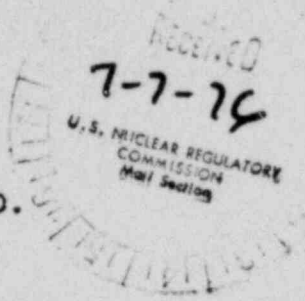
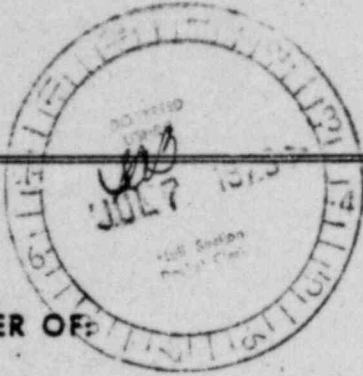


Regulatory
MR-274

NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING CO.

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

and

CLEVELAND ELECTRIC ILLUMINATING
CO., et al.

(Perry Nuclear Power Plants, Units
1 and 2)

Place - Silver Spring, Maryland

Date - Friday, 2 July 1976

Pages 12,496 - 12,755

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:	:	:
TOLEDO EDISON COMPANY and	:	Docket Nos.
CLEVELAND ELECTRIC ILLUMINATING CO.	:	
(Davis-Besse Nuclear Power	:	50-316A
Stations, Units 1, 2 and 3)	:	50-550A
	:	50-501A
and	:	
CLEVELAND ELECTRIC ILLUMINATING	:	50-440A
CO., <u>et al.</u>	:	50-441A
(Perry Nuclear Power Plants, Units	:	
1 and 2)	:	

First Floor Hearing Room,
7915 Eastern Avenue,
Silver Spring, Maryland.
Friday, July 2, 1976

The hearing in the above-entitled matter was reconvened, pursuant to adjournment, at 10:00 a.m.

BEFORE:

- DOUGLAS RIGIER, Esq., Chairman.
- JOHN FRYSIK, Member.
- IVAN SMITH, Member.

APPEARANCES:

(As heretofore noted.)

C O N T E N T S

<u>Witness:</u>	<u>Direct</u>	<u>Cross</u>	<u>Re-direct</u>	<u>Re-cross</u>
William R. Mayben	12,516	12,538	12,577	12,579
<u>Exhibits:</u>				
DJ 634; 635; 636; 637				12,516
DJ-633				
Excerpts, '67 Annual Rpt. Dugessne Light				12,516 12,516
Applicants' 186				12,516
Applicants' 186A				
FPC cy, AMP-O/Orville agreement				12,539 12,539
Applicants' 261 (TE)				12,539
E-165				
Addition to CBI prospectus, 5/76				12,532 12,532
Applicants' 266				
Kayuh memo, 7/10/75				12,532 12,532
App 267				
Kayuh memo, 6/11/75				12,593 12,600
Applicants' 263				
Bixler ltr to McGovern, 6/28/76				12,600 12,611
Applicants' 269				
Fail ltr to Kekela, 2/4/75				12,601 12,611
Applicants' 270				
Initial decision Adm Law Judge, 11/24/65 re: NEPOOL				12,605 12,605
Applicants' 271				
Hauser ltr to Poth, 6/30/76, w/Svc Sched B				12,610 12,610
Applicants' 270A				
FPC order re NEPOOL 1/22/74				12,611 12,611
Applicants' 272				
Memo to Files by Maurice Messier				12,611 12,616
Applicants' 273				
Vogler memo to files 10/5/73				12,616 12,617

wb

C O N T E N T S (Cont'd)

2	<u>Exhibits:</u> (Cont'd)	<u>For Ed</u> <u>Ex. 101</u>
3	Applicants' 274 Morrow Elec Co-op ltr to DJ 10/11/72	12,617 12,621
4	Applicants' 275 Hancock-Wood Elec Co-op ltr to DJ 10/9/72	12,618 12,621
5	Applicants' 276 Pioneer Rural Elec Co-op to DJ, 9/12/72	12,618 12,621
6	NRI Staff 222 Duncan ltr to Charno, 9/6/74	12,631 12,631
7	Applicants' 277 21-pg document	12,646 12,646
8	NRI Staff 223 Are Federal ltr to Lessy, 6/25/76	12,664 12,666
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P R O C E E D I N G S

CHAIRMAN RIGLER: On the record.

As we begin this morning we have pending Applicants' objections to DJ-634 through 637. A number of objections were made, some of which we would not sustain. However, we are going to exclude these documents from admission. After reviewing the offer of proof which appears on page 12,491, unless we are willing to analyze the documents, they don't contribute to the testimony already in the record with respect to the fact that NEPOOL is operating as a combination of small municipal units. So if the offer focuses on the feasibility of participation these documents would not contribute unless we are willing to actually go through them and make independent findings with respect to the efficacy of the NEPOOL agreement. That seems to be an idle exercise.

There is testimony, you got the Applicants to concede, the witness to concede that he was aware that NEPOOL was made up of small municipalities and that it has been in operation for several years. You can make your argument based on that, can't you?

MR. CHARNO: No, I believe these documents demonstrate a great deal more than that. They specifically rebut certain of Mr. Slemmer's observations concerning NEPOOL, his recollections.

CHAIRMAN RIGLER: /Such as what that was not contain

mpb2

1 in your offer?

2 MR. CHARNO: Mr. Slemmer indicated municipal
3 systems were not really members of NEPOOL and that their
4 participation in NEPOOL required the ownership of production
5 facilities.

6 Those are two erroneous assumptions that he was
7 relying on initially.

8 Further, these go into considerably more detail
9 than the Applicants' experts were able to upon the basis of
10 their recollection. We've had a tremendous amount of testi-
11 mony from Applicants witnesses that various municipal systems
12 are too small for pool or nuclear participation and these
13 show comparably sized systems.

14 I believe our review of the record has indicated
15 that while Applicants' witnesses would not be surprised by
16 -- pardon me, while Applicants' experts would not be
17 surprised, we have been unable to establish the absolute
18 existence of systems with a peak, say, of 1.5 megawatts as
19 a member of a power pool.

20 CHAIRMAN RIGLER: I thought that one of their
21 witnesses, either Mr. Pace or Mr. Gerber conceded that systems
22 that small did participate as members of NEPOOL.

23 MR. CHARNO: I don't believe that concession is
24 actually contained in the record. Mr. Gerber's answer was
25 very carefully phrased.

mpb3 1 Further, that there are a number of statements
2 that municipal governments would retard pool decision making
3 and I think that this shows a --

4 CHAIRMAN RIGLER: Once again it seems to me the
5 workings of NEPOOL have already been explained to a degree
6 which would allow us to think about the accuracy of that
7 statement.

8 I am much more interested, quite frankly, we may
9 rethink it only on the basis of what you said about Mr.
10 Slemmer. Tell me again about what his direct representations
11 were.

12 MR. CHARNO: Could I add two more points that
13 relate to the second half of the offer?

14 CHAIRMAN RIGLER: Sure.

15 MR. CHARNO: We've got testimony in the record
16 that equal percentage reserve sharing, while once common
17 industry practice, is on the way out. And I think we here
18 have a 40 member pool that was begun in '71 with annual
19 peak over 3200 megawatts, or an increase in peak of 3200
20 megawatts -- pardon me, 1000 megawatts, which is using equal
21 percentage reserve sharing.

22 Finally, we have a number of statements about
23 how industry practice is definitely not conducive to third
24 party wheeling and here is a situation where we've got third
25 party wheeling.

mpb4

1 We would show these at the very least as exceptions
2 to what Applicants' experts say is industry practice. And
3 this was an exception of which they were aware when they
4 wrote their testimony. Since Mr. Gerber lists Pilgrim 2 as
5 part of his qualifications and Mr. Slemmer, at least in part
6 testified that he relied upon or was aware of and took into
7 consideration in preparing his direct testimony the NEPOOL
8 arrangement.

9 CHAIRMAN RIGLER: Okay.

10 Well, I don't find many of those arguments as
11 persuasive as the direct contradiction of Mr. Slemmer, if it
12 actually occurred. So tell me again what it is Mr. Slemmer
13 said that is contradicted by these documents.

14 MR. CHARNO: Okay.

15 This testimony would appear at 8971 through 73 of
16 the record and he maintained at that time that the small
17 municipal systems were not really members of the Pool and
18 that in order to be a member of the Pool you had to own
19 generation facilities and the Department's Exhibits, I think
20 clearly rebut both of those statements.

21 MR. REYNOLDS: Mr. Chairman, it's my recollection
22 and I will have to get the page reference, if I can have a
23 minute, that Mr. Slemmer specifically corrected himself on
24 the record at a later point with respect to the matter of
25 whether there had to be ownership of generation as a condition

mpc5 1 to membership in the pool. His correction, as I recall, it
2 was that the ownership was related to transmission. And if
3 we were to wade through, and I use that terms advisedly, the
4 documentation here we would see that that in fact is the
5 requirement under NEPOOL which goes to an ownership of
6 transmission, not of generation, and is consistent entirely
7 with Mr. Slemmer's testimony as corrected.

8 Secondly, Mr. Slemmer's testimony, as I recall it,
9 with regard to small systems participating in the pool was
10 that it was his recollection that some small systems partici-
11 pated in NEPOOL directly, that a large number of systems
12 participated in NEPOOL indirectly through an association of
13 municipalities. Again, if we were to go through this
14 documentation that we've been presented with we would find
15 that that is entirely consistent with the agreement and the
16 arrangement and that Mr. Slemmer's characterization in that
17 respect is accurate.

18 The difficulty that I really have with this
19 material -- and I'm not going to reargue what I've said
20 before but focusing just on what we were told today about
21 equal percentage reserves and third party wheeling, there is
22 a very complicated series of provisions including formulas
23 as to what the reserve calculation is under NEPOOL which, when
24 it is balanced over against other provisions in the arrange-
25 ment, such as requiring that if you don't take 30 percent

mpb6 1 out of the unit there has to be certain payments made and
2 that relates to your reserve qualifications -- your reserve
3 responsibility. It is clear that equal percentage reserve,
4 as has been defined in this record, is not what NEPOOL
5 follows in terms of calculating reserves.

6 Now I would think if we were going to get into
7 this whole matter we would need to have an expert witness
8 come in here and explain to this Board exactly how the reserve
9 provisions do operate and whether that constitutes equal
10 percentage reserves as that term has been used here or
11 constitutes something else. My point is I don't think that
12 putting these into the record is going to assist the Board
13 in making any kind of finding with regard to industry practice
14 or NEPOOL practice on the matter of equal percentage reserves.

15 Similarly, directing myself --

16 CHAIRMAN RIGLER: You could agree, however, that
17 NEPOOL does not use the P/N formula?

18 MR. REYNOLDS: That's right, and I think that the
19 testimony in this record is more than clear that the P/N
20 formula is not a formula that is used throughout the industry.

21 The other point, just directing myself, confining
22 myself to Mr. Charno's remarks related to this morning --
23 this morning relating to third party wheeling, if we were to
24 go through the NEPOOL agreement, the NEPOOL arrangement we
25 would find that it does not provide for third party wheeling.

mpb7

What the NEPOOL arrangement, as I understand it and I will have to say admittedly it's on a reading of the document without the assistance of explanation on implementation, but, as I understand it there is a restriction in the NEPOOL arrangement with regard to wheeling which does not permit wheeling of outside power or power of third parties, that the transmission wheeling arrangement relates to what are pool facilities or non-pool facilities used for the same purposes that the pool facilities, and I'm talking about Pool transmission facilities -- can be used and that the contract is very specific in its limitations as to what use can be made of Pool transmission facilities or non-pool transmission facilities. And those limitations would not permit third party wheeling but indeed are very restrictive in terms of any kind of wheeling, if you will, and relate to the transmission of nuclear power or power that is for a pool related purpose.

Now, that's a general summary, but what I'm trying to demonstrate to the Board is that there is a very complicated provision. As I understand it it does not come close to third party wheeling and is not indicative of the fact, as Mr. Charno has indicated, that we have a pool arrangement where third party wheeling is prevalent throughout the area. In fact, I think if we were to have somebody come in and explain the NEPOOL arrangement to us, you'd find

mpb8

1 that there is, if you want to use the term "wheeling", very
2 little wheeling in the NEPOOL and that there is more
3 "wheeling" of power or opportunity for wheeling of power
4 in the CAPCO type arrangement and in the proposal of the
5 Applicants -- in Applicants' 44, the proposed license condi-
6 tions of the Applicants contemplate more wheeling than the
7 wheeling that you would be permitted to undertake under the
8 NEPOOL arrangement.

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1B ebl 1 So what I'm really saying is you can see, just
2 by looking through it yourselves, the kind of document we're
3 talking about. And we don't have any testimony here about
4 it. The Department chose not to ask witnesses on cross-
5 examination at the time they were talking about NEPOOL to
6 address themselves to the document.

7 They did not cross-examination and then they come
8 in and they put this on to reflect industry practice or
9 something contrary, as they suggest, to what might have been
10 suggested. It seems to me --

11 CHAIRMAN RIGLER: You're using it as a comparison
12 vehicle; right? Isn't that the purpose of it?

13 MR. CHARNO: Yes, it is.

14 CHAIRMAN RIGLER: Right, Mr. Reynolds?

15 MR. REYNOLDS: As to what their use of it is?

16 CHAIRMAN RIGLER: Why they want to use it. They
17 want to use it for a comparison vehicle.

18 MR. REYNOLDS: That's right. And my point is,
19 unless you know what the fact situation is, both in New
20 England generally and with respect specifically to the
21 provisions and the implementation of the provisions, how
22 can this Board make any findings on a comparison basis vis-
23 a-vis NEPOOL and CAPCO.

24 What we have in this record is a lot of testimony
25 which explains how things operate in the CAPCO area under

et2

1 various contracts. This Board has expressed time and again
2 that they wanted that kind of testimony so they could be
3 educated on how these arrangements operate.

4 We don't have any similar testimony with regard
5 to how NEPOOL operates, how those provisions do operate,
6 what the state law is in New England which might impact on
7 it. As a comparative basis I don't understand how the Board
8 is in any position to make findings on the basis of this one
9 document or these documents on NEPOOL.

10 CHAIRMAN RIGLER: Is this correct? One
11 of your expert witness' qualification background encompassed
12 considerable work in NEPOOL and there was a fair amount of
13 questioning devoted to the subject of the operation of NEPOOL.

14 MR. REYNOLDS: Who was that, sir?

15 CHAIRMAN RIGLER: Garber and Pace-- Gerber.

16 MR. REYNOLDS: No, sir. He participated in
17 environmental hearings in New England for utilities who were
18 involved in NEPOOL. He did not have-- In fact, he made it
19 very clear on the record that he did not have any kind of
20 working knowledge of the NEPOOL arrangement.

21 CHAIRMAN RIGLER: But he was doing his work for a
22 major utility which was a participant, a member of NEPOOL.

23 MR. REYNOLDS: That's right, on the environmental
24 side of a nuclear plant.

25 I guess my problem is you can do work for a utility

eb3 1 in a number of areas. You may do nothing but rate work for
2 a utility. That doesn't mean you would have any working
3 knowledge of the NEPOOL arrangement.

4 CHAIRMAN RIGLER: Okay.

5 MR. REYNOLDS: I guess more to the point, we never
6 had him confronted with the NEPOOL agreement and asked to
7 explain it on the basis of the documentation that the
8 Justice Department now wishes to put in.

9 MR. CHARNO: Mr. Chairman, --

10 MR. REYNOLDS: Let me just say, since I'm still
11 on my feet, Mr. Charno, that the reference that I made to
12 Mr. Slemmer's correction appears at page 9163 of the trans-
13 cript.

14 CHAIRMAN RIGLER: Let me see that.

15 (Document handed to the Board.)

16 MR. CHARNO: Mr. Chairman, Mr. Slemmer said
17 that he considered NEPOOL when he testified on direct at
18 page 8971.

19 We would further note that --

20 CHAIRMAN RIGLER: Wait a minute, please.

21 (Pause.)

22 Mr. Charno, you don't have 8971.

23 MR. CHARNO: I believe we do. I think the
24 implication contained in Mr. Slemmer's testimony at the
25 portion just cited by the Applicants is that you are not

eb4 1 going to get transmission participation in the Pool, the
2 benefits of it, without 25 megawatts of generation. That's
3 clearly rebutted by these agreements also.

4 I think the explanation of Mr. Reynolds' limita-
5 tion to Pool-related purposes, if one looks at Pool-related
6 purposes you see it covers a broad gamut of third-party
7 wheeling.

8 (Pause.)

9 CHAIRMAN RIGLER: Make your response very brief.

10 MR. CHARNO: It will be.

11 I think it's clear at this time that there is
12 substantial disagreement among the parties over the purport
13 of the testimony of Applicants' witnesses. The best reso-
14 lution of what NEPOOL provides is contained in the agreement
15 and the exhibits offered by the Department.

16 CHAIRMAN RIGLER: Well, it has become clear to
17 every member of the Board now that we must let it in because
18 these are background documents which were relied upon by
19 Mr. Slemmer and he makes that clear; in lines 1 through 5 of the
20 transcript at 8971, he specifically says that he was con-
21 sidering NEPOOL in his testimony.

22 Then we come over to the cite that Applicants
23 gave us on 9163 and in correcting his answer he says:

24 "Since then. . ."

25 meaning since the first day of his testimony, he has been

eb5 1 looking at the FPC decision on NEPOOL.

2 It looks to me like the background documents
3 relating to its operation and structure were very much in
4 the consideration of Mr. Slemmer and therefore, as expert
5 background materials, they can come in on that basis as
6 well.

7 Apart from that, we would still find them neces-
8 sary or useful in the construction of Mr. Slemmer's testi-
9 mony and the proper evaluation of it.

10 So for those reasons, the objections will be over-
11 ruled and we will admit Department of Justice documents 634
12 through 637.

13 (Whereupon, DJ-634 - 637,
14 having been previously
15 marked for identification,
16 were received in evidence.)

17 MR. REYNOLDS: Since I haven't had an opportunity
18 to address myself to it, I would just state to the Board
19 that Mr. Slemmer did not rely on any of these documents.
20 His testimony does not indicate he did.

21 The decision, the FPC decision he did rely on,
22 that is not one of the documents that has been tendered to
23 us.

24 CHAIRMAN RIGLER: Okay. Well, that would not
25 change my ruling at all because if he is going to testify

1 with respect to NEPOOL and he doesn't even look at the basic
2 operating agreement, that in itself I think would be a
3 significant fact.

4 MR. REYNOLDS: He only testified on cross-
5 examination. He was not testifying as to NEPOOL.

6 CHAIRMAN RIGLER: Yes, but in that cross-
7 examination he said that he specifically considered NEPOOL
8 in the drafting of his written testimony.

9 MR. REYNOLDS: Well, given the Board's ruling,
10 I would like to ask for an offer of proof by the Department
11 of Justice as to each section that has been red-lined by
12 the Department in the NEPOOL agreement.

13 CHAIRMAN RIGLER: No, no. They've made their offer
14 repeatedly. We've had an extensive discussion about it.
15 It's not necessary.

16 MR. REYNOLDS: Let me at this time then indicate
17 the additional portions that Applicants will red-line.

18 CHAIRMAN RIGLER: All right; fine.

19 MR. REYNOLDS: On page 4:

20 "The New England Power Pool agreement
21 dated as of September 1, 1971,"
22 which is DJ Exhibit 635.

23 Applicants would additionally red-line the
24 portion on page 4 that appears under subparagraph 2.3 headed
25 "Support of Legislation," and down to the bottom of the page.

eb7

1 On page 5, subparagraph 2.4 headed "Committee
2 Membership," that entire paragraph.

3 On page 9, the second paragraph in numbered sub-
4 paragraph 4.2 headed "Cooperation by Participants," that
5 second paragraph carries over to the top of page 10, and
6 we would ask that that entire second paragraph be red-lined.

7 On page 14, the paragraph lettered "c," the
8 third paragraph on that page.

9 On page 19, the remainder of the carryover para-
10 graph at the top of the page which basically continues
11 the red-lining of the Department that started on page 18,
12 the remainder of that paragraph down to 7.2.

13 On page 21, subparagraph 7.9 and subparagraph
14 7.10.

15 On page 26 and carrying over to page 27 and 28,
16 we would ask that the entire subparagraph 8.13 be red-lined.

17 On page 30, carrying over to page 31, the entire
18 subparagraph 9.3.

19 On page 34, carrying over to page 35, the entire
20 subparagraph 9.5.

21 There's a reference on page 36 at the very top,
22 the carryover sentence to Table A hereto. Table A is not
23 attached and we would ask that the Department provide that
24 table for us. We would like it attached and I believe we
25 would want to red-line portions of that. I would ask that

eb3

1 that be provided to us to supplement this exhibit.

2 On page 40 and carrying over to page 41, starting
3 at subparagraph 10.4 on page 40 we would ask the red-lining
4 to continue for the remainder of page 40, all of page 41
5 and the carryover portion at the top three lines of page 42.

6 Page 60. We would ask that subparagraph 13.4
7 be red-lined down to the red-lining that the Department of
8 Justice has put on at the bottom of page 60; in other words
9 the remainder of page 60.

10 Page 63, paragraph 13.5, which continues over
11 to page 64. We would ask that the subparagraph be red-lined
12 in its entirety.

13 Page 65, subparagraph 13.6, that paragraph down
14 to the bottom of page 65.

15 Page 70, subparagraph 15.2, that paragraph in its
16 entirety.

17 Page 71-- I'm sorry, page 72, subparagraphs
18 15.10, 15.11, and 15.12 in their entirety.

19 Page 74, paragraph 15.19.

20 Page 76, subparagraph 15.33.

21 Page 77, subparagraph 15.36.

22 Page 78, subparagraph 15.38 and 15.40 and 15.42.

23 I believe that completes our additional red-lining.

24 Now since the Board's ruling, as I understand it,
25 pertains to all of these documents that the offer was

eb9

1 directed to by the Department, I would ask that the Depart-
2 ment be -- I would request that the Department provide us
3 the remaining portions of the application that was filed
4 with the Atomic Energy Commission in the matter of Boston
5 Edison Company which is DJ Exhibit 634 so that I can make
6 a determination as to whether additional portions of that
7 application would be something that we would want to red-
8 line -- I'm sorry, the additional portions of the answers
9 to the Attorney General's twenty questions. We only have
10 portions of it here.

11 MR. CHARNO: The Department will certainly make
12 the application and the twenty-question answers for
13 Pilgrim 2 available to Applicants.

14 We will attempt to make available and will secure
15 if we don't have Table A which they requested.

16 We would add certain limited further red-lining
17 caused by their red-lining with respect to DJ-635 and that
18 is simply that the paragraph that they began red-lining on
19 page 4 which carries over to page 5, we would red-line that
20 portion of page 5, and the paragraph that they began red-
21 lining on page 65 which carries over onto 66, we would
22 finish the red-lining on 66.

23 Finally, for clarity in utilization of these
24 documents, we would note that the materials contained in
25 636 are already present in 635. It's an amendment. What

ep10 1 it does contain that is not present in 635 is the list of
2 signatories as of the last amendment.

3 635 is a completely revised copy which indicates
4 that it contains certain supplements on its face, and all of
5 those have already been incorporated in it. It is the agree-
6 ment as used by the New England Power Pool, and printed by
7 them.

8 MR. REYNOLDS: Mr. Rigler, we will be putting in
9 a number of FPC decisions relating specifically to this
10 NERPOOL arrangement. I'm not sure exactly how fast we can do
11 a turn-around on that. We'll try to do it as rapidly as
12 possible.

13 I would like to ask if we could interrupt at
14 this point the document introduction, the documentary
15 aspect of the hearing because Mr. Mayban does have a flight
16 to catch. If we can put him on I'd appreciate it, if we
17 could go forward with that right now.

18 CHAIRMAN RIGLER: Could we have one more Justice
19 document?

20 MR. CHARNO: Yes, sir.

21 MR. REYNOLDS: I think it may involve some dis-
22 cussion. If we could defer it, I don't believe we'll have
23 any problem getting it in today.

24 CHAIRMAN RIGLER: All right.

25 MR. STEVEN BERGER: Ohio Edison calls Mr. William
26 Mayban.

D mpbl
Whereupon,

WILLIAM R. MAYBEN

was called as a witness, and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. STEVEN BERGER:

Q Mr. Mayben, do you represent the WCOE?

