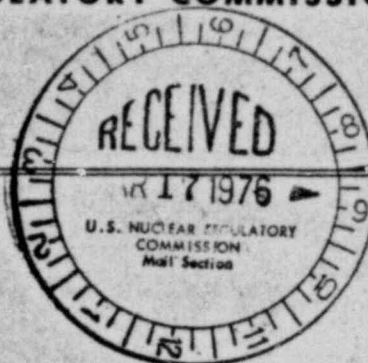


Regulatory Docket File



NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING
CO.

Docket Nos.
50-346A
50-500A
50-501A

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

and

CLEVELAND ELECTRIC ILLUMINATING
CO., et al.

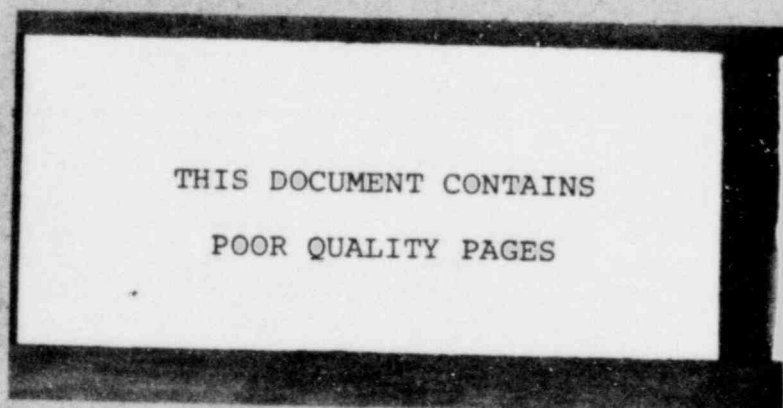
50-440A
50-441A

(Perry Nuclear Power Plants, Units 1 & 2)

Place - Silver Spring, Maryland

Date - Monday, March 15, 1976

Pages
6383 - 6545



THIS DOCUMENT CONTAINS
POOR QUALITY PAGES

Telephone:
(Code 202) 547-6222

ACE - FEDERAL REPORTERS, INC.

Official Reporters
415 Second Street, N.E.
Washington, D. C. 20002

8002 260 769 N

NATIONWIDE COVERAGE

2696

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

1			
2			
3	In the matter of	:	
4	TOLEDO EDISON COMPANY and	:	Docket Nos.
5	CLEVELAND ELECTRIC ILLUMINATING CO.	:	50-346A
6	(Davis-Besse Nuclear Power Station,	:	50-500A
7	United 1, 2 and 3)	:	50-501A
8		:	
9	and	:	
10	CLEVELAND ELECTRIC ILLUMINATING CO.	:	
11	<u>et al.</u>	:	
12	(Perry Nuclear Power Plant,	:	50-440A
13	1 and 2)	:	50-441A
14		:	
15			

First Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland

Monday, 15 March 1975

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

BEFORE:

MR. DOUGLAS RIGLER, Chairman

MR. JOHN FRYSIAK, Member

MR. IVAN SMITH, Member

APPEARANCES:

As heretofore noted.

bw

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25C O N T E N T S

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>REXCROSS</u>
Marvin Luxenberg	6385	6412	6457	6471

<u>EXHIBITS</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
DJ 584 (12000013- 12000023)	6400	6401
DJ 585 (three-page document entitled "Exhibits)	6472	6473
DJ 563		6477
DJ 564		6478
DJ 565		6479
DJ 566		6482
DJ 567		6484
DJ 568		6491
DJ 569		6499
DJ 570		6499
DJ 571		6510
DJ 572		6527
DJ 573		6528
DJ 574		6528
DJ 575		6528

ar

6384-A

	<u>EXHIBITS:</u> (Continued)	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
1			
2	DJ 576		6529
3	DJ 577		6530
4	DJ 578		6531
5	DJ 579		6531
6	DJ 580		6531
7	DJ 581		6532
8	DJ 582		6533
9	DJ 583		6534
10	DJ 586(excerpts from Moody's Public Utility Manual)	6536	
11	DJ 544 through 557		6543
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

Craig

P R O C E E D I N G S1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
251
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MS. URBAN: The Department of Justice would like to call Marvin Luxenberg to the stand.

CHAIRMAN RIGLER: Mr. Luxenberg, would you stand and raise your right hand?
Whereupon,

MARVIN LUXENBERG

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

DIRECT EXAMINATION

BY MS. URBAN:

Q What is your name?

A Marvin A. Luxenberg.

Q What is your address?

A 940 Skyline Drive, Ellwood City, Pennsylvania.

Q What is your present occupation?

A I am an attorney.

Q Would you describe your education after high school?

A I went one year to Geneva College in Pennsylvania; I then graduated from the University of South Carolina, got my BA degree.

I was stationed during World War I in Washington, D.C. and started my law school career at Georgetown with

1 one semester while I was in the service.

2 After service I completed my law school at
3 the University of Pittsburgh where I got my law degree
4 in 1948.

5 CHAIRMAN RIGLER: Mr. Luxenberg, you have destroyed
6 your credibility because you said World War I, and we just
7 don't believe you.

8 THE WITNESS: You are so right. It was II.

9 BY MS. URBAN:

10 Q What is your relation to the Borough of Ellwood
11 City?

12 A I am a Borough solicitor.

13 Q How long have you been the Borough solicitor?

14 A I am not certain. It is either 18 or 20 years.

15 Q Have your duties as Borough solicitor included
16 participating in the negotiation of contracts?

17 A Well, generally no, not in the negotiation of
18 contracts. Generally my duties have been the approval of
19 type of contracts.

20 Let me put it this way: Ellwood City is a
21 small town of right now less than 10,000 population. The
22 salary of the solicitor up until about two years ago has
23 been \$100 a month. It is now a little over \$200 a month,
24 so I don't get involved in that type of thing, but I generally
25 approve contracts, that type of thing.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

However, there are every once in a while some
that I participate in.

(Document handed to witness.)

en. 1

S3

bwl

1 Q I would like to show you a document that has been
2 marked and moved in evidence as DW Exhibit 71. Are you
3 familiar with that document?

4 A I am.

5 Q Is the contract contained in that document the
6 contract currently in effect between Ellwood City and
7 Pennsylvania Power Company?

8 A Well, I don't know how to answer that
9 question. It certainly is in effect. Originally, Pennsylvania
10 Power Company, some 50 years ago, the Pennsylvania Power
11 Company obtained a franchise from the Borough of Ellwood
12 City, authorizing them to distribute electricity, et cetera,
13 through the streets of the Borough of Ellwood City.

14 It was a 50-year contract. Now, that contract,
15 despite everything we learned in law school, has been
16 abrogated by the Public Utility Commission Law of Pennsylvania,
17 some -- 1924, 25, somewhere back in that area.

18 So that was probably the first contract. Subsequent
19 to that, they were regulated by the Federal Power Commission
20 in 1939, in that area.

21 Then, subsequent to that, they jumped to the
22 Public Utility Commission where they ended up until the 60s,
23 when this contract was negotiated as part of a rate filing
24 by the Pennsylvania -- by the Penn Power at that time.

25 MR. STEVEN BERGER: Your Honor, I would like

bw2

1 to move to strike the Witness' last response as non-
2 responsible.

3 (The reporter read the Witness' last
4 answer.)

5 MS. URBAN: Mr. Chairman, may I ask a clarification
6 question?

7 BY MS. URBAN:

8 Q Mr. Luxenberg, were you trying to explain that
9 perhaps there is more than one contract or type of document
10 that has an effect on Ellwood City purchasing power from
11 Pennsylvania Power Company?

12 A I certainly am. I am confused as to what I
13 am doing here. I haven't the faintest idea what this
14 proceeding is all about. I have subpoenaed to come here.
15 I am not here voluntarily to hurt anybody. I am just trying
16 to explain the entire situation as far as I know it between
17 the Borough of Ellwood City and Pennsylvania Power Company.

18 And if it takes some rambling answers, that's the
19 only way that I know how to do it.

20 CHAIRMAN RIGLER: The motion to strike is
21 overruled.

22 BY MS. URBAN:

23 Q Have the rate schedules changes since entering
24 into that contract?

25 A The rate schedules between the Pennsylvania

bw3

1 MR. REYNOLDS: Mr. Chairman, which contract are
2 we talking about now?

3 MS. URBAN: We are speaking about DJ Exhibit 71,
4 which is the 1966 contract between Pennsylvania Power
5 Company and Ellwood City.

6 THE WITNESS: Am I permitted to answer this?

7 CHAIRMAN RIGLER: Yes.

8 THE WITNESS: As I understand the situation, and I am
9 no regulatory lawyer, I am a small town hick lawyer, as I
10 understand the situation, Pennsylvania Power Company files
11 a requested rate structure with the Federal Power Commission,
12 and that structure is approved or disapproved, or whatever it
13 is, by the Federal Power Commission.

14 As part of that we entered into a contract
15 dealing with other subjects, mainly other than the rate
16 structure. But the rate structure that was set up for the
17 filing of 1966 has been changed because they filed, I don't
18 know, two, three years ago.

19 CHAIRMAN RIGLER: Because who filed?

20 THE WITNESS: Pennsylvania Power Company.

21 CHAIRMAN RIGLER: Filed what with whom?

22 THE WITNESS: Filed for additional rate changes
23 with the Federal Power Commission.

24 CHAIRMAN RIGLER: Was that with or without
25 negotiation with Ellwood City?

BWS

bw4

1

THE WITNESS: It was with one hell of a fight.

2

It was negotiations and a battle that lasted for two years.

3

The decision was handed down, I am not certain, maybe about a year ago, something on that order.

4

5

CHAIRMAN RIGLER: Whose decision?

6

THE WITNESS: Judge Kaplan, I think, his name

7

was of the Federal Power Commission. Then it was approved finally by the entire Commission.

8

9

MR. REYNOLDS: Mr. Chairman, I will make the

10

continuing objection on behalf of all Applicants other than Penn Power.

11

12

CHAIRMAN RIGLER: Overruled.

13

BY MS. URGAN:

14

Q Did you participate in negotiating the contract and letter agreement contained in DJ Exhibit 71?

15

16

A I did.

17

Q With whom did you negotiate?

18

A Well, generally, there were several people involved. The main negotiator would have been Mr. Jim Dunlevy.

19

20

Q Do you know what Mr. Dunlevy's position was at the time you negotiated the contract?

21

22

A Yes, I do. It was called in charge of sales. I remember it quite distinctly, because he was very perturbed that he wasn't in charge of sales, where I think he now is, where he deserves to be, good man.

24

25

CHAIRMAN RIGLER: Mr. Luxenberg, let's confine your

bw4

1 answers to the questions, please.

2 THE WITNESS: Yes, sir. I meant that sincerely,
3 sir, without any levity.

4 CHAIRMAN RIGLER: All right, but just try to
5 respond in direct terms to the question.

6 BY MS. URBAN:

7 Q Do you know whether at the time of negotiating
8 the contract, Mr. Dunlevy was reporting to anyone in
9 higher authority in Pennstlvania Power Company?

10 A Yes, sir, he was under the direct supervision of
11 the president, Mr. Charles Boden.

12 Q How do you know this?

13 A Mr. Dunlevy told me so. If I am not mistaken,
14 I am quite sure I spoke to Mr. Boden about it, also.

15 Q I would like to direct your attention to paragraph
16 4, on page 2 of DJ-71.

17 A All right.

18 MR. REYNOLDS: Excuse me just a minute. Can I,
19 just to clarify this, could we get an indication at this
20 stage what time period we are talking about?

21 We have heard the Witness testify about a position
22 Mr. Dunlevy had at a certain time and I can guess, I think,
23 what it is, but it would be helpful if you could ask the
24 question, what time period.

25 MS. URBAN: I believe that is on the record, but

bw5

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

I will ask it.

THE WITNESS: It would be very shortly before the date of this contract, and the date of the contract is August 1966.

So we are talking a period of, in my recollection, of being May or June, something of that order, of 1966.

ES2

arl

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BY MS. URBAN:

Q Mr. Luxenberg, could you comment on paragraph 4 of that contract during the negotiations with Pennsylvania Power Company?

A Well, again I don't know how to answer that question specifically. This was specifically put in there. Penn Power drew this contract. The purpose of it was so that the Borough of Ellwood City would not be able to serve industry for the period of the contract.

This was part of the major part of the negotiations that had been going on for some time.

If I may explain, prior to that time, if the Board wants me to go on, or wait for questions. Whatever you want me to do.

MS. URBAN: Would you like me to continue with questions, or allow him to finish his answer?

CHAIRMAN RIGLER: You may continue your answer.

THE WITNESS: Thank you.

Prior to this time, Pennsylvania Power had served all of the major industries with power in the Borough. This had been going on as long as I'd been there and for as long as they'd been serving power to the Borough of Ellwood City.

There had been many discussions as to the possibility of the Borough serving power to the industries.

ar2

1 We were always either led to believe that it was illegal
2 to do so or unable to do so, and we certainly didn't have
3 the capacity to do so.

4 Every time we -- this was just a general under-
5 standing, that we were not to do this.

6 CHAIRMAN RIGLER: An understanding between Ellwood
7 City and whom?

8 THE WITNESS: Penn Power.

9 CHAIRMAN RIGLER: These discussions were between
10 Ellwood City and personnel of Penn Power?

11 THE WITNESS: Yes, sir. And the negotiations,
12 the major negotiations on this contract were for the right
13 of the Borough of Ellwood City to serve industries, and that
14 was the major thing that we negotiated, and that was the
15 purpose of that, as my recollection.

16 MR. REYNOLDS: Mr. Chairman, I move to strike
17 that whole discussion as being unresponsive to the question
18 in the first place; and, two, dealing with matters that are
19 clearly remote in time from the period of time we are talking
20 about in this proceeding where the cutoff is September 1,
21 '65.

22 It is pretty clear from the testimony it goes
23 back to a much earlier time.

24 CHAIRMAN RIGLER: Denied.
25

1 BY MS. URBAN:

2 Q Why did Ellwood City agree to the inclusion
3 of paragraph 4?

4 A Well, to us this was a great victory. This
5 had been something that we had been shooting for, for a lot
6 of years before I became solicitor, and had been shooting
7 for ever since the moment I became solicitor, was to have
8 the right to serve industry.

9 This gave us the right to do so after a period
10 of 10 years. So this was what we negotiated towards.

11 Q How did it give you the right to serve
12 industry after 10 years?

13 A I am not sure how to answer that question except
14 up until that time -- let me put it this way:

15 Up until that time we weren't allowed to serve
16 industry. Part of the contract back in the back end of
17 it, they agreed, we made several trades, so to speak. They
18 were serving some commercial customers and one small type of
19 an industry. And they agreed that we could take those,
20 this was a tradeoff.

21 They were serving some -- I am looking at page
22 2 in the back of this exhibit -- some 19 residential
23 customers, Pennsylvania Power was, and they agreed to give us
24 back those 19, and in exchange for that, we were not to serve
25 anybody else other than those that we were serving during

1 the term of the contract.

2 After the contract we had the right to serve
3 industry. This was the whole discussion, went on and on
4 and on.

5 CHAIRMAN RIGLER: I am confused. You mean that
6 beginning in 1976, you would have the right to serve
7 industry?

8 THE WITNESS: That was our understanding of this
9 contract, that's right.

10 CHAIRMAN RIGLER: Can you refer us to some
11 particular provision on which you relied for that inter-
12 pretation?

13 THE WITNESS: No, I really can't. I haven't
14 looked at this contract now in 10 years, and I am just
15 giving you my recollection of the entire discussions and
16 the negotiations that went on.

17 The negotiations, if I may, Your Honor, we were
18 informed -- let me go back a little bit.

19 We did not realize that the Borough of Ellwood
20 City and its relationship to Pennsylvania Power had been
21 subject to the Federal Power Commission. We learned about
22 a year or a year and a half after the Colton case that
23 we were under the jurisdiction of the Federal Power
24 Commission.

25 Pennsylvania Power Company knew of this, of course,

ar5

1 and had been negotiating with the Federal Power
2 Commission for some many months in an attempt to arrive at
3 a figure that was satisfactory to the Commission.

4 CHAIRMAN RIGLER: Figure for what?

5 THE WITNESS: A new rate. The first knowledge
6 that we had of the situation was when one of the officials
7 of the Pennsylvania Power Company, I believe it was the
8 president, Mr. Boden, set up a meeting.

9 He came down with several individuals and met
10 with the council and told us what had happened and that
11 there was some -- that they had agreed with the Federal
12 Power Commission as to the rate schedule, but it could not
13 go into effect until the Borough of Ellwood City agreed
14 to it.

15 This was the first time we knew that we were even
16 subject to the thing and that they had been in these
17 negotiations. We were happy, of course, because at that
18 time there was a reduction in the price charged from what
19 had been set by the Public Utility Commission.

20 The Federal Power Commission reduced it
21 substantially. At that point, the Borough of Ellwood City
22 decided to hire a consulting engineer to find out what was
23 going on.

24 Once we did that, we got some advice and entered
25 into some further negotiations which resulted in this

ar6

1 contract.

2 BY MS. URBAN:

3 Q Mr. Luxenberg, when does that contract expire?

4 A My recollection is 10 years after the date of it,
5 so --

6 Q Do you expect to enter into a new contract under
7 the same terms and conditions when that contract expires?

8 A The way Pennsylvania Power has been fighting
9 the Borough of Ellwood City of late, I don't expect them
10 to talk to us about it.

11 I expect that when they want to do something,
12 they will merely file with the Federal Power Commission
13 for whatever they want, and if we don't like it, we'll fight
14 it.

15 Q Do you know whether Ellwood City has ever asked
16 Pennsylvania Power Company for permission to serve an
17 industrial customer in accordance with paragraph 4?

18 A I do not personally know that, no. My under-
19 standing was that we couldn't for 10 years, but I don't know
20 that we have or haven't.

21 Q What is your understanding that you could not
22 ask for 10 years based upon?

23 A Our discussions were entirely on industry.
24 This was the whole key. We had -- as I say, it is a
25 small town where the major industry was the United States

ar7

1 Steel Corporation which devastatingly moved out of the
2 town a year ago and it is gone. We don't have one employee
3 there.

4 Our second major industry was Matthews Conveyor
5 Company which closed up two weeks ago, so we are in real trouble
6 But those are the two industries that we really wanted
7 to serve.

8 It was our understanding that we couldn't even
9 ask for any of those industries for a period of 10 years.

10 Q Do you know who told you you couldn't ask for
11 any of these industries for 10 years?

12 A Mr. Dunlevy, this was part of our discussions.

13 Q Was this part of your discussions in 1966?

14 A Yes, ma'am.

15 Q Were the contract and the letter agreement
16 filed with the FPC?

17 A Yes, ma'am.

18 Q Did you receive a copy of the filing?

19 A Yes, ma'am.

20 MS. URBAN: I would like to mark for identifica-
21 tion as L7 Exhibit 584 a document bearing DJ internal
22 numbers 1200013 through 1200023.

23 (The document referred to was
24 marked DJ Exhibit 584 for
25 identification.)

1 MS. URBAN: I would also like to note for the
2 record that this document is incomplete on its face.
3 This is, however, the copy taken from Ellwood City's
4 files. The missing documents, the contract and letter
5 agreement, are contained in DJ Exhibit 71.

6 BY MS. URBAN:

7 Q Mr. Luxenberg, is DJ for identification 584
8 the copy of the filing you received?

9 A Yes, ma'am.

10 MS. URBAN: I would like to move DJ 584
11 into evidence at this time.

12 THE WITNESS: If anybody is interested, I will
13 be glad to explain the writing on page 3 of this.

14 MS. URBAN: I don't believe it is necessary
15 unless the Applicants request it.

16 THE WITNESS: Okay.

17 MR. STEVEN BERGER: I have no objection, Your Honor.

18 MR. REYNOLDS: Continuing objection with the
19 other Applicants.

20 CHAIRMAN RIGLER: The continuing objection
21 is overruled, and we will receive Department Exhibit 584
22 into evidence.

23 (The document previously marked
24 DJ 584 for identification was
25 received in evidence.)

1 BY MS. URBAN:

2 Q Do you know whether under state law Ellwood City
3 has a general right to serve all customers within the
4 Borough?

5 A I am no expert on federal power law or public
6 utility commission law. I imagine that they -- that's difficult
7 to answer. I really don't know.

8 There is some confusion and there is some
9 overlapping as to who has the authority. I am quite sure
10 that the customers that Penn Power has been serving in the
11 Borough of Ellwood City is not done illegally, I am sure of
12 that.

13 Or at least it's been done with the Borough's
14 knowledge.

15 Q Are there transmission lines connecting Pennsylvania
16 Power Company and Duquesne Light Company in the vicinity of
17 Ellwood City?

