHARNO: The Department would offer as DJ-265 for identification a multi-page document bearing the

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blt 7

1 numbers 114896 through 114907.

2 MR. RIESER: Could I have an offer of proof?

3 MR. CHARNO: The Department would offer DJ-265
4 for identification to show the internal communications within
5 Duquesne Light and by extending the red-lining to the
6 bottom of the page on the second page, which couldn't be
7 done on the Xeroxing without obliterating the language, to
8 show an internal Duquesne Light suspense date of August 20.

9 CHAIRMAN RIGLER: What is a suspense date?

10 MR. CHARNO: A date by which action must be
11 taken.

12 MR. RIESER: Could I ask what the first page of
13 the exhibit marked for identification is for?

14 MR. CHARNO: I don't believe we would have the
15 second page and attachment without the first page.

16 MR. RIESER: It merely is to provide a complete
17 document?

18 MR. CHARNO: Well, it further indicates that a
19 copy has in fact been forwarded to Mr. Schaeffer, who I
20 believe was the President of Duquesne Light at the date of
21 writing of this letter.

22 MR. RIESER: The letter itself shows that.

23 MR. CHARNO: The letter indicates that this copy
24 was sent to -- that is correct.

25 MR. SMITH: Which one are you talking about now?

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Second page of 265?

MR. CHARNO: The first page, which has the Department's internal number 114896, indicates that a copy of the letter which was addressed -- a carbon was sent to Mr. Schaeffer by Mr. Munsch.

MR. REYNOLDS: I'm trying to figure out what the offer of proof is. I don't understand what we have been told, except that we have a document that was circulated. But I don't understand what the offer of proof is.

MR. CHARNO: Was that your question, too, Mr. Smith?

MR. SMITH: I was wondering if you have addressed yourself to the bottom of the second page of that document, which would be 114897, where the, as you call it, suspense action is written by somebody.

End

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1 MR. LERACH: Are you having trouble with the
2 name, sir?

3 MR. SMITH: It is printed Mr. Schaefer, but is the
4 written part Mr. Schaefer too?

5 MR. LERACH: I'm relatively familiar with
6 Schaefer's initials and I think they are his initials.

7 MR. CHARNO: If the problem is the initial
8 page, I have no problem in removing the initial page.

9 CHAIRMAN RIGLER: The problem is what do you
10 expect to prove by it?

11 On August 3 we have Mr. Whiting of Cleveland
12 writing to Mr. Rudolph. At that the time he apparently
13 sends copies of his letter, the letter requesting discussion
14 about access to Perry, send copies of that letter to the
15 presidents of the other CAPCO companies.

16 And then you have directed our attention to an action
17 paragraph signed by Mr. Schaefer at the bottom of the
18 August 3 letter and the question is what are you showing by
19 this?

20 MR. CHARNO: I cannot at this point indicate
21 that action was taken on or about August 20.

22 MR. STEVEN BERGER: Mr. Smith, I might just
23 note as to the sending of this letter to all of the
24 presidents of the companies that the second from last name
25 on DJ Document Number 114898, Jack G. Busby, president,

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1 Pennsylvania Power Company, 901 Hamilton Street,
2 Allentown, Pennsylvania, I think I could state that the
3 letter was not sent to the president of Pennsylvania
4 Power Company.

5 To my knowledge Mr. Busby has never been nor is
6 he now associated with Pennsylvania Power Company.

7 CHAIRMAN RIGLER: Are the offices of Pennsylvania
8 Power located on Hamilton Street in Allentown?

9 MR. STEVEN BERGER: No, they are in Newcastle.

10 CHAIRMAN RIGLER: Do you have any response to a
11 request for a more detailed offer of proof.

12 MR. CHARNO: No, we don't, beyond communication
13 of the enclosure and the letter to Duquesne Light
14 Company and its circulation within the company, we have
15 no evidentiary offer for this document.

16 CHAIRMAN RIGLER: All right.

17 MR. CHARNO: The Department would offer as
18 DJ-266 a two-page document bearing the numbers 114889 and
19 890.

20 MR. REYNOLDS: Would you identify that for us?

21 MR. CHARNO: That is a letter from Mr. Whiting
22 to Mr. Rudolph, dated September 10, 1973, with a
23 clipping attachment.

24 The Department would offer as DJ-267, a two-page
25 document numbered 114887 through 888.

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(The documents referred to
were marked Exhibits DJ-199
through 267 for identification.)

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4 CHAIRMAN RIGLER: Is this a convenient place
5 to stop for the day?

6 MR. CHARNO: Yes, sir.

7 CHAIRMAN RIGLER: We will resume at 9:30 in the
8 morning.

9 MR. REYNOLDS: I have copies of the pleadings
10 that were filed in the District Court and also the District
11 Court order and the filings in the Court of Appeals with
12 reference to the CID matter and the question of producing
13 documents or using documents in this proceeding that had been
14 obtained pursuant to the civil investigative demand statute.

15 I have three copies here to provide the Board,
16 the Board requested that material. I also have, as
17 you can see, quite a lengthy group of documents, number
18 of pages that are the respective parties' briefs in the
19 Court of Appeals and it was not clear to me whether the Board
20 was interested in seeing this documentation or not.

21 If it is, I can also get copies of this made
22 and give it to the Board.

23 It is substantial and I thought I would wait to
24 see whether the Board was interested in also reviewing
25 this material.

1 MR. CHARNO: I have a bit of a problem with the
2 submission in that it doesn't contain the petition filed by
3 CEI.

4 MR. REYNOLDS: That is already on file with the
5 Board, attached to our original response to the motion of
6 the Department of Justice.

7 I believe the Board " already has that.

8 CHAIRMAN RIGLER: It would be our preference
9 not to take the briefs at this time.

10 MR. SMITH: I believe your petition is attached
11 to your answer in the memoranda for subpoena.

12 MR. REYNOLDS: The petition in the District
13 Court?

14 MR. SMITH: Yes.

15 MR. REYNOLDS: Yes, sir.

16 (Whereupon, at 4:55 p.m., the hearing was
17 adjourned, to reconvene at 9:30 a. m., on Wednesday,
18 February 18, 1976.)
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bw4

End 24