A My firm has a consulting engineering assignment for WCOE. I don't personally represent WCOE.

Q Are you the partner in charge at R. W. Beck and Associates of the WCOE matter?

A Yes, I am.

Q When did R. W. Beck and Associates and WCOE first establish a relationship?

A It's my recollection that it was in 1972, at the time that the Steering Committee of WCOE elected to pursue intervention before the Federal Power Commission of a proposed rate increase filed by Ohio Edison which would have affected the members of WCOE.

Q Were you the principal negotiator or one of the principal negotiators for WCOE in connection with the 1972 rate case?

A I was certainly involved in the negotiations. From a limited technical point of view, I was one of the principal negotiators.

mpb2

Q And Mr. Emerson Duncan was one as well?

A Yes.

Q Mr. Mayben are you familiar with the memorandum of agreement that was agreed to between WCOE, Ohio Edison with regard to the joint study of a new bulk power supply relationship between those entities?

A Yes, I am.

Q Did that settlement agreement, more particularly the memorandum of Agreement, contemplate that whatever would be studied and ultimately concluded would inure to the mutual advantage of both WCOE and Ohio Edison?

A Yes, it did.

Q Mr. Mayben, coming to the negotiating table with Ohio Edison, what is it that WCOE had in your view that could contribute to the advantage -- contribute to an advantage to Ohio Edison?

A Well, I think certainly one of the items that could have been used advantageously to both parties might have been the ability of -- at that time the assumed ability of the municipal utilities in Ohio to issue revenue bonds the interest on which was exempt from federal income taxes.

Now to the extent that that could have resulted in fixed costs for new capacity or new transmission facilities lesser than might be incurred by Ohio Edison Company, certainly that advantage might have been advanced as part of the

1 consideration of a joint power supply arrangement.

2 Q So that the lower fixed charges is really what
3 WCOE had to offer Ohio Edison in terms of consideration in
4 arriving at a new bulk power supply arrangement mutually
5 advantageous to both?

6 A Well, I have to speak from the point of view of
7 the WCOE negotiators. We could certainly see a spectrum of
8 so-called advantages to WCOE and Ohio Edison Company. The
9 mere fact that Ohio Edison Company would be entitled to
10 receive a return on whatever risks they may have incurred in
11 this arrangement contemplates or constitutes in my judgment
12 an advantage to Ohio Edison.

13 Q Were there any other advantages to OE that you
14 foresaw or could foresee in arriving at a new bulk power supply
15 relationship between WCOE and Ohio Edison?

16 A Mr. Berger, again, it's almost like saying what
17 are net benefits in any kind of arrangement which is
18 arrived at through arms length negotiations. To the extent
19 that the burdens imposed upon Ohio Edison Company were less
20 than the benefits derived by Ohio Edison Company, that would
21 have to be classified as an advantage.

22 If, however, you are comparing it to what are the
23 advantages or what are the benefits that Ohio Edison derives
24 as it serves all of these municipal customers as all require-
25 ments wholesale customers, then relatively speaking I would

mob4 1 say that there probably are no greater advantages than that
2 that the WCOE group could bring to Ohio Edison in a new power
3 supply arrangement.

4 Q Even the lower fixed charges of WCOE?

5 A Well, of course the lower fixed charges of WCOE
6 might be contemplated by the company in speculating as to how
7 they would consider it, but it may be contemplated as
8 substitution of profits they would otherwise make if they
9 were selling at all requirements full distributed rates for
10 wholesale power supply.

11 CHAIRMAN RIGLER: Can we go back and get the second
12 to last answer?

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

15 BY MR. STEVEN BERGER:

16 Q Mr. Mayben, you mentioned in one of those previous
17 answers these were arms length negotiations, is that not
18 correct?

19 A No, I didn't say that.

20 Q I thought you said that.

21 Q I said in defining net benefits that are arrived
22 at through arms length negotiations. There's a full spectrum
23 one might contemplate.

24 Q Were these arms length negotiations?

25 A Yes.

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1 Q Would you expect in an arms length negotiation
2 where, let's use your term, the burdens and benefits are
3 involved that there would be a certain give and take in those
4 negotiations?

5 A Well, depending upon your relative bargaining
6 strength, your relative bargaining position, there may be
7 more give than take or vice versa depending upon your point
8 of view.

9 Q You would expect, though, that there would be
10 proposals and counter-proposals in discussions of burdens
11 under the proposals and counter-proposals and benefits under
12 the proposals and counter-proposals?

13 A Yes.

14 Q Let me ask you this, Mr. Mayben:

15 You know, of course, that Ohio Edison had contract-
16 ual relationships with other electric entities.

17 A Yes.

18 Q You knew of the CAPCO relationship?

19 A I knew that the CAPCO relationship existed.

20 Q Would you have expected after the signing of the
21 Settlement Agreement with the FPC for Ohio Edison to enter
22 into a new bulk power supply relationship with WOOE which
23 would have worked to their disadvantage in terms of increas-
24 ing their responsibility or impairing their ability to
25 perform their contractual relationships with the other CAPCO

mpb6

1 companies?

2 MR. LESSY: I object to the question. It requires
3 speculation on behalf of the witness who is appearing as a
4 fact witness at this time.

5 CHAIRMAN RIGLER: Overruled.

6 MR. STEVEN BERGER: Would you like the question
7 reread?

8 THE WITNESS: No, I believe I understand the
9 significance of the question, or the point of the question.

10 Certainly I didn't contemplate that the company
11 would have ignored any disadvantages that may have been
12 imposed upon them by any proposals that would have been
13 advanced by WCOE, including whether or not they would be
14 able to accomodate a particular power supply relationship
15 under the terms of their agreements with the other CAPCO
16 companies and the obligations they had for capacity and
17 capital contributions and things of that nature. Certainly
18 that would be among other disadvantages that the company
19 may wish to quantify in evaluating and selecting a joint
20 power supply arrangement.

21 BY MR. STEVEN BERGER:

22 Q I don't know if that really gets at what I was
23 looking for, Mr. Mayben, but it's pretty close.

24 Mr. Mayben, are you aware that the company had
25 suggested that in the new power supply relationship between

mpb7

1 WCOE and Ohio Edison that Ohio Edison had proposed that
2 reserves would be established according to a formula
3 similar to the P/W formula that the company had agreed to
4 in the CAPCO arrangement?

5 A Mr. Berger, my involvement with the WCOE-OE
6 negotiations in joint studies stopped prior to getting into
7 detailed discussion on the method of allocating reserve
8 burden. We did not get into that in the last meeting that
9 I attended where we were attempting to establish the criteria
10 and objectives of the study.

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A Well, you have two questions.

I helped in the preparation in this regard, then Mr. Ervason Dunson and myself were the principal architects of the study criteria, both the engineering, economic and legal criteria that was first used in our negotiating sessions to start the studies.

From time to time staff would report to me with regard to progress of studies and I would generally have questions with regard to how far were they departing from the original criteria, and why.

And then at a stage in the progress of the studies where a draft of the report was prepared it was sent to my office for perusal and comment. I did look it over and I did not go into any of the calculations. I did concern myself with words which might be of a delicate nature in negotiations of this type, and tried to understand the concepts that were being advanced at that particular time because, following my review, the matter was going to be taken then to our client for discussion as to whether or not this seemed to be fitting in with their views of the joint studies that they had been engaged in.

Q That was the principal-- First let me ask you this:

Was this a joint study with Ohio Edison or was this a study that was prepared by Esch for MOE to be used

eb2

1 A Well, you have two questions.

2 I helped in the preparation in this regard,
3 that Mr. Emerson Duncan and myself were the principal
4 architects of the study criteria, both the engineering,
5 economic and legal criteria that was first used in our
6 negotiating sessions to start the studies.

7 From time to time staff would report to me with
8 regard to progress of studies and I would generally ask
9 questions with regard to how far were they deviating from
10 the original criteria, and why.

11 And then at a stage in the progress of the studies
12 where a draft of the report was prepared it was sent to my
13 office for perusal and comment. I did look it over and I
14 did not go into any of the calculations. I did concern
15 myself with words which might be of a delicate nature in
16 negotiations of this type, and tried to understand the
17 concepts that were being advanced at that particular time
18 because, following my review, the matter was going to be
19 taken then to our client for discussion as to whether or
20 not this seemed to be fitting in with their views of the
21 joint studies that they had been engaged in.

22 Q What was the principal-- First let me ask you
23 this:

24 Was this a joint study with Ohio Edison or was
25 this a study that was prepared by Beck for WCOE to be used

eb3 1 in connection with the joint study?

2 A Well, it was a study prepared by Beck which in-
3 cluded information, proposals, and negotiations to some
4 extent between Beck representatives and representatives of
5 Ohio Edison Company.

6 Beyond that point, I don't know that it was
7 necessarily to be used as the starting point for joint
8 studies as much as it may have been the starting point for
9 negotiating a joint power supply relationship. It iden-
10 tified alternatives and said now here's approaches we can
11 take. Whichever one is selected, let's get about the
12 business of refining that particular program.

13 Q In fact, it set forth certain proposals of the
14 company that WCOE or R. W. Beck and Associates, rather,
15 didn't agree with, and you had counterproposals in that, did
16 you not?

17 A Well, I don't consider our report as a counter-
18 proposal to Ohio Edison.

19 Q I would agree with that. Let me rephrase it.
20 You included matters in your study that were in-
21 consistent with then-outstanding proposals of the company,
22 were there not?

23 A Well, they were exploring alternatives that had
24 been discussed with the company, yes. I don't think that
25 we were necessarily dealing in a vacuum in those cases

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1 where we did not specifically analyze a proposal of the
2 company.

3 CHAIRMAN RIGLER: What do you mean by that?

4 THE WITNESS: Well, the first negotiating session
5 that was held in late 1974 that I participated in, we
6 advanced certain principles and guidelines to be used in
7 the guidance of the study, and the alternatives that we
8 explored, which were not specifically advanced as proposals
9 by the company, were clearly within the realm of informa-
10 tion and agreement at that particular meeting, that these
11 would be studied.

12 Now for those reasons, I don't believe that we
13 were necessarily advancing schemes that were in contra-
14 diction to the company's proposal. We were advancing
15 schemes that had already been discussed with the company
16 and as a matter of course had been refined through our dis-
17 cussions with company representatives.

18 CHAIRMAN RIGLER: Well, shall I ask the obvious
19 question, or do you want to ask it?

20 MR. REYNOLDS: I'll ask it.

21 MR. STEVEN BERGER: If you want to ask it, go
22 ahead.

23 CHAIRMAN RIGLER: Which is: As a result of the
24 first negotiating session, were there certain alternatives
25 which were ruled out for further consideration?

eb5

1 THE WITNESS: Oh, yes.

2 BY MR. STEVEN BERGER:

3 Q Mr. Mayben, what alternatives contemplated by the
4 settlement agreement were ruled out during this first
5 negotiating session with Ohio Edison?

6 A The settlement agreement was a very carefully,
7 somewhat hastily drawn set of words which did not set forth
8 any alternatives that were acceptable that were subsequently
9 ruled out when we began to negotiate the study objectives.
10 There were no specific alternatives set forth in the
11 settlement agreement.

12 Q Did the settlement agreement contemplate a new
13 bulk power supply relationship between WCOE and the company?

14 A Yes, it did.

15 Q Did the settlement agreement contemplate a
16 partnership arrangement?

17 MR. HJELMFELT: Might I ask whether by "partner-
18 ship arrangement" -- Is it "partnership" in a legal sense
19 of a legal partnership?

20 MR. STEVEN BERGER: No.

21 BY MR. STEVEN BERGER:

22 Q A partnership arrangement between WCOE and Ohio
23 Edison?

24 A As one of the possible alternative relationships,
25 yes.

eb6

1 MR. STEVEN BERGER: Could the Staff provide
2 Mr. Mayben a copy of the WCOE bulk power supply study?

3 MR. LESSY: At your request we have given him
4 one.

5 MR. STEVEN BERGER: Fine. Thank you.

6 BY MR. STEVEN BERGER:

7 Q Mr. Mayben, would you turn to page I-2 of the
8 report, and under Item No. 5, which is the fifth in a list-
9 ing of matters that were agreed to in the settlement of
10 1972, it states that:

11 "The company and WCOE will undertake
12 a joint study of the engineering, financial and
13 legal feasibility of an arrangement whereby the
14 municipals would be able to participate directly
15 with the company in bulk power supply facilities."

16 Is that a fair characterization of the settle-
17 ment agreement?

18 A I would say so, yes.

19 Q Mr. Mayben, would you turn to Section 5 of the
20 report, and it's under letter "A" under the introduction.
21 The first sentence says:

22 "As a result of the settlement agree-
23 ment, WCOE and the company agreed to conduct
24 certain engineering, economic and legal studies
25 examining a possible new power supply relationship

eb7

1 between the WCOE and the company."

2 Is that also a fair statement of what the agree-
3 ment was between the parties reached in the settlement
4 agreement of 1972?

5 A I think that's a little limiting.

6 Q You did review this document before it went out?

7 A No, I reviewed a draft document which went to
8 the client. This was refined and I believe sent to me in
9 its finished form. It was finally typed and printed prior
10 to my reading it.

11 Q What was the objective of the settlement agreement
12 as far as WCOE was concerned? What did you expect to result
13 from the settlement agreement?

14 A Well, if I may, recognizing it's my own schedule
15 that I'm tampering with:

16 The real dispute which precipitated the settle-
17 ment agreement of course was the rate case, and our clients,
18 the cities of WCOE, were somewhat concerned that that
19 particular rate modification was one of many to come in
20 years to come, and they were somewhat concerned about having
21 to go to the Federal Power Commission and slug it out every
22 six or eight months with regard to cost-of-service argu-
23 ments.

24 They felt if there was some way they could estab-
25 lish some power-supply relationship between Ohio Edison and

eb8 1 themselves which would avoid that possibility, they certainly
2 wanted to.

3 Now we negotiated several items in that settle-
4 ment agreement, one of which of course was the agreement to
5 do a joint study of a future power supply relationship.

6 Now after the settlement agreement was filed and
7 an order was entered by the Federal Power Commission which
8 addressed the matter of the negotiations or -- excuse me,
9 the joint study -- myself, Mr. Duncan and some of the members
10 of the WCOE went back as best we could through our recol-
11 lection of meetings that we had had with representatives
12 of Ohio Edison Company, whatever documents we had received
13 in response to certain questions that had been posed, and
14 the agreement itself, and formulated a list of study
15 objectives.

16 That set of study objectives that was presented
17 to Ohio Edison Company for discussion in late 1974 repre-
18 sented our view of what was intended by the settlement
19 agreement.

20 Q Mr. Mayben, take a look with me if you will at
21 page I-2 of the report again, and read for me if you will
22 the paragraph immediately following numbered paragraph
23 number 5.

24 A "The settlement agreement. . . ."

25 Out loud?

e-9

Q Please.

A "The settlement agreement, when fully implemented, is expected to insure the WCOE members a reliable source of power at cost which permits full utilization of the municipals' tax-exempt status and not-for-profit principles and provide an opportunity to exercise greater control over future power supply decisions and costs."

Q This study did have a recommendation, did it not?

A Yes, it did.

Q What was the recommendation?

A It's my recollection that the recommendation was to proceed with the implementation of a pre-payment for purchased power concept which would embody the principles that are advanced in the paragraph I just read.

Q Is that pre-payment concept, if you will, something that you developed?

A Well, it was developed during the period of time that we were working with the Steering Committee of WCOE and with Mr. Duncan as one possible way to accomplish what is included in that paragraph on page I-2.

Q And is it your view that the pre-payment concept, if fully implemented, will accomplish all the ends sought to be achieved by WCOE as reflected in that paragraph?

A No.

eb10 1 Q Well, then explain for me if you will the state-
2 ment on page 7, the statement in the report on VII-2, the
3 last paragraph. If you will read that into the record,
4 then explain to me your previous answer I'll appreciate it.

5 MR. LESSY: VII-2?

6 MR. STEVEN BERGER: Yes.

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THE WITNESS: Could I have the paragraph designation?

BY MR. STEVEN BERGER:

Q The last paragraph on the page. Out loud, please.

A "This arrangement is expected to insure the WCOE members a reliable source of power at cost which permits full utilization of the municipal's tax exempt status and not-for-profit principles to the mutual benefit of the WCOE and the company and provide WCOE an opportunity to exercise greater control over future power supply decisions and cost."

Q This arrangement refers to the pre-payment concept, is that correct?

A Yes.

The reason for the "no," -- if I may go on with the answer to the question you asked, the "no" is that with the exclusion of transmission by Ohio Edison Company in the early stages of negotiation, I'm not satisfied that we arrived at the lowest cost. We certainly have arrived at a program which creates power at cost permitting utilization of the municipals' financing capability, if it exists. But I am not sure that we have arrived at the optimum utilization of that financing capability.

Q When you said transmission service you were

1 referring only to third party transmission service, was that
2 not correct?

3 A I'm referring to the fact that Ohio Edison Company
4 removed from the study criteria any consideration of
5 importation or exportation of power on behalf of or by WCOE.

6 Q You're talking about the joint study now?

7 A Yes.

8 CHAIRMAN RIGLER: How about the exchange of power
9 among and between WCOE members?

10 THE WITNESS: I guess that would be included in
11 what would have been restricted. That particular detail
12 probably was discussed subsequently with Ohio Edison. I
13 don't believe it was necessarily discussed in our late 1974
14 meeting.

15 MR. REYNOLDS: Can I have the question and answer
16 back, please?

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

19 BY MR. STEVEN BERGER:

20 Q When third party power transmission services were
21 discussed in that October meeting, wasn't there also discuss-
22 ion of transmission service otherwise?

23 A In the context that if it was power that was
24 produced by Ohio Edison Company they would certainly wheel
25 that, yes.

mpb 3

1 Q Would you turn to V-3 of the report and read it
2 you will under Transmission Service C?

3 A For the record?

4 Q Please. The Board does not have copies available
5 to it of the study.

6 CHAIRMAN RIGLER: We don't have it in front of
7 us right now, so it is helpful to read it for the record.
8 We could get it if necessary to follow the stream of your
9 questions.

10 MR. STEVEN BERGER: I'm not going to go that much
11 further with it.

12 THE WITNESS: "Agreements making transmission
13 service available to the municipal systems from the
14 company is particularly important considered in the
15 geographic relationship and relative proximity of
16 the WCOE members. Without the ability to utilize
17 the company's existing and proposed transmission
18 facilities a coordinated power supply involving
19 WCOE generating facilities will not be economically
20 feasible."

21 BY MR. STEVEN BERGER:

22 Q Would you continue on with the other paragraph?
23 I think it's important.

24 A "For transmission service we anticipate that
25 charges would be based on WCOE sharing on a fully

mpb4

1 compensatory basis the costs as associated with the
2 company's transmission facilities utilized in the
3 transfer of power and energy from WCOE owned generat-
4 ing resources to the municipals' delivery points.
5 Such costs would be shared in proportion to WCOE's
6 and the company's respective loads. Assuming delivery
7 at 69Kv the charge would consist at proportionate
8 cost of the 345Kv level, 138Kv level and at the 69Kv
9 level. Costs at the 69Kv level would include only
10 those facilities in the company's operating division
11 where a WCOE member takes delivery. Presently there
12 are not any WCOE members located within the company's
13 Alliance division."

14 Q Please finish.

15 A "Company representatives informed us that by
16 utilizing an annual fixed charge rate of 17 percent
17 in annual cost of operation and maintenance expenses
18 of 2 percent of the transmission plant allocated to
19 the WCOE, the transmission service charge would be
20 approximately \$1.50 per kilowatt per month. Although
21 we have not received any documentation of the calcula-
22 tion of this charge this rate was used in our analysis
23 on the basis of it being the best available data."

24 Q Your analysis certainly envisioned substantial
25 access to the company's transmission system, did it not?

mpb5

1 A Yes.

2 Q Just one more question on the report, Mr. Mayben -
3 the study, rather:

4 Turn with me to V-2 and would you read the first
5 paragraph there?

6 A "The Company has proposed that the WCOE capacity
7 requirements be determined by the same criteria as
8 that utilized by the Company. The following tabula-
9 tion illustrates the problems of excessive reserves
10 if the WCOE would adopt CAPCO criteria."

11 Q Does that not indicate to you that it was at that
12 point in time the understanding of R. W. Beck and Associates
13 on behalf of WCOE that the P/N formula was not a restriction
14 which was going to be imposed upon WCOE but something that
15 was proposed by Ohio Edison in the course of the negotiations
16 which WCOE could adopt or not adopt or come forward with a
17 counter-proposal?

18 MR. LESSY: Could the question be repeated?

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

21 THE WITNESS: Well, that was the only method
22 advanced at that stage of the game on how to allocate the
23 reserve burden by Ohio Edison Company. And I would presume
24 the reasons, then, for analysing some other method of sharing
25 reserves was in anticipation of showing what the effect would

mp56 1 be if the reserve burden by WCOE was the same on a percentage
2 basis as borne by the Company and not necessarily in anticipa-
3 tion of a new proposal coming from the Company.

4 BY MR. STEVEN BERGER: You nonetheless studied
5 a different reserve formula notwithstanding the proposal of
6 the Company, isn't that correct?

7 A That's correct.

8 Q In fact, isn't it true that all of the alternatives
9 that were studied in the R. W. Beck study studied equalized
10 reserves, equalized percent reserves as a basis?

11 A No.

12 Q What was it?

13 A The specific company proposals were not on an
14 equalized reserve basis and those were studies that were
15 conducted by R. W. Beck.

16 MR. STEVEN BERGER: Would you read the question
17 again, please?

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

20 BY MR. STEVEN BERGER:

21 Q Other than the company proposals, the other
22 alternatives that are set forth in the R. W. Beck study
23 studied equal percent of peak load reserve as the basis for
24 the sharing of reserves between WCOE and the Company?

25 A I believe that's the case although I would have

mpb7 1 to review the report to say for certain. I do know that
2 there was an analysis of the P/M formula and a comparison of
3 that to equalized reserves.

4 Q Do you know whether equal percent of peak load
5 method of sharing reserves was discussed with the company in
6 the course of negotiations?

7 A It's my understanding that it was, yes.

8 Q And did the company agree to it?

9 A No, I don't know what the company agreed to.
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2B ebl 1 CHAIRMAN RIGLER: We're going to take a very short
2 break. We're going to try to cooperate with Mr. Mayben and
3 get him on his flight, hopefully with a lot of time to
4 spare. So let's take just five minutes or so, and be back
5 promptly.

6 (Recess.)

7 CHAIRMAN RIGLER: On the record.

8 BY MR. STEVEN BERGER:

9 Q Mr. Mayben, I believe you stated that the Beck
10 report applied an equal percent of peak load method of
11 sharing reserves to all the alternatives studied except for
12 the company's proposal which was also one of the alternatives
13 studied in the Beck report. Is that correct?

14 A Yes.

15 Q Is it your understanding that any reserves were
16 required to back up the 50 megawatts of generation
17 that WCOE would be taking out of a given unit?

18 MR. LESSY: I think we have to establish,
19 Mr. Berger, what you're referring to, or be more clear when
20 you say WCOE would be taking out of a specific unit.

21 MR. STEVEN BERGER: I think it's clear to the
22 witness. He has evidenced a knowledge of the company's
23 proposal. This is the company's second proposal.

24 THE WITNESS: Identified as Alternative 67

25 MR. STEVEN BERGER: I believe that's correct.

eb2

MR. LESSY: That's what I wanted clear for the record.

THE WITNESS: The matter of reserves under the company's alternative or second proposal and identified in the report as Alternative 6 has inherent in it a reserve burden. It has WCOE bearing the cost of reserves. That fully distributed rate principle which would be used in determining what WCOE's demand charges would be each month carries with it an allocated share of all of the company's generating plant including the company's reserves.

Now on top of that there does not seem to be much relationship between the amount of energy that WCOE is entitled to receive from the plants that they would be acquiring 50 megawatts of interest in and the 50 megawatts, so I'm not sure what the 50 megawatts is.

You see, they buy all their power at the company's fully distributed wholesale power rate. In addition, they buy it at the company's power plants. You can actually say each one of these 50-megawatt increments was reserves.