18 A Yes, ma'am.

19 Q Do you know who owns these lines?

20 CHAIRMAN RIGLER: Mr. Rieser?

21 MR. RIESER: Mr. Chairman, I am not sure if we
22 are proceeding on a new line of questioning. If it is
23 what I think it is, I want to object to it and ask for
24 an offer of proof. I think that the witness should be
25 dismissed.

1 MS. URBAN: I have a few questions. I think it
2 will become very clear from the questions what the Department
3 hopes to prove by this line of questioning. I certainly
4 have no objection to making an offer of proof with the
5 witness out of the room.

6 CHAIRMAN RIGLER: Let's let it continue for a
7 minute, Mr. Rieser, and see where it is going. You can
8 renew your objection.

9 BY MS. URBAN:

10 Q Do you know who owns this line?

11 A I am not certain who owns the line. I imagine
12 the Pennsylvania Power Company's line interconnects with
13 the Duquesne Light Company's line. So I suspect they
14 each own their own lines. I don't know.

15 Q Do you know where this line is located?

16 A Yes, about half, three-quarters of a mile, a
17 mile from the Borough line of Ellwood City.

18 Q Did you ever request that Duquesne Light
19 Company serve Ellwood City at wholesale?

20 MR. RIESER: I would like to object to that
21 question. I would like to ask the witness to be dismissed
22 and I would like to have an offer of proof on this line.

23 I believe the question is irrelevant because of the
24 nature of the Pennsylvania Public Utility law.

25 CHAIRMAN RIGLER: If that is so, that would go to any

1 weight the Board may accord the answer, so the objection
2 would be overruled.

3 MR. RIESER: I believe it would also go to
4 relevance as well as to whether or not a situation incon-
5 sistent with the antitrust laws can be made out.

6 CHAIRMAN RIGLER: That objection will be
7 overruled.

8 MR. REYNOLDS: Mr. Chairman, did you also
9 overrule his request for an offer of proof?

10 CHAIRMAN RIGLER: Yes.

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

13 THE WITNESS: Yes, ma'am.

14 BY MS. URBAN:

15 Q Was this request oral or written?

16 A Oral.

17 MR. REYNOLDS: As to this line of questioning,
18 I will make the continuing objection on behalf of all
19 Applicants other than Duquesne Light Company.

20 CHAIRMAN RIGLER: Overruled.

21 BY MS. URBAN:

22 Q Do you recall where and when this request was
23 made?

24 A Yes. It was made in the City of Pittsburgh.
25 It would have been in probably June of 1966. It was at the

1 same time that we were meeting with Mr. Dunlevy
2 negotiating several of the terms of this contract.

3 There had been a convention of all of the
4 boroughs in the State of Pennsylvania, and Duquesne Light
5 had an exhibit or hospitality room or whatever it was.
6 And the manager and I went in and specifically discussed
7 the matter at that time during our negotiations with Penn
8 Power.

9 We weren't doing so good in our negotiations.

10 Q To whom was this request made?

11 A I can't remember the gentleman's name. There
12 were three of them there. About the only way I could
13 describe them is they would have been middle management
14 type of personnel. They certainly weren't pole-climbers
15 and they certainly weren't the president or vice
16 president.

17 MR. RIESER: Mr. Chairman, I object.

18 THE WITNESS: That is about the best I can
19 describe.

20 MR. RIESER: He's testified he does not know who
21 they were.

22 MS. URBAN: I think the witness' lack of
23 recognition as to the names of the people to whom he
24 spoke would go, if anything, to weight.

s4

bw 1

CHAIRMAN RIGLER: The objection is overruled.

BY MS. URBAN:

Q What was their reply to their request that you came late, serve Ellwood City at wholesale?

A Their reply was they could not, this was Pennsylvania Power Company territory, that they wouldn't discuss it with us. That they couldn't and wouldn't.

Q Mr. Luxenberg, did you participate in litigation before the Federal Power Commission concerning Ellwood City's request that Pennsylvania Power Company file a high voltage discount rate?

A I did.

Q As a part of that litigation, did Ellwood City allege that Pennsylvania Power Company's refusal to file a high voltage discount rate was based in part on a desire by Pennsylvania Power Company to purchase the U.S. Steel substation and to prevent Ellwood City from purchasing that substation?

A Well, again, I have got to give a rambling answer to this, because I am going to start from the beginning.

MR. REYNOLDS: Could I have the question reread?

(The reporter read the pending question.)

CHAIRMAN RIGLER: I think that can be answered yes or no.

THE WITNESS: With all due respect ---

bw2

1 CHAIRMAN RIGLER: Do you want to hear the question
2 one more time?

3 THE WITNESS: With all due respect, I can't answer
4 it yes or now, because I really don't understand the question
5 as whether it was part of their proceedings.

6 CHAIRMAN RIGLER: All right. we will have the
7 question rephrased.

8 THE WITNESS: It certainly was brought up and I
9 want to explain it, but I can't answer whether it was part
10 of the proceedings or not.

11 BY MS. URBAN:

12 Q Mr. Luxenberg, did you, in a pleading in that
13 proceeding, formally allege that Penn Power Company's
14 refusal to file a high voltage discount rate was based in
15 part on a desire by Pennsylvania Power Company to purchase
16 the U. S. Steel substation and to prevent Ellwood City
17 from purchasing that substation?

18 A I personally made a statement similar to that
19 effect at the hearing, based on my own knowledge that, because
20 I, together with the Borough manager, had discussed
21 purchasing the substation from the United States Steel
22 Company. They told us that they had been in contact with
23 Pennsylvania Power Company concerning the situation, and we had
24 a great lengthy discussion about that.

25 I brought his matter to the attention of the
Federal Power Commission, at which time Mr. Edgerly, the

bw3

1 general counsel and secretary, I believe he is, of
2 Pennsylvania Power, sitting right back there, objected
3 strenuously, then asked for a continuance, or at least during
4 the lunch break something happened and he came back and
5 reported that he was able to state categorically that at no
6 time had Pennsylvania Power Company discussed this
7 matter with United States Steel.

8 Subsequent to that, we secured, the Borough of
9 Ellwood City secured from, I think it was one of the
10 vice-presidents of United States Steel Corporation, a letter
11 to the effect that they -- stating the time and the dates
12 that Pennsylvania Power had been in discussion with United
13 States Steel on this subject, and that letter was
14 submitted to the Federal Power Commission. It is part of
15 the record.

16 Q Thank you.

17 Prior to this litigation --

18 MR. REYNOLDS: Mr. Chairman, I believe the question
19 that we finally got a rambling response to, went to whether
20 a formal allegation had been made in a proceeding, and I am
21 going to move to strike the entire response on the grounds
22 that it does not go at all to the question, and is
23 not responsive to it.

24 CHAIRMAN RIGLER: I am going to sustain that.

25 (Board conference.)

1 MS. URBAN: Mr. Chairman, has the whole answer
2 been stricken?

3 CHAIRMAN RIGLER: The whole answer has been
4 stricken. If you want any of that material, you are going
5 to have to get it in response to a question to which it would
6 be relevant or responsive. Your question as posed was whether
7 Ellwood City had filed a formal pleading.

8 BY MS. URBAN:

9 Q Mr. Luxenberg, was the question of the purchase
10 of the U. S. Steel substation ever discussed during the
11 proceedings between the Federal Power Commission --

12 A It was.

13 Q Did you in discussion ever state that Pennsylvania
14 Power Company wished to purchase the substation and to
15 prevent Ellwood City from purchasing the substation?

16 A I did.

17 Q Did you have a factual basis for that statement?

18 A I did.

19 Q What was the factual basis for this statement?

20 A My discussions with the United States Steel
21 representative and the subsequent letter that we got from
22 the United States Steel which we filed in the
23 Federal Power Company -- Federal Power Commission proceeding.

24 I don't mean to imply that one was -- I have got
25 to explain this. Now, I don't know whether they were trying to

bw5

1 prevent, that is the word that is upsetting me, the
2 Borough of Ellwood City buying this. I think we were each
3 vying for the right to serve the United States Steel
4 Corporation, and in order to do that, you had to have this
5 substation or a substation similar to it which required a
6 great deal of expenditures.

7 We went to buy it. We went to discuss it with
8 United States Steel. United States Steel says,
9 "We'll be happy to talk to you about this latter. We are
10 presently discussing the situation with Pennsylvania Power
11 Company."

12 Q Prior to this litigation, did Pennsylvania
13 Power Company give you an indication of what the
14 discount for high voltage service would be?

15 A They did not. They refused to.

16 Q As a result of this litigation, was a high
17 voltage discount rate established?

18 A A formula for establishing the high voltage
19 discount was established and set by the Judge's opinion,
20 yes, ma'am.

21 We had been negotiating on that subject for
22 months and months and months, to no avail. We negotiated,
23 if I may, on the price of the -- whatever these are, of the
24 power. And that was settled in a matter of a few weeks.
25 We went for a year and a half trying to get a high voltage

bw6

1 discount without ever getting an agreement from them.

2 That was the fight, the whole fight.

3 MS. URBAN: We have no further questions.

4 MR. STEVEN BERGER: We would like about 15
5 minutes, your HONOR.

6 CHAIRMAN RIGLER: All right.

7 (Recess.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

#5

arl

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. GOLDBERG: Staff has no questions.

MR. HJELMFELT: City of Cleveland has no questions.

MR. RIESER: Mr. Chairman, Duquesne Light will proceed first.

CHAIRMAN RIGLER: All right.

CROSS-EXAMINATION

BY MR. RIESER:

Q Mr. Luxenberg, Ellwood City is located in Lawrence County; is that correct?

A Ellwood City is located partially in Lawrence County, partially in Beaver County. The line goes right through the town.

Q Is it also located entirely within the service area of Pennsylvania Power?

A I can't answer that.

Q Do you know if Duquesne Light serves any customers?

A I don't think so.

Q Near Ellwood City? Near meaning within a half mile or something like that?

A Yes.

Q Within a half mile?

A Well --

Q Isn't it closer to five miles?

1 A I am not certain. You would obviously know.

2 Q How far is Ellwood City from Beaver Falls?

3 A 11 or 12 miles.

4 Q Do you know whether Duquesne Light could
5 legally provide service to Ellwood City under Pennsylvania
6 law?

7 A I do not know that.

8 Q The request you made in June 1966, you said that
9 was in Pittsburgh; is that correct?

10 A Yes, sir.

11 Q That was at a meeting of a state association of
12 municipalities?

13 A The borough association.

14 Q The borough association?

15 A Right.

16 Q Where was that meeting held?

17 A My recollection was at the William Penn Hotel.

18 Q The request that you made --

19 A Both the William Penn Hotel and the Carlton
20 House which is right across the street, they were both
21 running.

22 Q They were meeting in both places?

23 A Yes.

24 Q Where was it that you made the request to
25 Duquesne Light?

1 A Duquesne Light had some sort of room, exhibit,
2 hospitality room, some sort of a thing there.

3 Q In one of those two hotels?

4 A Yes, my recollection.

5 Q Was this convention during the week or on a
6 weekend; during a weekday or on the weekend?

7 A Convention always start on a Sunday and ends
8 on a Wednesday.

9 Q Would you have made the request on the first
10 day of the convention?

11 A I have no recollection.

12 Q No recollection.

13 Do you remember whether or not it was during
14 the daytime or the evening?

15 A It would have been in the evening.

16 Q Was anybody with you when you made that request?

17 A Yes indeed. Mr. Mike Markle, who was the
18 borough manager, plus one or two other councilment of the
19 Borough.

20 Q From Ellwood City?

21 A Yes.

22 (Whereupon, the reporter read from
23 the record, as requested.)

24 BY MR. RIESER:

25 Q These conventions are semi-social, aren't they?

ar4

1 A Yes, indeed.

2 Q People have cocktails at them, that sort of
3 thing?

4 A Well, they are both. They are informative,
5 they are educational, there is some for sales, and
6 certainly there is the social aspect.

7 Q At the time you made this request, was there
8 anybody present from any other Boroughs?

9 A I don't think so. I can't recall that.

10 Q So then Ellwood City representatives were
11 the only ones in the room with Duquesne employees at the
12 time?

13 A No, I can't say that. There were many people
14 in the room. I don't know who all was there. I am sure
15 there were other Boroughs that were in there.

16 Q You said there were, I believe, three people
17 from Duquesne Light when you talked?

18 A That is the best of my recollection.

19 Q You talked with all three, or that there were
20 three people from Duquesne Light there?

21 A You are going back 14 years now. There were
22 three people that we talked to; one of them was doing
23 most of the talking.

24 Q Excuse me. You said 14 years. I thought this
25 request was made in 1966?

1 A Well, '66, that's 10 years, I am sorry. That is
2 why I am not a utility lawyer, I can't do numbers.

3 Q Are you aware that William Penn is right across
4 the street from the corporate offices of Duquesne Light?

5 A Was I aware of that?

6 Q Yes.

7 A No, I really wasn't. Doesn't surprise me, but I
8 wasn't aware of it.

9 Q Did you just have one single conversation with
10 these people?

11 A Yes.

12 Q Were there any follow-up communications?

13 A No, we felt there was no need for it. We
14 expected the answer that we got from them.

15 Q Why did you expect that answer?

16 A We had always been under the impression or under
17 the understanding that they had divvied it up either by -- the
18 territories, either by law or by custom, I don't know which.
19 But we were sure that they weren't going to compete with
20 each other for us.

21 Q Are you aware that in Pennsylvania, there are
22 state certificated service areas?

23 A I would imagine there are.

24 Q Is that perhaps what they could have meant?

25 A Could have been.

1 Q Did you discuss this request with anybody before
2 you made it? With anybody at Ellwood?

3 A Well, the Borough manager and the councilmen
4 who were with us, yes. We went deliberately over there to
5 do it.

6 Q Not with the mayor?

7 A Oh, heavens, no.

8 Q Nor with the entire council?

9 A No.

10 Q So you weren't directed or authorized to
11 venture into these negotiations?

12 A Well, the answer to that question is no, but we
13 were quite sure that the couple of councilmen that we had
14 and the solicitor and the manager, that had we got an
15 affirmative answer we would have been able to proceed
16 rather well.

17 Q But you weren't authorized to enter into a
18 contract at that time?

19 A Oh, no.

20 Q Are you aware of any other situation in
21 Pennsylvania where a municipality located entirely within
22 the service area of another utility is provided service
23 by a second utility?

24 A Am I personally aware of such a thing?

25 Q Yes.

1 A I have seen cases or just read where there
2 have been fights over the situation as to who does what,
3 but I am not aware of it. That's not my field and I don't
4 pay any attention to it.

5 Q What were the terms of your request for service
6 from Duquesne Light?

7 A Would they serve us. That was the terms, period.

8 Q That was the extent of your request?

9 A Yes. We wanted to know whether they would deal
10 with us. They said no.

11 Q You did testify that you made this request at
12 the same time you were meeting with Mr. Dunlevy?

13 A Right.

14 Q You didn't mean to imply that Mr. Dunlevy was
15 physically there at the time you made the request to
16 Duquesne?

17 A Oh, no, I am sorry if I gave that impression.
18 He certainly wasn't.

19 MR. RIESER: That's all for Duquesne Light,
20 Mr. Chairman.

21 BY MR. STEVEN BERGER:

22 Q Mr. Luxenberg, did you read Mr. Uran's testimony
23 before this board?

24 A I did.

25 Q You did?

1 A Yes.

2 Q Did you speak to Mr. Uran after his testimony
3 before this Board?

4 A Vaguely. Mainly not about this. About other
5 Borough matters.

6 Q You spent some time with Ms. Urban this morning
7 discussing what took place at the Federal Power Commission
8 with regard to the negotiations for the U.S. Steel Substation
9 and I would like to ask you if you can recall some statements
10 that you made at the time of those hearings before the
11 Federal Power Commission.

12 It was quite an extended discussion that took
13 place before the presiding judge at that time on the question
14 of whether or not you had proof or what was your factual
15 basis for believing that Pennsylvania Power Company was
16 negotiating with United States Steel for the purchase
17 of the substation; is that not correct?

18 A There was quite an extended discussion.

19 Q Do you recall that just before the presiding
20 judge put a halt to any further discussions with regard to
21 that matter, presiding judge asked you directly the
22 question:

23 If I understand correctly, you did not intend
24 to imply that there have been any negotiations or anything,
25 discussions with respect to the purchase by the company of

1 that substation?

2 And you stated:

3 I wouldn't be privy to anything the Pennsylvania
4 Power Company -- I didn't mean to imply that and I don't
5 know why everybody gets so upset. We want to buy it.
6 I assume Pennsylvania Power wants to buy it. I know they
7 want to service the people.

8 . Do you recall having made that statement?

9 A Sounds like me. I don't recall it. But that
10 sure sounds like one of my answers.

11 Q Do you recall this discussion taking place before
12 the presiding judge of the Federal Power Commission?
13 Mr. Edgerly came back after the recess and made this
14 statement:

15 Your Honor, just before we recessed, Mr.
16 Luxenberg stated in the record that he had been
17 reliably informed that Pennsylvania Power Company had been
18 having negotiations concerning the U.S. Steel Substation
19 at Ellwood City.

20 During the break I called the office and I talked
21 to Mr. Zimmerler, the president, and Mr. Dunlevy, the vice
22 president of sales. Both categorically deny that
23 Pennsylvania Power has any interest in the U.S. Steel
24 Substation, nor have we had any negotiations with
25 anything concerning its purchase.

ar10

1 Mr. Luxenberg made the statement on the record,
2 and I would appreciate him elaborating on the record his
3 reliable informed source.

4 At that point, Mr. Mattingly, who was the
5 staff counsel for the Federal Power Commission in that
6 proceeding, stated:

7 I would also like to know the sources he referred
8 to. Allegations such as that, I think, should be documented
9 if they are made on the record.

10 Then the presiding judge turned to you and said:

11 Mr. Luxenberg.

12 And Mr. Luxenberg said:

13 I don't have any documentation here. I don't
14 know why you are looking at me so angrily, Mr. Mattingly, I
15 am just a little country lawyer. But we have been talking
16 to officials of United States Steel Corporation and this is
17 the impression we got, that they would be happy to discuss
18 the matter with us along with Pennsylvania Power and others
19 that might be interested.

20 Do you recall that?

21 A Sounds like it. I might explain that I
22 couldn't understand Mr. Mattingly's attitude. Mr.
23 Mattingly --

24 Q Just wait for --

25 A I think I have a right to explain it.

1 May I, Your Honor? He's read a great deal here
2 out of context, and I think that I ought to be able to
3 explain why I said what I said.

4 If he's picking it out of context, I think I can
5 pick it up.

6 CHAIRMAN RIGLER: Not unless there is a pending
7 question as to which the answer would add amplification.
8 His question to you was whether you recalled making that
9 statement.

10 THE WITNESS: Well, I answered that, but may I not
11 explain it?

12 CHAIRMAN RIGLER: Not at this time.

13 THE WITNESS: All right.

end 5

14

15

16

17

18

19

20

21

22

23

24

25

S6

1

BY MR. STEVEN BERGER:

bwl

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Q Mr. Luxenberg, you stated, I believe, on your direct examination by the Department of Justice that after this discussion took place on the record, you obtained a letter from United States Steel stating time and place of negotiations that United States Steel had had with Penn Power Company with regard to the possible purchase by Penn Power Company of that substation; is that correct?

A No, I don't believe that is correct at all.

Q Well, then, would you just try and clear that up for us.

A All right. My understanding of what Edgerly said, is that they had had no negotiations whatsoever of any kind with United States Steel. And we secured a letter from the vice-president of United States Steel stating that they had had negotiations and discussions.

Now, what were in those discussions, I don't know. We discussed with them the possibility of purchasing the substation. The gentleman who was in charge says we have been in discussions with Pennsylvania Power on this and other subjects. That is all I can answer.

MS. URBAN: May I have the last question asked answer back, please?

(The reporter read the record as requested.)

bw2

1 BY MR. STEVEN BERGER:

2 Q Did the letter that you received from United
3 States Steel indicate that there had been discussions
4 with Penn Power Company with regard to the possible
5 purchase by Penn Power Company of the United States Steel
6 substation?

7 A It is in the record of the Federal Power
8 Commission. I'd suggest you get it there. I don't know.
9 I can't answer it specifically.

10 Q When you say it is in the record of the
11 Federal Power Commission --

12 A Right.

13 Q -- are you saying that you sent the letter
14 after the record was closed at the FPC?

15 A I doubt if it was closed at the time. We forwarded
16 it to Charlie Wheatly, who was our counsel before the
17 Federal Power Commission, who forwarded it to the Federal
18 Power Commission. I assume that he had also forwarded it
19 to Penn Power.

20 Q Do you have a copy of that letter with you?

21 A With me? Oh, heavens no.

22 Q Did you inform the Department of Justice of this
23 letter?

24 A Did I inform the Department of Justice of this
25 letter?

bw3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q That was the question.

A I imagine that I did in our discussions. I informed them that it was filed with the Federal Power Commission.

Q It would surprise you if there was no such letter in the record before the Federal Power Commission, would it not?

A It wouldn't surprise me, it would totally amaze me. I am willing to bet my life. I know that I received a copy of the letter of transmittal that went with it.

Q Is there any doubt that you have got a copy of that letter in your files back in Pennsylvania?

A I should have. I mean I can't say that I have. I got files this fat, and whether they are destroyed now or not, I don't know.

I think possibly Mr. Wheatly has it.

MR. STEVEN BERGER: Your Honor, I would like to get a copy of that letter.

THE WITNESS: Fine.

CHAIRMAN RIGLER: All right, Mr. Luxenberg, you will, with the Department, undertake to supply a copy of that letter to Counsel for Pennsylvania Power.

THE WITNESS: Of course.

MS. URBAN: Certainly.

bw4

1 BY MR. STEVEN BERGER:

2 Q Mr. Luxenberg, let's talk a little bit more about
3 that proceeding before the Federal Power Commission.

4 Just before I do that, Mr. Luxenberg, other
5 than this letter that you speak of, do you have anything
6 to tell this Board in the way of proof that Pennsylvania
7 Power Company was in negotiations with United States Steel
8 with regard to the possible purchase by Pennsylvania Power
9 Company of that substation?

10 A Only what I have repeated what was said to me by
11 the manager of the United States Steel project there.

12 Now, when you are talking about purchasing,
13 I don't know whether -- if I understand you correctly, your
14 question is, do I have any proof that Pennsylvania Power
15 attempted to purchase this.

16 All I know is that the Borough of Ellwood City
17 requested to purchase it. United States Steel says, "We
18 won't discuss this with you at the time. We are in
19 negotiations with Pennsylvania Power Company."

20 That's what I know.

21 Q Did Ellwood City ever purchase that substation?

22 A Ellwood City is still in negotiations with the
23 United States Steel Corporation to purchase it. Presently.

24

25

bw5

1 The reason for it being that we wouldn't
2 negotiate for it until we secured the discount rate from
3 the Federal Power Commission, or the Pennsylvania Company, until
4 we found out whether it was economically feasible.
5 Mr. Urian gave you those answers better than I can.

6 Q Mr. Urian also told us that the Borough had
7 no intention of purchasing that substation.

8 A That's not my recollection of what he said.
9 That they wanted to purchase part of it and -- well, let me
10 put it this way" my understanding is that since that time
11 that we --

12 Q Since what time?

13 A The original discussions with the United States
14 Steel Corporation about purchasing the thing, it is our
15 understanding we learned much later after hiring a con-
16 sulting engineer that the substation is old, antiquated,
17 and will need considerable amount of money to update it.

18 Q In fact, the officials of United States Steel
19 have told the Borough that if they, in fact, purchase it,
20 they would have to move it; isn't that true?

21 A I don't know that.

22 Q You don't? Have you been involved in the
23 negotiations?

24 A No.

25 Q Who has been?

bw6

1 A Borough manager.

2 Q That would be Mr. Urian?

3 A Yes.

4 Q Is the Borough presently attempting to establish
5 its own substation to receive power at 69 kv?

6 A It certainly has it under consideration and is
7 discussing it and is getting semi-official type of bids, that
8 type of thing, yes.

9 Q Pennsylvania Power Company ever refuse to
10 serve the Borough at 69 kv?

11 A It never refused to serve us, to my knowledge,
12 they just refused to give us a discount rate.

13 Q Refused to give you a discount rate, or refused
14 to file the rate with the Federal Power Commission?

15 A To me, it is the same thing.

16 Q Which is it?

17 Q Same thing. They refused to give it to us --

18 Q It may be the same thing to you; I am asking
19 the question --

20 A They refused to --

21 Q I am asking the question, Mr. Luxenberg.

22 A I am sorry.

23 Q I am asking you the question whether or not the
24 position the company took throughout, you are the Borough
25 solicitor, you are the one who they dealt with. I am asking

bw7

1 you was the the position that the company took, "We will
2 not file a rate with the Federal Power Commission for 69 kv
3 service until such time as the Borough can physically
4 demonstrate that they are capable of receiving such service"?

5 A That was part of it. They also said they wouldn't
6 give it to us. They also said they wouldn't even discuss
7 the matter with us until we are able to disclose that we
8 were ready, able and willing, ifnancially and physically,
9 to do this, which was a total impossibility, and they knew
10 it.

11 Q You weren't aware of the fact that the position
12 that the company took with regard to the rate at which
13 the Borough would take at 69 kv, if they ever did establish
14 the facilities was: "We can give you a rough idea. You can
15 take a look at the discount to our industrial customers,
16 taking at 69 kv, which discount is 3.5 percent, and you can
17 rough it out on that basis to determine the economic
18 feasibility. But we can't give you an exact figure, until
19 we know the physical properties that are going to be used
20 in providing this service, because we design rates and the
21 Federal Power Commission approves rates on a cost of
22 service basis."?

23 A I hear you, but I didn't get a question.

24 Q I asked you if that was the company's position.

25 A That was part of the company's position. It was

bw8

1 their argument which our counsel totally disagreed with.
2 This went on for months and months and months. They simply
3 would -- simply said over and over and over again, and they
4 quoted a section, I don't know the section, but they quoted
5 that same section, until I heard it, until it came out my ears,
6 that section so and so says that we do not have to do this,
7 until you have the physical facilities to do it.

8 And we kept repeating over and over again
9 this is really a merry-go-round and getting ridiculous,
10 because we can't spend the money to put up these physical
11 facilities until we know what kind of a discount it is. And
12 this was the argument. That went on for months.

13 Q Is there a rate presently on file with the
14 Federal Power Commission which would allow the Borough
15 of Ellwood City to take at 69 kv service, not allow,
16 excuse me, that would establish the rate that the Borough
17 would take at, if they were to receive service at 69 kv?

18 A I don't think so. There is a formula set up. I
19 doubt if there's an actual rate. I am not that conversant.

20 Q Why do you doubt that there is an actual rate?

21 A I am not that familiar with the mechanics of how
22 this matter works. My understanding, and I only got this
23 from reading Mr. Urian's testimony, was that we have to
24 request the specific industry to serve, and at that
25 time they have 45 days to file a rate or some such thing as that.

bw9

1 Q Mr. Luxenberg, were you counsel for the Borough,
2 as well as the other municipalities served by Pennsylvania
3 Company in that proceeding?

4 A I was local counsel. I wasn't Federal Power
5 Commission counsel. I don't know where the front door of
6 the building is, let alone, the rules.

7 Q Were you counsel of record for all the
8 municipalities?

9 A I was one counsel of record. Our counsel
10 was Charles Wheatley.

11 Q Did you read the decision of the presiding
12 examiner after it was decided?

13 A I doubt if I read it in its entirety. I read
14 mainly a summary of a letter sent to me by Mr. Wheatley
15 telling me what it was.

16 We were considerably happy that we had -- we
17 thought we had won.

18 CHAIRMAN RIGLER: Mr. Berger, which decision are
19 you referring to now?

20 MR. STEVEN BERGER: I am referring to
21 Judge Kaplan's decision in Docket 9159 before the Federal
22 Power Commission.

23

ES6

24

25

#7

arl

1 CHAIRMAN RIGLER: But deciding what issue?

2 MR. STEVEN BERGER: Deciding the question of
3 whether or not Pennsylvania Power Company had to file a
4 rate for 69 kV service.

5 CHAIRMAN RIGLER: All right.

6 THE WITNESS: My understanding, that was the
7 only issue that was in dispute. That went on for a
8 couple years.

9 BY MR. STEVEN BERGER:

10 Q All the other matters were settled, were they
11 not?

12 A Very quickly.

13 Q And the only reserved issue was the question
14 of whether or not Pennsylvania Power Company had to file a
15 rate for 69 kV service?

16 A Whether they had to or would. They didn't care
17 which. They wouldn't do either.

18 Q Do you recall at least that portion of the
19 decision which said that Pennsylvania Power Company didn't
20 have to file a rate for 69 kV service with the Federal
21 Power Commission unless they received notice within 45
22 days that the Borough would be establishing service at 69 kV?

23 A That is my understanding except that there was a
24 formula upon which it was to be based, that filing. That
25 was the position we were fighting for and that was the

ar2

1 position that our FPC counsel told us that we were
2 successful in.

3 I always thought we were. I hope you are not
4 telling me we weren't.

5 Q I hope you didn't get charged too much, Mr.
6 Luxenberg.

7 A We got charged a lot.

8 MS. URBAN: I would like to move to strike the
9 comment about getting charged too much.

10 THE WITNESS: I think it is a fair question. I
11 don't mind.

12 CHAIRMAN RIGLER: Motion will be granted.

13 Mr. Berger, back up about four questions, did
14 you ask the witness if there is a 69 kV rate on file today
15 with the Federal Power Commission?

16 MR. STEVEN BERGER: Yes, I did.

17 CHAIRMAN RIGLER: Is there such a rate on file?

18 MR. STEVEN BERGER: You are asking me?

19 No, there isn't, Your Honor.

20 CHAIRMAN RIGLER: All right.

21 MR. STEVEN BERGER: I don't believe any
22 municipality in the Pennsylvania Power area has ever given them
23 notice that within 45 days they would be capable of receiving
24 service at 69 kV and it is only under those circumstances
25 that the company would be required to file pursuant to Judge

1 Caplan's decision in 3159, which was affirmed by the
2 Commission.

3 CHAIRMAN RIGLER: I was just confused because
4 your question could imply to my way of thinking
5 that such a rate had been filed.

6 MR. STEVEN BERGER: Yes, sir.

7 BY MR. STEVEN BERGER:

8 Q Mr. Luxenberg, you talked this morning about trades
9 between the Borough of Ellwood City and Pennsylvania
10 Power Company.

11 To your knowledge, has the Borough of Ellwood
12 City ever given Pennsylvania Power Company the right to
13 serve a customer which was receiving service from the
14 Borough of Ellwood City?

15 A I really can't answer that. I would suspect
16 that we never objected to them serving, to my knowledge,
17 at least; I don't know. This relationship goes back, as I
18 say, maybe 75 years, and it's always been a rather friendly,
19 good relationship. And it's been done mainly orally,
20 without writing.

21 If there was a lone house somewhere out on
22 the edge of the town, that was in the city, but it was closer
23 to Penn Power's lines and it would just have been
24 economically not feasible for the Borough to serve it,
25 Penn Power served it with our consent.

1 Probably we asked them to, I would imagine; I
2 don't know. It was always these informal type of things.
3 And the same thing in reserve.

4 We have served, oh, two or three, I don't know,
5 maybe half a dozen at the most, that are actually located
6 30 or 40 feet beyond the Borough line, mainly because
7 Penn Power asked us to do that because it would have been
8 totally economically unfeasible for them to run lines miles
9 to get there.

10 So this is the type of relationship that
11 has been going on. When you ask was there anything, did
12 we ever request or refuse, there was constant
13 discussion that went on between the power company and the
14 Borough.

15 Q Let's talk about those customers outside. You
16 read Mr. Uran's testimony?

17 A Yes, sir.

18 Q Since reading Mr. Uran's testimony, have you
19 read some of the Pennsylvania statutes?

20 A No, sir.

21 Q You are the Borough solicitor of Ellwood City --

22 A I know what you are driving at, I suspect --

23 Q Can I ask the questions, Mr. Luxenberg?

24 A Sure.

25 Q Do you know whether or not you are presently

1 serving outside the Borough limits without the
2 authorization of the Public Utilities Commission of
3 Pennsylvania?

4 A I don't know whether we are presently. We
5 certainly have in the past. We may be presently.

6 MR. SMITH: Where does this go to, that line?

7 MR. STEVEN BERGER: Well, Mr. Uran testified
8 to it. There are two witnesses here called by the
9 Department of Justice with regard to this. Mr. Uran was not
10 qualified to speak to the question. I would think as
11 Borough solicitor that Mr. Luxenberg is qualified to speak
12 to the questions and seems peculiarly qualified since he
13 is the Borough solicitor of Ellwood City?

14 MR. SMITH: I know, but where does the line go
15 to? What will be established by it?

16 MR. STEVEN BERGER: Well, I think the question of
17 the ability or inability of the Borough to serve outside
18 or inside --

19 MR. SMITH: The lawfulness of it, whether it is
20 lawful for them to do it?

21 MR. STEVEN BERGER: Yes.

22 MR. SMITH: Then the result would be that if it
23 is unlawful, it is because of an agreement with Pennsylvania
24 Power Company?

25 MR. STEVEN BERGER: I don't think that is what I am

1 implying at all.

2 MR. SMITH: That will be his testimony,
3 that Pennsylvania Power Company induced the City of
4 Ellwood City to violate whatever is unlawful about it.
5 To save them money.

6 MR. STEVEN BERGER: Well, Your Honor, the
7 question of whether or not the Borough of Ellwood City
8 can or cannot serve outside of its incorporated limits
9 is a question of law under Pennsylvania law. I don't think
10 it would be the witness' testimony that Pennsylvania
11 Power induced them to enter into an illegal arrangement.

12 MR. SMITH: Well, that is your suggestion,
13 though.

14 MR. STEVEN BERGER: Well, if the Borough of
15 Ellwood City is going to be serving outside the Borough
16 limits, it would seem to me that it would be incumbent upon
17 the Borough and its solicitor to find out how they would
18 go about doing that.

19 I don't feel that there is anything with regard
20 to Pennsylvania Power. If Pennsylvania Power serves inside
21 the nincorporated limits, it gets a franchise to serve.

22 MR. SMITH: You are making a point that the
23 Borough of Ellwood City, at least you are suggesting it
24 strongly, that the Borough of Ellwood City is somehow
25 acting unlawfully by serving outside the Borough limits.

1 I am suggesting that the same point goes
2 to Pennsylvania Power Company when they do it at their
3 request for their convenience.

4 MR. STEVEN BERGER: Well, I just don't think
5 that's the case. I respectfully disagree with you on
6 that.

7 MR. SMITH: I am just wondering if that is where
8 it goes, and I am trying to find out.

9 THE WITNESS: That's exactly where it goes, sir.

10 MR. STEVEN BERGER: Your Honor, just before I
11 move on, and I want to get this as clear as I possibly can,
12 that certainly a question in this case with regard to
13 Pennsylvania as well as Ohio is the degree to which
14 competition in fact does exist or can exist.

15 It seems that if there are statutes in Pennsylvania,
16 you are quite right, it would be a question of law.

17 But if we are dealing with a factual situation
18 here which actually involved service outside the Borough,
19 it seems to question the witness on that and a lawyer for
20 one of the Boroughs as to what need be done in terms of going
21 go the Public Utilities Commission and getting authority
22 to serve in an area that was certified to be served by a
23 different utility and who would regulate the rates to those
24 customers, I think, are matters which are important for
25 this proceeding.

1 MR. SMITH: I am not saying they are not.

2 MR. STEVEN BERGER: Okay.

3 MS. URBAN: Excuse me, Mr. Chairman, could I
4 clarify?

5 Is counsel asserting that there is a similar
6 law in Ohio as there is in Pennsylvania? I believe his
7 comments indicated that that might be the case.

8 MR. STEVEN BERGER: I didn't mean to suggest
9 that the laws in Ohio and Pennsylvania are identical,
10 Your Honor, if that is what Ms. Urban is asking. That
11 wasn't my intention.

12 BY MR. STEVEN BERGER:

13 Q Mr. Luxenberg, do you know whether or not you
14 have to obtain the approval of the Public Utilities
15 Commission of Pennsylvania to serve customers outside
16 the incorporated limits of the Borough?

17 A I am not going to answer that yes or no because
18 I have got to give a lengthy answer.

19 The law in my book is rather unclear on the
20 thing. I think that some part of it will be yes and
21 some part of it will be no. The history that we have had is
22 that this has been a mutual understanding and mutual
23 agreement with Pennsylvania Power that is so
24 infinitesimal as compared with the entire project that
25 for the Borough of Ellwood City to go to the Public

1 Utility Commission to request permission to get a rate
2 set for one house located outside the Borough of Ellwood
3 City would be idiotic, to say the least, economically.

4 We have also had long, lengthy discussions
5 with Pennsylvania Power over extending our service area
6 into the township located to the north of the Borough
7 of Ellwood City. And this has been over the years
8 many times we have discussed this with Pennsylvania
9 Power. We wanted to annex farmland that was adjoining,
10 the only way that the town could grow. And Pennsylvania
11 Power refused to allow us to do this.

12 Many is the time that I have heard and I could
13 name the officials, if you want me to, that have said we
14 have the -- Louie B. Round, Louie B. Round was the
15 former president of Pennsylvania Power, and he drew a line
16 through the one township and he says that borough
17 will not go above that line. We will allow them to serve
18 the township which was outside the borough for so
19 many feet and beyond that we won't.

20 CHAIRMAN RIGLER: Wait a minute, Mr. Luxenberg.
21 How can Pennsylvania Power Company prevent the Borough of
22 Ellwood City from annexing additional territory?

23 THE WITNESS: It wasn't a question of
24 annexing. It was a question of once we annexed, could we
25 serve the power. And that was the big problem. Roughly

1 50 percent of our physical base comes from the operations
2 of our electric distribution system. And to annex
3 something and not be able to serve it with electricity was,
4 in our minds, just an impossibility because it would be
5 totally unfair to everybody concerned.

6 Q Pennsylvania Power would decide whether or not
7 you would serve in those annexed areas?

8 A They sure did decide.

9 Q That's not a decision for the Public Utilities
10 Commission of Pennsylvania?

11 A Pennsylvania Power Company -- I don't know the
12 answer to that.

13 Q If you don't know the answer to that, how can you
14 say Pennsylvania Power Company could decide that?

15 A All I am saying to you is that that is what
16 they decided, that is what they told us, and there were no
17 further negotiations, period.

18 Q You are the Borough solicitor; don't you look
19 into the question?

20 A The question of us going to the Public Utility
21 Commission to fight over this is one of economics. And to
22 fight them would have cost us thousands, many thousands of
23 dollars, it would have appealed and gone into tremendous
24 appellate courts.

25 There was one case, I never did find out how it

1 finally ended up. The Borough of Lansdowne in Pennsylvania,
2 which one of the cities down here near Philadelphia fought
3 that thing up and down the line, I still don't know the
4 answer.

5 We couldn't afford to do it. So we would ask
6 Penn Power, if we annex this farm so we expand, will you
7 allow us to serve those people once that becomes a part
8 of the Borough, and they said absolutely not, period.

9 Q Did you know that the area that you are speaking
10 about is an area that the Public Utilities Commission of
11 Pennsylvania had certified to be served by Pennsylvania
12 Power Company?

13 A Of course it did. And our question would have
14 been, would you object to it if we did it? Can we agree so
15 that we can walk into the Public Utility Commission with
16 an agreement which would take 10 minutes and \$20 worth
17 of legal time and solve a problem?

18 The answer was no, period.

19 CHAIRMAN RIGLER: Mr. Luxenberg, under
20 Pennsylvania law, does a borough have the right to take
21 over customers within its municipal franchise?

22 THE WITNESS: I can't answer that. I --

23 CHAIRMAN RIGLER: My question would be, despite
24 the objection of any outside company presently serving
25 those customers?

1 THE WITNESS: I honestly can't answer that.
2 We started to go into that many years ago for the
3 industry, to attempt to take over industry. But the
4 question of the -- the question the City Council asked
5 me was how much would this cost to find out, and when I gave
6 them a figure that it would cost, into the many thousands
7 of dollars, they just said forget it.

8 BY MR. STEVEN BERGER:

9 Q The question about annexing farmland, that's
10 a question that came up in negotiations leading up to the
11 signing of the 1966 contract and letter agreement?

12 A That was part of that, yes. We did that.
13 But that had been going on for many years before that.

14 Q It is true that Pennsylvania Power Company did
15 waive its rights with regard to the areas that were farmland,
16 if you will, virgin territories, outside of the
17 incorporated limits of the Borough of Ellwood City that
18 the Borough might annex at some time in the future and
19 attempt to serve electricity?

20 A We negotiated this, I negotiated this with Mr.
21 Dunlevy, that's right. That was part of this agreement.
22 This was one of the things that we worked towards. 10 years
23 for industry and the right to annex and to serve a part of
24 the outside territory. These were negotiations that were
25 entered into.

1 Q And you do have that right now, the right to
2 serve in areas annexed that were farmland?

3 A No, it is very limited, whatever it is. I don't
4 recall. I think it is in this agreement. My recollection is
5 that it was very limited.