BY MR. STEVEN BERGER:

Q Is it your understanding of Alternative 6, that is, the company's second proposal, that WCOE would have had to have bought or built a single megawatt in addition to the 50 megawatts in order to back up that 50 megawatts under the company's proposal?

eb3 1 A It's my interpretation of the company's proposal
2 that 50 megawatts has nothing to do with the service to
3 the municipals. That 50 megawatts was only a way of re-
4 ceiving capital from WCOE by the power company.

5 Q I don't think that's responsive, Mr. Mayben.
6 I asked whether or not, in addition to the 50 megawatts,
7 where or not WCOE would have had to have built or bought
8 another megawatt of capacity in order to back up that 50
9 megawatts when it was not available.

10 A The deficiency in your question is that it assumes
11 that the 50 megawatts has to be backed up. The 50 megawatts
12 has no relationship to the capacity that is ultimately
13 delivered to the municipals.

14 Fifty megawatts is only used in the company's
15 proposal as a means of determining how much capital WCOE
16 is going to contribute to Ohio Edison Company for the
17 privilege of receiving energy from designated units.

18 Q Where is the sharing of reserves in that example
19 in Alternative 6?

20 A The sharing of reserves is in the method of rate-
21 making employed by Ohio Edison Company where they allocate
22 to the WCOE WCOE's share of all plants in service including
23 the surplus plant in service which is designated as reserves
24 by Ohio Edison Company.

25 Q In the other alternatives that you studied where

eb4 1 you are applying the equal percent of peak load method
2 of sharing reserves, where would the sharing of reserves be
3 there?

4 A In that particular instance, the WCOE would have
5 acquired capacity in excess of their loads and that addi-
6 tional amount would have been the reserve burden that they
7 would have borne in ownership cost.

8 Q Just going back for a second now to Alternative
9 No. 6, as between WCOE and Ohio Edison there would be no
10 application of the P/N formula to WCOE's 50 megawatts?

11 A I haven't studied that in that kind of detail,
12 but I believe specifically the P/N formula does not apply.

13 Q Mr. Mayben, could you explain for us what the
14 pre-payment plan contemplates?

15 A I think it is fairly well delineated in the re-
16 port. Frankly, it's articulated better perhaps, refined
17 over my early conception of what it would be.

18 But generally speaking, it is a method whereby
19 the portion of generation and transmission plant determined
20 to be necessary to serve the WCOE would be paid for by WCOE
21 on a pre-payment basis.

22 Let's just say that in any particular period of
23 time it was determined that 350 out of 3,000 megawatts of
24 capacity would be allocated to WCOE, whatever the rate
25 base or the utility plant in service less allowance for

eb; 1 depreciation and work in capital would be, WCOE would make
2 a capital contribution to the company entitling it to that
3 allocated share of plant.

4 And in that fashion, WCOE would be incurring its
5 own fixed cost of ownership as opposed to incurring the
6 utility's, the power company's fixed cost of ownership and
7 taxes associated with return.

8 Q And that capital contribution would be for the
9 purposes of the existing generation and transmission of the
10 company?

11 A It would be for purposes of the then-rate base,
12 yes.

13 Q Which includes the existing generation and
14 transmission of the company?

15 A Yes.

16 Q Other than the pre-payment plan, Mr. Mayben,
17 are you aware of any other specific plan that was proposed
18 by WCOE or by R. W. Beck and Associates to Ohio Edison?

19 A Well, again, except those that were discussed
20 in the early criteria and agreed upon or not agreed upon,
21 those were essentially proposals by R. W. Beck and Asso-
22 ciates on behalf of WCOE.

23 Q I'm talking about a specific proposal where you
24 could go-- You contemplated phases here, did you not?

25 A Yes.

ebc 1 Q And your recommended plan really was that if the
2 company was agreeable to the pre-payment concept you would
3 then move on to jointly implementing that plan. Is that not
4 correct?

5 A That's right. There's no need for additional
6 studies at that stage.

7 Q Were you made aware of the fact that Ohio Edison
8 accepted the pre-payment plan?

9 A No.

10 Q Mr. Cheesman never said that to you?

11 A Mr. Cheesman advised me that he was expecting an
12 analysis and a critique of all of the plans and did not
13 receive or -- I guess did not receive that particular analy-
14 sis.

15 Q Did you ever hear anything about a letter of
16 intent that was supposed to be prepared by Mr. Duncan?

17 A Yes, I've heard about it.

18 Q Tell me what you've heard about it.

19 MR. LESSY: I think that question could be a lot
20 more specific. "Tell me what you've heard about it" is--- I
21 think I would like to see specific questions and answers
22 with respect to that matter.

23 CHAIRMAN RIGLER: I think the witness can answer
24 in narrative fashion.

25 THE WITNESS: I know that there was a discussion

eb7

1 that perhaps at the culmination of this phase of the studies
2 that if agreement had been reached between the parties with
3 regard to proceeding along these lines, that they should be
4 set forth in some kind of a document, and that a memorandum
5 of understanding or a letter of intent or something would
6 be prepared.

7 I know that as far as out work is concerned, we
8 have been instructed by the client to cease any further
9 activities until the matter of financing has been fully
10 clarified. I don't know if that same instruction has been
11 advanced to Mr. Duncan as far as any assignments he may have
12 had, but it certainly was advanced to our firm.

13 BY STEVEN BERGER:

14 Q Wasn't it contemplated that the financial and
15 legal feasibility of the plan could be jointly studied and
16 implemented by the parties and would be something that would
17 take place after phase 1 was completed?

18 A Yes.

19 Q Wouldn't the logical completion of phase one in
20 your mind be the so-called memorandum of agreement or letter
21 of intent?

22 A I'd have to see what is put down in that letter of
23 intent. If it embodies, for instance, certain financing
24 principles it ought not be finished until the financing
25 problem is solved, so I don't know what is going to be

eh3 1 included in the letter of intent.

2 Q Well, assume for the moment that the way it was
3 left between the parties was that Mr. Duncan would prepare
4 a letter of intent and no such draft of such a letter of
5 intent has as yet been forthcoming from Mr. Duncan.

6 What do you assume from that situation?

7 MR. LESSY: I'm going to object, Mr. Chairman.
8 Mr. Mayben, I think it is clear on the record, did not attend
9 the '75 meeting where this went forth, and he's answering
10 certain questions, and I haven't objected with respect to
11 information that he may have been made aware of.

12 Having not attended, I think detailed cross ex--
13 We've had a lot of testimony on surrebuttal with respect to
14 the so-called letter of intent which was discussed only at
15 a meeting which he did not attend. I object on the basis
16 that he did not attend that meeting and going forth down
17 this line at this point in time would not be productive
18 and is I think beyond the scope of proper surrebuttal.

19 CHAIRMAN RIGLER: Let me hear the question.

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

22 CHAIRMAN RIGLER: I'm going to sustain the objec-
23 tion to that.

24 BY MR. STEVEN BERGER:

25 Q Do you know why Mr. Duncan has not sent a letter

eb) 1 of intent to Ohio Edison?

2 MR. LESSY: Objection, Mr. Chairman.

3 CHAIRMAN RIGLER: That I will permit him to answer.

4 THE WITNESS: No.

5 BY MR. STEVEN BERGER:

6 Q Mr. Mayben, is it your opinion that Ohio Edison
7 negotiated in good faith pursuant to the settlement agree-
8 ment?

9 A Mr. Berger, I did not participate in the ultimate
10 negotiations leading to proposals and the study that the
11 staff prepared. I would say in the meetings I participated
12 in, the company's position was made quite clear; there was
13 no hedging with regard to what they were willing to do and
14 not willing to do in terms of establishing a new power supply
15 relationship.

16 I know that from time to time I would get reports
17 back from members of my staff with regard to elements of
18 frustration in the so-called negotiations or joint study
19 but I'm not disturbed at that. I think anyone who has ever
20 negotiated anything in the power business can suffer
21 frustrations from it all.

22 Taking into consideration that the company made
23 it clear at the outset what they would be willing to give
24 consideration to under a joint power supply arrangement, I
25 would say that from that point on they have been negotiating

eb10 1 as I would expect them to in permitting the establishment
2 of a new power supply relationship with WCOE.

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1 Q Is it your understanding of WCOE that all of the
2 municipal members of WCOE would have to accept the pre-
3 payment plan in order for it to go forward?

4 A It was one of the matters that was discussed at
5 the early stages of the negotiation when I participated and
6 I think it was felt that the company didn't want to treat
7 some of the members of WCOE or some of its wholesale customers
8 in one manner and others in a different manner.

9 I don't know that it was ever stated as a condition
10 of proceeding ahead that all members would have to go along
11 with it or the company would not go along with it for any
12 member.

13 It will work for only one or it will work for 21.

14 Q Did the company evidence a fear of a claim of
15 discrimination?

16 A I don't recall that they claimed that as much as
17 the bookwork associated with treating customers of like
18 class.

19 Q I guess my original question really dealt with the
20 other side of it. My question really was assuming that the
21 plan was acceptable to Ohio Edison, how many municipals
22 would it take for it to adopt the plan, for WCOE?

23 A One.

24 Q It would take one?

25 A One municipal can impliment a pre-payment concept.

mpb2

1 yes, in my judgement. There may be some economies of scale
2 lost in the terms of the amount of fixed -- the amount of
3 direct cost incurred for the obtaining of the capital, but
4 it will work with one as well as it will work with 21.

5 Q Do you know of any municipal that is definitely
6 willing to go forward on the pre-payment plan right now?

7 MR. LESSY: I object, Mr. Chairman. Mr. Haybur
8 has described his involvement and not being in direct
9 involvement since 1974 we're getting into questions now of
10 what's happening in June and July of '76 and it's clearly
11 beyond what he's testified has been his involvement.

12 CHAIRMAN RISLER: If it's beyond it he can so
13 testify. I'll permit the question.

14 THE WITNESS: Certainly it is. I have had no
15 contact with the members of WCOE for some time.

16 BY MR. STEVEN BERGER:

17 Q Are you still presently the supervisor of the
18 WCOE project?

19 A I have not been known as that. I never have been
20 known as the supervisor.

21 Q Are you in charge?

22 A No, again Mr. Cheesman is the designated chief
23 engineer.

24 Q He's not a partner of R. W. Beck, is he?

25 A No, sir.

mpb3

1 Q Does he work for you?

2 A Yes he does.

3 Q Is he working with you on the WOMB matter?

4 A Yes, but in the structure within our firm we
5 assign, like many law firms do, a client, a responsibility to
6 an individual and he sees to it that that client's needs
7 are established and met and my particular role is to assist
8 him if he's having trouble staff-wise or counsel him if there
9 is some technical problem that he's having and to make
10 ultimate review of whatever the work product is.

11 MR. STEVEN BERGER: I have no further questions,
12 Mr. Chairman.

13 CHAIRMAN RIGLER: All right.

14 Before you terminate your direct examination there
15 is a loose end that has been troubling me about a part of
16 the position that you have been trying to develop and maybe
17 I should raise that with you now.

18 As I understand it --

19 MR. STEVEN BERGER: Maybe the witness can be
20 excused if you think it is necessary? Or perhaps it doesn't
21 matter if he's sitting here at this point in time.

22 CHAIRMAN RIGLER: I don't think that the loose end
23 I'm going to tell you about --

24 MR. STEVEN BERGER: If you're going to tell me
25 about a position you think we're taking then how I frame the

mpb4

1 question to the witness may involve ---

2 CHAIRMAN RIGLER: All right. Would you be excused
3 for a few minutes?

4 (The witness temporarily excused.)

5 CHAIRMAN RIGLER: You have indicated that the
6 power supply study was an outgrowth of the resolution of the
7 controversy during a rate case at the FPC and that OE contem-
8 plated that they would enter into negotiations with WCOE,
9 that the product of these negotiations would be something
10 mutually advantageous to the parties and that as Ohio Edison
11 considered its negotiating posture it was going to weigh
12 the benefits to be derived from whatever emerged from the
13 negotiations against the liabilities which would be incurred
14 by its system and that it hoped that there would be some
15 positive net benefit at the end of this and that, in turn,
16 influenced their negotiating posture. Is that essentially
17 correct?

18 MR. STEVEN BERGER: Essentially.

19 CHAIRMAN RIGLER: All right.

20 And to that end you put a series of questions
21 to the witness about what he conceived the advantages to OE
22 to be relating to some of the proposals that were discussed,
23 right?

24 MR. STEVEN BERGER: Yes.

25 CHAIRMAN RIGLER: All right.

mpb5

1 One thing that wasn't discussed in the enumeration
2 of possible advantages was the disposition of the rate case
3 itself and I am wondering if that isn't entitled or should
4 be entitled to some consideration when we are going to the
5 balancing act between benefits and liabilities, that is, did
6 OE start the negotiations with a benefit in its pocket
7 because it had resolved the rate case or maybe a series of
8 rate cases? The witness has indicated that it was contemplated
9 that every six or eight months there might be recurring rate
10 fights within the FPC.

11 MR. STEVEN BERGER: Your Honor, I don't really
12 believe it was suggested, perhaps I am wrong, that the
13 settlement was in any way tied to integral parts of it.
14 What I am suggesting to you is that the municipalities
15 benefited from that settlement as well, every element of
16 that settlement.

17 CHAIRMAN RIGLER: Well, they may have, but the
18 question is suppose there's a greater benefit to OE in having
19 the rate case resolved, not only that rate case but the
20 prospect that a continuing series of rate cases might not
21 have to go to the negotiation before the FPC.

22 MR. STEVEN BERGER: How has that been evidenced
23 in this proceeding? They are in the middle of a rate case
24 right now, the FPC.

25 CHAIRMAN RIGLER: All right.

apb6

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Against WCOE?

MR. STEVEN BERGER: Yes.

MR. LESSY: I think that's a fair question, Mr. Chairman, to address to the witness.

CHAIRMAN RIGLER: I'm not going to address it to the witness but it's just something that --

MR. STEVEN BERGER: They're in hearings right this week at the FPC with WCOE.

CHAIRMAN RIGLER: All right.

My only question is whether Ohio Edison might have gained some benefit sort of at the starting point of these negotiations which would be entitled to some weight on the scale as we consider the posture that Ohio Edison had to balance the advantages versus the liabilities and try to come up with some position that was overall advantageous to the company. If you want to explore it with the witness you may, if you don't want to you certainly don't have to. I just thought I would call it to your attention because it's a point that had occurred to me.

MR. LESSY: Can we bring the witness back? I am concerned about time slipping away.

CHAIRMAN RIGLER: Let's give the Applicants a minute to consider this. We'll get him out of here.

MR. LESSY: I know we will. I just hope we'll have a chance to ask him a few questions.

mpb7

1 CHAIRMAN RIGLER: You can.

2 (Pause.)

3 MR. STEVEN BERGER: Your Honor, let me just say
4 this:

5 I think certainly as evidenced by Mr. White's
6 testimony and otherwise in this proceeding Ohio Edison wants
7 to come in here and educate the Board as best they can to the
8 true facts involved in all the matters in controversy and
9 all of the issues that have been raised in this proceeding.
10 IF the Board is of a mind that they believe there is a loose
11 end or something important that should be developed with
12 regard to the settlement in 1972 reached between WCOR and
13 Ohio Edison, then I think it should be fully explored. And
14 if you want to examine Mr. Mayben on it--I personally don't
15 feel the need to.

16 CHAIRMAN RIGLER: All right.

17 MR. STEVEN BERGER: But if it's something the
18 Board is concerned with I am prepared to certainly have it
19 addressed by an Ohio Edison witness at the Board's pleasure,
20 sir.

21 CHAIRMAN RIGLER: Well, how you present your case
22 really is up to you. I just was trying to be fair and you--

23 MR. STEVEN BERGER: Matters which you raise
24 substantial concern about may concern me and if you feel
25 this should be addressed by my client then we're here to

mpb3

1 address them. This is not such a structured proceeding, I
2 think the Board would agree, that the concerns of the Board
3 should be ignored because the particular charge involved does
4 not in the Applicants' opinion go directly to the Board's
5 concern. I mean that's just not the nature of the beast.

6 CHAIRMAN RIGLER: Well, why don't we recall the
7 witness and start his cross-examination? Perhaps it will be
8 resolved during cross. If not, -- I'll just leave it to your
9 judgment how you want to proceed.

10 MR. STEVEN BERGER: Okay.

11 CHAIRMAN RIGLER: I don't want to indicate, either
12 that this is an overriding concern. It's just a loose end.
13 I don't want to give it undue weight either.

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Whereupon,

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WILLIAM R. MAYBEN

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resumed the stand and, having been previously duly sworn,

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was examined and testified further as follows:

5

MR. LESSY: Does Mr. Reynolds have any questions?

6

If not, I'll proceed.

7

MR. REYNOLDS: If you'll wait a moment, please,

8

I do have some questions.

9

(Pause.)

10

CROSS-EXAMINATION

11

BY MR. REYNOLDS:

12

Q Mr. Mayben, I have a few questions.

13

Let me first ask you: To the extent that you have

14

knowledge about this matter, could you advise us as to what

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your understanding was during the inception and continuation

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of your 1972 settlement negotiations of the advantage Ohio

17

Edison believed would be derived by entering into a settle-

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ment of some sort with the WCOE municipalities or members

19

in the rate case?

20

A Well, it's probably speculation but when you're

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negotiating the settlement of a rate dispute before the

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Federal Power Commission, to some extent each party, parti-

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cularly after you've had some negotiations, knows that their

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weaknesses have been revealed, and therefore, you may decide

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whether you wish to go before the Commission in a full-blown

eb2 1 hearing and depend upon the vagaries of the hearing getting
2 you evidence or not getting you evidence as you would like
3 to have it appear.

4 And on the basis of that I guess the company felt
5 the principal advantage they were going to get was not to
6 have to proceed with the rate hearing and in fact would be
7 able to settle the real dispute in the matter, namely what
8 level of rates would they be permitted to charge, at some
9 level not too different than what the FPC staff themselves
10 had come in at.

11 Q And what was the municipality's view as to the
12 advantage that it might derive by virtue of entering into
13 this sort of settlement negotiation?

14 A Well, I think more the possibility that they
15 could start the development or the creation of a new power
16 supply relationship between themselves and Ohio Edison
17 Company because the level of settlement as far as the numbers
18 in the rate case were concerned were certainly advantageous
19 to the company.

20 Q All right. I think we've had some testimony as to
21 that.

22 Was there also an advantage, a similar advantage
23 as the one you discussed for Ohio Edison with respect to
24 resolving the dispute before the FPC which the WCOE members
25 considered?

eb31

A Yes. Certainly that would be one that Ohio Edison viewed as beneficial to them because of the pressures that are brought to bear upon them during their rate proceedings.

Q And WCOE also viewed that as beneficial to them?

A In terms of their out-of-pocket cost to intervene in a rate proceeding and defend their view with regard to the appropriate level of rates, certainly that would be viewed as an advantage.

Q Do you know if the Ohio Edison Company and the WCOE are presently engaged in controversy before the FCC on a rate matter?

MR. LESSY: I'm going to object, Mr. Chairman. That's beyond the scope of anything that has been presented.

CHAIRMAN RIGLER: I'm going to let him answer that. It relates to our discussion.

THE WITNESS: Well, to the extent that there are differing views with regard to the cost of service, yes, it is a controversy.

If you mean has WCOE again intervened in a rate filing before the Federal Power Commission, yes, they have.

BY MR. REYNOLDS:

Q Mr. Mayben, let me show you what has previously been identified as NRC Staff Exhibit 32, and ask whether this is the statement of study objectives to which you made

eb4 1 reference earlier that was, I believe, prepared for the meet-
2 ing in late 1974.

3 (Handing document to the witness.)

4 A Yes, I believe it is.

5 Q Do you recognize the handwriting in the margin
6 on that exhibit?

7 A Yes.

8 Q Is that your handwriting?

9 A Yes, it is.

10 Q Now I believe you were asked by the Board a ques-
11 tion that concerned a restriction imposed by the company
12 on consideration of transmission among the municipalities
13 within the Ohio Edison area. And my recollection is that
14 you felt that perhaps that restriction had been imposed at
15 that first meeting.

16 Do I have a clear recollection of your --

17 A I don't recall that it was because at that time
18 I was not that intimately familiar with the existence of
19 generation by the members of WCOE, and I don't think that
20 it was a point that we discussed at length.

21 Q Well, that was a point that you included in the
22 list of study criteria, was it not?

23 A Could you help me by pointing out where that
24 would be?

25 Q Yes, if I can sneak over here.

eb5 1 3-E, I believe.

2 MR. REYNOLDS: Would that not be right? It might
3 be helpful if he read it.

4 THE WITNESS: 3-E is:

5 "Identify arrangements which can be
6 perfected to accommodate coordinated power supply
7 development and operations, which arrangements
8 contain at least the following features:

9 "E. Transmission service for delivery
10 of power and energy to each municipal delivery
11 point."

12 That point was not in dispute at our meetings.
13 I understood the question from the Chairman to be whether
14 or not there would be wheeling from one municipal to another
15 within the Ohio Edison system.

16 CHAIRMAN RIGLER: That was my question.

17 MR. REYNOLDS: Let me have the answer back, please.

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

20 BY MR. REYNOLDS:

21 Q Showing you 3-E and I guess 3-G over on the next
22 page, if you can just read that for the benefit of the Board?

23 A G reads:

24 "Economic dispatch of resources owned
25 or controlled by the municipals."

eb51

Q My question is whether those subparagraphs contemplated the transmission among municipals within OE?

MR. LESSY: Did you mean as he wrote it, or what do you mean by "contemplated"?

BY MR. REYNOLDS:

Q Do you have any difficulty with the question?

MR. REYNOLDS: I'm trying to shorten this. He's got a plane to catch. I'm asking him to read that and tell me whether it was contemplated under those criteria that one of the elements of the study would be the transmission back and forth between municipalities within the Ohio Edison area.

MR. LESSY: That's a lot clearer to me now.

THE WITNESS: Yes, Item G which reads "Economic dispatch of resources owned or controlled by the municipals" contemplates that whatever generation was owned or controlled by the municipals in the Ohio Edison system would be dispatched and the output would be delivered over the Ohio Edison transmission line.

BY MR. REYNOLDS:

Q Now did Ohio Edison object to that?

A I can't recall. My marginal notation doesn't indicate that it was deleted.

Q Is it your understanding that the study did not address that matter?

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MR. LESSY: Which matter, Mr. Reynolds.

MR. REYNOLDS: The matter he just referred to with regard to Items J-E and G.

THE WITNESS: Well, it would assume that in those plans that were studied other than the pre-payment or the company's proposals.

BY MR. REYNOLDS:

Q Other than the pre-payment?

A And the company's proposals.

Q Well, let me direct your attention to the study again at page V-3, the portion that you read into the record, and specifically it is under Paragraph C, "Transmission Service," and particularly the last paragraph on that page as it carries over to the next page, and ask you whether that portion of the study that you read does not provide for the use of Ohio Edison's transmission facilities for the transfer of power and energy from WCOE-owned generating resources to the municipals' delivery points.

A All that does is tell the reader how we went about allocating cost of transmission service to WCOE. It tells what facilities were included.

It doesn't address itself as to which facilities would be producing energy which would be flowing over the WCOE transmission facilities.

Q But you did include that in the study?

eb8¹ A We estimated the cost of transmission so that we
2 would have a complete cost picture for comparison purposes,
3 yes.

4 Q And one of the alternatives in your study that
5 you considered was the use of the Ohio Edison transmission
6 facilities for purposes of transferring the energy from the
7 WCOE-owned generating resource to a municipal delivery point?

8 A One of the alternatives was that, yes.

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

10 MR. HJELMFELT: The City has questions of the
11 witness.

12 BY MR. HJELMFELT:

13 Q Mr. Mayben, you testified that in your study
14 certain of the alternatives studied included the concept
15 of equal percent reserves.

16 In your experience is the equal percent reserve
17 method common in the industry?

18 CHAIRMAN RIGLER: Mr. Reynolds?

19 MR. REYNOLDS: Mr. Chairman, I was on my feet to
20 object first to the fact that this witness was brought in
21 here in rebuttal to a part of the Staff's case and we're
22 at a stage in the hearing where the City has not put on
23 anything at all which would justify the City cross-examining
24 this witness.