6 Q Ellwood City --

7 A They drew the line.

8 Q There were some areas, you correct me if I am
9 wrong, there were some areas around the Borough of Ellwood
10 City that Pennsylvania Power Company would not waive its
11 right to but which the Borough of Ellwood City didn't
12 give up any right with regard to the 1966 letter agreement
13 as to claiming that they should be the power supplier in
14 areas annexed --

15 A You have lost me; I am sorry.

16 Q Let me put it to you this way:

17 There were virgin territories, territories that
18 were just farmland with no or very little in the way of lines

19 A Right.

20 Q -- already established?

21 A Right.

22 Q As to those areas, Pennsylvania Power Company as
23 part of the 1966 agreement said that if the Borough of
24 Ellwood City were to annex these areas at some time in the
25 future and attempt to supply electricity to customers located

1 in those newly annexed areas --

2 A They drew a line, the answer to the question is
3 yes.

4 Q Excuse me, there were other areas surrounding
5 the Borough of Ellwood City which were developed areas,
6 areas where Pennsylvania Power Company already had facilities?

7 A Right.

8 Q It was as to these areas that Pennsylvania
9 Power Company said we will not waive our right to serve
10 in these areas with regard to customers locating in that
11 area or being served in that area, even if you annex in that
12 area; is that correct?

13 A That was correct. We tried to do that, too.

14 Q The Borough didn't at that time give up its right
15 to claim a right to serve in newly annexed areas which are
16 developed at this time by Pennsylvania Power Company, did it?

17 A I don't -- did we give up our right?

18 Q Yes.

19 A I don't think we had the right.

20 Q Did you waive your right to serve in newly
21 annexed areas that were already being served by Pennsylvania
22 Power Company?

23 A I don't recall. If that's in the agreement, I
24 don't recall.

25 Q Can you take a look at the agreement?

1 MR. STEVEN BERGER: Could you provide him with a
2 copy of the July 30, 1966 letter agreement, Ms. Urban?

3 MS. URBAN: He has a copy of it. It is part of
4 DJ 71.

5 THE WITNESS: Could you tell me what paragraph
6 you are referring to?

7 BY MR. STEVEN BERGER:

8 Q Why don't you take a look at the entire letter?
9 We will ask a few questions about it. Read it over.

10 A I would rather you did it the other way. I have
11 got a plane to catch, and I don't feel like sitting here
12 and reading this. If you are going to ask a specific
13 question on a specific paragraph, I will be glad to
14 look at it and read it and give you my opinion, if I can.

15 CHAIRMAN RIGLER: He wants you to be familiar
16 with the entire agreement.

17 THE WITNESS: That may take me two hours.
18 This is a very complicated thing. If he is going to ask me
19 on the entire thing, we may be here all day. It is all
20 right with me, but --

21 CHAIRMAN RIGLER: Well, we may be here all day,
22 Mr. Luxenberg, but in the meantime let's start out with
23 the July 30, 1966 letter.

24 MR. STEVEN BERGER: Three-page letter.

25 CHAIRMAN RIGLER: Yes.

1 (Pause.)

2 THE WITNESS: I am sorry. I was reading
3 the contract. Are you talking about the letter attached
4 to the contract?

5 BY MR. STEVEN BERGER:

6 Q Yes, sir.

7 A Oh, all right. Well, I will get to it. I thought
8 you were going on the contract.

9 (Pause.)

10 All right.

11 Q Mr. Luxenberg, do you see anywhere in that
12 letter anything that might preclude the Borough of Ellwood
13 City from asserting a right to serve customers in newly
14 annexed territories by the Borough of Ellwood City?

15 A No, there's nothing in the letter except the
16 line that they drew and told us how far it would go. That
17 was there. We understood that. We wouldn't go so many
18 miles, it was only a mile or two that they allowed us to
19 go.

20 Q A mile who allowed you to go?

21 A Pennsylvania Power Company.

22 MS. URBAN: May I have the last two questions
23 and answers, please?

24 (Whereupon, the reporter read from the
25 record, as requested.)

1 MR. STEVEN BERGER: Your Honor, I can
2 proceed at this point in one of two ways. If you would
3 hear the question and the answer again, I could move to
4 strike everything -- no, there is nothing in the letter,
5 everything that follows after that, and the additional
6 question and answer that I had, just move to strike all of
7 that.

8 Or if Your Honor would, I could go into the
9 matters that Mr. Luxenberg embellished on the answer,
10 if that's your desire. But if you grant the motion to
11 strike, I won't find it necessary to go into this question
12 about a mile and that's all they'd allow us to go.

13 I don't know what he's talking about.

14 THE WITNESS: I will be glad to explain it
15 further.

16 MR. SMITH: Well, Mr. Berger, as I read that
17 letter, at the very least the Borough of Ellwood City was
18 faced with the assertion by Pennsylvania Power Company
19 that they had the right to foreclose Ellwood City from
20 going into that area. I mean whether Pennsylvania Power
21 was correct in asserting that or not is one question.

22 But it seems to me that that paragraph No. 1
23 said that --

24 MR. STEVEN BERGER: Your Honor, I would like to
25 discuss this and follow this up with you, but I would like

1 to do it without the witness present.

2 CHAIRMAN RIGLER: All right. We will excuse
3 the witness for a minute.

4 THE WITNESS: I would like to say, sir, that
5 I would object to being excused if there is going to be
6 some discussion without the Borough of Ellwood City being
7 present as to whether we did something illegal.

8 This is kind of a shock to me. If we did something
9 illegal, we have a partner. And if the partner, Penn Power,
10 is here, discussing the legality or illegality of what
11 my borough has done, it worries me.

12 CHAIRMAN RIGLER: We will excuse you, anyway,
13 Mr. Luxenberg.

14 (Witness temporarily excused.)

15 MR. STEVEN BERGER: Mr. Smith --

16 (Board conference.)

17 MR. STEVEN BERGER: Mr. Smith, if I can try and
18 give you my best understanding of what took place, and
19 maybe we can try and reach some kind of understanding
20 with regard to it.

21 At the time of the negotiation of the contract,
22 it is my understanding the question of annexation came
23 up. And the question is, the Borough of Ellwood City saying,
24 well, what happens if we annex? Can we serve in the areas
25 that we annex?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Now Pennsylvania Power Company is certified to serve in all of the areas surrounding the Borough of Ellwood City. And in order for the Borough of Ellwood City to serve in newly annexed areas, I imagine that Pennsylvania Power Company would have to be decertified, if you will, and the Borough of Ellwood City --

end 7

S8 1 CHAIRMAN RIGLER: That's a question I had
bwl 2 for you. What is Pennsylvania Power's position with
3 respect to any preemptive positions in Pennsylvania law
4 that would allow a municipal to take over the service of
5 customers within the municipal limits, whether or not the
6 existing supply consents to that take over?

7 MR. STEVEN BERGER: Are you talking about
8 in a newly annexed area?

9 CHAIRMAN RIGLER: Well, either. Either within
10 existing municipal boundaries or in newly annexed areas,
11 if there is some type of a grandfather clause there.

12 MR. STEVEN BERGER: As to existing
13 customers inside what is already the Borough, it is my
14 understanding that the Borough has an absolute right to
15 serve those customers. Except with regard to what may be
16 established between the parties as to contract rates.

17 CHAIRMAN RIGLER: Right, but there would be some
18 sort of compensation formula, but the Borough could
19 preempt service for those --

20 MR. STEVEN BERGER: I don't know that there
21 would be a compensation formula, I don't know that they
22 wouldn't have to duplicate facilities, I don't know if they
23 would have to condemn facilities, I don't know the answers
24 to these questions, your Honor.

25 CHAIRMAN RIGLER: All right.

bw2

1 MR. STEVEN BERGER: Now, as to areas that are
2 newly annexed, where Pennsylvania Power Company is already
3 certified as the supplier, it is my understanding that
4 Pennsylvania Power Company is the supplier in those areas,
5 and the public utilities commission of Pennsylvania would have
6 to be approached as to the question of anybody else supplanting
7 Pennsylvania Power Company in those newly annexed areas.

8 CHAIRMAN RIGLER: Does the Pennsylvania Utilities
9 commission have arate authority within the boundaries of
10 municipalities that are furnishing their own service?

11 MR. STEVEN BERGER: That's a very interesting
12 question, which we discussed with Mr. Urian somewhat, if
13 I recall. I believe there is a Senate bill pending now in
14 the Pennsylvania Legislature to provide for that.
15 Right now it is my understanding that it is entirely rates,
16 and what have you, with regard to electric service are
17 entirely within the purview of Borough council.

18 But outside the Borough with regard to
19 service and rates, it is established that Pennsylvania
20 Utilities Commission is the one having jurisdiction over those
21 questions.

22 CHAIRMAN RIGLER: I understand what you have
23 said up this point. I am not entirely clear about the legal
24 effect of annexation. I have trouble distinguishing between
25 municipal boundaries and municipal boundaries created by

bw3

1 annexation. I don't understand why if the PUC does not have
2 authority within an existing municipal authority, it would
3 not lose authority over the area covered by annexation.

4 MR. STEVEN BERGER: Your Honor, I think that's
5 a question, one. I am not -- I think we are on one side
6 of that question and there may be people who are on the other
7 side of it. I am not sure that it's been fully litigated or
8 litigated at all. What I do know, is that I believe that
9 as to when the Public Utilities Commission came into
10 effect, there were certain municipalities with incorporated
11 limits as of the time that the Public Utilities Commission
12 came into effect.

13 When you asked me the questions as to present
14 incorporated boundaries of a municipality, I was speaking
15 in terms of a municipality as it was incorporated at the
16 time that the Public Utilities Commission was established
17 in Pennsylvania.

18 That's the way I think about it.

19 As to future annexations and annexations which
20 have taken place since that time, and whether or not the
21 question has been litigated, I really don't have answers
22 for.

23 CHAIRMAN RIGLER: The problem is that that
24 bears really on the interpretation of paragraph one of the
25 July 30, 1966 letter that you are discussing with the

bw4

1 Witness right now, doesn't it?

2 MR. STEVEN BERGER: Somewhat, and I am glad that
3 we have had this discussion.

4 I would like to go a little bit further as to
5 really the circumstances surrounding the inclusion of
6 paragraph one and what my understanding of it is.

7 CHAIRMAN RIGLER: Not in lieu of testimony,
8 but with that understanding, we will allow you to explain
9 the position the company will be taking.

10 Is that a fair statement?

11 MR. STEVEN BERGER: I think that's a fair
12 statement.

13 CHAIRMAN RIGLER: All right.

14 MR. STEVEN BERGER: If the Company deems it
15 necessary to take a position.

16 CHAIRMAN RIGLER: All right.

17 MR. SMITH: Would you address yourself to the
18 language in paragraph one.

19 MR. STEVEN BERGER: Paragraph one?

20 MR. SMITH: I realize there are two sentences
21 here that don't seem to mesh. One is a reference to not
22 opposing, as compared to a waiver of a right to serve.

23 MR. STEVEN BERGER: Yes.

24 MR. SMITH: It is poorly written. If you will
25 excuse me, I hope I --

bw5

1 MR. STEVEN BERGER: I don't know, I was just think-
2 int the same thing.

3 (Laughter.)

4 MR. SMITH: This is what is confusing me.

5 MR. STEVEN BERGER: All right. I think what is
6 involved here is this: I think that when the question of
7 annexation came up, the position which Pennsylvania Power
8 took was, let's see where we have our investments and see
9 where we don't have our investments. We have money invested
10 in certain areas surrounding the Borough of Ellwood City,
11 and we have got to protect our investments with regard to
12 that. We are not about to waive our right to serve, our rights
13 under Pennsylvania law, to serve in areas where we are
14 presently serving and have investments and have facilities.

15 However, as to areas that are virgin, the farm-
16 land that Mr. Luxenberg was talking about, where we have
17 no investment, if the Borough brings within its
18 incorporated limits those virgin territories, that's another
19 matter. They can serve in those areas, if they want to
20 serve in those areas, and we won't contest it.

21 Whether or not the Borough, after annexation,
22 would have to go to the PUC and get Pennsylvania decertified,
23 I can't give you the definitive answer that I would like to
24 give you on that question.

25 But I think that's really what is involved in

bw6 1 Section 1. The point I was trying to bring out with the
2 Witness is that we, that is, Pennsylvania Power, did not
3 extract from the Borough of Ellwood City any rights it
4 may have had or has to serve in areas annexed, where Pennsylvania
5 Power is presently serving.

6 We merely said we intend to protect our rights,
7 and we are not going to waive our rights.

8 That's all that was done. That's all
9 that I am saying...

10 MR. CHARNO: Could we ask one --

11 CHAIRMAN RIGLER: Wait a minute.

12 (Board Conference.)

13 MR. STEVEN BERGER: I just would note that
14 Mr. Edgerly informs me that, of course, if Pennsylvania
15 Power were to be supplanted in any area where it
16 served, it would have to petition the Public Utilities
17 Commission for a certificate of abandonment to allow it to
18 stop serving in an area where it was certified. So that
19 that would be involved as well, and I would think the PUC would
20 necessarily be involved.

21 MR. CHARNO: We would like to ask one question for
22 clarification. Counsel made a rather lengthy explanation
23 of the position of the Pennsylvania Power. And there is one
24 point that seems to me absent. Is it Counsel's understanding
25 of the facts relating to paragraph numbered one in the letter

1 agreement that with respect to future annexation of
2 undeveloped areas, Pennsylvania Power was waiving its
3 right to serve commercial and industrial customers, or only
4 waiving its right to serve residential customers in those
5 areas?

6 We note that the letter agreement is very
7 specific on that point.

8 CHAIRMAN RIGLER: Well, if it is specific,
9 then you don't have to ask the question.

10 MR. CHARNO: I want to find out what Counsel's
11 point is. If he's making the argument that there was an
12 agreement that went beyond the specific terms of this letter
13 agreement, and they, in fact, waived more than is apparent
14 from this letter agreement, if that is what he is trying to
15 elicit from the Witness, I think it is appropriate to find
16 that out at this time.

17 MR. STEVEN BERGER: I think the letter speaks
18 to that question. I couldn't speculate as to other matters.
19 I wasn't privy to negotiations. I can't give you a specific
20 answer as to that, as to whether or not Pennsylvania
21 Power would come in and say the Borough of Ellwood City, you
22 can't serve this customer, because he's not a residential custo-
23 mer. Whether or not they would have a right to do it, a new
24 industrial customer locating in an annexed area of a
25 municipality --

bw8

1 MR. CHARNO: That's not part of your presentation
2 of the facts here, and what you are trying to prove with
3 this Witness here at this time; is that correct?

4 MR. STEVEN BERGER: That's not part of it, that's
5 correct.

6 MR. CHARNO: Fine.

7 CHAIRMAN RIGLER: Shall we return to the Witness,
8 please?

9 MR. STEVEN BERGER: Well, okay.

10 CHAIRMAN RIGLER: Did you have a further
11 point, Mr. Berger?

12 MR. STEVEN BERGER: No. I was at the point
13 where I was just asking just the one question, which I wanted
14 to, as to whether or not they had given up anything more
15 than I think what the letter says it gave up.

16 CHAIRMAN RIGLER: All right, and your
17 pending question to the Board was whether you wanted to,
18 whether you should proceed via motion to strike or further
19 questions?

20 MR. STEVEN BERGER: Yes. There was a
21 question as to the one-mile limitation he spoke of. I
22 don't know what he's talking about. The answer was, no,
23 not in the letter, and he went on with this one-mile business.
24 I really don't know what he is talking about.

25 If the Board deems it appropriate to go into, I

bw9

1 will go into it. If you grant the motion to strike, I
2 will stop it at this point.

3 CHAIRMAN RIGLER: The Board isn't going to give
4 you any advice as to how to proceed.

5 MR. STEVEN BERGER: I move to strike.

6 CHAIRMAN RIGLER: All right, we will strike
7 all portions of the answer to the question, except that
8 portion in which the witness indicates that there is nothing
9 in the letter itself. The remainder of the answer will be
10 stricken.

11 BY MR. STEVEN BERGER:

12 Q Mr. Luxenberg, you said that you read
13 Mr. Urian's testimony before this Board. Do you recall this
14 series of questions and answers? This appears at pages
15 4986 and 87 of the transcript here.

16 The question was asked of Mr. Urian: "Did
17 you ever evidence your desire to Pennsylvania Power Company
18 that the Borough would like to serve a particular customer
19 served by Pennsylvania Power Company at the time?"

20 Mr. Urian's answer was: "I believe at this
21 points this would definitely be hearsay. I was under the
22 advice of our attorney who had, in fact, stated to me that
23 in the past and on occasions which he pinpointed, that
24 Pennsylvania Power was asked, and they did not receive the
25 approval of Pennsylvania Power to serve that customer."

bw10

1 "Question. You are talking about Mr. Luxenberg
2 now?"

3 "Answer. Yes, I am."

4 "Did Mr. Luxenberg tell you which customers were
5 involved and what, in fact, had been done in the way of
6 communication?"

7 The answer was: "There were meetings with
8 officials of Pennsylvania Power, and I am relating what
9 Mr. Luxenberg told me. There were meetings with
10 members of Pennsylvania Power, representatives of Pennsylvania
11 Power and the serving of industrial customers was requested
12 and discussed, and Mr. Luxenberg's words to me was, there
13 was an absolute no. I do not know of the specific
14 customers they discussed."

15 My question to you, Mr. Luxenberg is -- well,
16 I guess there is a pending question.

17 Do you recall that testimony?

18 A Yes.

19 Q Do you know specific industrial customers
20 that the Borough of Ellwood City has asked for the right
21 to serve, were presently being served by Pennsylvania
22 Power Company and an express refusal was given by Pennsylvania
23 Power?

24 A Yes.

25 Q Would you give the names of those customers?

bwll

1 A I can name one in particular, because it was
2 just recalled to me by this letter here, Ryman Engineering
3 Company.

4 Q Any others?

5 A The answer to your question, specifically, goes
6 not one individual customer. We were constantly asking
7 could we serve industrial customers. We talked about
8 every one of these six that are listed on page 2 of the
9 letter, the Columbia Gas Company, the Solomon's Dry
10 Cleaning, Ryman Engineering, Ellwood City Ice Company,
11 Wayne Lumber Company, George W. Blank Supply Company.

12 These were not giant industrial customers, these
13 were the kind of customers that Ellwood City had the facilities
14 to serve.

15 There wasn't any problem serving them at all with
16 whatever lines we had, and I don't know the numbers of what
17 we are talking about there.

18 Pennsylvania Power had them and they said they
19 were keeping them, period.

20 That had gone on many times. During the same period
21 of time we would discuss the possibility of serving industry.
22 This was our goal.

ES8

23

24

25

#9

ari

1 Q You said that the Borough had the physical
2 capability of serving these customers?

3 A Yes.

4 Q Am I to assume from your answer that you didn't
5 have the physical capability to serve the larger customers?

6 A That's right, we did not.

7 Q And you couldn't serve --

8 MR. SMITH: Mr. Luxenberg, how can you say that
9 Pennsylvania Power denied you permission to serve the six
10 customers referred to in the letter agreement since paragraph
11 2 of that agreement indicates that the company will consent
12 to the Borough's serving those customers?

13 THE WITNESS: I am sorry, sir. My understanding
14 of his question was, prior to this agreement. That was what
15 the intent of my answer was, prior to this agreement.

16 BY MR. STEVEN BERGER:

17 Q As to industrial customers other than these
18 customers that are reflected in the July 30, 1966 letter, am
19 I correct that the Borough could not physically serve those
20 customers, the larger industrial customers, without obtaining
21 some kind of additional physical properties in order to
22 serve them?

23 A Correct.

24 Q When you talk in terms of Pennsylvania Power
25 Company refusing to give you the right to serve

ar2

1 industrial customers, you are talking again in the context
2 of filing a rate for 69 kV service?

3 A No, indeed I am not.

4 Q Tell us what you are talking about?

5 A I am talking about at every discussion we ever had,
6 the impression I always got was that they had the right
7 and we didn't. At that point we were not under the Federal
8 Power Commission. We were under the Public Utility
9 Commission.

10 Q Don't you have the absolute right to serve any
11 customer inside the Borough?

12 A This is an excellent question and it is about
13 the third time you have asked it, and it is going to be the
14 fourth time that I have answered it. I don't know.
15 Pennsylvania Power has served them in the Borough. Whether
16 we have the right to go in and take over that customer, I
17 don't know the answer to that. I know it would be one lu-lu
18 of a battle if we tried it.

19 Q You know that Pennsylvania Power Company couldn't
20 serve within the Borough without the Borough having given it
21 the right to serve in the Borough?