25 He is not in here to address any portion of the

eb9

1 City's case whatsoever. And I think we're beyond that point
2 in the hearing where we were talking initially of giving
3 the City some latitude on cross-examination.

4 I would also state, since I got on my feet and
5 I heard the question, that it is clearly outside the scope
6 of the direct.

7 CHAIRMAN REGLER: The first objection is over-
8 riled and the second is sustained.

9 MR. HJELMFEIT: I have no other questions.

10 BY MR. LESSY:

11 Q Mr. Mayben, with respect to the '74 meeting that
12 you attended, other than restrictions with respect to
13 deletion of third-party wheeling, were there any other
14 restrictions by Ohio Edison that were conveyed, to your
15 recollection, at that meeting, as to the scope of the study?

16 A Well, the one that comes to my mind which was
17 somewhat disconcerting but I thought perhaps could be
18 alleviated through negotiations subsequently was a statement
19 by Mr. White that by no means were they going to let WCOB
20 just pick and choose which plants of OE's they would par-
21 ticipate in. And I wasn't sure then what criteria we were
22 going to be guided by.

23 Subsequently that particular requirement seemed
24 to have been tempered; at least as my staff analyzed it,
25 they were not guided by only specific plants that they might

eb10

1 participate in.

2 Now there was one point where I believe my reac-
3 lection is Mr. White made it apparent that Ohio Edison was
4 not going to be a banker for the WCOE program. It's a
5 little difficult to know exactly what he meant by that.
6 We did not pursue it because the ultimate goal of WCOE was
7 to utilize its own ability to raise capital.

8 It would have been restrictive only in the sense
9 that they may have insisted that capital be available the
10 instant an agreement was reached, which would have been a
11 little onerous under the circumstances.

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1 Q Now with respect to the picking and choosing,
2 did Ohio Edison make available its present facilities that
3 were on line to WCOE as being available to pick and choose
4 from at that meeting?

5 A No, I don't believe they did. I think again
6 "picking and choosing" had to do with future units.

7 Q Did they eliminate picking and choosing from the
8 units on line?

9 A My recollection is that that alternative is always
10 open if WCOE wants to continue as an all-requirements
11 customer. But I don't recall any specific language that said
12 that they could not buy into existing plants although the
13 studies indicate that that's the case.

14 MR. STEVEN BERGER: Can I have that back again?

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

17 BY MR. LESSY:

18 Q Now with respect to page 1-2 of the study,
19 the paragraph numbered 5, the language that you read or was
20 read to you earlier is that the company and WCOE would
21 undertake a joint study of the engineering, financial and
22 legal feasibility of an arrangement whereby the municipals
23 would be able to participate directly with the company in
24 bulk power supply facilities.

25 Now with respect to the phrase "with the company"

eb21 in bulk power supply facilities," as your interpretation
2 of the settlement what would that language refer to?

3 A Well, that among other things that NCOE could
4 be either a purchaser of power or a co-owner of facilities
5 of the company.

6 Q Was that limited to bulk power supply facilities
7 of Ohio Edison as being available?

8 A Well, in my interpretation of the settlement,
9 the alternatives were to consider not just --

10 MR. STEVEN BERGER: I don't think that was the
11 question, your Honor.

12 MR. LESSY: I'll rephrase it.

13 BY MR. LESSY:

14 Q Does the phrase in the settlement or pursuant--
15 Strike that.

16 When you went to the '74 meeting with the
17 settlement in mind, would the phrase "participate with
18 the company in bulk power supply facilities," was that your
19 understanding that that was limited to only facilities of
20 Ohio Edison?

21 MR. STEVEN BERGER: I think the question has been
22 asked and answered.

23 CHAIRMAN RIGLER: He may answer.

24 THE WITNESS: I guess I have trouble with the
25 question. Certainly we didn't expect Ohio Edison to tell us

eb3

1 we could participate in something that they didn't have any
2 control over. But we didn't expect that Ohio Edison would
3 limit us from participating with other parties in other
4 projects.

5 It seems to me when you're dealing with Ohio
6 Edison on a power supply relationship they're in a hard posi-
7 tion to say you can participate in the Cardinal plant.
8 They can't ordain that. But we did not expect them to say
9 you can't.

10 Q Did they say you can't?

11 A Effectively they did.

12 Q How did they say that?

13 A By the elimination of Item 3-F in the list of
14 criteria, namely, the ability to wheel power in or out from
15 third-party systems.

16 Q Does economic dispatch envision transmission of
17 power between generators or between entities?

18 A Well, Mr. Cole has written volumes on what that
19 means. I think economic dispatch really means the scheduling
20 of production of energy from a group of energy sources so
21 as to produce the lowest cost of production, and it has to
22 do with scheduling of resources.

23 Q With respect to Alternative No. 6, or the second
24 Ohio Edison proposal, if Ohio Edison does not take all of
25 its energy from the CAPCO units, what bearing does this have

eb4 1 on the energy available from those CAPCO units to WCOE?

2 MR. STEVEN BERGER: I would like to have that back
3 again, please.

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

6 THE WITNESS: As I understood the proposal which
7 was analysed as Alternative 6, the amount of energy that
8 WCOE would be entitled to from any one of the plants to
9 which they had made a capital contribution toward 50 mega-
10 watts of capacity would be in proportion to the amount of
11 energy that Ohio Edison took from that plant as it bears to
12 its total energy requirements.

13 BY MR. LESSY:

14 Q Would this result in an energy deficiency in the
15 supply of energy to WCOE?

16 A Well, to the extent that Ohio Edison scheduled
17 less than all of its energy from those specified plants,
18 less than all of WCOE's energy would similarly be coming
19 out of those plants and therefore they would have to get
20 energy from another source.

21 Q What would that other source be?

22 A Well, it was contemplated it would be Ohio Edison
23 under their wholesale power rate schedule.

24 Q Therefore, under Alternative 6, is there any
25 relationship between capacity acquired, that is, paid for by

eb5 1 WCOE, and energy available to WCOE under units in which it
2 participated?

3 A No, not by a direct formula.

4 Q Isn't there usually such a direct relationship
5 between capacity owned and energy available?

6 A Yes, having to do with the normal availability of
7 capacity from a plant. I think that relationship is generally
8 displayed in the alternatives that we studied which were
9 other than the company's proposal and the pre-payment
10 arrangement.

11 Q Now under Alternative No. 6, would WCOE have to
12 purchase their capacity requirements, say each month, under
13 Ohio Edison's wholesale power rate and also pay fixed costs
14 with a credit for those wholesale purchases for 50 megawatts
15 from each of the CAPCO units?

16 A Well, "fixed costs" gives me some concern. The
17 fixed costs really are the costs of ownership or the debt
18 service associated with bonds that WCOE may bear.

19 But with that qualification, yes, that's the
20 effect of that plan.

21 Q Would this result in WCOE paying for more capa-
22 city to Ohio Edison than it used or than it could use?

23 A It could result in that, yes.

24 Q Could it likely result in it?

25 A Well, you have to compare the magnitude of the

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1 50 megawatts acquired, or the right to 50 megawatts in
2 particular plants acquired to the load and see if it was
3 substantially in excess of load. And if it was then there
4 would be an excess.

5 The key it seems to me is this, that the company's
6 wholesale power rate reflects the company's fixed cost of
7 all of its plant, and is passed on to the cities, and in
8 addition to that an amount reflecting the difference between
9 the cities' fixed cost for 50 megawatts of increments pur-
10 chased and the company's fixed cost are also passed on to
11 the city because it's a reduction in the credit received.

12 So to that extent there is the bearing of the cost
13 of capacity in excess of-- There's a possibility of bearing
14 the cost of capacity in excess of what they might get under
15 a fully-distributed, all-requirements rate.

16 Q Again under Alternative No. 6, if the P/N
17 formula was not applied to the 50-megawatt purchase, didn't
18 the 50-megawatt purchase require WCOE to pay for more power
19 than it needed?

20 A To the extent that the 50 megawatts in the aggre-
21 gate was in excess of its load, yes, it was bearing costs
22 greater than its requirements.

23 Q I'd like you to turn to page V-2 of the study,
24 and I believe that you read into the record this morning
25 the first paragraph on that page. I'd like to read, and

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1 I'll save you the time, the second paragraph, and I want to
2 ask you a question about it.

3 MR. STEVEN BERGER: Which page, Mr. Lessy?

4 MR. LESSY: V-2.

5 BY MR. LESSY:

6 Q "The generation capacity requirements
7 for WCOE as determined under this method. . . ."

8 and I believe that refers up above to the CAPCO P/N method --

9 ". . . .would result in maintaining excessive

10 reserves. Thus it would be uneconomical for the

11 WCOE to make the transition from total wholesale

12 (with the exception of Newton Falls and Oberlin)

13 to total self-owned generation. The validity of

14 the company's requisition compelling WCOE to meet

15 CAPCO requirements is open to question. WCOE is

16 not a member of CAPCO, nor have our studies assumed

17 that WCOE would become a member of CAPCO. It is

18 also assumed that WCOE's load and partial owner-

19 ship of CAPCO generating units would be credited

20 to the company by the CAPCO member companies;

21 therefore, CAPCO would not recognize WCOE as a

22 member. The CAPCO capacity requirements were

23 established by the member companies long before

24 the WCOE became a viable entity. The net re-

25 sult is that WCOE, which is not anticipating

eb3 1 becoming a CAPCO member at this time, would be
2 meeting the total CAPCO power pooling requirement
3 even though CAPCO will not recognize WCOE."

4 Now do you generally agree with the statements
5 contained in that paragraph?

6 A Well, I think there are certain characterizations
7 that if I were to write the paragraph, I probably wouldn't
8 do it. But I cannot disagree with it.

9 Q With the knowledge that you have of those matters
10 which WCOE-- Strike that.

11 With the knowledge that you have, Mr. Mayban,
12 of those matters which Ohio Edison was not willing to have
13 included in the study, do you have an opinion as to whether
14 or not the deletion of those matters precluded certain
15 results or forced certain results?

16 A Well, I have a judgment. "Opinion" I think is--
17 Yes, I do.

18 Q All right.

19 Do you feel that those restrictions so structured
20 in the Beck study as to preclude a result other than all-
21 requirements purchase or pre-payment?

22 MR. REYNOLDS: Let me have that back again, please.

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

25 THE WITNESS: At the time we were negotiating

eb9

1 the study objectives and criteria in October of 1974, I
2 was somewhat concerned that the elimination of third-party
3 wheeling would possibly restrict the -- or possibly cause
4 an economic burden on the plans which contemplated owner-
5 ship participation and the actual operation of plants by
6 WCOE.

7 At that time I reflected on whether or not that
8 would therefore be fatal to the efforts of WCOE to perfect
9 their goal of utilizing their tax-exempt financing under
10 a new power supply relationship with Ohio Edison Company
11 and I considered that it was not fatal, but I had concerns
12 at that time that it could result in a hybrid sort of power
13 supply relationship other than the classical ownership and
14 operation of generating plants on a joint coordinated
15 development basis.

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BY MR. LESSY:

Q There was some mention of a wholesale rate increase recently filed by Ohio Edison and now in front of the FPC. Do you have any knowledge today as to the range of percentages of wholesale municipal customers of that wholesale rate?

MR. STEVEN BERGER: Objection.

CHAIRMAN RIGLER: Overruled.

THE WITNESS: No, I don't.

BY MR. LESSY:

Q Do you feel that the 1972 rate settlement between WCOE imposed some obligations on Ohio Edison other than just to simply do what it considered to be advantageous to it?

A Yes.

MR. LESSY: I have no further questions.

MS. URBAN: The Department has no questions of this witness.

REDIRECT EXAMINATION

BY MR. STEVEN BERGER:

Q Mr. Mayben, other than the discussion that was had at the meeting in late October that you attended --

MR. LESSY: October of '74, Mr. Berger?

MR. STEVEN BERGER: It's the only meeting he's testified to.

MR. LESSY: I think it should be clear in the

mpb2

1 record.

2 BY MR. STEVEN BERGER:

3 Q Was the subject of third party wheeling ever
4 again raised generally with Ohio Edison?

5 MR. LESSY: I object. He said that was the last
6 meeting that he attended.

7 MR. HJERMELT: It exceeds the scope of any of
8 the cross. If they have testified to only one meeting how
9 can they come back to other meetings?

10 MR. LESSY: I think it's inherently an absurd
11 question.

12 CHAIRMAN RIGLER: I think if the witness has
13 information it would be useful. I'll let him answer the
14 question.

15 THE WITNESS: I know of no discussions one way or
16 the other that transpired between the parties during the
17 negotiations after the October of 1974 meeting.

18 BY MR. STEVEN BERGER:

19 Q As far as you know the matter was broached
20 at the '74 meeting and was never raised again?

21 A Well, I certainly instructed my staff not to
22 pursue it because of Mr. White's forcefulness in the meeting
23 concerning the dropping of that topic in these joint studies.
24 I didn't see any point in jeopardizing what otherwise were
25 continuous relationships in negotiating the joint study with

mpb3

1 the company.

2 Q Mr. White said he wouldn't study it jointly.

3 A Yes.

4 Q Ohio Edison also talked about the P/W formula
5 as something that they would want to establish between WCCM
6 and Ohio Edison, isn't that correct?

7 A No, that's not correct.

8 Q That wasn't the proposal that was made by the
9 company?

10 A Not at the meeting that I attended. We indicated
11 at that meeting that we did not wish to become a member of
12 CAPCO because we were aware that that would carry with it
13 the obligation of the P/W formula and there was no objection
14 raised at that particular time to that theory. So that the
15 imposition of the P/W formula, if it did, came out in
16 subsequent negotiations that I was not party to.

17 MR. STEVEN BERGER: No further questions.

18 MR. LESSY: I have one recross.

19 MR. REYNOLDS: I have one question.

20 RECCROSS-EXAMINATION

21 BY MR. REYNOLDS:

22 Q Mr. Mayben, going back for a minute to your
23 discussion with Mr. Lessy relating to your testimony on the
24 possible excessive capacity costs under proposal number 6,
25 let me ask you: would it be appropriate if somebody were to

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1 make a unit power purchase from a nuclear plant and also at
2 the same time were to take wholesale power from the same
3 system which had an ownership interest in that nuclear plant,
4 that the portion of the nuclear plant allocation to the
5 unit power purchase be excluded from the wholesale rate base?

6 MR. CHARNO: I'll object to that question. I
7 believe that's well beyond the scope of any questions asked
8 by Mr. Lessy. It certainly is not tied to proposal number 6
9 and furthermore it has an impact well outside the testimony
10 by this witness today.

11 MR. LESSY: I would join in that. I limited my
12 questions to capacities under alternative number 6 and costs
13 and I think Mr. Reynolds' question is well beyond anything
14 that was asked of this witness.

15 MR. REYNOLDS: It's directly related to that
16 whole line of questions and the witness' answers.

17 CHAIRMAN RIGLER: Let me hear the question again,
18 please.

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

21 MR. LESSY: There was not a single question
22 addressed to wholesale rate allocations. We were concerned
23 with the amount of capacity available and the 50 megawatt
24 requirement. We're getting into a rate making type question
25 which is well beyond anything that I asked.

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CHAIRMAN RIGLER: Sustained.

BY MR. REYNOLDS:

Q Mr. Mayben, if you are a total generator would you bear a cost of capacity greater than your peak load?

MR. LESSY: Objection, Mr. Chairman, again we're talking about --

CHAIRMAN RIGLER: Yes, that's well beyond redirect Mr. Reynolds.

MR. REYNOLDS: That goes precisely, Mr. Chairman, to alternative number 6 and the testimony this witness gave with respect to excessive capacity costs. It's on point directly.

MR. LESSY: I disagree with you. Those questions went to the relationship that fails to exist between capacity owned and energy available from these units. It does not go to that point.

MR. CHARNO: The Department joins in the Staff's objection.

CHAIRMAN RIGLER: Let me hear the question again, please.

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

MR. STEVEN BERGER: If numbers matter, I support the question.

(Laughter.)

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1 MR. REYNOLDS: I'm not going to go any further
2 with it. It's directly in line with -- it's exactly what
3 he's testified to in response to Mr. Lessy's questions, Mr.
4 Chairman.

5 CHAIRMAN RIGLER: All right, let's see what he
6 says.

7 MR. LESSY: Do you want the question repeated, Mr.
8 Hayben?

9 THE WITNESS: No.

10 The answer is yes, but you would have to refer
11 back to previous testimony of mine in these proceedings to
12 get all the reasons I would like to add right now, but I
13 won't.

14 MR. REYNOLDS: Thank you, sir.

15 MR. LESSY: I just have one question, Mr. Hayben.

16 CHAIRMAN RIGLER: Clue us in, Mr. Hayben, don't
17 go through the whole drill.

18 THE WITNESS: In the interest of reliability
19 you've got to have more capacity on line than your peak
20 load might be because you run the risk of a unit being
21 forced out of service or having to take one out of service
22 for maintenance, things of that nature. So a total generator
23 as we're talking about here, is assumed to be an isolated
24 entity without interconnections or even if it is interconnect-
25 ed it is involved in a reserve pool where it contributes

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1 reserves to that pool.

2 CHAIRMAN RIGLER: All right.

3 MR. REMNOLDS: Thank you.

4 BY MR. LESSY:

5 Q Mr. Mayben, based on the October '74 meeting,
6 would you have concluded that Mr. White would agree to
7 third party wheeling outside the content of the joint study?

8 MR. STEVEN BERGER: Objection.

9 MR. LESSY: I think it is directly responsive to
10 one of Mr. Berger's questions on redirect.

11 MR. STEVEN BERGER: Mr. Lessy had a chance to ask
12 that question a round ago. This is on re-cross, I believe.

13 LESSY: I could point to the question --

14 CHAIRMAN RIGLER: I know the question you had in
15 mind, but I'm going to sustain the objection.

16 Thank you, Mr. Mayben, you are excused.

17 (The witness excused.)

18 MR. CHARNO: The Department would offer as
19 DJ-638 excerpts from the 1967 annual report of Duquesne
20 Light. An offer of proof was requested of this document.
21 The offer is the document is being submitted to rebut
22 inferences which might be drawn from Applicants' Exhibit 130,
23 which was the Pennsylvania Economy League Study.

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1 (Whereupon, the document
2 referred to was marked
3 as DJ Exhibit 638 for
4 identification.)

5 CHAIRMAN RIGLER: Which inference?

6 MR. CHARNO: The inferences that the only available
7 alternative to the Borough of Aspinwall was the sale of its
8 system by virtue of projected increases in generating costs.
9 This document indicates the power costs available to Duquesne
10 or to those coordinating with Duquesne and clearly indicates
11 that the only alternative was not sale.

12 Specifically the Fort Martin Unit in which
13 Duquesne was a joint participant had costs per kilowatt of
14 \$123 as opposed to \$225 which is projected in Applicants'
15 120 and the embedded system costs for all Duquesne's generation
16 and transmission is approximately \$180 a kilowatt as opposed
17 to, again, \$225 simply for generation by Aspinwall according
18 to Applicants' 120.

19 CHAIRMAN RIGLER: All right.

20 Are you moving its admission?

21 MR. CHARNO: We would move the admission of
22 DJ-638 at this time.

23 MR. REYNOLDS: I'll object.

24 First, I object that I don't understand that there
25 is any testimony here to suggest that the only alternative

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1 or that an inference can be drawn that the only alternative
2 available to Aspinwall was the sale of its system and if it
3 goes to rebutting inferences in 120, 120 on its face was
4 a document which recommended alternatives available to
5 Aspinwall and left it to Aspinwall to make its decision.

6 On the point going beyond that, as to how this
7 might be rebuttable information, I fail to see what the costs
8 regarding Duquesne Light -- what Duquesne Light's costs are
9 regarding its participation with some other entity, that is
10 not identified in some other plant how those costs on a
11 comparative basis can be at all informative to the Board or
12 to anybody else with regard to the figures that were set
13 forth in the Aspinwall study, I really don't see how this
14 begins to speak to those figures one way at all -- any way
15 at all. We don't even know what those cost figures here
16 include. If you look at what's red-lined there is no indication
17 of what the cost figures include or exclude and on a compari-
18 tive basis I don't see how this is at all instructive to
19 anybody in any way.

20 CHAIRMAN RIGLER: We don't need the lunch hour to
21 reflect.

22 The objection is overruled. We will admit 638 into
23 evidence.
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(Whereupon, the document
previously marked as
DJ Exhibit 638 was
received in evidence.)

CHAIRMAN RIGLER: We'll be back in 40 minutes.

(Whereupon, at 1:05 p.m., the hearing in the
above-entitled matter was adjourned, to reconvene
at 1:45 p.m., this same day.)

AFTERNOON SESSION

(2:45 p.m.)

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3 CHAIRMAN RIGLER: Back on the record.

4 MR. ZAHLER: Mr. Chairman, at the time that
5 Applicants' Exhibit 186 was offered into evidence, which is
6 the agreement between the City of Orrville, Ohio and Ohio
7 Power Company, Mr. Lewis was here. It was either rejected
8 or deferred because there was no stipulation by the parties
9 as to the authenticity of the document and Applicants were
10 requested to secure a copy from the Federal Power Commission
11 for that purpose. Applicants have secured that copy and at
12 this time would like to distribute and replace the present
13 exhibit marked as Applicants' Exhibit 186 with a new Exhibit
14 186 that is the FPC copy of that agreement.

15 I will state for the record that the document
16 we are distributing at this time is identical in all respects
17 with the one previously marked but it has been red-lined, so
18 for the convenience of the parties it may be easier to
19 replace this exhibit with the one previously marked.

20 At this time I would like to move Applicants'
21 Exhibit 186 in evidence.

22 CHAIRMAN RIGLER: My record indicates it had been
23 rejected on the previous occasion, so you want us to reconsid-
24 er our ruling?

25 MR. ZAHLER: I would like the Board to reconsider

mpb2 1 the ruling with respect to Applicants' Exhibit 186.

2 CHAIRMAN RIGLER: Hearing no objection we will now
3 reconsider and accept into evidence Applicants' Exhibit 186.

4 (Whereupon, the document
5 previously marked as
6 Applicants' Exhibit 186
7 and previously rejected
8 was received in evidence.)

9 MR. ZAHLER: Mr. Chairman, at the time Mr. Lewis
10 was here, also, Applicants marked as 187 an agreement between
11 American Municipal Power, Ohio Inc. and the City of Orrville,
12 which was actually an unsigned copy of that agreement. That
13 document was received into evidence though Mr. Lewis could
14 not testify whether the document had in fact been executed
15 by the parties.

16 In our attempt to locate the Orrville, Ohio power
17 contract which was just received into evidence, Applicants
18 located a copy of the agreement between American Municipal
19 Power, Ohio Inc. and the City of Orrville in the files of the
20 FPC. That document differs from the document previously
21 identified as Applicants' Exhibit 187 and in fact, the document
22 marked as Applicants' Exhibit 186 is in the files of the
23 FPC attached as an exhibit to the agreement between American
24 Municipal Power, Ohio Inc. and the City of Orrville.

25 At this time I would like to mark for identification

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1 the FPC file copy of the agreement between American Municipal
2 Power, Ohio Inc. and the City of Orrville as Applicants'
3 Exhibit 186A and would move its admission.

4 (Whereupon, the document
5 referred to was marked
6 as Applicants' Exhibit 1
7 for identification.)

8 CHAIRMAN RIGLER: You referred to 187.

9 MR. ZAHLER: Yes.

10 CHAIRMAN RIGLER: Was there a cover letter on
11 that? My notes show that was Artery to Williams, June 2,
12 1974.

13 MR. ZAHLER: There is a cover letter, June 24,
14 1974 from Artery to Williams and it enclosed a three page
15 document entitled "Agreement Between American Municipal
16 Power, Ohio, Inc. and the City of Orrville Dated as of June
17 27, 1974."

18 CHAIRMAN RIGLER: All right.

19 Now you want the agreement of June 1, 1974 between
20 American Municipal Power-Ohio, Inc. and the City of Orrville
21 marked as Applicants' 186A?

22 MR. ZAHLER: Yes.

23 MR. CHARNO: For clarification, counsel, did you
24 just state that the unsigned agreement between American
25 Municipal Power-Ohio and Orrville was 186 or 187?

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1 ZAHLER: That was 187.

2 The document previously identified as 186 is
3 identical with the document I have now distributed and asked
4 to be moved in evidence as 186. We're only replacing it
5 because it has been red-lined by Applicants at this time.