22 A I imagine that's true.

23 Q You imagine it is true? As Borough solicitor,
24 wouldn't you know that?

25 A You are going back now 50, 75 years. I don't know

ar3

1 what the law was then or what happened then.

2 Q Would you take a look at paragraph 4 of
3 the contract again?

4 A Okay.

5 Q Did you ever write to the company in conformity
6 with paragraph 4 of the contract asking the company to
7 waive its right to consent to the service by the Borough of a
8 customer then being served by Pennsylvania Power Company, be it
9 industrial or otherwise?

10 A I doubt it.

11 Q To your knowledge, has there been any industrial
12 customer, residential customer or commercial customer
13 inside the Borough being served by Pennsylvania Power
14 Company which has either come to the Borough or which the
15 Borough has approached with regard to the question of the
16 supply of electric service and the customer involved was
17 desirous of changing power suppliers, but the Borough of
18 Ellwood City was precluded from providing service to that
19 customer because of the operation of the agreement?

20 A I don't recall of any.

21 Q Prior to the signing of the July 30, 1966 letter,
22 do you recall your negotiations with representatives of
23 Pennsylvania Power Company that you talked about this
24 morning?

25 A Yes.

1 Q Did you ever ask for the right to serve a
2 particular customer at that time and get refused?

3 A Well, we certainly asked for the right to serve
4 industry. We were refused, period. It was not
5 discussable.

6 Q The right to serve industrial customers that
7 you didn't have the physical capability to serve?

8 A That may be right, but our position was that
9 if we had the right to serve them, we would go out and
10 get the physical capabilities to do it, or at least
11 certainly go out and find out whether we financially could
12 do it. This is what we had tried to do for 30 years.

13 Q Did you talk to the industrial customers?

14 A There wouldn't have been any problem with
15 the industrial customers if we didn't have any problem
16 with Pennsylvania Power Company.

17 Q Why wouldn't there have been any problem with
18 the industrial customers?

19 A If we had an agreement with the power company
20 that they would have allowed us to do it, why would
21 there have been any problem with the industrial customers?

22 Q Do you think the industrial customers have a desire
23 to keep Pennsylvania Power Company as their power supplier?

24 A We don't generate power, we distribute. It
25 would have still be Pennsylvania Power Company's power.

ar5

1 Q Do you know the services performed by
2 Pennsylvania Power Company for the industrial customers
3 it serves at retail that it doesn't provide to
4 industrial customers that are served by a municipality
5 at retail?

6 A I don't personally know them, but I imagine
7 there are some.

8 Q Would you believe they are pretty extensive?

9 A I would imagine that the Borough, if we
10 had the physical facilities and were making the money out of
11 the industrial customers, that I am quite sure Pennsylvania
12 Power is, would do the same thing, or break our backs trying.

13 Q Do you think the industrial customer would be
14 happy about the prospect of having a Borough council
15 set the rates?

16 MS. URBAN: Objection. I believe this is beyond
17 the scope of direct.

18 CHAIRMAN RIGLER: Overruled.

19 THE WITNESS: The answer to that is, I think the
20 industrial customer would be more than happy to. We
21 have always had lower rates than Pennsylvania Power, and
22 it would be a tremendous inducement for industry to come
23 into a devastated area that Ellwood City is right now.
24 It would be, I think, an industrial customer would be
25 more than happy provided we had the capabilities of doing it

1 far happier than they are probably with the regulatory
2 bodies.

3 (Pause.)

4 MR. STEVEN BERGER: I have no further questions,
5 Your Honor.

6 CHAIRMAN RIGLER: Are you going to ask some
7 questions, Ms. Urban?

8 MS. URBAN: Yes, I am.

9 May we have a short recess?

10 CHAIRMAN RIGLER: We will give you five minutes.

11 (Recess.)

12 REDIRECT EXAMINATION

13 BY MS. URBAN:

14 Q Mr. Luxenberg, can I refer you again to the
15 letter agreement that you were discussing earlier?

16 A Okay.

17 Q Is there anything outside the letter agreement
18 which prevents the Borough from fully extending into
19 newly annexed areas?

20 A Well, as I started to say, when we discussed this
21 in negotiations, we tried to negotiate for one in
22 particular listed there, the Borough of Ellipton, which is
23 a contiguous community. It is built up. It is about a
24 thousand people. We got nowhere with those negotiations.

25 The other part of the negotiation was could we move

1 into the farm territory to the north. We negotiated that
2 and we didn't spell it out in there, but it was our
3 understanding with Penn Power that we would not go halfway
4 to Newcastle or three-quarters of the way to Newcastle.
5 We were only going to go out literally to the top of the
6 hill, which is about a mile. That is what I was trying to
7 explain before when I didn't understand all the objections.

8 CHAIRMAN RIGLER: The question was, was there
9 anything that prevented you from doing so?

10 THE WITNESS: Was there anything that
11 prevented us from annexing or from serving?

12 CHAIRMAN RIGLER: From serving.

13 THE WITNESS: The question I don't think has
14 yet been decided by the Pennsylvania courts, although I
15 don't know that. It is a difficult question. There have
16 been several fights over it. Many of them have just died
17 without going all the way up to the Supreme Court on it.
18 I don't know the answer. If I may, it has since gotten to be
19 worse because two, three years ago, whenever it was,
20 Pennsylvania had several Constitutional amendments, one of
21 which did away with all annexations in which the Constitution
22 directed the legislature that they mandated them within two
23 years to pass a uniform annexation law.

24 That was, I don't know, four or five years ago.
25 The legislature has not done it. The Pennsylvania Supreme

ar8

1 Court says since they haven't done it, you can't annex
2 anything. So we are in a real bind at the moment. But
3 that's been in the last three or four years. Not at the
4 time of these negotiations.

5 BY MS. URBAN:

6 Q Mr. Luxenberg, you testified that Ellwood City did
7 not have the physical capabilities to serve industries.
8 Were you referring to the physical capabilities to serve
9 industries at high voltage?

10 A At this 69 kV or anything of that type, that
11 is what I was intending to mean, yes.

12 Q Are you aware of any request that Ellwood City
13 provide service to an industrial customer who was being
14 served at the time by Pennsylvania Power Company?

15 A Yes.

16 (Whereupon, the reporter read the
17 last question, as requested.)

18 MR. STEVEN BERGER: I think that's been asked
19 and answered, Your Honor. I object.

20 MS. URBAN: Your Honor, I think the record is
21 confused. I do not believe that question had been asked
22 and answered.

23 CHAIRMAN RIGLER: Are you asking if he received a
24 request from the industry?

25 MS. URBAN: Yes, I am.

1 CHAIRMAN RIGLER: I don't believe that question
2 has been asked.

3 BY MS. URBAN:

4 Q Mr. Luxenberg, could you give us an example of
5 such a request?

6 A Of an industry that asked us to serve them?

7 Q Yes, sir.

8 A When Penn Power was already serving them?

9 Q Yes, sir.

10 A Yes, the Ellwood Knitting Mills would be one
11 of them. They wanted to know if we would do it cheaper,
12 frankly. Said yes, if we have the right to do it. And
13 the capacity, the physical capacity.

14 Q Mr. Luxenberg, where are they located? Are
15 they within or outside the Borough limits?

16 A At the time they were located within the
17 Borough limits. They have since expanded and have moved
18 out to the outskirts. They are probably in Duquesne's
19 territory now. They may be in Penn Power's. I am not sure
20 which.

21 MR. STEVEN BERGER: Could we put a timeframe
22 on that? It would be helpful for our purposes.

23 BY MS. URBAN:

24 Q Mr. Luxenberg, when was the request made?

25 A I am trying to put it before or after this

1 agreement. It might have been before. I don't remember.
2 It's been a long time ago. That's one that I recall
3 specifically.

4 Q Have there been any requests for service made
5 after this contract and agreement?

6 A Yes. Mr. Uran has informed me that he is
7 presently in negotiations with one or two of the small
8 industries that have moved into the U.S. Steel Industrial
9 Park.

10 MS. URBAN: We have no further --

11 MR. REYNOLDS: Excuse me. I think that he
12 misinterpreted the question.

13 THE WITNESS: Could be.

14 MR. REYNOLDS: We will go ahead and do what she
15 wants, if she is going to wind it up there. I am sorry.

16 MS. URBAN: We have no further questions.

17 RE-CROSS EXAMINATION

18 BY MR. STEVEN BERGER:

19 Q Mr. Luxenberg, if the Borough of Ellwood City
20 were to take on large industrial customers which are not
21 being served at 69 kV, isn't it true that the existing
22 substation that Ellwood City receives power from Pennsylvania
23 Power Company would have to be enlarged in order to serve those
24 new industrial customers?

25 A I have no knowledge of that at all. It wouldn't

1 surprise me, but I have no knowledge of it.

2 MR. STEVEN BERGER: I have no further questions,
3 Your Honor.

4 CHAIRMAN RIGLER: Thank you, Mr. Luxenberg.

5 THE WITNESS: If the Board please, I would like
6 to state something, if I may.

7 I don't care whether it is on the record or
8 off the record.

9 MR. STEVEN BERGER: Let's go off the record.

10 CHAIRMAN RIGLER: Off the record.

11 (Discussion off the record.)

12 (Witness excused.)

13 MR. CHARNO: The Department would like to offer
14 as DJ 585 for identification a three-page document
15 entitled "Exhibits." This document contains an index
16 of the pages of the Department's deposition excerpts
17 which are Exhibits 558 through 583.

18 We would also like to offer that in evidence
19 at this time.

20 (The documents referred to
21 were marked DJ Exhibit 585
22 for identification.)

23 CHAIRMAN RIGLER: Hearing no objection, it will
24 be received into evidence at this time.

25

1 (The document previously
2 marked DJ Exhibit 585 for
3 identification was received
4 in evidence.)

5 MR. CHARNO: As the parties were previously
6 informed, we have been contacted by Dr. Wein who is ill
7 and under the care of a physician. As of this morning
8 he hopes to be able to appear here for cross-examination
9 on Wednesday. That's the latest and best estimate we have.

10 CHAIRMAN RIGLER: Thank you.

11 MR. CHARNO: We would at this time propose to
12 go forward with the offering of the depositions.

13 CHAIRMAN RIGLER: Right.

14 My recollection is that the entire list of
15 depositions have been offered into evidence, and we are
16 now receiving objections from the Applicants commencing
17 with Department Exhibit 563.

18 MR. REYNOLDS: As to Exhibit 563, Applicants
19 would object to the marked testimony appearing at
20 pages 36 and 37 which deal with the subject of customer
21 conversions between the Electric Illuminating Company
22 and Municipal Electric Light Plant of Cleveland as involving
23 an area of activity at the retail level which is not
24 relevant to the matters in controversy in this proceeding.

25 CHAIRMAN RIGLER: Off the record.

1 (Discussion off the record.)

2 CHAIRMAN RIGLER: Mr. Charno.

3 MR. CHARNO: We previously have argued the
4 issue of whether retail competition is relevant. We will
5 rely upon our past arguments.

6 CHAIRMAN RIGLER: I believe the Board also had
7 observed at one point, had it not, that a desire on the
8 part of CEI to acquire customers of Muni might not be
9 read as anticompetitive, but might be read as indicating
10 one of the objectives of competition, namely to acquire
11 additional customers? Didn't we observe that previously?

12 MR. CHARNO: I believe the Board has observed that.
13 I think the competitive context in which CEI is taking
14 steps, performing actions, employing a course of conduct
15 which is anticompetitive in effect makes the context of
16 significance. Makes it possible to view the activities
17 such as refusal to engage in coordinated operation,
18 considerably more meaningful than if one doesn't know that
19 there is an ongoing program and a company objective to get
20 10 times as many conversions to CEI as away from CEI.

21 CHAIRMAN RIGLER: But let me be clear on this.
22 The Department is not arguing in this proceeding, is it,
23 that it wants CEI to forego competition for additional
24 customers?

25 MR. CHARNO: Oh, certainly not.

1 CHAIRMAN RIGLER: All right.

2 MR. HJELMFELT: I would like to address that
3 objection also, and note that on page 37 there is a tie-in
4 of that goal to the generation outages experienced by
5 the municipal system and an indication that the goal
6 change from a one-to-one customer ratio to a 10-to-1 ratio
7 at the time those outages became more frequent.

8 CHAIRMAN RIGLER: The objection will be overruled.

9 MR. REYNOLDS: I would object to the testimony
10 on page 56, and I must confess, Your Honor, that the basis
11 for my objection is that essentially I really don't
12 understand what the testimony on 56 goes to, and therefore
13 what it could possibly be relevant to.

14 As it stands, it doesn't seem to me to be relevant
15 to anything that's involved in this proceeding. I wonder if
16 it is relevant to anything else. I just can't make heads
17 nor tails out of what it is here for.

18 If the Department has some response, I am receptive
19 to it.

20 CHAIRMAN RIGLER: Mr. Charno.

21 MR. CHARNO: I believe that the sales
22 coordination is a further amplification of Mr. Farling's
23 position.

24 CHAIRMAN RIGLER: All right.

25 MR. CHARNO: Mr. Zittman is identified as

ar15

1 the author of a document in evidence, at this time, but I
2 don't have the exhibit number.

3 CHAIRMAN RIGLER: All right, the objection
4 will be sustained and we will strike on page 56 everything
5 on that page down to line 23.

6 MR. REYNOLDS: All right, and then the only other
7 thing that I have with respect to this exhibit pertains
8 to the marked testimony on the top of page 58, and then
9 going over to the bottom of 60 and up at the top of 61,
10 which relates to opinion survey material, and is, I under-
11 stand the prior ruling of the Board, that that material is
12 admissible for purposes of demonstrating that the market
13 in the Cleveland area is both price-sensitive and reliability-
14 sensitive, but that not for other purposes.

15 If that is so, I would object to the admissibility
16 of this testimony for any reason other than the limited
17 reason that the Board has already pronounced.

18 MR. CHARNO: I think it is clear from reviewing
19 the testimony the witness goes beyond the opinion survey
20 testimony and states after it would be implied, at the top of
21 page 61, which relates to the opinion survey, I take his
22 next sentence to be a statement concerning the acquisition
23 of MELP based on something outside the survey.

24 CHAIRMAN RIGLER: The testimony will be limited in
25

arl6

1 accordance with the understanding of Applicant's
2 counsel and I would have to note that on page 61, if the
3 witness' knowledge of his company policy comes from
4 reading newspapers, we wouldn't put any weight on that.

5 MR. REYNOLDS: Other than that, Mr. Chairman,
6 my only other objection with respect to this exhibit
7 goes to the continuing objection on behalf of all parties
8 other than the Cleveland Electric Illuminating Company.

9 I would also object on behalf of all Applicants --
10 I am sorry, I said all parties -- I meant all Applicants
11 other than Cleveland Electric Illuminating Company, and I
12 would also object on behalf of all Applicants to the
13 introduction of excerpts of Mr. Farling's deposition since
14 he is neither an officer, director or managing agent
15 and was not at the time he testified.

16 CHAIRMAN RIGLER: Those objections will be
17 overruled and subject to our rulings with respect to
18 objections and motions to strike, we will receive 563
19 into evidence.

20 (The document previously
21 marked DJ 563 for identifica-
22 tion, was received in evidence.)

23 MR. REYNOLDS: DJ Exhibit 564, I would note
24 the continuing objection on behalf of all the Applicants
25 other than the Cleveland Electric Illuminating Company

1 with respect to this exhibit.

2 In addition, I would make the objection on
3 behalf of all Applicants to the introduction of excerpts
4 of testimony from the deposition of Mr. Michael Titus
5 since he was neither an officer, director or managing
6 agent at the time he testified.

7 CHAIRMAN RIGLER: Both of those objections
8 will be overruled. We will receive 564 into evidence.

9 (The document previously
10 marked DJ 564 for identifica-
11 tion was received in evidence.)

12 MR. REYNOLDS: 565, on this exhibit I would
13 object to testimony appearing on pages 45 through 47, that is
14 the portion that has been designated by red-lining, on
15 the grounds that it has no relevance to matters at issue
16 here. It relates solely to studies conducted by CEI over
17 the course of the years with respect to the purchase of
18 the Cleveland Municipal Plant and also makes reference to
19 other studies in this area conducted by CEI. I really
20 don't know that it has any relevance to matters in issue in
21 this case.

22 end 9
23
24
25

1 CHAIRMAN RIGLER: The acquisition or
2 elimination of a competitor would be. That objection would
3 be overruled.

4 MR. REYNOLDS: That objection and, therefore, the
5 ruling would also relate to pages 48 and 49 which also
6 deal with these studies. I just wanted it so the record
7 is clear what portions of the testimony I was addressing.
8 The same objection goes to 48 and 49.

9 CHAIRMAN RIGLER: All right. Our ruling would
10 be the same.

11 MR. REYNOLDS: Then I would object, making the
12 continuing objection on behalf of all Applicants other than
13 CEI, with respect to Exhibit 565.

14 CHAIRMAN RIGLER: The continuing objection is
15 overruled and we will receive 565 into evidence at this
16 time.

17 (The document previously marked
18 Exhibit DJ-565 for identifi-
19 cation, was received in
20 evidence.)

21 MR. REYNOLDS: The next exhibit, 566, there are a
22 series of marked pages, 60 to 61, 83, 85, 109, 110, 111,
23 and 132. And the testimony that appears in those portions
24 of this deposition transcript relate to the practices and
25 activities of CEI at the retail level with respect to service

S10

bwl

bw2

1 to its retail customers, specifically discussing what has
2 been called a red card charge in certain instances, and
3 what has been called a white card charge, which is another
4 practice, and also some discussion about metering boards
5 and the like.

6 The objection goes to the relevance of this kind
7 of testimony at the retail level and discussing activities
8 and practices that related to CEI's retail customers in the
9 context of the present proceeding and the matters of
10 controversy that are involved in the present proceeding.

11 I would object to the introduction of this
12 material along with the other excerpts of Mr. Wyman's
13 deposition.

14 MR. CHARNO: The Department would adopt its
15 prior position on competition at retail, and
16 restate that it is not the Department's position that CEI
17 should not be in competition.

18 We would further note that at pages 111 and
19 112 the factor of service reliability and its aid to CEI
20 in competing with MELP is specifically outlined.

21 MR. REYNOLDS: I did not include 111 and 112
22 in my objection.

23 MR. CHARNO: I am sorry.

24 MR. REYNOLDS: It was 110 and 111. I don't have
25 112.

bw3

1 MR. HJELMFELT: 112 is not part of it. I think
2 it is 111 and 113.

3 MR. CHARNO: That is correct. It is 111 and 113.

4 MR. HJELMFELT: This also goes to the types of
5 things that CEI did in competitive areas that it did not
6 do in noncompetitive areas.

7 CHAIRMAN RIGLER: All right, that objection
8 will be overruled consistent with the ruling we made the
9 last time we argued the extent and scope to which the Board
10 should consider retail competition vis-a-vis the issues
11 in controversy in these proceedings.

12 MR. REYNOLDS: Let me direct the Board's
13 attention also to pages 70 to 72, which is not dissimilar
14 from the other category but at least in my view is
15 a little separate from it. It deals with the matter of
16 solicitation of retail customers within the CEI territory.

17 I would make an objection to that kind of
18 testimony, again to relevance grounds, although I think it
19 is probably something a little different from the prior
20 objection to the activities relating to the kinds of charges
21 and so on that we just addressed.

22 CHAIRMAN RIGLER: Well, it is undisputed, isn't
23 it, that CEI did solicit customers of the municipal
24 system?

25 MR. REYNOLDS: Whether it is or isn't, is a different
question from whether it is relevant or irrelevant.

1 CHAIRMAN RIGLER: It is undisputed ---

2 MR. REYNOLDS: I am not disputing that CEI solicited
3 customers.

4 CHAIRMAN RIGLER: Right. So then we come to the
5 question of whether that solicitation would be inconsistent
6 with the policies underlying the antitrust laws.

7 I suppose that puts us back to the Board's
8 previous observations, that it might be difficult to find
9 anything in those solicitations that would be objectionable.

10 At that point I suppose we would have to consider
11 the statement of the Department and the City of Cleveland
12 with respect to why they indicate general policies relating
13 to capturing retail customers as a group rather than
14 individually, would be important.

15 On that basis and with that observation we will
16 overrule the objection.

17 MR. REYNOLDS: Other than that, I will make the
18 continuing objection on behalf of all Applicants other
19 than CEI with respect to Exhibit 566.

20 CHAIRMAN RIGLER: The continuing objection is
21 overruled and we will receive 566 into evidence.

22 (The document previously
23 marked Exhibit DJ-566 for
24 identification, was
25 received in evidence.)

bw5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. REYNOLDS: Mr. Chairman, could we break for a second and maybe go off the record to talk about scheduling for just a minute?