6 CHAIRMAN RIGLER: Hearing no objection, we will
7 now receive 186A into evidence.

8 (Whereupon, the document
9 previously marked as
10 Applicants' Exhibit 186A
11 was received in evidence.)

12 MR. ZAHLER: Mr. Chairman, at the time that
13 Applicants' Exhibit 261 (TE) was marked for identification
14 there was an objection raised by Mr. Hjelmfelt, I believe,
15 because the document did not contain the original or first
16 filing by Toledo Edison with the Federal Power Commission.
17 Applicants' Exhibit 261 was the cost of service study filed
18 by Toledo Edison. Admission of that document was deferred
19 until Toledo Edison could produce a copy of the original
20 filing before the FPC and show that to Mr. Hjelmfelt. That
21 has been done. Applicants have consulted with Mr. Hjelmfelt
22 and the offer of proof originally given as to Applicants'
23 Exhibit 261 (TE) is to be revised in the following manner:

24 That document is offered to show that the FPC
25 requires Toledo Edison to file a cost of service study and

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1 Toledo Edison has so filed the study and as such the study
2 provides some of the information upon which the NPC relies
3 in approving the rates Toledo Edison charges its wholesale
4 customers.

5 It's my understanding with that reformulated offer
6 of proof there is no objection from Mr. Hjalmsfelt at this
7 time and I would move the admission of Applicants' Exhibit
8 261 (TE).

9 MR. HJALMSFELT: The City has no objection, Mr.
10 Chairman.

11 CHAIRMAN RIGLER: We will now receive Applicants'
12 Exhibit 261 (TE) in evidence.

13 (Whereupon, the document
14 previously marked as
15 Applicants' Exhibit 261 (TE)
16 was received in evidence.)

17 MR. ZAHNER: At the time that City Exhibit C-165
18 was received into evidence Applicants requested the right to
19 supplement that document. It was the prospectus of CBI
20 filed in May of 1976 and it was an incomplete document.
21 At this time I would like to distribute the additional
22 pages that Applicant would like included in that prospectus
23 with the additional red-lining that Applicant would also
24 like.

25 CHAIRMAN RIGLER: This is an addition to City

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1 Exhibit 1657

2 MR. ZAHLER: Yes, sir, some of the pages may
3 duplicate because of the additional red-lining that Applicants
4 have added.

5 CHAIRMAN RIGLER: All right.

6 We'll receive the pages just distributed as an
7 addition to City Exhibit 165.

8 (Whereupon, the document
9 referred to was marked as
10 an addition to Exhibit
11 C-165 and was received
12 in evidence.)

13 MR. PERI: We'd like to proceed to the Ohio
14 Edison documents made mention of earlier. The first two
15 documents are a letter of July 10, 1975 -- pardon me, a
16 memorandum, an internal memorandum Ohio Edison Company from
17 Mr. Kayuha to a number of different employees of Ohio Edison.
18 I would like that designated as Applicants' 266 and I would
19 move the admission of that document.

20 (Whereupon, the document
21 referred to was marked
22 as Applicants' 266 for
23 identification.)

24 CHAIRMAN RIGLER: Hearing no objection, we'll
25 receive Applicants' 266 into evidence.

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1 (Whereupon, the document
2 previously marked as
3 Applicants Exhibit 266
4 was received in evidence.)

5 MR. PERI: The next document which we would like
6 identified as Applicants' 267 is dated June 11, 1975 and is
7 a memorandum from Mr. Kayha to a number of nurses, employees
8 and officers of the Ohio Edison Company.

9 (Whereupon, the document
10 referred to was marked
11 Applicants' Exhibit 267
12 for identification.)

13 MR. PERI: We would like to move that into evidence
14 at this time.

15 MR. CHARNO: The Department would object to 267
16 as at least double hearsay.

17 MR. LESSY: As would the Staff. At this late point
18 in time some of the individuals on which the hearsay state-
19 ments are made would have to be called or examined to verify
20 it. Without that opportunity it remains hearsay.

21 MR. PERI: If I may respond, if it is necessary?

22 CHAIRMAN RIGLER: Before I hear your response let
23 us read the document.

24 (Pause.)

25 CHAIRMAN RIGLER: Mr. Peri?

mpb8 1 MR. PERI: Yes.

2 In terms of Mr. Kayuh's statements, this is a
3 business record kept in the course of his duties. In terms
4 of the statement which I assume has drawn the objection
5 primarily according to Bruno Codispoti and following, this
6 also falls under the exceptions to the hearsay rule of records
7 of regularly conducted activity, information transmitted by
8 a person with knowledge in the normal course of his business
9 activity. It also appears to record the present sense
10 pressure to Mr. Codispoti at that time and that would over-
11 come in effect the second hearsay objection.

12 MR. LESSY: To the business record exception, it
13 is required there be testimony of the custodian or other
14 qualified witnesses --

15 MR. PERI: Do you have any serious doubt that this
16 is an Ohio Edison Company --

17 MR. LESSY: I would like to continue my statement.

18 Under Rule 3036 of the Federal Rules it's required
19 that testimony of a custodian or other qualified witness be
20 given. Those witnesses are available and also -- this document
21 also includes speculation in addition to double hearsay. It's
22 not based on the facts, and on that basis we would object to
23 it.

24 CHAIRMAN RIGLER: With respect to the custodian
25 objection, I don't think there is any doubt this document was

mpb9 1 draft by Mr. Kayuha and that it did come from the Ohio Edison
2 files.

3 However, with respect to accepting it for the
4 truth of its content I think the objection is well founded,
5 particularly given the opportunities to call Mr. Kayuha, who
6 has been in attendance frequently at these hearings.

7 MR. PERI: The document does a great deal more
8 than that and if the Board chose to limit it merely to the
9 basis that Mr. Codispoti having made such a comment, although
10 we believe it would say more than that we can accept that.

11 And I believe the statement concerning Mr. Stout
12 is Mr. Kayuha's statement and we have I believe received
13 numerous documents that have talked about one individual
14 setting down what another individual has said under the
15 unsponsored rule. I think whatever is objectionable about
16 this document is solely limited to the "according to Bruno
17 Codispoti" statement.

18 CHAIRMAN RIGLER: How far does that statement go?
19 Does that include the next sentence about what WCOE has
20 decided to do?

21 MR. PERI: It's my understanding that it does not
22 and that that is Mr. Kayuha's statement.

23 MR. LESSY: That's why we need the witness, Mr.
24 Chairman.

25 CHAIRMAN RIGLER: Yes, I think so.

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I have some problems accepting the truth of it without an opportunity for cross-examination. The objection to 267 will be sustained.

(Whereupon, the document previously marked as Applicants' Exhibit 267 was REJECTED.)

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MR. STEVEN BERGER: Do I understand the Chairman's ruling to be that the Chairman would not accept the document even for the facts of the statements having been made?

CHAIRMAN RIGLER: Which statements? You see, the problem is it is very difficult to discern from the document which are reports of statements which were made and which are Mr. Kayuha's inferences drawn from those statements and beyond that, what actually was the position of WCOE which is being reported sort of second-hand to Mr. Kayuha.

And you add it all together and I really don't see how we could form any definitive opinions based on the information contained in this document.

MR. STEVEN BERGER: And you would not even accept the document for not the truth of what Mr. Stout said but that it was a statement made to Mr. Kayuha in the regular course of business in connection, as stated in this document?

CHAIRMAN RIGLER: Well, assuming that we accept it that Mr. Codispoti made these statements to Mr. Kayuha, again how far would that take us if we have reservations about the accurate understanding of Mr. Codispoti of whatever Mr. Stout may have said?

But beyond that I have the problem that I can't really separate where the report of the statement ends and where Mr. Kayuha is beginning to put his own input into

eb2 1 the document in terms of interpreting what WCOE's position
2 is or may be.

3 We really are so limited in any use we could make
4 of it that I don't see that it --

5 MR. STEVEN BERGER: I'm sorry I didn't anticipate
6 the problem. Mr. Codispoti and Mr. Kayuba just caught a
7 plane going back to Akron or I would have put them on the
8 stand.

9 MR. PERI: We were not asked for an offer on this
10 document. However, I believe if the document were offered
11 solely to indicate what Mr. Kayuba communicated to other
12 members of Ohio Edison at this point in time to be his
13 understanding, either as he independently arrived at it or
14 as Mr. Codispoti related it to him, it would be his under-
15 standing at this time that the point had been reached in
16 the WCOE negotiations, and I think there's some probative
17 value to the document in that the kind of concerns that
18 have been addressed would go to the weight.

19 But I think it's an important landmark, an
20 important benchmark in these negotiations and it would be
21 somewhat unfair to exclude the document in its entirety.

22 CHAIRMAN RICLER: All right.

23 I'm going to ask the opposition parties to con-
24 sider admission of the document limited just to the first
25 part of Mr. Peri's suggestion, namely that at least the

eb3 1 addressees received the information contained in the document
2 from Mr. Kayuha.

3 MR. CHARNO: The Department has no objection to
4 that.

5 MR. LESSY: The Staff would object to that.
6 We're talking about a document that is of critical impor-
7 tance. We've had both Mr. Codispoti and Mr. Kayuha here.
8 I'm not questioning the fact that when an important document
9 comes in that they are unavailable, but assuming that's
10 just chance, it is so mixed as to what is speculation, what
11 is fact, what is hearsay --

12 CHAIRMAN RIGLER: We've agreed with you on that
13 point though, Mr. Lessy.

14 MR. LESSY: I think the document is entitled so
15 little weight, and because it's an important matter I
16 think we should strictly comply with the rules of evidence
17 and without a custodian and because of the hearsay, I would
18 still maintain my objection even for their perception of it.
19 We cannot test that perception.

20 CHAIRMAN RIGLER: Mr. Hjelmfelt, I wasn't clear
21 whether you had raised an objection or not.

22 MR. HJELMFELT: No, I had not.

23 CHAIRMAN RIGLER: All right.

24 We will admit it for the limited purpose I just
25 stated, namely the transmittal of information from

eb4 1 Mr. Kayuha to the addressees, and that will be the sole
2 purpose for which we will permit it into the record.

3 (Whereupon, App. 267,
4 having been previously
5 identified and rejected,
6 was received in evidence.)

7 MR. PERI: Ohio Edison has at this point only two
8 other documents. These deal with the Niles situation.

9 I would like to identify as Applicants' 268 a
10 letter from Bixler to McGovern dated June 28, 1976 with
11 attachments.

12 (Whereupon, the document
13 referred to was marked
14 as Applicants' 268 for
15 identification.)

16 MR. PERI: I would move them into evidence at
17 this time.

18 MR. LESSY: No objection by Staff, but we do
19 have some additional red-lining on the attachment.

20 We would red-line the second paragraph on page
21 1 of the attachment, the third paragraph of page 1, the
22 first paragraph of page 2, and the last paragraph on page 3
23 or what is entitled or numbered number 4, the term of this
24 agreement, all the way to the end of the document.

eb 5 1 MR. PERI: In that case, your Honor, -- and I think
2 I was derelict in not doing it in the first place -- I think
3 it would be appropriate to red-line the entire agreement
4 since it is extremely current and does indicate the very
5 latest in the proposals between Niles and Ohio Edison.

6 MR. CHARNO: By the "entire agreement" do you mean
7 the entire document, the entire draft letter, or the entire
8 numbered clauses?

9 MR. PERI: I meant everything else essentially
10 has been red-lined. I would say everything in the packet
11 that is Applicants' 268.

12 CHAIRMAN RIGLER: Hearing no objection, we'll
13 receive 268 into evidence.

14 (Whereupon, Applicants' 268
15 having been previously
16 marked for identification,
17 was received in evidence.)

18 MR. PERI: We would like identified as Applicants'
19 269 Ohio Edison internal correspondence from Mr. Beil to
20 Mr. Kekela dated February 4, 1976, with attachments.

21 (Whereupon, the document
22 referred to was marked
23 as Applicants' 269 for
24 identification.)

25 MR. PERI: We would move it into evidence at this

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1 time.

2 MR. LESSY: The Staff has no objection but would
3 offer additional red-lining.

4 There are two attachments. With respect to the
5 first attachment, a letter dated January 30, 1976, from
6 Mr. Burgess of Niles, Ohio, to Mr. Bixler, we would red-
7 line the rest of the letter. Only about half of it is red-
8 lined.

9 And with respect to the second attachment which
10 was a letter from Mr. Bixler dated October 14, 1975, to
11 the Mayor of Niles, we would ask that the paragraphs which
12 bear the numbers 1, 2, and 3 be red-lined.

13 MR. PERI: Once again, Mr. Lessy, I appreciate
14 your concerns. In the event that red-lining is made I
15 think in all fairness the entire October 14, 1975 letter
16 agreement should be red-lined, and that would be to only
17 a very limited further extent.

18 CHAIRMAN RIGLER: What is the date of 269? Mine
19 has a stamp printed over it.

20 MR. PERI: Yes, I'm afraid it's obscured.
21 February 4, 1976.

22 CHAIRMAN RIGLER: Hearing no objection, we'll
23 receive Applicants' 269 into evidence.
24
25

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1 (Whereupon, Applicants' 26
2 having been previously
3 marked for identification
4 was received in evidence.

5 MR. PERI: At this time we have just a single
6 additional matter. Mr. Zahler will be handling some other
7 documents dealing with Ohio Edison.

8 When the Department of Justice Exhibit No. 628
9 was introduced into evidence we undertook to supply a
10 typewritten version of those notes. We have those and will
11 distribute those at this time.

12 MR. CHARNO: The Department's recollection differs
13 somewhat. We had requested if a better copy of the actual
14 notes of Mr. Codispoti could be made available. This may
15 or may not be such a copy. It appears to be a trans-
16 cription presumably recently executed which we have not had
17 an opportunity to compare with the original.

18 CHAIRMAN RIGLER: All right, we'll give you a
19 chance to do so. Let the Board know if this is not an
20 accurate transcription or if you are unable to determine its
21 accuracy.

22 Subject to that, we will attach it to Department
23 Exhibit 628 and attempt to use it to clear up any illegible
24 portion.

25 Our directions in closing the record are going

eb8 1 to become apparent in a few minutes. I think I will give
2 you some guidance, but essentially you can let us know on
3 Tuesday if you have any problem in the use of this.

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A mpbl 1 MR. ZAHLER: Mr. Chairman, at this time I would
2 like marked as Applicants' Exhibit 270 a 35 page document
3 entitled "Initial Decision of the Administrative Law Judge
4 Dated November 24, 1965 in the Case of the New England Power
5 Pool Agreement."

6 (Whereupon, the document
7 referred to was marked
8 as Applicants' Exhibit 270
9 for identification.)

10 MR. ZAHLER: Because what Applicant believes is
11 the essential if not crucial nature of the decision as it
12 relates to the NEPOOL documents that have been introduced
13 earlier, Applicants would request that the document be red-
14 lined in its entirety. I think it gives the Board some
15 insight into how the NEPOOL agreement was implied and
16 concerns of the municipalities and how the companies operate
17 under the agreement as applied.

18 MR. LESSY: Mr. Zahler, was there an appeal
19 from this decision?

20 MR. ZAHLER: I'm not exactly sure what the present
21 status of this is. I don't believe -- of this docket and
22 that's because I'm not clear exactly whether I have the most
23 recent things or not. It's my understanding that the
24 Commission itself has this decision under advisement but has
25 issued no further ruling but merely to postpone the date

mpb2 1 upon which it has to make a final determination and I must
2 tell you I don't know whether that's completely accurate or
3 not either.

4 MR. LESSY: Is it the burden of the other parties
5 to find further decisions on this if they exist, or is it
6 the burden on Applicants to produce anything further on this?
7 My impression is there was at least one more further written
8 decision with respect to this docket.

9 MR. CHARNO: The Department has an additional
10 problem. Standing alone Applicants' 270 indicates a great
11 deal of opposition whereas in fact a good part of that
12 opposition was withdrawn. Settlements were made which were
13 incorporated in the NEPOOL agreement, the original charges
14 were abandoned by a large number of people and a very small
15 number of people continued forward. If Applicants' 270 is
16 going to be admitted I would like to submit another document
17 that is a prior order in that docket which indicates some
18 of the settlement agreements, some of the problems that
19 existed and how they were solved.

20 MR. ZAHLER: I have no objection to that. I
21 would note, however, that if one does read the opinion that
22 Applicants have submitted, their 270, I think the procedural
23 history of the case is laid out and the Commission or the
24 Administrative Law Judge does indicate that there were
25 some changes in the agreements. That's incorporated in this

mpb3

1 decision. Some parties did withdraw, some parties did con-
2 tinue. It's not being introduced for the fact that the
3 NEPOOL agreement was contested. I think that's obvious.
4 It's being introduced to show you what the problems are,
5 what the contractual provisions mean in a day to day atmos-
6 phere. Just written alone, bare, without any evidence as to
7 the situation in New England and how the utility companies
8 operate, it's difficult to understand there. I believe
9 this decision of the Administrative Law Judge gives the
10 Board further insight as to that.

11 MR. LESSY: Do you have an obligation to do that,
12 Mr. Zahler, to complete the picture?

13 CHAIRMAN RIGLER: Well, I've heard suggestions
14 that additional documents may be necessary. I haven't
15 heard objection to Applicants' 270 as such. I think it's
16 obvious that there is a limitation to the Board's interest
17 in delving into each and every aspect of NEPOOL, as we
18 discussed earlier today. NEPOOL may be of interest for
19 comparison purposes but surely we're not going to use
20 the NEPOOL agreement as a benchmark and we're not going to
21 make independent determinations as to the reasonability or
22 effectiveness of the NEPOOL agreement.

23 Therefore, for us to become involved in a complex
24 analysis of pending decisions of other agencies relating to
25 the operation of that agreement at some point is going to

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1 lose its utility for us. I'm not sure that it's necessary
2 for us to abandon our red-lining rule, for example, and
3 become familiar with all 35 pages of this agreement. I
4 suppose we may be willing to do so and we may be willing to
5 receive additional material but I can't help but caution you
6 that at some point the effect of burdening our record with
7 too much material is going to unreasonably delay our reaching
8 a decision, I think.

9 MR. STEVEN BERGER: Mr. Chairman, I didn't hear the
10 word you said on purposes, the word that preceded purposes
11 that the Board intended to use the NEPOOL agreement for. I
12 missed that at the beginning of your statement. You said
13 that the Board will consider it for some --

14 CHAIRMAN RIGLER: Comparison.

15 MR. STEVEN BERGER: Comparison purposes, is that
16 what you used?

17 CHAIRMAN RIGLER: Yes, I think we discussed that
18 earlier this morning.

19 The NEPOOL agreement has been offered to us in the
20 context of whether it is feasible, whether it is practical,
21 whether it can be done. You have either small systems --
22 you have to have either small systems or a consortium of
23 small systems participate jointly in the power pool, but
24 assuming that we found NEPOOL to be workable or unworkable,
25 obviously we would have to allow for differences that might

mp55

1 arise elsewhere in the country. I mean, standing alone it
2 could only be a model up to a certain point.

3 All right, hearing no objection we will receive
4 Applicants' 270.

5 (Whereupon, the document
6 previously marked as
7 Applicants' 270 was
8 received in evidence.)

9 MR. CHARNO: Would it be appropriate to annex
10 the prior decision to Applicants' 270? Ours is red-lined
11 specifically.

12 MR. REYNOLDS: We don't have any objection.

13 MR. ZAHLER: At this time I would like to identify
14 a letter from Donald Hauser to Harry Poth, dated June 30,
15 1976 enclosing service schedule B, Firm Power Service, which
16 is an agreement between Cleveland Electric Illuminating
17 Company and the City of Cleveland, the Department of Public
18 Utilities entered into on June 30, 1976. I would request that
19 this document be marked as Staff Exhibit 204A and attached
20 to Staff Exhibit 204 which is the agreement between Cleveland
21 Electric Illuminating Company and the City of Cleveland.
22 This is an additional service schedule that is appended to
23 that contract and incorporates and makes mention of the base
24 contract itself. For the convenience of the Board it may be
25 easier to refer to if they are put in one place.

mpb6

1 CHAIRMAN RIGLER: We may do that or we may
2 just want to cross reference it. Let me see it.

3 MR. CHARNO: Could we have a moment while we
4 secure the Staff exhibit? We're not sure whether that was
5 filed or not.

6 (Pause.)

7 CHAIRMAN RIGLER: We'll cross reference it.
8 Now that we have made it an Applicants Exhibit,
9 why don't we just proceed.

10 MR. CHARNO: I have no objection.

11 MR. ZAHLER: Is it clear in the record that this
12 document is --

13 CHAIRMAN RIGLER: Our preference is to receive
14 Applicants' 271 as a separate document, Applicants' 271 being
15 the June 30, 1976 Hauser to Poth letter with the attachment.
16 We'll just cross reference that to Staff Exhibit 204.
17 Applicants' 271 is admitted.

18 (Whereupon, the document
19 referred to was marked as
20 Applicants' Exhibit 271
21 for identification and
22 received in evidence.)

23 MR. REYNOLDS: Could I back up for just one second?
24 This additional opinion and order of the Federal Power
25 Commission to be appended to Applicants' Exhibit 270, can I

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1 request we mark that as Applicants' Exhibit 270A for purposes
2 of reference? They are different dates and different opinions
3 and it would be easier if we could have it marked that way,
4 Applicants' Exhibit 270A would be the order of the Federal
5 Power Commission in the matter of NEPOOL power pool which is
6 dated January 22, 1974.

7 CHAIRMAN RIGLER: It will be so marked.

8 MR. CHARNO: For clarification of the record, has
9 that been received in evidence, then?

10 CHAIRMAN RIGLER: Yes.

11 (Whereupon, the document
12 referred to was marked
13 as Applicants' Exhibit 270
14 for identification and was
15 received in evidence.)

16 MR. ZAHLER: At this time I would like to mark
17 as Applicants' Exhibit 272 an October 1, 1973 memorandum to
18 the files from Maurice Messier.

19 (Whereupon, the document
20 referred to was marked as
21 Applicants' Exhibit 272
22 for identification.)

23 MR. ZAHLER: At this time I would move the
24 admission of Applicants' Exhibit 272.

25 MR. CHARNO: 272 or 271?

1 MR. ZAHLER: 272. 271, I believe, is the service
2 schedule to the CBI-Cleveland contract.

3 MR. CHARNO: The Department would object to the
4 receipt in evidence of Applicants' 272, while we didn't
5 object on 271 because it seemed to be recent data that
6 could not have been put in previously, even though it wasn't
7 surrebuttal it's clear that this is not surrebuttal. It's
8 something that has been in the possession of Applicants
9 for a considerable period and I think they have lost their
10 opportunity. It meets no issue raised on rebuttal by any of
11 the parties.

12 MR. LESSY: The Staff would join in that objection.
13 This document was produced by the Staff on December 1, 1974
14 in discovery in the Perry proceeding.

15 MR. EJEMLFELT: The City would join in the objec-
16 tion.

17 MR. ZAHLER: Mr. Chairman, I would note that
18 Applicants are introducing this document at this time in
19 light of the recent colloquy that we've had regarding the
20 Milburn deposition and the fact that the issue in the
21 Milburn deposition is still open. Applicants believe that
22 this memorandum and the one to follow could replace the
23 negotiation between CBI and Painesville that they reflect
24 the attitude of proposal by Mr. Milburn as principal nego-
25 tiator for Painesville in connection with the negotiations

mpb9

1 concerning interconnection with CEI and it reflects
2 Painesville's interest or lack thereof in participating in
3 nuclear power.

4 Now a lot of this confirms the statements that
5 were made in Mr. Milburn's deposition. That deposition at
6 some later date is not going to be received in evidence.
7 Applicants should not be barred because of that ruling from
8 putting in alternative evidence to support and confirm what
9 would have been in the Milburn deposition.

10 MR. CHARNO: We object very seriously. The
11 Applicants stated their direct case was close with certain
12 very minor exceptions. This is not one of those exceptions.

13 MR. ZAHLER: I would note one of the exceptions
14 that was left open in Applicants' case was the facts regard-
15 ing Painesville because of the open status of the Milburn
16 deposition.