CHAIRMAN RIGLER: Sure.

(Discussion off the record.)

CHAIRMAN RIGLER: Let's go back on the record and break for lunch.

(Whereupon, at 12:50 p.m., the hearing was recessed to reconvene at 1:50 p.m., this same day.)

ES10

AFTERNOON SESSION

(2:03 p.m.)

1
2
3 MR. REYNOLDS: As to DJ 567, I would make the
4 continuing objection on behalf of all Applicants other
5 than CEI.

6 CHAIRMAN RIGLER: That objection will be overruled
7 and we will receive 567 into evidence at this time.

8 (The document previously
9 marked DJ 567 for identifica-
10 tion was received in evidence.)

11 MR. REYNOLDS: On 568, I will object to testimony
12 on pages 14 and 15 as being remote in time.

13 CHAIRMAN RIGLER: All this, this relates to
14 the circumstances under which CEI was attempting to
15 obtain rate equalization. We have already indicated that
16 we consider that incident to fall into the "good cause shown"
17 category and for that reason the objection will be
18 overruled.

19 MR. REYNOLDS: On pages 54 to 60, I will object
20 to that entire line of testimony as being remote in time
21 and not relevant to the matters in issue.

22 MR. CHARNO: We would note that this matter
23 concerning the MELP expansion program and possible inter-
24 connection of various municipal systems is directly tied
25 in by the testimony appearing in that portion which Mr.

1 Reynolds objects to the purpose and reason behind the
2 offers to interconnect that were coupled with rate
3 equalization made by CEI at that time.

4 We would note further that with respect to the
5 matters in controversy, the matters specifically refer
6 to the use of dominance to prevent coordinated operation
7 between entities within the CCCT.

8 It would appear that the Painesville, Cleveland-
9 Orrville interconnection would constitute coordinated opera-
10 tions between entities within the CCCT as defined in the
11 matters of controversy.

end 11

12
13
14
15
16
17
18
19
20
21
22
23
24
25

bw1

S12

1 MR. REYNOLDS: Insofar as the testimony relates
2 to that, that, that seems to me is clearly outside the
3 time period. It is all pre-1965, and whatever the testimony
4 might be that relates to Orrville and Painesville and
5 the City of Cleveland is not a matter that would have
6 any relevance here, even under the Board's ruling as to good
7 cause with respect to the interconnection discussions
8 between the City of Cleveland and CEI.

9 MR. HJELMFELT: The testimony there shows that
10 in part the offer to interconnect in 1962 or '63 was
11 made in an effort to forestall the proposed expansion
12 of the municipal light plant with the construction of
13 a 75 megawatt unit, and that it was offered in the hopes
14 that the City would interconnect with MELP on the condition
15 of price stabilization or rate stabilization.

16 CHAIRMAN RIGLER: You said the City would
17 interconnect with MELP?

18 MR. HJELMFELT: Excuse me, the City would
19 interconnect with CEI on that basis, rather than interconnect-
20 ing with the other municipal systems.

21 And I think that in the context of these pro-
22 ceedings that that is relevant, not just to the price fixing
23 for which things of 1962 have already come in, but with
24 respect to the entire context of the situation that
25 exists today in the CEI service area, and in the CAPCO

bw2

1 area.

2 MR. REYNOLDS: I would like to ask Mr. Hjelmfelt
3 to point to me where in this testimony it shows what he just
4 said that the testimony shows. That may be the allegation
5 that the City intends to try to substantiate through evidence
6 it wants to put on, but the testimony to the extent it relates
7 to the Painesville, Orrville, Cleveland situation indicates
8 that the Witness had very little recollection about
9 that at all and doesn't at all support that CEI responded
10 to that kind of a proposal in order to forestall any other
11 possible activity in another area.

12 If he's indicating that that is what this shows,
13 I would like him to point to exactly where it is it shows
14 that.

15 MR. HJELMFELT: That is certainly one of the things
16 I am going to be arguing.

17 In that respect I would look at page 58 where
18 the question was, Did CEI reiterate that proposal in
19 the hope that the City would not construct that inter-
20 connection. The answer was made, we made this proposal in
21 good faith. It was obviously our hope that our proposal
22 would be accepted and this uneconomic phantom could be
23 dropped.

24 On page 60 the question was asked: In making
25 this offer that you say was made in good faith in the hope

bw3

1 that the City would accept an interconnect with
2 CEI in terms that would require the City to increase its
3 rates to the level of CEI's rates, was it also the hope
4 that in accepting CEI's offer, the City would drop its plan
5 to make a \$12 million addition to its plant?

6 The answer is, yes.

7 I might also note that the proposed expert
8 testimony of Mr. Caruso states, "I believe that an
9 interconnection by the City with other parties would
10 have been economic at any point in time." And here we have
11 a person who was at one time chairman and president of
12 CEI stating that it was CEI's position that such an
13 interconnection would not be economically feasible.

14 CHAIRMAN RIGLER: Mr. Hjelmfelt, are we talking
15 about two separate proposals in this testimony?

16 Directing your attention to page 55, line 6,
17 where there is discussion of the construction of
18 transmission lines between the City and Painesville and
19 Orrville. Is that a separate proposal?

20 MR. HJELMFELT: As I understand the proposal
21 at that time, the City had two plans in mind. One was to
22 interconnect with the Cities of Orrville and Painesville
23 and at the same time it was also planning its 75 megawatt
24 generation expansion. And that those were two separate
25 plans that the City had under consideration at that time.

bw4

1 CHAIRMAN RIGLER: All right. If I overrule the
2 Applicants' objection, generally, with respect to pages
3 54 through 60, why shouldn't I sustain it with respect to
4 that portion of the testimony beginning on line 6, page 55,
5 continuing down through the bottom of the page?

6 MR. HJELMFELT: Again, you were starting at
7 line?

8 CHAIRMAN RIGLER: Six, on page 55.

9 MR. HJELMFELT: Well, I think that with respect
10 to lines six through nine, on page 55, that they are
11 certainly relevant. The rest of it merely indicates that
12 he doesn't have a great deal of recollection about the
13 situation. But I think when we come back on page 58, where
14 he's talking about the proposed interconnection again, and the
15 indication that their proposal to interconnect with the
16 City was made in part at least in the hopes that the City
17 would interconnect with CEI and not with Orrville and
18 Painesville, I think that lines six through nine on page
19 55 are relevant.

ES12

20

21

22

23

24

25

#13

arl

1 CHAIRMAN RIGLER: All right, I am going to over-
2 rule the objection.

3 MR. REYNOLDS: I am sorry, overruled in its
4 entirety?

5 CHAIRMAN RIGLER: Yes.

6 MR. REYNOLDS: I will make the continuing
7 objection on behalf of all Applicants other than CEX with
8 respect to Exhibit 568. And also I will make the objection
9 on behalf of all Applicants to the introduction into evidence
10 of Exhibit 568 since Mr. Lindseth was neither an officer,
11 director or managing agent at the time he was deposed.

12 MR. CHARNO: We would note that while Mr. Lindseth
13 was no longer either president or chairman of the board
14 of at the time/his deposition, the basis for the managing
15 agent rule is to avoid a company being prejudiced by the
16 testimony of a disgruntled former employee who is no longer
17 associated with the company.

18 We think that is hardly relevant in the context
19 of a gentleman who spent his entire career with a
20 company and rose to the highest office of the company and
21 retired and was still in amiable relations with the
22 company.

23 CHAIRMAN RIGLER: Both objections will be
24 overruled, and we will receive 568 into evidence at this
25 time.

1 (The document previously
2 marked DJ 568 for identifica-
3 tion was received in evidence.)

4 MR. REYNOLDS: On Exhibit 568, I will
5 object to 27 to 30, 94 to 95, and then 94 to 97, 110 to
6 112, and 115 to 116 on the basis that I have stated earlier
7 with regard to matters that pertained to activity solely at
8 the retail level regarding retail customers of the City
9 of Cleveland Electric Illuminating Company in competition
10 in that context.

11 MR. CHARNO: We would rely on our prior comments
12 and note that in addition we have -- this witness is the
13 manager of the commercial sales department. The statement
14 that it was desirable to have rate equalization in the con-
15 text of the competition between CEI and MELP.

16 CHAIRMAN RIGLER: All right. We have indicated
17 that we are not interested as much as a switch of a
18 particular retail customer as we are in the nature of
19 the competition.

20 Also there begins to be an element of repetition
21 because Mr. Greenslade has already indicated that CEI
22 competed on the basis of rates and service or reliability
23 with MELP. The need for additional reinforcement of that
24 point eventually pales.

25 As a result, we are going to sustain the

1 objection to pages 27 through 30. However, we will
2 overrule it on pages 94, 95, 96, and 97.

3 The material on page 110 through 112
4 is either irrelevant to the issues in controversy or of such
5 marginal relevance that there is no need to have it.

6 We will sustain the objection to pages 110 through
7 112.

8 We will overrule the objection with respect to
9 pages 115 and 116.

10 MR. REYNOLDS: All right.

11 Now, there is also attached to this exhibit
12 additional pages of confidential testimony.

13 I am going to object to that in its entirety
14 because it does go directly to a specific instance of
15 retail competition regarding a specific customer which I
16 think does fall into that area that the Chairman has
17 indicated the Board is not interested in, and in my view of the
18 issues in controversy, rightfully so.

19 In the event that the Board overrules the
20 objection, I guess we do need to come to some determination
21 as to how we are going to treat the confidential excerpts,
22 but it may well be that this isn't the time, because I
23 think this is all objectionable and cannot be admitted into
24 evidence.

25 CHAIRMAN RIGLER: I am not sure from the extracts

1 in front of me that I fully appreciate your point, Mr.
2 Reynolds.

3 The load, the customer load here is the
4 municipality of Justice Center; is that correct?

5 MR. REYNOLDS: No, it is a complex which is --
6 of buildings which were business offices that were labeled
7 Justice Center. I mean that's the name of the complex
8 of offices or, I think there were stores and offices.

9 There may well have been apartment buildings,
10 is that right?

11 It included the courthouse and the jail, too.

12 MR. HJELMFELT: Might account for its name.

13 MR. REYNOLDS: But it was a complex of buildings
14 that were treated -- that were initially treated as a
15 single unit, and then later as two different ones.

16 CHAIRMAN RIGLER: We are going to overrule the
17 objection at least on page 18, because of the question and
18 answers from lines 19 to 25, in which it is indicated that
19 here was the specific objective of the company to acquire
20 a customer for the purpose of keeping it away from a
21 municipal system, although I must say that I don't know
22 what weight we can attach to it since the witness indicates
23 he's heard it from some unspecified source.

end 13

24

25

S14

bwl

1 No, on further reflection I don't see how
2 we could give any weight to that answer. We will sustain
3 the objection to all three pages. Those are pages 18,
4 51 and 52 of the confidential excerpt

5 MR. HJELMFELT: Excuse me, did your ruling
6 go to the entire confidential extract?

7 CHAIRMAN RIGLER: Yes, although it occurs to
8 me I didn't hear you on that. Did you have a comment you
9 wanted to make?

10 MR. HJELMFELT: Well, I have -- there are
11 documents that will also tie into the portion on
12 18.

13 On page 52 it, I think, directly shows that CBI
14 was considering the effect of an intertie on competition.
15 In this case it happens to be in the context of a specific,
16 competition for a specific customer. But I think what we
17 are dealing with not here is an argument over whether or
18 not competition for a particular customer may have been
19 a situation inconsistent so much, as showing that CBI
20 was aware of the reliability situation and took it into
21 account in competing.

22 CHAIRMAN RIGLER: How many times
23 we have to have that? Mr. Greenslade has, I don't want to
24 say "conceded that point," but agreed with that point,
25 and there are numerous citations in the record, not only
from the City's witnesses, but from,

bw2

1 throughout these depositions, CEI employees.

2 MR. HJELMFELT: I don't know if there is
3 anything as directly in the record relating to the difference
4 between a 69 kv and the 11 kv coming from CEI.

5 CHAIRMAN RIGLER: All right. I see your point on
6 that.

7 We will reconsider our ruling on page 52.

8 MR. CHARNO: Mr. Chairman, previously I did not
9 address myself to your ruling on pages 110 and 112. 110
10 through 112 of this deposition.

11 CHAIRMAN RIGLER: Wait a minute. Before we go back
12 to that, or does this relate to the discussion on page 52?

13 MR. CHARNO: Not directly, now.

14 CHAIRMAN RIGLER: I think we are going to change
15 our mind on page 52, Mr. Reynolds, because I agree with
16 Mr. Hjelmfelt that we do not have the direct tie to the
17 possibility of a 69 kv interconnection, certainly not
18 presented to us in a fashion with as direct a focus as
19 this particular paragraph, so we are going to admit page
20 52.

21 Now, that presents a problem of how to handle it,
22 since it's been designated confidential.

23 MR. REYNOLDS: But that portion is clearly not
24 the portion that was necessary to the confidential treatment.
25 So, given the ruling of the Board, I still think we avoided

bw3

1 the problem of what we might come up with at a later date,
2 if we have testimony that does go to a confidential matter.

3 CHAIRMAN RIGLER: Shall we waive confidentiality
4 with respect to page 52?

5 MR. REYNOLDS: With respect to page 52, yes, sir.

6 CHAIRMAN RIGLER: All right.

7 Now, you wanted to address pages 110 through
8 112?

9

ES14

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

arl

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CHARNO: Yes, sir. Those -- that series, pardon me, of questions and answers goes to a document presently in evidence, DJ Exhibit 352.

352 contains a number of position statements concerning interconnection, the city's capability, its loss of customers, its reliability specifically under interconnection and otherwise.

The document was allowed into evidence, the relevance of those statements being evidence to the issues in controversy in the proceeding.

We think it significant that at 112 it is indicated that this document is utilized by representatives of CEI to inform the public of these different factors and that this was a sheet used in competition.

These are not privately-held opinions of the company, internal to the company, but are ones that are disseminated freely in a competitive context.

CHAIRMAN RIGLER: Is there a response?

MR. REYNOLDS: Pardon me?

CHAIRMAN RIGLER: Is there a response?

MR. REYNOLDS: No, I am satisfied with the Board's ruling. I don't see -- I mean I come back again to where the basis for the objection in the first place, taking everything Mr. Charno says, I still don't see that that gives a basis to go into this whole area in this proceeding.

1 I fail to see the relevancy at all. I don't
2 know what order of a response --

3 CHAIRMAN RIGLER. I don't see what this adds
4 to your document, Mr. Charno. We are going to adhere to our
5 ruling.

6 MR. CHARNO: I am sorry, I didn't hear the last
7 part.

8 CHAIRMAN RIGLER: We are going to adhere to our
9 ruling.

10 Is that it for 569?

11 MR. REYNOLDS: I am sorry. The continuing
12 objection on behalf of everybody other than Cleveland
13 Electric Illuminating Company, and on behalf of all the
14 Applicants including Cleveland Electric Illuminating
15 Company, an objection to the admissibility of any
16 excerpts of Mr. Gould's deposition on the grounds he is
17 neither an officer, director or managing agent of the
18 company.

19 MR. CHARNO: Mr. Gould was the manager of the
20 sales department and the statements made are within his area
21 of competence, for example, that a tie between MELP and
22 CEI would reduce the number of conversions to CEI. That
23 it was desirable to have a rate equalization between the
24 two in order to reduce conversions away from CEI. I
25 think these are clearly within the area of competence of

1 the manager of a sales department since they refer
2 directly to the fact there is bearing upon sales.

3 CHAIRMAN RIGLER: The objections are overruled and
4 we will receive 569 into evidence subject to the ruling
5 as to the portions which were struck.

6 (The document previously
7 marked DJ 569 for identifica-
8 tion was received in evidence.)

9 CHAIRMAN RIGLER: 570.

10 MR. REYNOLDS: As to 570, I will make the
11 continuing objection on behalf of all Applicants other
12 than Duquesne Light Company, and as to all Applicants
13 including Duquesne Light Company I will object to the
14 introduction into evidence of any excerpts from Mr.
15 Dempler's deposition on the ground he was neither an
16 officer, director or managing agent of the company at the time
17 he testified.

18 CHAIRMAN RIGLER: Both objections are overruled,
19 and we will receive 570 into evidence at this time.

20 (The document previously
21 marked DJ 570 for identifica-
22 tion was received in evidence.)

23 MR. REYNOLDS: Mr. Chairman, as to Exhibit 571,
24 the Board had indicated that it might entertain in an
25 exceptional case a request for an offer of proof.

1 I would like to suggest that the marked portions of Mr.
2 D'Amico's deposition do present such an exceptional case
3 and would like to ask that as to this material, the
4 Department of Justice be required to give Applicants an
5 offer of proof.

6 CHAIRMAN RIGLER: What is the relevance of
7 this particular testimony, Mr. Charno?

8 MR. CHARNO: The Department would advance
9 this testimony to show one of the benefits coordinated
10 operation and development which flows from CAPCO membership
11 and seems directly related to licensing of the units under
12 consideration here, that is that there are benefits in the
13 procurement of nuclear fuel.

14 MR. SMITH: Isn't that a comparative concept,
15 though, compared to what?

16 MR. CHARNO: Compared to, for example, purchasing
17 fuel for a single unit.

18 MR. SMITH: By whom?

19 MR. CHARNO: By a hypothetical municipal
20 attempting to establish nuclear generation, establish
21 itself in nuclear generation.

22 MR. SMITH: Does that hypothetical relate to
23 this case?

24 MR. CHARNO: I think, in fact I know we are faced
25 with an argument that the benefits of membership in CAPCO

1 are really immaterial in terms of coordinated operation,
2 development. And we feel that this is one of the benefits
3 that is definitely not immaterial.

4 CHAIRMAN RIGLER: Mr. Reynolds, do I recall your
5 inquiring with Dr. Hughes as to the feasibility of a
6 group of municipals combining to build a small scale
7 nuclear plant?

end 15

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 MR. REYNOLDS: I don't think that the
2 cross-examination went to the possibility of a group of
3 municipals combining together to build a small-scale
4 nuclear plant. may well be that we cross-examined
5 Dr. Hughes with regard to a number of municipalities
6 combining together in a coordinated arrangement, but I --

7 CHAIRMAN RIGLER: Didn't you explore with either
8 DR. Hughes or Mr. Mozer the type of plant which might be
9 built? Wasn't there some discussion as to whether they could
10 build a coal plant or at what approximate size range a
11 nuclear plant would become a feasible alternative to supply
12 a group of municipals?

13 MR. REYNOLDS: There was discussion with regard to
14 comparisons between participation in large-scale nuclear
15 plants versus building a small-scale coal plant.

16 CHAIRMAN RIGLER: had a series of theoreticals
17 based on fuel costs with Mr. Kampmeier

18 MR. REYNOLDS: That is much different than the
19 type of testimony we have here. That is right. There is
20 testimony that Mr. Kampmeier addressed himself to going to
21 fuel costs --

22 CHAIRMAN RIGLER: Doesn't this testimony go to
23 the question of fuel costs where you are purchasing in large
24 volumes and that's a benefit that you can get only because you
25 happen to be engaged in coordination, coordinated development

S16

bw1

bw2

1 and operation?

2 MR. REYNOLDS: I guess the problem I am having
3 is that I look at the testimony. It talks about
4 purchasing nuclear fuel from suppliers, as being done by
5 all large utilities without regard to whether there is
6 coordination involved.

7 Certainly, in terms of the case that the
8 Department has put on, and the Staff has put on and what
9 I anticipate from the City, although Mr. Hjelmfelt can
10 correct me if I am wrong, I have not heard yet that we
11 are going to get into the area of the ability of municipalities
12 to deal with suppliers in order to obtain nuclear fuel at
13 a lower cost or a greater cost; if they go in a group or
14 if they go singly, which would seem to be the other half
15 of this testimony, if we are really going to open the door
16 in this area.

17 There has been discussion on cross-examination of
18 the expert witnesses, regarding fuel costs, but I don't
19 think it's been anything that relates to the ability to obtain
20 fuel from suppliers or the arrangements that you would have
21 with suppliers in obtaining that fuel.

22 I don't really -- I guess I am at a loss to see
23 where this testimony fits into anything that has been involved
24 in, one, the allegations or, two, in the proof that is being
25 presented to the Board to this date.

1 And certainly, in terms of what I have been led
2 to believe the City of Cleveland intends to
3 present as its case, I don't see how it's at all relevant to
4 that. That is why I am really asking for an offer of proof,
5 because I do think it's -- it may well fall within the
6 exception to some of the other rulings that the Board has
7 made on offers of proof.

8 I haven't yet heard from the Department what it is
9 that it feels is relevant about this particular line of
10 questions and answers.

11 CHAIRMAN RIGLER: As I reread the testimony,
12 Mr. Charno, I don't see any reference to any possible
13 advantage the CAPCO group can obtain through direct
14 purchase of the nuclear fuel that would be denied other pur-
15 chasers.

16 MR. CHARNO: I think if we go --

17 CHAIRMAN RIGLER: The closest you com is on page
18 20 in the question you pose on line 16. And the answer is that
19 apparently a CAPCO committee decided that there might be
20 an economic advantage in purchasing fuel in a particular
21 manner. That may not go quite far enough, so I think maybe
22 we will require require an offer of proof on this.

23 MR. CHARNO: We would note with respect to page
24 20, that we are talking in terms of five units as opposed
25 to one. I will grant that any utility that is large enough

1 to have five nuclear units in operation at one time is
2 going to benefit substantially less from coordinated
3 development than a utility that is putting one on-line at the
4 outset.

5 CHAIRMAN RIGLER: Yes, but your own
6 witness continues to say that all big utilities purchase
7 this way, and he doesn't make referenfe to whether they are
8 building one plant or five.

9 Look at the testimony on page 21.

10 MR. CHARNO: I don't have the exhibit numbers at
11 this point, but the reports to which the witness is
12 referring, I think, can be viewed, or when viewed in the
13 context of this document, will bring out the fact that
14 he is not talking about a single small system, he is talking
15 about substantial purchases of nuclear fuels, such as are
16 made by CAPCO or in comparable quantities. Again, at page
17 21 henotes that we are talking in terms of 12 and 1/2
18 million pounds of uranium.

19 CHAIRMAN RIGLER: That was for the purchase
20 contemplated by the CAPCO group?

21 MR. CHARNO: That is correct. I am trying to
22 indicated that that is not a small purchase.

23 The Department very simply would offer this
24 docuemnt to demonstrate that one of the benefits of
25 coordinated operation and development which flows from

bw5

1 CAPCO membership to the members of CAPCO lies in the pro-
2 curement of nuclear fuel for CAPCO-run units.

3 CHAIRMAN RIGLER: You have heard the offer.

4 MR. REYNOLDS: Well, I guess if that's all it's
5 introduced to show, I will object just because I don't know
6 that it is relevant to anything that we are talking about.

7 It seems to me that all he said is that anybody
8 who is going to build a nuclear plant, one of the benefits
9 they are going to enjoy is the procurement of nuclear fuel.

10 I can't dispute that if that is all he is intending
11 to show with it.

12 It seems to me that is all he said he's intending to
13 show.

14 I don't see how it is relevant or what it is going
15 to prove. It seems to me you offer evidence that
16 tries to prove something that furthers your case.

17 I would say it is totally irrelevant in that
18 respect.

19 MR. CHARNO: I will stand on my offer as stated.
20
21
22
23
24
25

arl

1 MR. REYNOLDS: I can't dispute somebody who is
2 going to build a nuclear plant is going to benefit if he
3 gets nuclear fuel from a supplier.

4 (Whereupon, the reporter read from
5 the record, as requested.)

6 (Board conference.)

7 (Whereupon, the reporter reread from
8 the record, as requested.)

9 MR. CHARNO: If I might expand that slightly,
10 since there seems to be some confusion, I am saying the
11 economies of large scale purchases are a result of CAPCO
12 coordinated development.

13 This goes to prove that that is one of the
14 benefits of CAPCO membership flowing from CAPCO
15 coordinated development.

16 We are not saying that these large scale fuel
17 purchases would be impossible to secure under any other
18 circumstances.

19 MR. REYNOLDS: I don't think it proves that.
20 Certainly this doesn't meet that offer of proof, if that's
21 the offer. We don't have any comparison as to what would be
22 the ability, what the costs would be to buy this fuel from
23 other sources rather than the supplier.

24 I don't see how you can reach that conclusion
25 to this particular testimony.

ar2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHAIRMAN RIGLER: That is an objection as to what weight, if any we should give to the evidence being presented.

MR. REYNOLDS: It went to the fact that if this document is being offered to prove what the Department says now it wants to prove with it, it does not meet the offer.

I don't even think it rises to the level of being entitled to any weight, but obviously the Board has the last word on that.

(Board conference.)

1 MR. CHARNO: At page 21, I believe the comparison
2 that was mentioned is made as to half a dollar a pound for
3 12-1/2 million pounds.

4 CHAIRMAN RIGLER: That indicates that purchasers
5 of up to 12-1/2 million pounds might expect to find some
6 cost savings. My problem with page 21 and any weight we give it
7 is that the comparisons to other utilities don't indicate
8 that the savings are not available to other nuclear plant
9 operators whether they are single utility systems or
10 whether they are building a single plant.

11 MR. CHARNO: I think it does indicate that
12 the savings are available in that magnitude of purchase,
13 and that magnitude of purchase is clearly impossible for a
14 single plant operator, for example.

15 CHAIRMAN RIGLER: Well, as to whether it is
16 admissible, I think the Board is going to overrule the
17 objection, leaving you with your argument as to the weight,
18 if any, which should be accorded it.

19 MR. REYNOLDS: All right, I will make the
20 continuing objection with regard to the Department of Justice
21 Exhibit 571, on behalf of all Applicants other than
22 Duquesne Light Company, and also with respect to all
23 Applicants I would object to the excerpts from the
24 deposition of Mr. D'Amico being introduced because he was
25 neither an officer, director nor managing agent of the

1 company at the time.

2 MR. CHARNO: We would argue that he was a managing
3 agent testifying within his field of competence.

4 CHAIRMAN RIGLER: With respect to the continuing
5 objection, would you argue that this testimony is being
6 presented as a -- in his capacity as a member of a CAPCO
7 committee?

8 MR. CHARNO: Certainly, sir, yes.

9 CHAIRMAN RIGLER: He is testifying with respect
10 to a CAPCO interim report on page 20?

11 MR. CHARNO: Yes, he is.

12 CHAIRMAN RIGLER: Both objections will be
13 overruled. We will receive 571 into evidence.

14 (The document previously
15 marked DJ 571 for identifica-
16 tion was received in evidence.)

17

18

19

20

21

22

23

24

25

1 MR. REYNOLDS: On Exhibit 572, I would object
2 to the marked testimony appearing on pages 109
3 on the grounds I don't see what relevance that question
4 and answer has to anything that is involved in this
5 proceeding.

6 MR. CHARNO: The Department on 109 would note
7 simply that the question of integration as opposed to
8 coordination as different methods of achieving the same
9 economies is the subject of expert testimony by both of
10 the Department's witnesses, and I believe also by Mr. Pace,
11 if not in this proceeding, in another one.

12 CHAIRMAN RIGLER: The objection is sustained and
13 we will strike that testimony.

14 MR. REYNOLDS: Also I would object to the
15 testimony appearing on pages 130 to 132. This deals
16 with the OVEC arrangement. I think that, one, it is remote
17 in time, certainly as to the nature of the arrangement
18 and how it was set up. I think that it's got nothing
19 to do with this proceeding or with the matters in contro-
20 versy involved in this proceeding.

21 MR. CHARNO: The OVEC contract provides that
22 its sponsors, according to this testimony, make their
23 systems available for transmitting power from the sponsors
24 to OVEC and vice versa.

25 This to us seems to fit within any definition

1 of wheeling we have heard, and we believe it is in direct
2 contravention of Ohio Edison's assertion in its
3 interrogatory answers that it doesn't wheel, never wheeled,
4 and won't wheel, will enter only buy-sell agreements.

5 We believe this doesn't even fall within that.

6 CHAIRMAN RIGLER: To whom does Ohio Edison
7 transmit power pursuant to the OVEC power agreement?

8 MR. CHARNO: Its obligation is both to and
9 from -- the figures are -- the exact amount of power that's
10 been transmitted came in through the supplemental answers
11 to interrogatoriss.

12 CHAIRMAN RIGLER: That wasn't my question. My
13 question was to whom does Ohio Edison transmit power
14 pursuant to the OVEC agreement?

15 MR. CHARNO: I would have to refer to that
16 exhibit to determine the parties between which it wheels.

17 MR. HJELMFELT: I would note on page 132 the
18 indication that they agreed to transmit OVEC power for
19 Toledo Edison.

20 CHAIRMAN RIGLER: Does any of this OVEC power
21 flow through the system of an entity which is not a member
22 of OVEC prior to its delivery to one of the participants
23 in the OVEC agreement?

24 MR. HJELMFELT: I have absolutely no knowledge
25 of that.

1 MR. REYNOLDS: No, it does not.

2 CHAIRMAN RIGLER: Is a transmission charge
3 made by Ohio Edison for transmitting OVEC power over
4 its system to the system of Toledo Edison?

5 MR. REYNOLDS: I have no reluctance at all to
6 provide an answer to you. I am not at this time able to
7 state it. I will have to go back and review the arrange-
8 ment. The power that is transmitted in the example that
9 you were talking about would be, or in that type of
10 example, would be, for instance, Toledo Edison power that
11 was transmitted to Toledo Edison.

12 CHAIRMAN RIGLER: I understand that. When you
13 ship Toledo Edison Power, you mean power
14 representing Toledo Edison's production share or generation
15 share --

16 MR. REYNOLDS: Allocated share out of the OVEC
17 plan.

18 CHAIRMAN RIGLER: Right, which in turn would be
19 surplus power over and above the needs of the primary OVEC
20 customer which had first call on that power.

end 17

21

22

23

24

25

S13

1 MR. REYNOLDS: Right. Your question was, if to
2 get Toledo Edison's power to Toledo Edison, it had to go
3 over lines of another utility that was located in the inter-
4 vening area, whether there was a --

5 CHAIRMAN RIGLER: Transmission charge.

6 MR. REYNOLDS: Transmission charge for that.
7 I will have to doublecheck that somewhere.

8 CHAIRMAN RIGLER: In fact there doesn't have to be
9 actual transmission of that power, it can be displacement
10 power taken at one end of the Ohio Edison system and merely
11 replaced by OVEC and rated power at the other end, I would
12 assume.

13 MR. REYNOLDS: It is not a third party wheeling
14 situation, is all I am saying.

15 MR. CHARNO: We would say it could very definitely
16 be a third party wheeling situation. For example, with
17 respect to power generated by Toledo Edison transmitted
18 over Ohio Edison to OVEC, power flows both ways under this
19 agreement.

20 So it isn't necessarily power belonging to Toledo
21 Edison being transmitted from one point to another point
22 for Toledo Edison.

23 CHAIRMAN RIGLER: In the Department's definition
24 wheeling is an element of cost associated with the
25 transmission service included in the definition?

bw2

1 In other words, as Department has defined
2 wheeling, is the carrying entity compensated for providing
3 its transmission services?

4 MR. CHARNO: Certainly, in some manner it is.
5 There are different ways that have been adopted for arriving
6 at the amount of compensation.

7 CHAIRMAN RIGLER: Now, OVEC was created
8 at what time? In the 1950s?

9 MR. CHARNO: Yes, it was.

10 MR. ZAHLER: '52.

11 CHAIRMAN RIGLER: But the OVEC operation is still
12 being utilized today?

13 MR. CHARNO: That is correct.

14 CHAIRMAN RIGLER: Well, I would say the
15 significance of this testimony would relate to wheeling
16 policies, and I don't think that Counsel is prepared
17 to satisfy all the Board's questions on that right now,
18 we are going to defer ruling with respect to these pages,
19 until we get some better indication of the type of wheeling
20 that is involved.

21 We would not be interested in the formation of
22 OVEC as such, although I understand some expert witnesses
23 held it out as an example of a way a coordinated system
24 can work.

25 Next. Refresh my recollection, Mr. Reynolds.

bw3

1 You inquired into the OVEC operation in some detail
2 with Mr. Kampmeier. Had he described OVEC in detail
3 in his direct, or did you initiate the OVEC line of
4 questioning on your cross?

5 MR. REYNOLDS: He referred to it. Dr. Wein
6 has gone into it in some detail.

ES18

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

#19

arl

1 CHAIRMAN RIGLER: I am aware of that. I am
2 talking about Mr. Kampmeier.

3 MR. REYNOLDS: And I cross-examined him and at the
4 time there was an objection raised and I pointed out to
5 the Board that the questions went in part to what Mr.
6 Kampmeier had testified on direct and in part to the
7 matters that Dr. Wein had testified to on his direct.

8 CHAIRMAN RIGLER: All right.

9 MR. REYNOLDS: For that reason we pursued the
10 OVEC matter to some extent with Mr. Kampmeier.

11 CHAIRMAN RIGLER: All right.

12 Were there other objections to 572?

13 MR. REYNOLDS: All right, just -- yes, sir,
14 page 135, I would object on the grounds of relevance to
15 the material that is marked on that page that relates to
16 proposed acquisition by American Electric Power of
17 Columbus and Southern Ohio Electric System.

18 MR. CHARNO: I am going to argue that the
19 issue of susceptibility to acquisition absent the presence
20 of economies of scale, specifically as it relates to CAPCO
21 here, is highly relevant to this proceeding.

22 We are arguing the City of Cleveland is similarly
23 subject to acquisition absent those economies of scale and
24 CEI is arguing that that's not the case.

25 You would think that a situation where much

1 larger companies are feeling that same bite, that it is
2 not an unacceptable inference that a very small system should
3 feel that bite.

4 MR. HJELMFELT: I would also note that
5 Applicants have raised the argument that they engaged in
6 coordination and taken advantage of nuclear power because
7 of the urging and importunings of the government.

8 Here is an indication that they had some other
9 motivation for coordinating.

10 CHAIRMAN RIGLER: The objection is overruled.

11 MR. REYNOLDS: I would also object to the testimony
12 on pages 164 and 165. I am tempted to ask for an offer of
13 proof, but I will merely note an objection as to relevance.

14 I don't know why that's red-marked or what it has
15 to do with anything.

16 MR. CHARNO: We have no objection to striking it
17 and we will withdraw it.

18 CHAIRMAN RIGLER: All right, we will strike
19 the testimony on 164 and 165.

20 MR. REYNOLDS: I would, other than that, make
21 the continuing objection on behalf of all Applicants
22 other than the Ohio Edison Company with respect to DJ 572.

23 CHAIRMAN RIGLER: All right. That objection
24 will be overruled and at the proper time we indicate our
25 intent to receive into evidence all of 572 except

1 the portions which we just struck, deferring, however,
2 our ruling with respect to the 130 to 132 pages until we
3 have more information on the OVEC situation.

4 So once that is cleared up, the remainder of the
5 exhibit will come in, and we will decide at that time
6 about those pages.

7 573.

8 MR. REYNOLDS: On 573 I would object to the
9 testimony that is marked on pages 118 to 121 which deals
10 with the Akron parties' agreement and is remote in time --

11 CHAIRMAN RIGLER: Again it goes through this
12 year. How can it be remote in time if it was still in
13 effect in 1975?

14 MR. REYNOLDS: Well, if you --

15 (Pause.)

16 CHAIRMAN RIGLER: What is the remainder of the
17 objection?

18 MR. REYNOLDS: The objection is that I am at a
19 loss to see what the whole discussion is being introduced
20 into this proceeding for.

21 CHAIRMAN RIGLER: Certainly it indicates there
22 is competition within individual company service areas
23 for large industrial customers, doesn't it?

24 Well, based on either ground as stated, the
25 objection is overruled.

ar4

1

MR. REYNOLDS: 121 to 125 is again

2

testimony relating to the OVEC situation. I would make

3

the same objection on that that I did before.

4

en 19

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

s20

bwl

1

CHAIRMAN RIGLER: All right, I can see we are

2

going to have to defer ruling on that until we have more

3

information.

4

I notice that one of the questions seems to

5

pertain to wheeling. The question is red-lined.

6

"Do you wheel power under the OVEC arrangements?"

7

And then there is no answer.

8

MR. REYNOLDS: That must have been a

9

convenient place to cut off the excerpt. "Carefully

10

selected excerpts."

11

MR. HJELMFELT: You are referring to the

12

question at the bottom of page 121?

13

CHAIRMAN RIGLER: Yes.

14

MR. HJELMFELT: The answer that was given is

15

red-lined on the top of page 122, so it is not a matter

16

of editing.

17

MR. CHARNO: It is a matter of a missing page.

18

MR. HJELMFELT: It is a matter of an

19

unresponsive witness.

20

MR. REYNOLDS: It is a matter of a poorly

21

put together document.

22

MR. CHARNO: The answer appearing in our copy

23

of 122 is: "I would say that all of the OVEC sponsors

24

have jointly agreed to transmit surplus power from

25

capacity, which they have participation in.

bw2

1 down on the OVEC project.

2 CHAIRMAN RIGLER: My problem is the pages were
3 out of order. I see that.

4 MR. REYNOLDS: I gather 123 is missing out of
5 this?

6 Well, I take it if the Board is going to defer
7 the OPEC matter, then I don't have any thing else with
8 regard to Exhibit 573, except the continuing objection on
9 behalf of all Applicants, other than Ohio Edison Company.

10 CHAIRMAN RIGLER: All right. As I look again at
11 121 to 125, I am not sure that we are not better served
12 by admitting that as helping to explain the OVEC situation.

13 It seems to me that the questions being asked
14 here are the same nature as the inquiries the Board was
15 making with respect to the operation of the OVEC
16 arrangement.

17 What is objectionable about pages 121 through
18 125?

19 MR. REYNOLDS: I really don't know what part
20 OVEC plays in this proceeding, if any. I can't see
21 that it plays any part in the proceeding.

22 If the government is trying to characterize
23 the OVEC arrangement as one which includes the concept
24 of wheeling, it seems to me that whatever label they put
25 on it, that OVEC arrangement is a unique situation that

bw3

1 has been explained to the Board in testimony and is also
2 in testimony to come. I don't know how it impacts
3 at all on the dealings and relationships of these companies
4 with entities in their service area, or with other private
5 utilities.

6 I just don't think think it is at all
7 relevant to this Board's evaluation of whatever situation
8 might exist or might not exist in the separate service
9 areas of these companies or in the CCCT area, if you
10 will.

11 CHAIRMAN RIGLER: I have some trouble with it,
12 except as it relates to the wheeling policy of the
13 Applicants, and I suppose whether transmission pursuant to
14 the OVEC arrangement constitutes wheeling could be an
15 arguable point.

16 However, I want to hear from the Department
17 on that after a five minute break.

18 I want a clear, concise answer as to exactly
19 why evidence relating to OVEC is being introduced.
20 It seems it would be of limited value, but if there is some
21 precise point that you wish us to make from the evidence
22 being presented relating to OVEC, TELL US WHAT IT IS.

23 (Recess.)
24
25

ES20

#21

arl

1 CHAIRMAN RIGLER: Are you ready?

2 MR. CHARNO: Yes, we are.

3 The Department believes that the operation under
4 the OVEC contract which continued up until last year is
5 relevant to this proceeding as indication of the policies of
6 certain of the Applicants, Ohio Power, Pennsylvania Power,
7 and Toledo Edison -- pardon me, Ohio Edison, Pennsylvania
8 Power and Toledo Edison, with respect to the wheeling of
9 power.

10 We would note that in Exhibit DJ 507 Ohio Edison
11 answered that it had received power and delivered power
12 from its system in response to interrogatories, supplemental
13 interrogatories 1 and 3, gives the volumes of that.

14 I think the descriptions that appear in the
15 various depositions are supplementary and show the working
16 of that.

17 In addition we would note that in the amended
18 interrogatory answer which is DJ 137 for Toledo Edison,
19 they indicated they wheeled pursuant to the OVEC contract.

20 The contract itself is not in evidence. It is
21 some, I think, 800 pages in length, and again it doesn't
22 show the workings of the agreement today, as I believe this
23 testimony does.

24 CHAIRMAN RIGLER: All right. But what is your
25 contention, that transmitting power pursuant to OVEC does

1 constitute wheeling?

2 MR. CHARNO: Yes, it is.

3 CHAIRMAN RIGLER: And it is a practice in
4 which the companies will engage when it suits their
5 convenience, not otherwise?

6 MR. CHARNO: That they will engage certainly in
7 a noncompetitive context.

8 CHAIRMAN RIGLER: And that's the significance?

9 MR. CHARNO: It is.

10 MR. REYNOLDS: Mr. Chairman, I would just point
11 out in connection with the colloquy that it is my
12 understanding and I believe this is right, that there is no
13 wheeling charge associated with the transmittal of power
14 that comes from the OVEC Plant and goes to any company members
15 or vice versa.

16 CHAIRMAN RIGLER: So you have an argument as to
17 whether it constitutes wheeling?

18 MR. REYNOLDS: Well, I am simply saying that
19 there is no charge associated with the transmission of that
20 power as such.