17 MR. CHARNO: The Milburn deposition was open and
18 that was the only piece of evidence that was outstanding.

19 CHAIRMAN RIGLER: Yes, but we haven't ruled on the
20 Milburn deposition.

21 MR. CHARNO: Is it the Board's ruling, then, that
22 any information that is relevant to the Milburn deposition
23 can now come in on rebuttal and surrebuttal? It seems that
24 that would be the import of it.

25 CHAIRMAN RIGLER: Well, we do have a problem

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1 because we are unable to examine Mr. Milburn.

2 In one of the attacks made on the receipt of the
3 Milburn deposition was that his judgment may have shifted and
4 varied from time to time and from the opposition viewpoint
5 it would seem there would be a certain prima facie validity
6 to the information contained in these documents since they
7 are NRC Staff documents.

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2 MR. LESSY: That's true. However, they can only
3 reflect what Milburn was thinking as of the day that the
4 interview was taking place, and I think the record is pretty
5 clear as to consistency or inconsistency between what
6 Mr. Milburn said on a day-to-day basis.

7 MR. ZAHLER: Applicants' position is that the
8 information contained in this memo of October '73 supports
9 Mr. Milburn's deposition in August of 1975, and it is being
10 offered partly for that very purpose.

11 If Mr. Lessy is going to be making that type of
12 objection as to Mr. Milburn I think that's the reason why
13 this type of document should come in and be before the Board
14 to have before the Board the consistency, if you will, of
15 Mr. Milburn's thinking.

16 The argument I'm making here goes to the next
17 document which completes the notes on the interview that
18 the NRC Staff conducted of Mr. Milburn.

19 CHAIRMAN RIGLER: I think we may have to admit
20 it over the objections. I don't know what we're going to
21 do with the Milburn deposition but in the event the Milburn
22 deposition does come into evidence and if it is the Staff
23 that has objected to the introduction of this because of
24 the lack of opportunity now to cross-examine Mr. Milburn
25 and to find out about changes of position, the consistency
of his statements, then it seems to me that prior Staff

eb2 1 documents relating to interviews with Mr. Milburn may have
2 some impact on the weight we give that deposition and may
3 actually be addressed to some of the concerns that the
4 Staff raised in asking us not to accept the deposition into
5 evidence.

6 I would not hesitate to keep these out if
7 Mr. Milburn were available to testify. Obviously that would
8 be our preference. But since we can't have Mr. Milburn we
9 may have to let his deposition in and if we do so, really
10 it seems to me that the opposition parties are hard pressed
11 to argue that their own notes of conversations with
12 Mr. Milburn should not be considered in assessing whether
13 or not he had been consistent in his deposition.

14 So I think we are going to have to overrule the
15 objection. We will receive 272 into evidence.

16 (Whereupon, Applicants' 272
17 having been previously
18 marked for identification,
19 was received in evidence.)

20 MR. ZAHLER: At this time I would like to mark
21 as Applicants' Exhibit 273 a memorandum from Benjamin H.
22 Vogler to the files dated October 5, 1973.

23 (Whereupon, the document
24 referred to was marked
25 as Applicants' 273 for
identification.)

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MR. ZAHLER: I move the admission of this document.

MR. CHARNO: The Department will object on similar grounds.

MR. ZAHLER: Applicants' position is as stated before with respect to document 272.

CHAIRMAN RIGLER: Well, I had actually looked ahead and my prior remarks were addressed to both documents. And we will receive 273.

(Whereupon, Applicants' 273 having been previously marked for identification, was received in evidence.)

MR. ZAHLER: I would like to mark three documents together at this time.

I would like to mark as Applicants' Exhibit 274 a one-page letter from the Morrow Electric Cooperative to the United States Department of Justice dated October 11, 1972.

(Whereupon, the document referred to was marked as Applicants' 274 for identification.)

MR. ZAHLER: I would like to mark as Applicants' Exhibit 275 a two-page letter from the Hancock-Wood Electric Cooperative to the United States Department of Justice

eb4 1 dated October 9, 1972.

2 (Whereupon, the document
3 referred to was marked
4 as Applicants' 275 for
5 identification.)

6 MR. ZAHLER: And I would like to mark as Appli-
7 cants' Exhibit 275 a one-page letter from the Pioneer Rural
8 Electric Cooperative to the United States Department of
9 Justice dated September 12, 1972.

10 (Whereupon, the document
11 referred to was marked
12 as Applicants' 275 for
13 identification.)

14 MR. CHARNO: Could we inquire whether Applicants'
15 274 is offered for the truth of the statements contained
16 therein?

17 MR. ZAHLER: Yes.

18 MR. CHARNO: And could we have an offer of proof
19 on Applicants' 276?

20 MR. ZAHLER: The offer of proof would be true
21 for all, 274, 275 and 276. It is that these are the only
22 letters received from the distribution co-ops in the Ohio
23 Edison area in response to the Department's third-party
24 letters requesting information for this proceeding.

25 And part of the request was whether the co-ops

ab5 1 had ever indicated an interest in bulk power supply coordi-
2 nation with Applicants including use of Applicants' trans-
3 mission lines.

4 These documents indicate that the Buckeye co-ops
5 and in particular the Morrow Electric Cooperative had
6 labeled Ohio Edison's transmission service to Buckeye as
7 wheeling; that in the co-ops' views any failure of Ohio
8 Edison to sign the power delivery agreement had had no ad-
9 verse impact on the co-ops' ability to compete with Ohio
10 Edison; and that without any additional bulk power supply
11 alternatives, the co-ops believed that they could effectively
12 compete with Ohio Edison.

13 MR. CHARNO: I have some problem with the offer,
14 especially with respect to 276.

15 First I would note that all of these appear to
16 be letters in the Beaver Valley proceeding rather than this
17 proceeding. And I'm not in a position to say whether this
18 represents the sum total of the letters. I don't believe
19 it does with respect to this proceeding.

20 Finally, I believe it falls short of the offer
21 as stated.

22 That does appear to be the letters received from
23 Ohio Edison cooperatives, those, as they point out, on the
24 edge of the Ohio Edison's service area.

25 I don't believe that any of these documents are

sb6 1 properly surrebuttal in that they do not treat of the impact
2 of a refusal to wheel during the 1960's. The request, as
3 indicated by the record in the proceeding and indicated
4 by these letters, was not made by individual distribution
5 cooperatives but by Buckeye. And I don't believe any of these
6 shed any light on that.

7 MR. ZAHLER: Could I have the very last part of
8 Mr. Charno's statement repeated?

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

11 MR. CHARNO: I would note that Hancock-Wood's
12 response indicates that it might be worthwhile to
13 refer to Buckeye Power for further comments and answers.

14 CHAIRMAN RIGLER: Well, as we read them I think
15 they may fall a little short of your offer of proof. I
16 notice, for example, on the Morrow one the conclusion at the
17 very end appears to me a personal one of Mr. Winston's
18 rather than the response of the Morrow Electric Cooperative.

19 The Hancock-Wood response seems to stress the
20 benefits of coordination in generation and transmission
21 but whether the offer is completely supported by the docu-
22 ment is a matter for argument.

23 I know our rule has been to let the documents in;
24 whether they thereafter meet the purpose described by the
25 offering party remains to be seen.

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1 So we will overrule the objections and we'll
2 admit 274, 275, and 276 into evidence.

3 (Whereupon, Applicants'
4 274, 275, and 276, previous
5 marked for identification,
6 were received in evidence.)

7 MR. ZAHLER: Mr. Chairman, the final thing that
8 I have is to re-move the admission of Applicants' Exhibit
9 248 which is the December 19, 1967 letter from Donald F.
10 Turner to Richard M. Dickey which has been the subject of
11 discussion at an earlier time.

12 The ruling of the Board was that admission of
13 this document would be deferred until Toledo Edison produced
14 any other documents that it needed to complete the Department
15 of Justice's files with respect to the request for business
16 review clearance.

17 Toledo Edison has gone back and searched the files
18 of the company and of Mr. Henry of the law firm and we have
19 not found any additional documents in their possession at
20 this time, and the Department of Justice was so informed.

21 We would like to move the admission of Applicants'
22 248 at this time.

23 MR. CHARNO: I don't believe that the Applicants'
24 files have been exhausted. Certainly Ohio Edison would
25 have files relating to this.

eb8

1 Further, I think Toledo Edison's reliance on
2 a letter that was not addressed to them, when that letter
3 is based upon representations and those representations
4 are no longer in the possession of the Department of Justice
5 makes it incumbent upon them to go out and secure those
6 files from the same place that they got the original letter
7 and complete the document, under Rule 106.

8 The things we believe were not included in those
9 representations include Ohio Edison's refusal to wheel,
10 the Southeast Michigan Cooperative's desire for power in
11 Michigan, and the territorial agreements, any one of which
12 we believe would have been sufficient to have resulted in
13 a different answer in this letter without anything more.

14 I think there's an obligation upon them to seek
15 the remaining correspondence from wherever they sought the
16 original correspondence. I find it hard to believe that
17 the only document in their files -- in the files of Toledo
18 Edison relating to the Buckeye agreement is this one letter.

19 MR. ZAHLER: Mr. Chairman, I've spoken with
20 Toledo Edison people a number of times as to the inquiry
21 and they made the representation to me, and I have no
22 reason to doubt them, about the number of times they have
23 checked to see if there were additional documents.

24 CHAIRMAN RIGLER: Wait a minute. That's not what
25 Mr. Charno was referring to. He was asking if they had gone

eb9

1 to outside sources in an effort to obtain it. And you're
2 telling me that they searched their own files.

3 MR. CHARNO: We made the suggestion to Applicants
4 that they might go to other sources some weeks ago when this
5 originally came up.

6 MR. ZAHLER: I will state that Toledo Edison has
7 not gone to any other outside sources and I don't understand
8 that that is their obligation. Rule 106 provides that any
9 other documents the Department believes may be necessary
10 can be introduced at the same time.

11 This correspondence was addressed to the Department
12 of Justice. The Department of Justice does have a sizable
13 amount of correspondence. I'm not in a position, nor is the
14 Department, to advise me whether the correspondence they have
15 is complete or not complete.

16 MR. CHARNO: That's not true.

17 CHAIRMAN RIGLER: Does somebody have a copy of
18 248?

19 (Document handed to the Board.)

20 MR. CHARNO: 106 specifically provides that an
21 adverse party may require the introducing party to introduce
22 any other part or any other writing or recorded statement
23 which ought in fairness to be considered contemporaneously
24 with it. It's a misrepresentation of 106 that the
25 Department is required to complete the documents.

eb10

1 Further, we have supplied, as the Board requested,
2 every document we have on Buckeye, that we still had in the
3 files of the Department. We made copies of them and have
4 given them all to the Applicants.

5 MR. ZAHLER: I happen to have a different reading
6 of 106 which is that if the documents are in Applicants'
7 possession or if there are documents the Department gives
8 us we will introduce them on our behalf under this number
9 or whatever.

10 The Department is just as able to go as Appli-
11 cants are to secure any additional documents. These docu-
12 ments are not within the control of Applicants. I do not
13 understand the basis for the reasoning that we have that
14 obligation to get this document into evidence.

15 CHAIRMAN RIGLER: Where did Applicants obtain
16 their copy of Exhibit 248?

17 MR. ZAHLER: I do not know that answer. I have
18 not checked that. It is my understanding that that document
19 does appear in the files of Toledo Edison, but I'll go back
20 and check with them.

21 CHAIRMAN RIGLER: All right. Where did they
22 get it, even if it were in their own files?

23 MR. ZAHLER: I believe at the time the letter was
24 sent, either a copy was sent to them or they secured a
25 copy.

eb11 1 CHAIRMAN RIGLER: From Simpson, Thatcher?

2 MR. ZAHLER: I don't know.

3 I do not doubt that they may have had additional
4 documents in their possession at one time. I do not know
5 that. I'm telling you that at this time --

6 CHAIRMAN RIGLER: Well, the point is if the
7 document was given to them by the law firm of Simpson,
8 Thatcher or by somebody associated with the proceeding, then
9 it ill becomes them to come in and argue that they really
10 don't have complete control over the file, and that justifies
11 putting in documents on a selective basis.

12 Rule 106 is bottomed on the concept of fairness,
13 and I think that fairness here requires that the entire file
14 be made available. And we're not going to take 248 into
15 evidence unless we have a much greater assurance that other
16 documents cannot be obtained readily.

17 If we have a situation where cooperation in pro-
18 ducing only a part of the files is extended to one of the
19 Applicants by representatives of Ohio Power or Buckeye or
20 some outside party, then that's something we would have to
21 take into consideration in deciding whether or not to admit
22 just a part of that file into evidence here.

23 MR. STEVEN BERGER: Can I make a statement with
24 regard to Applicants' 243?

25 That document was quoted extensively in Applicants'

eb12 1 prearing brief. It was on Ohio Edison's original document
2 designation and the Department has been fully aware of what
3 purpose Applicants intended to made of that document for
4 more than seven months.

5 If they had a problem under 106 or otherwise with
6 its admission into this record, they sure were on notice
7 of it and could have informed us as to the problem.

8 MR. CHARNO: We did.

9 CHAIRMAN RIGLER: Well, the obligation is not on
10 them to make sure that your files are complete if you intend
11 to introduce a document into evidence.

12 MR. STEVEN BERGER: What is it about the document
13 on its face that requires, in fairness, the inclusion of
14 other things?

15 CHAIRMAN RIGLER: We've argued that extensively.
16 Obviously a lot of supporting materials were submitted to
17 the Department in order to try to get a particular clearance
18 letter.

19 MR. REYNOLDS: Mr. Rigler, let me just say one
20 thing. The problem is not that Toledo Edison's files are
21 incomplete. It's that the Justice Department's files are
22 incomplete, and that's the whole point we're making, that
23 the additional documentation they're asking for relates to
24 representations made to the Justice Department.

25 The Justice Department is coming in now and

eb13 1 telling us because their files are incomplete that we have
2 to go out and there is some obligation on us to go to Ohio
3 Power and go to whoever else, Buckeye, and somehow complete
4 their files because they've lost some copies.

5 CHAIRMAN RIGLER: You may have a point that things
6 are in kind of a mess at the Department, but as this
7 agency and this Board thinks about it, from the viewpoint of
8 our consideration of the issues, before we accept this
9 letter we want to see the underlying material. And it's
10 that simple.

11 MR. ZAHLER: Is it that the Board wants to see it
12 or the Department does? It's very voluminous. What the
13 Department has already is voluminous (demonstrating).

14 I don't think that anyone is proposing that we're
15 going to introduce into evidence all the supporting documents.
16 Some of it I would point out is already in evidence as
17 independent documents.

18 That document stands by itself and it's no dif-
19 ferent than any other document in any file of any Applicants
20 that have come into this proceeding. To say that Applicants
21 have to, when you put in one document, put in the entire
22 file, is just not the rule that's been followed in this
23 proceeding.

24 CHAIRMAN RIGLER: Certainly it would be illogical
25 to require that in each and every case but this is a case

eb14

1 where I think the importance of the conclusions reached by
2 the Department require us to look at the underlying documents
3 in view of the posture the Department has taken with respect
4 to the admission of the document.

5 MR. ZAHLER: That's Applicants' burden.

6 CHAIRMAN RIGLER: Okay.

7 Does that conclude your documents?

8 MR. STEVEN BERGER: At this time.

9 MR. REYNOLDS: Mr. Chairman, at this time I would
10 like to make an offer of proof on the record relating to
11 Exhibit 248.

12 CHAIRMAN RIGLER: That offer of proof is that that
13 exhibit, had the Board allowed it to come into evidence,
14 would have sustained the offer as articulated originally
15 by the Applicants with respect to this particular document.

16 CHAIRMAN RIGLER: You still might get it in, but
17 you're not going to get it in until we're more satisfied
18 than we are right now with respect to the underlying docu-
19 ments.

20 MR. REYNOLDS: I would tell the Board now I don't
21 think there is any way to get it in. We've exhausted files.
22 We don't have it. The Department is the one that says
23 that their file is incomplete. I don't know what kind of
24 documentation is missing even.

25 CHAIRMAN RIGLER: Well, you haven't even gone

eb15 1 back to the firm of Simpson and Thatcher and tried to find
2 out what they would make available.

3 I listened to Mr. Zahler's representations. He
4 said the company, namely Toledo Edison, searched its own
5 files. It didn't even go out to the source, the generating
6 source of the document.

7 All right. We're going to take a five-minute
8 break.

9 MR. REYNOLDS: Let me just make one final state-
10 ment if I can in connection with that.

11 The problem I have with what you're saying is
12 we'll go to Simpson, Thatcher but if we run into claims of
13 attorney-client privilege, if we run into the fact that--

14 CHAIRMAN RIGLER: If you run into claims of
15 attorney-client privilege, then all the more reason why
16 we would not accept it.

17 MR. REYNOLDS: It's not my client and it's not
18 my client's attorney. Simpson, Thatcher was representing
19 somebody else in this particular negotiation and if Simpson,
20 Thatcher has documents on behalf of that client and claims
21 an attorney-client privilege with respect to those documents--

22 CHAIRMAN RIGLER: That would be a very interest-
23 ing claim since the letter itself appears in the files of
24 the Toledo Edison Company.

25 MR. REYNOLDS: You asked for backup documentation.

eb16 1

2 MR. CHARNO: Mr. Chairman, what we asked for
3 originally to be submitted under Rule 106 by the Applicants
4 were those representations made to the Department of Justice
5 upon which there would be no claim of attorney-client
6 privilege.

7

8 CHAIRMAN RIGLER: Because it was already trans-
9 mitted to an outside party.

10

11 MR. CHARNO: That's correct. That's all we wanted
12 and that's clear on the record.

13

14 CHAIRMAN RIGLER: We'll take a recess.

15

16 (Recess.)

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1 CHAIRMAN RIGLER: On the record.

2 MR. LESSY: Mr. Chairman, one of the documents
3 distributed by Applicants, but not offered into evidence --
4 and we'll secure copies if they don't still have them -- is
5 a letter dated September 6th, 1974 from Mr. C. Emerson
6 Duncan II to Mr. Charno. We had not -- that is, the Staff
7 had not seen this document before. And we would like to
8 offer it into evidence at this time. We'll provide the
9 appropriate copies.

10 We had thought Applicants were going to
11 move it into evidence.

12 We would ask that this document be identified
13 as NRC Exhibit 222.

XZXXZX 14 (Whereupon the document referred to
15 was marked for identification as
16 NRC Staff Exhibit 222.)

17 CHAIRMAN RIGLER: Is there objection?

18 MR. REYNOLDS: We just saw it about two seconds
19 ago. May we have just a moment?

20 (Pause)

21 MR. STEVEN BERGER: No objection, your Honor.

22 MR. REYNOLDS: Our continuing objection.

23 CHAIRMAN RIGLER: The continuing objection is
24 overruled.

25 We'll receive Staff Exhibit 222.

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(Whereupon NRC Staff Exhibit 222,
marked for identification, was
received in evidence.)

4 MR. LESSY: Mr. Goldberg also has a motion to
5 make with respect to the Codispot notes, DJ-628.

6 MR. JACK GOLDBERG: With respect to the
7 Department of Justice Exhibit 628, which is the Codispot
8 notes, this was originally offered by the Applicants as
9 Applicants' Exhibit 226.

10 At that time the Staff objected to the document
11 on the ground that it was hearsay, and that objection was
12 sustained.

13 Subsequently the Department of Justice offered
14 this document as Department of Justice 628, limiting it to
15 the admissions contained therein.

16 The Staff would like to make a motion under
17 Rule 105 to limit the use of this document to its proper
18 scope; that is, we would wish the Board to rule that the
19 only use of this document is for the admission, since other-
20 wise it is hearsay.

21 CHAIRMAN RIGLER: Well, whatever our prior ruling
22 was, we're going to adhere to it. That was argued at the
23 time it was admitted, and we will rely on the record as of
24 that time.

25 The typed version does nothing more than put in

wb3 1 legible form the handwritten notes.

2 MR. JACK GOLDBERG: I'm not speaking about
3 the typed version; I'm speaking with respect to the original
4 document itself.

5 CHAIRMAN RIGLER: Yes, I understand that. And
6 my comment is that it was argued at that time, as I recall,
7 or at least you're refreshing my recollection that there
8 was discussion.

9 The Board made a ruling relating to its use.
10 And why wouldn't we continue to adhere to that ruling?

11 MR. JACK GOLDBERG: As long as it's understood
12 that when the Department of Justice introduces a document
13 with an offer of proof which limits the use, that that offer
14 of proof and that use applies to all parties in this
15 proceeding, and that it cannot generally be used by any
16 other party for any other purpose.

17 If that's what the Board meant by its ruling,
18 then there is no necessity for a further ruling.

19 That's the concern of the Staff, that it simply
20 be used for the admissions; which is the way the Department
21 of Justice's offer read.

22 MR. CHARNO: The Department believes that the
23 record with respect to this single document is confused in
24 that it had been rejected in its entirety and then, under
25 a limited offer by the Department, it was allowed in.

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1 However there was no discussion. And if the Board's
2 general rule would prevail, then it could be used by any
3 party other than the Department of Justice for any purpose.
4 And I presume that's the basis for the Staff's motion under
5 Rule 105.

6 Our review of the record indicates there is
7 some confusion as to the use that may be made of the docu-
8 ment.

9 MR. STEVEN BERGER: Mr. Chairman, it's my under-
10 standing that any document less than four pages in this record
11 need not be redlined in any regard; is that not correct? and
12 that all of the document will be considered in the proceeding?

13 CHAIRMAN RIGLER: Right.

14 MR. STEVEN BERGER: And many documents have
15 come into this record with no offers, limited offers,
16 and that there was no duty upon the other party to indicate
17 what use that party would make of that document.

18 CHAIRMAN RIGLER: Generally speaking, that's
19 true. But where there has been argument as to the purpose
20 of the document, and where there has been argument as to
21 limited admissibility, then obviously any rulings associated
22 with the argument would take precedence over the general
23 rule that the document is in for all purposes.

24 MR. STEVEN BERGER: If that's the Board's ruling
25 then I won't argue the matter further. But there have been

wb5 1 many instances with over a thousand exhibits in this pro-
2 ceeding now when there have been limited offers made.

3 And if the Board is saying now that even though
4 the other party was not put under the obligation to
5 indicate what use the other party would make of that docu-
6 ment because it was less than four pages, that it nonetheless
7 is limited to the basis upon which it was discussed and
8 admitted at that time, I won't discuss it further.

9 MR. LESSY: The record in this particular matter
10 says the document was received pursuant to the offer.

11 I think it's clear.

12 CHAIRMAN RIGLER: Make your point one more time,
13 Mr. Berger.

14 MR. STEVEN BERGER: Normally, Mr. Chairman, I
15 think the Chairman would agree that when evidence comes into
16 the record that's evidence in the record for the parties
17 to make use of it as they see fit.

18 Is that correct?

19 CHAIRMAN RIGLER: Okay. Right.

20 MR. STEVEN BERGER: Okay.

21 My point is that we have had some rather
22 special rules which have been established in this proceeding
23 with regard to redlining, redlining of documents in excess
24 of three pages. If they are less than three pages the
25 general rule I thought would have been the rule to have been

wb5

1 followed.

2 MR. CHANCO: We would agree with Mr. Berger's
3 interpretation of the Board's ruling.

4 CHAIRMAN RIGLER: All right. When there's no
5 dispute.

6 MR. STEVEN BERGER: I'm not that sure of that.

7 MR. CHANCO: I believe that provides the basis
8 for Mr. Goldberg's motion.

9 CHAIRMAN RIGLER: Mr. Goldberg is saying this
10 is an exception to that rule, and he wants to limit the
11 use of that particular document.

12 MR. JACK GOLDBERG: What's correct.

13 MR. STEVEN BERGER: If that's the case then why
14 don't we go back over than twelve thousand pages of the
15 record and see exactly what the offers were that were made
16 on all the unsponsored exhibits, and see if we don't want
17 to make an exception to the documents under four pages that
18 were admitted on limited offers of proof?

19 CHAIRMAN RIGLER: Probably because it's too
20 late in the proceeding for you to do that.

21 MR. STEVEN BERGER: But not too late for the
22 Staff to do that?

23 MR. LESSY: We just got a legible copy of this
24 document today. And you were required to provide a legible
25 copy.

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MR. JACK GOLDBERG: It's an entirely different matter with respect to this document. Because originally it was rejected because the document as a whole was hearsay. That objection was sustained.

And then the Department came back and simply introduced it for the admissions contained in the document, which is an exception to the hearsay rule.

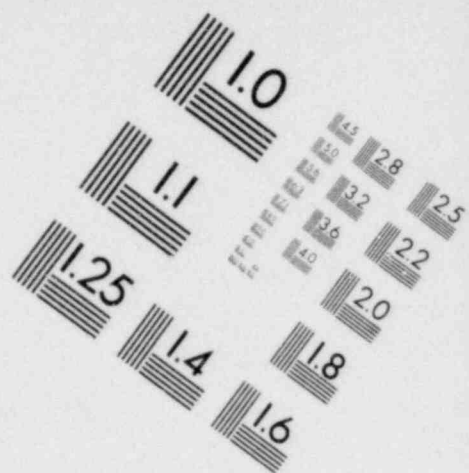
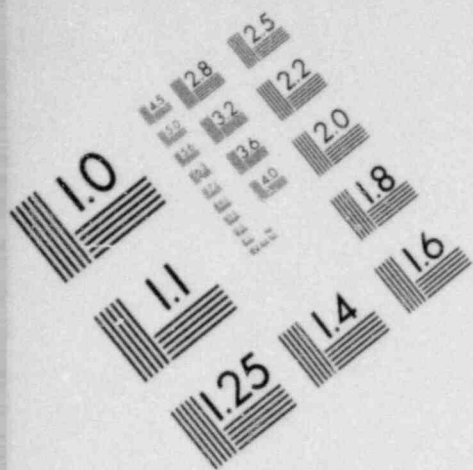
And it's only on that basis that the document can be received in evidence at all.

And all I'm asking is that it be restricted to the use of the admissions contained in the document. That's all.

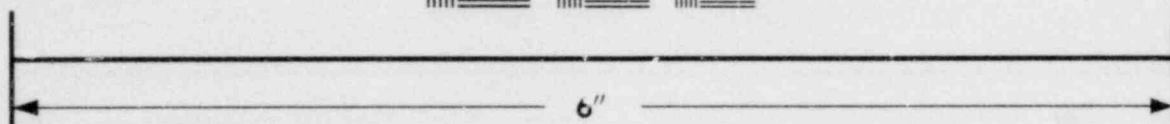
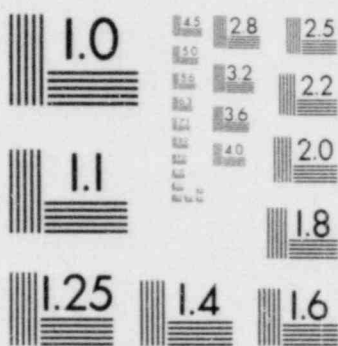
MR. REYNOLDS: Mr. Rigler, the only comment I wish to make is that the handwritten version of the document was certainly legible, but a better copy was required as to certain portions.

The Staff was clearly in a position to know what the document said in order to make its objections earlier.

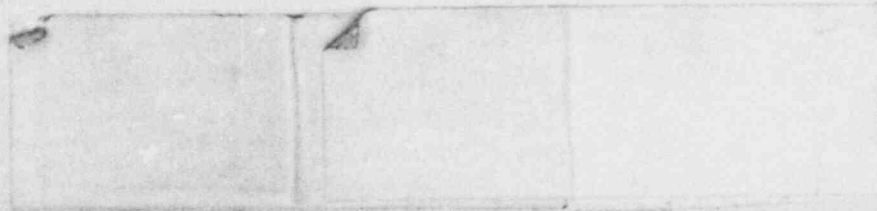
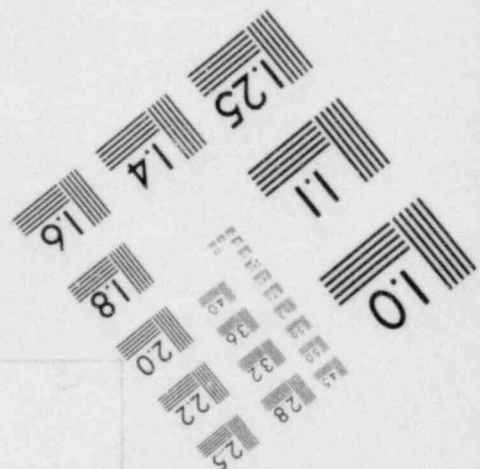
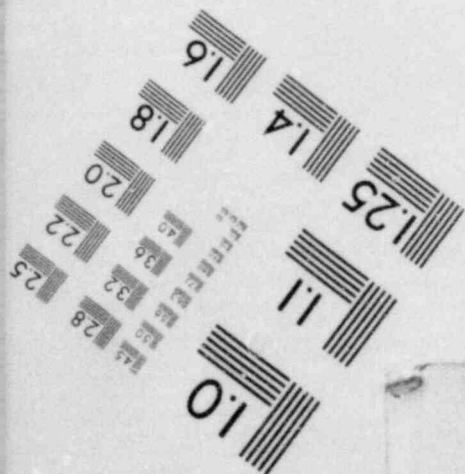
The thing that really troubles me is that the Staff has been with us now for the last two days with Mr. Codispoti present in the room. And if we had been alerted as to this kind of a motion we could have put Mr. Codispoti on the stand, and we could have cured the hearsay problem.

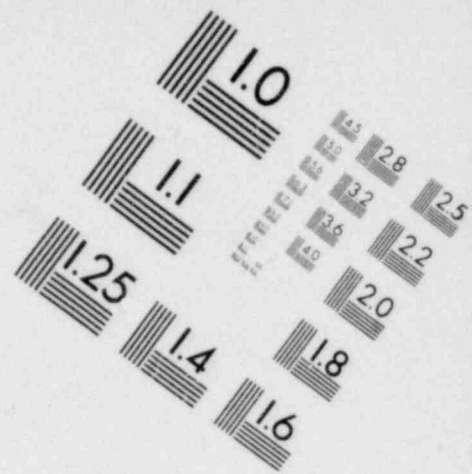
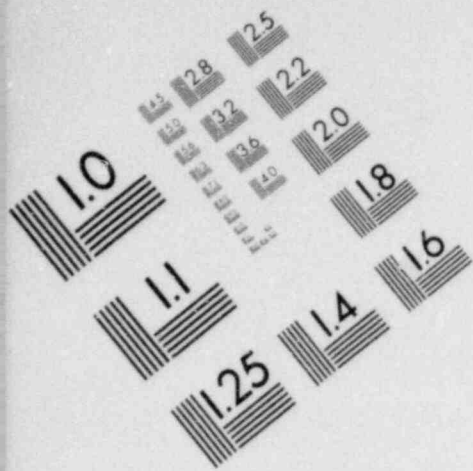


**IMAGE EVALUATION
TEST TARGET (MT-3)**

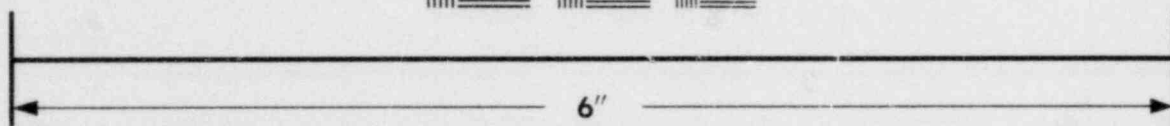
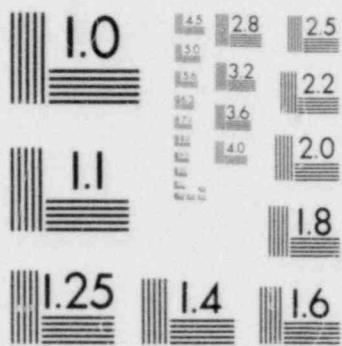


MICROCOPY RESOLUTION TEST CHART

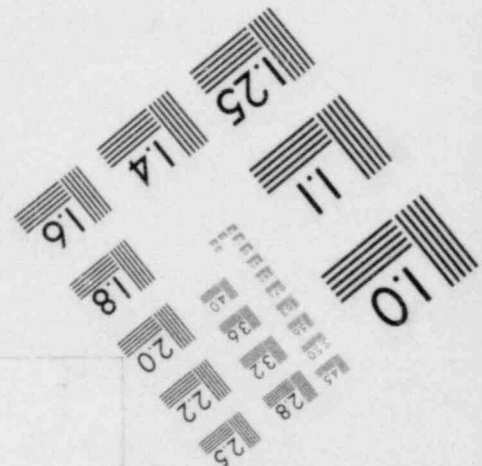
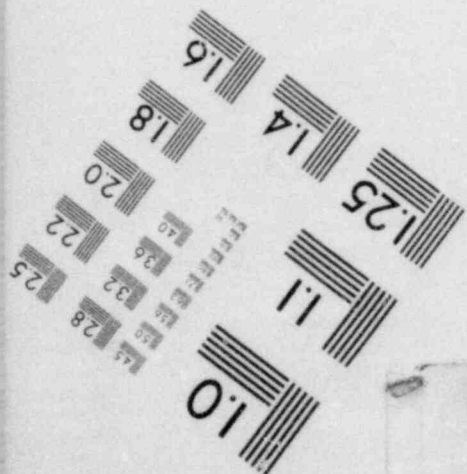




**IMAGE EVALUATION
TEST TARGET (MT-3)**



MICROCOPY RESOLUTION TEST CHART



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1 We didn't hear anything about it until this
2 afternoon at three-fifteen, after they had been alerted
3 that Mr. Codispoti is back on the airplane.

4 That really does trouble me. Especially at this
5 late date. Because had I know that they were going to
6 do this -- and it seems to me they could well have advised
7 me before they set out to do it right now -- then I could
8 have made the decision to put Mr. Codispoti on the stand
9 and we could have cured whatever hearsay problem there
10 was, we could have done it within the period of time we're
11 talking about for ending this hearing.

12 And he has been here for two days and available
13 for that purpose if that was necessary.

14 MR. JACK GOLDBERG: Mr. Rigler, to be honest,
15 when this document was introduced by the Department of
16 Justice with its offer I thought that the introduction of
17 it with the offer and the discussion about the admissions
18 in it, in light of the fact that it had been rejected in its
19 entirety before because of the Staff's hearsay objection, in
20 light of that I thought that it would come in only for the
21 admissions. And that was my understanding.

22 I simply made this motion because I wanted it
23 to be clear, and I wanted it to be certain that that's what
24 the Board was ruling at the time.

25 CHAIRMAN RIGLER: Are you saying that during this

wb9 1 past two days Mr. Reynolds should have anticipated, or
2 should already have been on notice that the Board's ruling
3 is as you requested?

4 MR. JACK GOLDBERG: He should have known it at
5 the time it was received into evidence when the Department
6 offered it and it was received with the discussion about
7 the admissions contained in it. It should have been clear
8 to him then.

9 I just wanted to make certain that no one was
10 going to use this for any reason other than the admissions.

11 CHAIRMAN RIGLER: I see that.

12 MR. REYNOLDS: Mr. Chairman, I advised Mr. Charno--
13 and perhaps he can confirm this in the record -- that I
14 understood that document, when it came in, to come in to
15 be used as evidence for any purpose by any other parties.
16 And I think if we go back and read the transcript and the
17 colloquy that followed introduction of the document, I
18 indicated on the record to Mr. Goldberg my understanding
19 at that time in very clear terms.

20 CHAIRMAN RIGLER: All right. Let's get the
21 transcript.

22 MR. REYNOLDS: I don't know whether--

23 MR. LESSY: You just made a representation,
24 Mr. Reynolds. Let's get the transcript.

25 CHAIRMAN RIGLER: That would be the transcript

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of the 18th of June. --or, rather, that would be the
transcript of June 23rd.

(Pause)

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1 MR. REYNOLDS: I was going to point out at 12,072
2 it does not reflect, if you're looking at that page at line
3 13, it indicates that that's a comment by Mr. Charno. It
4 was actually a statement by Mr. Reynolds.

5 MR. CHARNO: The statement above was not mine,
6 either.

7 CHAIRMAN RIGLER: Wait a minute. 12,072, line 13,
8 who is speaking there?

9 MR. REYNOLDS: I was speaking and I'm trying to
10 determine whether I started speaking at line 14.

11 MR. CHARNO: 14 through 17, which is attributed
12 to Mr. Charno on the record clearly doesn't have -- it could
13 not be mine since I'm not objecting to the admission of
14 my own document according to the transcript.

15 CHAIRMAN RIGLER: All right.

16 So the transcript correctly should indicate that
17 at page 12,072 at line 14 it was Mr. Reynolds speaking
18 continuing down through line 21, is that correct?

19 MR. REYNOLDS: I'm sorry, Mr. Berger spoke at
20 lines 14 to 17, Mr. Steven Berger. And Mr. Reynolds spoke
21 on lines 18 to 21.

22 CHAIRMAN RIGLER: All right.

23 MR. STEVEN BERGER: Mr. Rigler, I just want to
24 add one point. I believe Mr. Codispoti's notes of the meeting
25 he had on February 27, 1974 in connection with the Orrville

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1 matter came into this record unopposed by any objection with
2 regard to hearsay. I'd like to really know what it is that
3 the Staff is so concerned about being included in this
4 record with regard to Mr. Codispoti's notes of 10/7/74.

5 CHAIRMAN RIGLER: It is not necessary to answer
6 that. The fact that they don't make an objection on one
7 document doesn't waive their rights on any subsequent docu-
8 ment. It's not necessary to argue that.

9 I think we're ready to rule on the motion.

10 We reviewed the transcript with respect to what
11 I consider to be one of the more important points which is
12 Mr. Reynold's point about notice and the opportunity to put
13 Mr. Codispoti on the stand. As I refer to page 12,068 and
14 069 it's crystal clear to me that Applicants were on ample
15 notice to put Mr. Codispoti on the stand at that point if
16 they wanted to explore it beyond the bounds of the offer
17 made by the Department. Frankly I don't see any basis for
18 this so-called confusion. As I review what it seems to me
19 the Board indicated it would receive this for a limited
20 purpose as was indicated by Mr. Goldberg. I don't even think
21 it is necessary to rule affirmatively on his motion. How-
22 ever, if we were called upon to do so we would rule favorably
23 to the motion just made by the Staff.

24 MR. STEVEN BERGER: Will you leave the record
25 open for the purposes of me calling Mr. Codispoti back?

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1 CHAIRMAN RIGLER: I don't know that I want to do
2 that, Mr. Berger. I don't know that I want to be unfair but
3 really, the 12,068 reference, as I said, is so clear to me
4 that you were on notice at that time that it's difficult to
5 justify it now.

6 MR. STEVEN BERGER: It's also difficult to
7 justify it even in light of Mr. Reynolds's discussion with
8 Mr. Charno and what we believe to be the rightful use of the
9 Codispoti notes.

10 CHAIRMAN RIGLER: Let me hear from Mr. Charno
11 as to his version of that discussion.

12 MR. CHARNO: I presume that counsel is referring
13 to the one we were just talking about, which was Mr. Reynolds
14 came to me after -- I think there was a break just shortly
15 after this document was discussed. At any rate, at the next
16 break we were talking and he indicated he believed it was in
17 the record for all purposes and I believe that it wasn't.

18 CHAIRMAN RIGLER: This occurred after the document
19 had been admitted?

20 MR. CHARNO: That's correct.

21 CHAIRMAN RIGLER: Is that correct, Mr. Reynolds?

22 MR. REYNOLDS: Yes, sir, that is correct.

23 CHAIRMAN RIGLER: All the more reason, then, why
24 you were on notice at that time.

25 MR. REYNOLDS: I'm sorry, I guess I don't

mpb4

1 understand which way the notice is going. My position, Mr.
2 Chairman, was that --

3 CHAIRMAN RIGLER: Well, if you had a disagreement
4 with the Department as to how and why the document had been
5 received and if there was some question thereby raised in
6 your mind as to how the Board might receive the document, then
7 if you had Mr. Codispoti here for two days you should have
8 brought it up during those two days.

9 MR. REYNOLDS: I guess, Mr. Rigler, my point is,
10 and I'm not going to belabor it because obviously you've
11 made your mind up, but my point is that I believed on the
12 basis of the Board's ruling on the admission of unsponsored
13 documents heretofore that were under three pages and under
14 the red-lining rule that once the Board admitted a document
15 irrespective of the offer of proof that that document was
16 in evidence for all parties and there was no need to go
17 through and red-line that document again.

18 CHAIRMAN RIGLER: That's certainly true, but that's
19 not this situation.

20 Here you had, as was pointed out, the prior
21 rejection of the document coupled with a very specific state-
22 ment as to the purpose for which it was being offered and
23 admitted and argument on that point. So you do not have the
24 ordinary rule in play. You have a special argument relating
25 to this document and your rights under the rules under which

mpb5

1 we have been operating have not been abused where it was
2 specifically called to your attention. I don't know that
3 we need to hear from you further, Mr. Goldberg.

4 MR. GOLDBERG: I just would like to put this
5 discussion in context with a comment that will only take
6 a minute, just to complete this portion of the transcript
7 and that is on page 12,072 in response to a request for a
8 Staff comment on this document Mr. Lessy stated that:

9 "We haven't raised an objection to the
10 Department's offer as stated."

11 And on the next page the Chairman said:

12 "It's coming in only as Department's 628.
13 It was rejected as an Applicants' material."

14 And Mr. Reynolds said:

15 "I guess then that's no longer material.
16 My only question was what number it is."

17 And Mr. Lessy stated:

18 "It is material to the extent that there's
19 much difference in the offer. It was received in
20 evidence as offered. There is much more of a
21 difference than just the number."

22 CHAIRMAN RIGLER: That's what I just said, yes,
23 okay. Thank you.

24 Mr. Smith reminds me that the offer under which it
25 was received was broader than just that of admissions. It

mpb6

1 was admissions, yes, but it was also that the statements set
2 forth were --

3 MR. GOLDBERG: Yes, that's exactly correct and
4 they are both exceptions to the hearsay.

5 MR. ZAHLER: Mr. Chairman, at this time I would
6 like to mark as Applicants' Exhibit 277 a 22 page document
7 that includes Applicants additional red-lining.

8 CHAIRMAN RIGLER: Is this your last document, Mr.
9 Zahler?

10 MR. ZAHLER: I think so.

11 CHAIRMAN RIGLER: You're going out in style, aren't
12 you?

13 (Laughter.)

14 (Whereupon, the document
15 referred to was marked as
16 Applicants' Exhibit 277
17 for identification.)

18 MR. ZAHLER: If I could just make one or two
19 comments about the document so there is no misunderstanding
20 as to what it tries to indicate, the pages, unless otherwise
21 described, indicate the pages starting from page 1 of the
22 document introduced in evidence and one should not be misled
23 by page numbering. We start counting from the page of the
24 document as introduced. There are one or two pages where we
25 make specific reference to a Department of Justice number

mpb7

1 put on the page or whatever, but that's specifically identi-
2 fied.

3 In addition, if there was no description next to
4 a page reference that indicates that the entire page should
5 be red-lined.

6 CHAIRMAN RIGLER: Is there objection to the
7 admission of 2777

8 MR. CHARNO: There is.

9 CHAIRMAN RIGLER: What's the objection?

10 MR. CHARNO: Well, the Department would object
11 to a large category of documents which we feel are indis-
12 criminate red-lining of entire contracts which are not even
13 between CAPCO members. As an example, where metering and
14 billing provisions are red-lined, notes of entire meetings
15 that are maybe 30 pages in length when only one or two pages
16 appear to be directly relevant to proceedings, some of the
17 FPC forms have been red-lined through blank pages and
18 material that appears to be totally alien to anything that
19 might be the subject of this proceeding.

20 I think it greatly increases the burden on the
21 Board and the parties and serves absolutely no useful pur-
22 pose. We can go into an enumeration of the different
23 portions that we can find no reason for red-lining and no
24 relevance.

25 MR. ZAHLER: Mr. Chairman, if I can state, this

mpb3

1 document was prepared with some care on my part and with
2 considerable time on my part and I did take to heed the
3 Board's statements as to no blanket red-lining of documents.
4 In some cases where it says entire document as to the
5 document, the Board should not be misled. In a lot of cases
6 it's a 5 or 6 page document that has been red-lined inter-
7 spersed throughout and the easiest way to describe the
8 additional red-lining was to indicate we were red-lining the
9 entire document. I will state that as to all the CAPCO
10 documents, I have asked that they be red-lined in their
11 entirety -- CAPCO contracts, excuse me, that they be red-
12 lined in their entirety. I believe that that's essential
13 for this Board's understanding.

14 As to the reference to FPC forms, there are only
15 two FPC forms here with additional red-lining and that is
16 also limited and it's described as the pages between which
17 the red-lining takes place. We can go through this one by
18 one and argue. I really do want to represent to the
19 Board that I did take the time to do it and I don't believe
20 that it was indiscriminate.

21 MR. CHARNO: I can raise some very clear examples
22 of --

23 CHAIRMAN RIGLER: Well, in view of the representa-
24 tion of counsel I think we're inclined to accept it as a
25 good faith effort.

mpb9

1 If that's the only objection to that document
2 then --

3 MR. CHARNO: It is not.

4 We have a problem with the additional red-lining
5 of the entire document on NRC-126. There are two pages
6 which appear to be illegible in our copy and we can't make
7 them out. If there is content there that we are supposed to
8 extract something from we would need legible pages.

9 CHAIRMAN RIGLER: All right.

10 MR. ZAHLER: Do I understand Mr. Charno is request-
11 ing the Staff to provide a better copy?

12 MR. CHARNO: I am requesting whoever wants to put
13 in the two illegible pages in evidence to provide a better
14 copy.

15 CHAIRMAN RIGLER: Well I think if it's a Staff
16 document the Staff would be a good place to start. We will
17 permit the red-lining but obviously in order for the red-
18 lining to be meaningful the copy would have to be legible.
19 The parties should work that out. If the Board needs more
20 legible copies, provide them to us as well.

21 MR. CHARNO: Could we have a moment to get the
22 documents in here?

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JE wbl 1

MR. CHARNO: The Department would object to additional redlining on page 2 of DF-93 as hearsay.

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MR. ZAHNER: Mr. Chairman, maybe we can short-circuit this.

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4

I want to get a procedural ground rule down.

5

6

It's my understanding that when documents came in they came in, as we've been talking about before, for all purposes. And when the document was received in evidence that the redlining was for the convenience of the Board and the parties as to what one party was desiring to put into evidence -- to base findings of fact on, its side, with respect to.

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The fact that I redlined additional parts and the Department is now going to claim a hearsay objection as to specific parts that I've redlined is not the procedural standard that Applicants have been under in this proceeding as to the admission of these documents. These documents are in evidence.

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CHAIRMAN RIGLER: Particularly if it's a document which was originally offered by the Department.

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MR. CHARNO: The problem I have with that interpretation is: at times the Department offered materials as exceptions to the hearsay rule; where they contained a combination of self-serving statements then we offered it solely for the admission and not for the remainder that was

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wb2 1 unchallenged and came in.

2 And now the expansion of redlining brings in
3 the self-serving portions of the documents.

4 CHAIRMAN RIGLER: Don't you have to take the
5 good with the bad when you offer the document? Isn't that
6 one of the objections you make?

7 MR. CHARNO: I think not, not with the redlining
8 rule, if there's some responsibility for justifying an in-
9 crease of redlining.

10 CHAIRMAN RIGLER: Well it seems to me if you
11 want to limit the use of the document the burden is on you
12 to point that out.

13 We just went through that with No. 628 where
14 the Department did follow the procedures. It would have
15 limited the use of the document, and over the Applicant's
16 objections I ruled in your favor.

17 MR. CHARNO: Here we're talking about the
18 situation that they admitted was exempt from that type of
19 a ruling when there is redlining involved.

20 In other words, these are not three-page
21 documents in which you are taking the good with the bad when
22 you put it in, unless you make a request for--

23 CHAIRMAN RIGLER: Well you take the good with
24 the bad on any document when you put it in. The redlining
25 was for the convenience of the Board, to limit the amount of

wb3 1 material we had to go through.

2 Wasn't that the agreement of the parties?

3 MR. STEVEN BERGER: Absolutely.

4 MR. REYNOLDS: That was my understanding, as
5 I've already indicated.

6 MR. CHARNO: That wasn't my understanding,
7 and it wasn't my understanding of what Mr. Berger just
8 stated.

9 CHAIRMAN RIGLER: As Mr. Smith points out, were
10 it otherwise there would be no point for our dispensing
11 with the redlining rule on short documents versus long
12 documents.