21 CHAIRMAN RIGLER: Right. That was one of the
22 questions we had asked the parties and we appreciate the
23 answer.

24 Now, continuing, now that you have heard from the
25 Department of Justice, I take it the Applicants take the

ar3

1 position that power transmittals pursuant to the OVEC
2 agreement do not constitute wheeling?

3 MR. REYNOLDS: Depends on your definition of
4 wheeling.

5 CHAIRMAN RIGLER: All right.

6 MR. REYNOLDS: It could or couldn't. It
7 depends really, I mean we have heard in this proceeding
8 already some six or seven different definitions of wheeling
9 and I think there are another dozen or two dozen that are
10 available, depending on which one one picks, I guess that
11 that label could be attached to this kind of transaction or
12 not.

13 I wasn't trying to respond to your question as
14 to whether or not a charge for transmission is associated
15 with the OVEC arrangement. The answer to that, I feel
16 confident, but I will double-check it, with respect to what I
17 was able to verify during the break, there is no separate
18 charge associated with the transmission of power in the
19 OVEC arrangement.

20 CHAIRMAN RIGLER: All right. Having heard
21 the Department's explanation of why it contends the
22 firm is relevant, we are inclined to permit it into the
23 record to try to support contentions outlined by the
24 Department.

25 As a result, we will overrule the objection to the

ar4

1 introduction of the testimony on pages 121 to 125 of
2 Exhibit 573.

3 MR. REYNOLDS: Is the board now inclined to go back
4 to the earlier deposition where it deferred its ruling?

5 CHAIRMAN RIGLER: We will permit it, by it I refer
6 to pages 130 to 132 in Exhibit 572, but only to the extent
7 that it can be used in support of the Department's contention
8 with respect to the purpose for which it is introducing
9 evidence of the OVEC transmission.

10 MR. REYNOLDS: Which goes to the wheeling question?

11 CHAIRMAN RIGLER: Yes.

12 Having made that ruling, we will receive 572
13 into evidence at this time.

14 (The document previously
15 marked DJ 572 for identifica-
16 tion was received in evidence.)

17 MR. REYNOLDS: I am not sure whether I did or did
18 not note the continuing objection on 575 with respect to
19 Applicants other than Ohio Edison.

20 CHAIRMAN RIGLER: Do you mean 573?

21 MR. REYNOLDS: 573. That's right, 573.

22 (Board conference.)

23 CHAIRMAN RIGLER: All right. The continuing
24 objection is overruled, and we will receive 573 into
25 evidence at this time.

1 (The document previously
2 marked DJ 573 for identifica-
3 tion, was received in evidence.

4 MR. REYNOLDS: On 574, I would make the continuing
5 objection on behalf of all Applicants other than the Ohio
6 Edison Company.

7 CHAIRMAN RIGLER: The continuing objection
8 will be overruled and we will receive 574 at this time.

9 (The document previously
10 marked DJ 574 for identifica-
11 tion was received in evidence.

12 MR. REYNOLDS: On 575, I will make the continuing
13 objection on behalf of all Applicants other than the
14 Ohio Edison Company so far as the excerpts included material
15 on page 46 and 47, and 53 to 59, 62 to -- well, 62.
16 And that's it.

17 CHAIRMAN RIGLER: The continuing objection is
18 overruled. We will receive 575 at this time.

19 (The document previously
20 marked DJ 575 for identifica-
21 tion, was received in evidence)

22 MR. REYNOLDS: On 576, I will object only to
23 page 207. It seems to me that this is highly objectionable.
24 I am not sure what it is that Mr. Keck can bring to bear
25 on that situation regarding an interconnection between CEI
and Ohio Power and I don't see any relevancy to his personal

1 observations, whatever they might be, to that situation.

2 MR. CHARNO: Mr. Keck's characterization of
3 having interconnections with more than one party is business
4 opportunity rather than an operating opportunity is relevant.

5 CHAIRMAN RIGLER: I tend to agree that he is
6 speculating there. He is an official of Toledo Edison
7 and he is being asked to make a judgment with respect to
8 why CEI would contract with Ohio Edison.

9 We will sustain that.

10 MR. REYNOLDS: Other than that, I just have
11 the continuing objection on behalf of all Applicants
12 other than Toledo Edison.

13 CHAIRMAN RIGLER: The continuing objection is
14 overruled and 576 will be admitted at this time.

15 (The document previously
16 marked DJ 576 for identifica-
17 tion was received in evidence.)

18 MR. HJELMFELT: Did you rule on the objection
19 on 207?

20 CHAIRMAN RIGLER: I did. I sustained it.

21 MR. HJELMFELT: I was going to argue that it
22 doesn't appear to me that the import of it is that he is
23 commenting on an interconnection; I mean that could be a
24 hypothetical for the import of the answer which is that
25 being connected with more than one system gives you more

1 business opportunities than just being interconnected
2 with one party.

3 CHAIRMAN RIGLER: We took that into considera-
4 tion. We will adhere to our ruling.

5 MR. REYNOLDS: On 577, I would simply make
6 the continuing objection on behalf of all
7 Applicants other than the Toledo Edison Company.

8 CHAIRMAN RIGLER: The continuing objection is
9 overruled and 577 will be admitted at this time.

10 (The document previously
11 marked DJ 577 for identifica-
12 tion, was received in evidence.)

13 MR. REYNOLDS: On 578 I would simply make the
14 continuing objection on behalf of all Applicants other
15 than the Toledo Edison Company.

16 Wait just a minute.

17 All right, I wanted to check one portion of the
18 marked excerpts to determine whether the continuing
19 objection was applicable to that portion. I think it is.

20 So we will make the continuing objection on behalf
21 of all Applicants to the entire excerpted portion of
22 Mr. Sullivan's deposition other than Toledo Edison.

23 CHAIRMAN RIGLER: The continuing objection
24 is overruled, and we will receive 578 at this
25 time.

1 (The document previously
2 marked DJ 578 for identifica-
3 tion, was received in evidence.)

4 MR. REYNOLDS: As to 579, the continuing
5 objection on behalf of all Applicants other than Toledo
6 Edison.

7 CHAIRMAN RIGLER: The continuing objection is
8 overruled, and we will receive 579 in evidence.

9 (The document previously
10 marked DJ 579 for identifica-
11 tion, was received in evidence.)

12 MR. REYNOLDS: As to 580, I will make the
13 continuing objection on behalf of all Applicants other than
14 Toledo Edison Company, and as to all Applicants including
15 Toledo Edison Company I will object to the introduction
16 into evidence of any excerpts of the deposition of Mr. Bosch
17 on the ground that he was neither an officer, director or
18 managing agent at the time he was deposed.

19 CHAIRMAN RIGLER: Both objections will be
20 overruled, and we will receive 580 at this time.

21 (The document previously
22 marked DJ 580 for identifica-
23 tion, was received in evidence.)

24 MR. REYNOLDS: 581, I will make the continuing
25 objection on behalf of all Applicants other than the Toledo

1 Edison Company.

2 CHAIRMAN RIGLER: The objection is overruled.

3 We will receive 581.

4 (The document previously
5 marked DJ 581 for identifica-
6 tion, was received in evidence.)

end 21

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

S22

bw1

1 MR. REYNOLDS: I will make the continuing
2 objection on behalf of all Applicants, other than Toledo
3 Edison, in connection with the Department's Exhibit 582
4 and, in addition, I will object on behalf of all Applicants,
5 including Toledo Edison Company, to the introduction into
6 evidence of any excerpts of the deposition of Mr. Cloer,
7 on the ground that at the time he was deposed, he was
8 neither an officer, manager, director or agent.

9 CHAIRMAN RIGLER: Objection is overuled, and
10 we will receive 582 at this time.

11 (The document previously
12 marked Exhibit DJ-532 for
13 identification, was received
14 in evidence.)

15 MR. REYNOLDS: 583. I will object to
16 lines 11 through 14 on page 12, on the grounds of remoteness.

17 MR. CHARNO: We have no comment to make
18 on the portion, question and answer, Applicants wish to
19 strike on page 12. We felt for completeness, it should
20 remain in.

21 CHAIRMAN RIGLER: The objection will be
22 sustained.

23 MR. REYNOLDS: All right. Now, similar objection
24 would go to lines 14 through 25 on page 25, and then lines
25 1 through 3, page 25 and, similarly, 13 through 13 on page 25.

bw2

1 MR. CHARNO: I think the excerpt on page 24
2 that Applicants wish to strike goes on to explain the
3 answer on line 14. I believe, as a matter of fact, he
4 is striking the answer on line 14 to the question that
5 appears on 12 and 13. Maybe that wasn't his intention.

6 MR. REYNOLDS: Line 15 through 25.

7 MR. CHARNO: I am sorry. I heard 14.

8 At any rate, I believe that that answer goes on to
9 expand the answer given at 14. Other than that we have
10 no comment on any of the portions on 24 or 25.

11 CHAIRMAN RIGLER: All right. We will sustain the
12 objection as to lines 15 through 15 on page 24; lines
13 1 through 3 on page 25 and lines 13 through 13 on page 25.

14 MR. REYNOLDS: Other than that, I will make the
15 continuing objection on behalf of all Applicants, other
16 than the Toledo Edison Company with respect to Exhibit 583.

17 CHAIRMAN RIGLER: The continuing objection will
18 be overruled and we will receive 583 at this time,
19 subject to the portions which were struck, as a result of
20 the objection.

21 (The document previously marked
22 Exhibit DJ-583 for identifi-
23 cation, was received in evidence.)

24 CHAIRMAN RIGLER: Off the record.

25 (Discussion off the record.)

1 MR. CHARNO: The Department would like
2 enter certain stipulations into the record at this time
3 which have been reached between us and Counsel for Toledo
4 Edison.

bw3

5 DJ-544 was prepared in 1971 and its author
6 was Mr. Grant, G-r-a-n-t. Now for the Board's convenience,
7 we would note, and this is not stipulated, that DJ-134
8 identifies Mr. Grant as a district manager for Toledo
9 Edison at that time.

10 The author of --

11 CHAIRMAN RIGLER: That was a document written in
12 1973?

S22

13
14
15
16
17
18
19
20
21
22
23
24
25

arl

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CHARNO: 1971, sir.

CHAIRMAN RIGLER: 1971.

MR. CHARNO: The author of DJ 547, 549, and 550 is John Cloer, C-l-o-e-r.

The author of DJ 551 was either Mr. Grant or Mr. George Oden, O-d-e-n, his district engineer at that time.

The author of DJ 553 is Mr. Schwalbert, S-c-h-w-a-l-b-e-r-t, and this document was prepared some time in 1966.

DJ 557 was prepared in 1965 or 1966 and served as the basis for a presentation made to the Bryan City Council.

The Department would offer for identification as DJ 586 a series of listings of the management of Ohio Power Company from 1962 through 1965, which have been excerpted from Moody's Public Utility Manual.

(The document referred to was marked DJ 586 for identification.)

MR. CHARNO: At this time the Department would like to either move into evidence or renew its motions on Exhibits 200, 480, 512, 544 through 557 and 586.

When we last met, the Board had raised a certain question with respect to -- or raised certain questions

1 we felt could best be answered by looking at certain
2 exhibits in relationship to each other, and we would like
3 to raise certain points concerning some of these exhibits
4 at this time.

5 All of my comments will be directed primarily
6 to the formulation of the Buckeye agreement and the necessity
7 for going before September 1, 1965 in order to fully under-
8 stand the intent behind the agreement and the manner in which
9 it was subsequently negotiated and effectuated.

10 We would note first that DJ 200 indicates that
11 Ohio Power itself felt it would have to face rugged
12 competition from an independent generation and transmission
13 system owned by cooperatives for both industrial customers
14 at retail, and municipal systems on the wholesale level,
15 and they feared the probability that the co-ops would
16 attempt to sell at wholesale to municipal systems and
17 they attempted to forestall the building of an independent
18 generation and transmission system and noted that in order
19 to forestall that system, that would be competitive, it
20 would require the wheeling of power to the cooperatives
21 by Ohio Power and the other investor-owned utilities of
22 Ohio.

23 That appears at 400000022 of DJ 200.

24 400000004 indicates Ohio Power's feeling again
25 that the cooperatives were not bluffing, they intended to

1 establish such a generation system totally apart from
2 any systems owned by investor-owned utilities and that
3 the only alternative available to the investor-owned
4 utilities was to enter a wheeling agreement.

5 CHAIRMAN RIGLER: Just a second. 200 was one of
6 the out-of-order exhibits?

7 MR. CHARNO: I am sorry?

8 CHAIRMAN RIGLER: I am having trouble locating it.

9 MR. CHARNO: It should have been back at --

10 CHAIRMAN RIGLER: I have 199 and then I have 201.
11 They were stapled together.

12 All right.

13 MR. CHARNO: It was the Baiter affidavit that was
14 first introduced and then we deferred.

15 CHAIRMAN RIGLER: Right. Okay.

16 MR. CHARNO: The document 40000005 shows a
17 recognized need for participation by Toledo Edison and Ohio
18 Edison in 1962.

19 40000007 again shows in 1962/^{fear}that an independent
20 cooperative go and the network would take municipal loads
21 served at wholesale by investor-owned utilities away
22 from those investor-owned utilities, notwithstanding the
23 state antipirating statute.

24 And this was a problem that should be considered
25 at the very initial stages of negotiating a wheeling

1 arrangement with what later became Buckeye.

2 It further shows the desire on the part of Ohio Power
3 to prevent interconnection and coordinated operation
4 between co-ops and entities outside Ohio which the
5 Department argues later exempted in the restrictions contained
6 in the Buckeye agreement on such sales of power.

7 Now when you take those initial feelings by Ohio
8 Power and you combine them with Mr. Mansfield's testimony
9 before the SEC in DJ 480 where he indicates first that
10 Ohio Edison was in at a very early time, that Ohio Edison
11 was contacted by Ohio Power prior to the time the
12 meeting among all investor-owned utilities took place,
13 page 47, and that Mr. Sporns' fears, which is what we
14 have been talking about in the context of DJ 200, were
15 communicated to Ohio Edison which appears at page 49, and
16 that this took place in or before 1964, since that's the
17 point at which Mr. Mansfield did become president and he
18 refers that this was prior to his -- was it president or
19 vice president?

20 Prior to the time he became president.

21 The Mansfield deposition, DJ 572, gives the date
22 at which he became president.

23
24
25
end 23

S24

bwl

1 It reiterates in somewhat more detail what
2 Mr. Sporn's problems were and then shows that there was an
3 inclination by Ohio Edison to go along at page 118.

4 We would further note that DJ-577, pages 40
5 through 42, shows that -- Mr. Schwalbert's deposition shows
6 that the negotiations on the Buckeye contract involving
7 all of the Ohio utilities except CEI began in approximately
8 1962, so that these motivations, the intent behind it,
9 one has to go back before '65, because by '65 they were
10 taken for granted and in large part already embodied in the
11 contractual provisions which are today restraining competition.

12 MR. REYNOLDS: Is that it, Steve?

13 MR. CHARNO: Yes.

14 With respect to Buckeye.

15 MR. REYNOLDS: Mr. Chairman, I guess I don't
16 have any particular quarrel with Mr. Charno's
17 characterization of Ohio Power's attitude regarding the
18 Buckeye situation, but I don't represent Ohio Power, I
19 don't think Ohio Power is represented in this proceeding.

20 Ohio Power is not only not involved in this
21 proceeding, but there has been a very studious effort on the
22 part of the parties to keep Ohio Power out of the
23 relevant market that is to be considered by this Board
24 in connection with the antitrust allegations in this
25 proceeding. Ohio Power entered into one arrangement with

bw2

1 certain utilities which related to the cooperatives and
2 certain of the cooperatives in its area. That arrangement
3 was significantly different in certain respects from the
4 arrangement that Ohio Edison, for example, entered into that
5 concerned co-ops in its area and the whole matter of access
6 to Buckeye Power.

7 Mr. Mansfield's testimony makes a very direct point
8 of alluding to Mr. Sporns attitudes and his arguments as
9 to the whole concept of co-ops and co-ops building
10 transmission, and then goes on to state on page 119, lines 4
11 through 7: I guess I would have to say that that
12 argument was not persuasive for us to join in with the other
13 Ohio companies in the arrangement that they made with Ohio
14 Power and Buckeye.

15 We are looking at a number of documents that
16 pertain to a period which clearly precedes September 1, 1965,
17 pertain to a company that is not involved in this litigation,
18 and raises a curious suggestion that somehow it is anti-
19 competitive if you do enter into an arrangement with
20 companies whereby you are going to provide them access to
21 power, and in the face of allegations by the Department of
22 Justice that a refusal to enter into such arrangements is
23 somehow anticompetitive.

24 I guess the Justice Department would like it
25 both ways.

al

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

If they want to argue their case that way, I would urge that they at least be confined to the companies that are involved in this case and to the time period the Board has indicated it is interested in, and we not get off on these diversionary tactics as to what Ohio Power's attitude may have been with respect to the Buckeye arrangement, at any time, let alone prior to 1965.

I think that there is no basis to link whatever Ohio Power's attitude is to Ohio Edison or any of the other companies, certainly not on the strength of anything Mr. Charno has pointed to thus far.

CHAIRMAN RIGLER: Is your objection to the introduction of 586, or to the receipt into evidence of 586?

MR. REYNOLDS: I guess that it depends on what the use or need may be for the information. At the moment I would say that it is not relevant to anything to know who the officers of Ohio Power may or may not have been at any time period.

CHAIRMAN RIGLER: So is there an objection or not?

MR. REYNOLDS: Yes.

CHAIRMAN RIGLER: All right.

Is there objection to 544 through 557?

MR. REYNOLDS: Except for the continuing objection on behalf of Applicants other than the Toledo Edison Company, I don't have any objection to Documents

1 544 through 557.

2 CHAIRMAN RIGLER: All right. The continuing
3 objection is overruled. We will receive into evidence
4 at this time Department Exhibits 544 through 557.

5 (The documents previously
6 marked DJ 544 through 557
7 for identification, were
8 received in evidence.)

9 MR. REYNOLDS: Now I have, if I might -- I am
10 sorry.

11 CHAIRMAN RIGLER: Go ahead.

12 MR. REYNOLDS: I was just going to suggest with
13 respect to Exhibit 200 and Exhibit 512 there are other docu-
14 ments besides the ones relevant to this Buckeye discussion
15 which also go back prior in time.

16 As to 512, I would point out specifically that I think
17 there is only one document in that whole package that even
18 relates to the Buckeye situation, although there may be two.

19 Yet we are given the argument by Mr. Charno
20 that we just heard as a basis for introducing Exhibit 512,
21 notwithstanding the remoteness of the material.

22 MR. CHARNO: I am sorry, I think I wasn't properly
23 understood. All the references that I made to pre-1965
24 documents with respect to Buckeye today were with
25 respect to DJ 200. I had previously made comments on the

1 Buckeye documents in 512 and you had asked me questions
2 which were the basis for what I said today, what I was
3 responding to today.

4 Indeed, there are documents in 200 and 512
5 that go to the territorial allocation agreements.

6 CHAIRMAN RIGLER: All right, we are going to
7 want to take a look at the transcript of the argument
8 with respect to those documents, so we are going to defer
9 ruling on them at this time.

10 We will stand adjourned until Wednesday Morning
11 at 9:30.

12 MR. REYNOLDS: Could I get, before we go off the
13 record, exactly where we are on documents now?

14 CHAIRMAN RIGLER: I believe that everything
15 has been admitted except for perhaps four or five -- admitted
16 or ruled upon, except for perhaps four or five outstanding
17 documents of the Department. We are aware of those.

18 MR. REYNOLDS: 200, 480, and 512, I believe
19 the Board has deferred ruling on.

20 Are there others in that category, where the
21 Board has deferred ruling?

22 MR. CHARNO: There are 10 documents which either
23 have been deferred or have not yet been offered while we
24 are waiting for better copies or attachments or supplements.

25 Eight of 10 are from Toledo Edison and we are

1 sure those are on their way, once, I believe Ohio Edison --
2 but those are going to be taken care of.

3 CHAIRMAN RIGLER: Will you contact all of
4 the parties tomorrow and give us a progress report on whether
5 Dr. Wein is going to be with us on Wednesday?

6 MR. CHARNO: We will.

7 Which would be a more convenient time, late
8 morning or early afternoon for people's schedules, so that
9 they will have some idea?

10 CHAIRMAN RIGLER: It doesn't matter. Just leave
11 word with my secretary.

12 MR. CHARNO: Certainly.

13 CHAIRMAN RIGLER: We will see you Wednesday.

14 (Whereupon, at 4:43 p.m., the hearing was
15 adjourned, to reconvene at 9:30 a.m., Wednesday,
16 March 17, 1976.)

17

18

19

20

21

22

23

24

25

- - - - -