13 I don't think you can pick and choose. Unless
14 your original offer was such that you clearly intended to
15 limit the use of the document or to introduce it for a
16 particular purpose. And presumably those instances are
17 going to be apparent in the record itself.

18 MR. CHARNO: Is it, then, the Board's ruling
19 that where we offered a document for a limited purpose
20 pursuant to an offer of proof, and the redlining is being
21 expanded, that to the extent that brings in matters which
22 were not covered by the Department's original offer of
23 proof that the document is not usable to prove any matter
24 that is not encompassed in the offer of proof as originally
25 stated, and that to increase the use of that document not

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1 only would you need to add additional redlining but you
2 would need to make a supplemental offer of proof on the
3 document?

4 CHAIRMAN RIGLER: I'm not sure I followed you.

5 If you made an offer of proof and you had a
6 redlined document it seems to me the other parties are
7 free to attack that offer by redlining additional portions
8 of the document.

9 MR. CHARNO: I have no problem with that.

10 Can they use it for any purpose other than to
11 narrow the offer of proof, or in support of the offer of
12 proof?

13 CHAIRMAN RIGLER: I would think so.

14 We come back to the sort of fundamental rule
15 that if you put a document in, unless you delineate, or
16 try to limit its admissibility, it's in the record. And
17 you really can't pick and choose.

18 MR. CHARNO: Well, then, how would one go about
19 limiting the use of a document if it wouldn't be by an
20 offer of proof?

21 CHAIRMAN RIGLER: By stating as part of the
22 offer of proof that it was -- that the admission was
23 limited, and stating the scope of the limitation. Which
24 is why we ruled in your favor on 628.

25 Did the Applicants quarrel with that?

wb5

1 MR. REYNOLDS: I think you're correct. I don't
2 quarrel with your statement.

3 My problem before was the extent to which we
4 had understood the limitation. We obviously had misunder-
5 stood the limitation based on the Board's ruling, and had
6 operated on a misunderstanding as to that particular document.

7 But certainly my understanding there was the
8 same as it was with all the others: which was, once the
9 document is in evidence it's in evidence for the use of all
10 parties, and you are to alert the Board as to what portions
11 of the document you intend to refer to, or to use in con-
12 nection with your proposed findings and conclusions.

13 (The Board conferring)

14 CHAIRMAN RIGLER: The Board has a further comment
15 in clarification for you.

16 The ground rules that we reviewed a minute ago
17 have been our ground rules and will continue to be our
18 ground rules. That is, once a document comes in it's fair
19 for the other side to use other portions of the document on
20 a fairly broad scale.

21 The one problem that we see is that where a party
22 introduced a document and made an offer, and then the other
23 side comes in and applies redlining, it has nothing to do
24 with rebutting that offer but goes into a brand new segment
25 of the case, and that the original offering party may find

wb6 1 himself ambushed by the redlining rule. --which we continue
2 to feel is a rule that benefits all the parties and the
3 Board.

4 We don't anticipate that that necessarily will
5 be the situation. If there are such situations we would
6 think they would be extremely limited. That is, as we look
7 at Applicant's 277, their redlining of the other parties'
8 exhibits, we assume that most of the Applicant's redlining
9 will relate directly to the offers of proof as made, and
10 be used in rebuttal or in conjunction with those offers
11 of proof.

12 Now, in the rare event that some of this red-
13 lining is not addressed in any instance to the offer of
14 proof but is an attempt to put in new material relating to
15 a different segment of the case as to which no proper oppor-
16 tunity for answer has been made, that could conceivably
17 create a problem.

18 What the Board has determined to do is to
19 permit Applicant's 277 to come in under the rules that we
20 stated. If other parties are being unfairly disadvantaged
21 because the redlining applies to some completely different
22 area than that of the original offer, then on specific
23 application we will consider a most limited reopening of
24 the record to allow the opposition parties to protect them-
25 selves.

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1 However since we anticipate that that will be
2 the rare and unusual situation, it may never come to that.

3 MR. STEVEN BERGER: Mr. Chairman, let me
4 just make one comment, if I may, on the Board's remarks.

5 I can recall a very lengthy discussion that I
6 had with the Chairman at the time that the unsponsored
7 exhibits against Ohio Edison and Pennsylvania Power were
8 being proffered. And my dilemma at that time, early on,
9 in the offering of those documents was set forth by me as
10 to I really don't know as to whether I should be asking for
11 an offer or not. And you said, Well that's counsel's
12 judgment.

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2 And I must say that from what the Board has
3 said I think it is pretty clear that if you didn't ask for
4 an offer and the document came in, you have the right to use
5 it on an unlimited basis. But if you ask for an offer then
6 possibly you were prejudicing yourself by asking for that
7 offer.

8 CHAIRMAN RIGLER: Not with the directions we've
9 just given you. If you ask for an offer, then the use by
10 the opposition party is limited by the offer. And then if
11 you want to red-line against that offer you are protected.

12 Now if you did not request the offer, then it's
13 in for all use and no one is prejudiced. However, if you
14 took the limited offer you are quite able to protect your-
15 self against that offer by additional red-lining in any
16 other portion of the document.

17 If you wanted to use the document for something
18 else, all we're doing is affording other parties the
19 opportunity to protect themselves from last-minute red-
20 lining.

21 Now I don't think you've been prejudiced in any
22 way. And I think as we review this we would make the ruling
23 the same way we did and give you the same advice we did,
24 and I think that eliminates prejudice to all parties.

25 MR. ZAHLER: Does the Department have any other
objections? If not, I might add some clarification with

eb2 1 respect to NRC 126. That is also in evidence as NRC Exhibit
2 I believe 20, 21, 22, and 23 and 24. I believe NRC Exhibit
3 24 are the two pages in NRC 126 that are illegible so that
4 if one refers to NRC Exhibit 24 one can find the legible
5 pages.

6 MR. LESSY: Pertaining to the elements of the
7 Pitcairn settlement?

8 MR. SAHLER: Yes.

9 MR. LESSY: Mr. Larach was to get together with
10 me with a copy of the most -- the latest copy of that
11 settlement with all the addenda and pages and everything
12 and he never did before he left so we're just left with
13 dispersion of the four exhibits.

14 MR. SAHLER: I believe NRC 126 is the complete
15 settlement.

16 CHAIRMAN RIGLER: Did you have other objections,
17 Mr. Charno?

18 MR. CHARNO: Well, all the objections would be
19 subject to your previous ruling and there is no point in
20 raising any further objections to that exhibit.

21 CHAIRMAN RIGLER: All right.

22 I'm anticipating that the bulk of this red-lining
23 is going to relate right back to the offer of proof.

24 All right. Subject to those observations we
25 will now receive into evidence Applicants' 277.

eb3 1

(Whereupon, Applicants' 27

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having been previously

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marked for identification

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was received in evidence.

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MR. CHARNO: Mr. Chairman, the Department has certain additional red-lining we've not been able to get typed up.

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CHAIRMAN RIGLER: All right.

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MR. CHARNO: If it's appropriate I'll read it into the record at this point.

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CHAIRMAN RIGLER: How long is it?

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MR. CHARNO: Well, the long one would be Applicants' 120.

13

14

CHAIRMAN RIGLER: I'll tell you what we're going to do. We're going to give you an opportunity to red-line it and submit it in written form on Tuesday.

16

17

Off the record.

18

(Discussion off the record.)

19

CHAIRMAN RIGLER: Back on the record.

20

That concluded your exhibits, Mr. Zahler?

21

MR. ZAHLER: Yes.

22

CHAIRMAN RIGLER: All right.

23

Have we concluded the entire case now of the City of Cleveland, Mr. Hjelmflet, recognizing that you have outstanding the motion to reopen discovery?

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1 If that motion is denied, have you completed your
2 case?

3 MR. HJELMFELT: With the exception of making a
4 final review of the additional red-lining by the Applicants.
5 Right now I have nothing further that I intend to put in.

6 CHAIRMAN RIGLER: The Staff?

7 MR. LESSY: Everything with the exception of the
8 pending matter of the Milburn deposition, in which event we
9 may have some other couple exhibits that would go in.

10 With the exception of that, that completes every-
11 thing, sir.

12 CHAIRMAN RIGLER: The Department of Justice?

13 MR. CHARNO: There's red-lining; there's Milburn.
14 I think our rebuttal case is complete except to the extent
15 that Applicants haven't completed their direct case.

16 CHAIRMAN RIGLER: In what respects? Well, let's
17 find out from Applicants.

18 MR. CHARNO: I believe they held it open.

19 MR. REYNOLDS: I think there are a couple of
20 matters still to be completed. One relates to the colloquy
21 this afternoon regarding the Turner letter and the addi-
22 tional documentation to complete the file as to what
23 representations were made to the Department of Justice in
24 connection with that letter.

25 CHAIRMAN RIGLER: All right.

eb5

1 MR. REYNOLDS: And I intent to pursue that as soon
2 as I can, to see if I can obtain any further documentation.

3 CHAIRMAN RIGLER: Other than that, have Appli-
4 cants completed their case?

5 MR. REYNOLDS: There is also the matter of the
6 Milburn deposition. Mr. Lessy and I, in a joint call to
7 Mr. Cannon just after the lunch break, were advised by
8 Mr. Cannon that there is a letter in the mail, I believe
9 to you, Mr. Rigler.

10 He indicated that the letter would reflect that
11 Mr. Milburn was sent a copy of his deposition and has no
12 recollection of being asked to sign his deposition but that
13 if the Board would like him to sign his deposition he is
14 prepared to do so.

15 Mr. Cannon advised Mr. Lessy and myself that
16 Mr. Milburn has authorized Mr. Cannon to waive Mr. Milburn's
17 signature or if the Board would prefer, a certificate can
18 be sent to Mr. Milburn and he will sign the certificate.

19 He also said he added to his letter I
20 believe two additional paragraphs which reported on the
21 condition of Mr. Milburn and the fact that he is in ill
22 health at the present time.

23 MR. CHARNO: Can I ask who added to whose letter
24 and who the author of the letter or multiple authors of
25 the letter are?

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1 MR. REYNOLDS: Mr. Cannon has written to Mr. Ragle
2 and the letter I was referring to was a single letter with
3 two or three paragraphs.

4 MR. CHARNO: And this is in response to the
5 parties' letter to Mr. Milburn?

6 MR. REYNOLDS: That's right, with a copy to
7 Mr. Cannon.

8 MR. LESSY: Now it became apparent during the
9 course of that conversation I guess that there had been in
10 the interim a conversation between Mr. Reynolds and
11 Mr. Cannon. In light of the fact that the letter was sent
12 by Mr. Zahler to Mr. Reynolds I would like-- The Staff
13 was not advised of the interim conversation and the Board
14 I believe specifically instructed that there should not be
15 interim conversations.

16 And I would like Mr. Reynolds to state for us
17 when the conversation occurred and what was the context of
18 it.

19 MR. REYNOLDS: I don't have any difficulty with
20 doing that. I had been in communication with Mr. Cannon
21 prior to the time of the colloquy with regard to the
22 Milburn deposition precisely because I had heard that
23 Mr. Milburn was sick and we had been trying to bring him in
24 here since the Board had indicated they preferred to have
25 him rather than to have his deposition.

eb7

1 Mr. Cannon phoned me after he received the letter
2 from Mr. Zahler and said he had received the letter and asked
3 me whether we wanted the deposition signed.

4 And I said, "Does he have the deposition?"

5 He said, "He does have a copy of the deposition
6 in his file, and I will ask him if he can sign it."

7 And I said, "Fine."

8 And that was the extent of the conversation.

9 CHAIRMAN RIGLER: So it was Mr. Cannon who called
10 you?

11 MR. REYNOLDS: Yes, sir. And he contacted me
12 rather than Mr. Zahler because I had previously discussed
13 with Mr. Cannon the possibility of bringing Mr. Milburn in
14 here. And I was advised that Mr. Milburn was not well.

15 MR. LESSY: While this matter is pending, the
16 Staff has one or possibly three exhibits that bear on this
17 matter that I would like to distribute at this time.

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1 I would ask to have identified as Staff
2 Exhibit No. 223 a letter dated June 25th, 1976 from Ace
3 Federal Reporters, Incorporated, to Mr. Roy P. Lessy, Jr.,
4 Counsel for N.R.C. Staff.

CZKXKXKZ

5 (Whereupon the document referred to
6 was marked for identification as
7 NRC Staff Exhibit 223.)

8 MR. LESSY: The Board will note that on page 2
9 of the inclosure, the second to the bottom entry is directly
10 relevant to the letter.

11 CHAIRMAN RIGLER: Wait a minute.

12 You want the Ace Federal letter to Mr. Lessy
13 of June 25th, 1976 marked as Exhibit 223?

14 MR. LESSY: Yes.

15 And there is also a two-page inclosure to
16 NRC-223. To save time in reading, the relevant portion
17 of the inclosure is at the bottom of page 2 of the inclosure.

18 The Staff would also prepare, or have available
19 an affidavit with respect to persons who were in Mr. Milburn's
20 office after the completion of the deposition and the
21 conversations that occurred at that time.

22 And since this matter has just in fact occurred,
23 we don't have that affidavit yet available.

24 CHAIRMAN RIGLER: All right.

25 MR. REYNOLDS: I guess no response is required at

wb2 1 this time as to these matters.

2 Can I just ask as a question of clarification:
3 I'm not sure what this June 25th, 1976 letter, what the
4 purpose of it is. To confirm that a copy was delivered to
5 Mr. Milburn? Is that what you're saying?

6 MR. LESSY: Do you want an offer of proof,
7 Mr. Reynolds? If you want an offer of proof I'll give you
8 an offer of proof. If not, I think it's clear that it speaks
9 for itself.

10 MR. REYNOLDS: If you would indicate on the record
11 what it is that this document shows, that you believe this
12 document shows-- I'll ask for an offer of proof if that's
13 necessary.

14 MR. LESSY: This document shows that the official
15 reporters for this, which were the Ace Federal Reporters,
16 sent a copy of the deposition of Mr. Milburn to Mr. Milburn
17 at the completion -- at the time that other parties received
18 it; that the party which paid for the copy of the deposition
19 of Mr. Milburn was the Nuclear Regulatory Commission Staff,
20 and that the copy sent to Mr. Milburn included a request
21 for signature and a stamped self-addressed envelope for
22 proper return of the transcript.

23 And as of now, as of June 25th, Ace Federal had
24 not received the copy of Mr. Milburn's transcript returned
25 and signed.

wb3

1 CHAIRMAN RIGLER: Are you moving the admission?

2 MR. LESSY: Yes, sir.

3 CHAIRMAN RIGLER: Hearing no objection, we'll
4 receive it.5 MR. REYNOLDS: All I would -- I guess all I would
6 do is ask that perhaps we defer it until such time as we
7 receive from Mr. Cannon the copy that this letter refers
8 to, which is the deposition that was sent to Mr. Milburn
9 and which Mr. Milburn still has.10 CHAIRMAN RIGLER: Well, based on the conver-
11 sation so far, I see no reason to defer.12 MR. REYNOLDS: Okay. I don't feel strongly
13 about it. It's just, given the phone conversation-- Okay.14 CHAIRMAN RIGLER: We'll receive 223 into
15 evidence.

XXXXXX

16 (Whereupon the document referred to
17 heretofore marked for identification
18 as NRC Staff Exhibit 223, was
19 received in evidence.)20 CHAIRMAN RIGLER: So that the Staff's case,
21 including surrebuttal is complete, with the exception of
22 the Milburn matter and the attempt to provide the -- to get
23 the Turner to Dickey letter into evidence after supplemental
24 materials have been made available?

25 MR. CHARNO: I believe you said the Staff's case,

wb4 1 Mr. Chairman.

2 CHAIRMAN RIGLER: I'm sorry; the Applicant's.

3 Yes.

4 MR. REYNOLDS: There is the one other matter
5 of the recorded meeting of the City Council of the City of
6 Cleveland on March 4th and 5th, 1974, and making available
7 to the Board the recording and the transcript of the record-
8 ing.

9 CHAIRMAN RIGLER: Has Mr. Hauser located that?

10 MR. REYNOLDS: I've not had a chance to speak
11 with Mr. Hauser today. He left on a nine o'clock plane
12 last night. And, I'm sorry, I just don't know.

13 But he did indicate to me he was going to under-
14 take to do that as soon as he got back.

15 CHAIRMAN RIGLER: All right.

16 What I think we're going to do is close the
17 record as of Tuesday afternoon, July 6th, with the exception
18 of the items enumerated on the record here this afternoon,
19 which may be supplied timely, as soon as possible, but per-
20 haps later than Tuesday depending on how fast the parties
21 can make the various document available.

22 MR. REYNOLDS: Is it the Board's intention to
23 communicate directly to Mr. Cannon its preference as to
24 whether it wants Mr. Cannon to waive signature or it wants
25 Mr. Milburn to sign and return the deposition he has in his

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1 files?

2 CHAIRMAN RIGLER: I'd rather read the letter.

3 My preliminary preference would be to permit
4 the waiver of signature if it is clearly indicated that
5 Mr. Milburn is willing to sign but also is willing to waive
6 signature.

7 MR. REYNOLDS: Very well.

8 CHAIRMAN RIGLER: It would save time if we used
9 the waiver procedure.10 At that time the Board then will make a ruling
11 with respect to whether or not it will admit the Milburn
12 deposition. I don't know what that ruling will be after
13 we confer. But I think the parties should anticipate that
14 we probably will permit the admission of the Milburn
15 deposition.16 MR. REYNOLDS: I just wanted to indicate, to
17 make it clear, as I understood Mr. Cannon's remarks on the
18 phone, the letter addressed itself only to Mr. Milburn's
19 willingness to sign. Mr. Cannon represented to Mr. Lessy
20 himself on the telephone that he had authorization from
21 Mr. Milburn to indicate that Mr. Milburn was willing to
22 waive signature. I'm just not sure if that's contained in
23 the letter. He did indicate that on the phone.

24 Is that not correct, Mr. Lessy?

25 CHAIRMAN RIGLER: I think we would accept that.

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Is that agreeable, Mr. Lessy?

MR. LESSY: Yes, sir. And if the Board's inclination is to receive it in evidence, would the Board advise an affidavit to the effect -- would the Board be receptive to receipt in evidence?

CHAIRMAN RIGLER: Yes. I mean, we have to read the affidavit, because Applicants might object.

But as we try to think the problem through a little bit in advance, an affidavit of the type you indicated probably would be received into evidence if there weren't any collateral problems associated with it.

MR. LESSY: I just didn't want to go to the trouble of getting one and then-- You know, if the record was--

CHAIRMAN RIGLER: We have a difficult situation where we have an important witness whose health does not permit him to testify. And it's on that basis that we reluctantly think we may have to accept a deposition.

But in view of the circumstances reported by counsel, it seems, in order to keep the record fair and equitable, that the receipt of that type of affidavit may be necessary.

MR. LESSY: Thank you, sir.

MR. REYNOLDS: I haven't seen the affidavit, but my initial reaction is that I would object to that kind of

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1 evidence coming in by affidavit. I would like the oppor-
2 tunity to cross-examine the parties.

3 CHAIRMAN RIGLER: Actually Mr. Lessy could be
4 one of those parties, I suppose. And you've already heard
his representations.

6 MR. REYNOLDS: Then I might have to cross-
7 examine Mr. Lessy.

8 MR. LESSY: Assuming there's somebody in addition
9 to me--

10 CHAIRMAN RIGLER: We'll have to come back anyway.
11 What we're contemplating is closing the record
12 on Tuesday, and then re-opening it only on a limited
13 basis on specific items that have already been set forth in
14 the record; those items being: conditioned upon receipt of
15 the Milburn deposition, the receipt of an affidavit and
16 cross-examination on the affidavit; the second item being
17 the Turner to Dickey letter; the third item being surprise
18 by redlining, and the fourth item being the receipt of the
19 transcripts relating to the Gaul hearings and the Cleveland
20 City Council.

21 MR. LESSY: If there be cross-examination permitted
22 why don't I make available a witness? Why go to the trouble
23 of writing something and getting an agreement on language?

24 CHAIRMAN RIGLER: All right.

25 MR. LESSY: Then there'll be a subpoena with

wb8 1 respect to that individual.

2 CHAIRMAN RIGLER: All right.

3 Now we may take that even as late as the second
4 or third week in July, depending upon the schedule of the
5 Board. That should not impede in any way the preparation
6 of findings of fact.

7 We will close the record on Tuesday afternoon,
8 then, subject to those exceptions.

9 With the record being closed, we now would like
10 to get the City of Cleveland's statement with respect to
11 the questions we alerted it to previously.

12 First, as to what prejudice, if any, has resulted
13 from the participation of Squire, Sanders and Dempsey in
14 the hearings to this date?

15 Then, second, if the City contends any
16 prejudice has occurred, what remedy it asserts to be neces-
17 sary to cure the prejudice? That's prejudice on the
18 record, Mr. Hjelmfelt, prejudice that has occurred on the
19 record of these proceedings.

20 MR. HJELMFELT: I have prepared, and my office
21 has filed today, a written response to those, since we
22 consider this as something that can best be fully described
23 in written form.

24 CHAIRMAN RIGLER: All right.

25 MR. HJELMFELT: I asked that copies be sent out,

wb9 1 and the messenger was supposed to pick them up at one o'clock,
2 and I haven't got copies to hand out. They're being
3 filed in the normal course.

4 If you want me to talk about it on the record
5 now I can give you the gist of what I'm saying.

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CHAIRMAN RIGLER: All right.

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MR. HJELMFELT: With respect to the prejudice ---

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CHAIRMAN RIGLER: If any.

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MR. HJELMFELT: We believe we have been
5 prejudiced. It appears there will be a full evidentiary
6 hearing on the scope of the types of disclosures that were
7 made by the City to SS&D during the scope of SS&D's work
8 for the City before the other Board.

9

That evidence, if it shows the same sorts of
10 things that were disclosed in the testimony that was taken
11 in the civil action in Cleveland, would show that on almost
12 all of the major points that CEI appears to be raising as
13 defenses, the City had communicated in great detail with
14 SS&D while SS&D was acting as bond counsel.

15

Mr. Kadakis had conversations with Mr. Brueckel
16 which went into the City's interest in participation in
17 nuclear power, in obtaining PASNY power, in its desire to
18 compete with CEI, the areas in which it thought it might
19 be expanding its system, the need for changes or additions
20 in management, management weaknesses, financial problems,
21 the way to finance --

22

CHAIRMAN RIGLER: All right. But assuming these
23 conversations took place, how has that resulted in prejudice
24 in these proceedings as Squire, Sanders represented its
25 client, CEI?

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1 MR. HJELMFELT: If I prevail on the merits I
2 suppose we haven't been prejudiced. But SS&D by appearing
3 -- and of course that's another point that may be clarified
4 in the other proceedings in that right now the City has
5 out a subpoena duces tecum to SS&D which might produce
6 evidence which would go to specific prejudice.

7 I believe that CEI has until the 6th to move to
8 quash.

9 Again, anything I say here has got to be taken
10 in light of possible future developments.

11 But SS&D in conducting a hearing here was able
12 to utilize or could have been utilizing this information
13 to determine --

14 CHAIRMAN RIGLER: That's what we want to know,
15 what specific information did they unfairly utilize against
16 you?

17 MR. HJELMFELT: All I can do is speculate as to
18 what information he used against us. But they came in and
19 raised defenses or raised what appear to be defenses,
20 matters on which they had obtained information from
21 Mr. Kadukis.

22 Now how they used that information, deciding what
23 lines of attack to take, what questions to ask, what ques-
24 tions not to ask, what witnesses to put on, what documents
25 to offer and not offer, I can't tell you that. There is

eb3 1 no way to tell you that.

2 I tried to find cases that dealt with this ques-
3 tion of what do you do once Counsel is in there. The cases
4 generally say any harm is irreparable, that you can't point
5 to specific points, that it's almost impossible to, and that
6 the burden is not on the party.

7 I recognize that this Board, coming down this
8 far down the line, should SS&D be disqualified, is faced
9 with the choice of how, if at all, can this be remedied?
10 Frankly, I think to a large extent it's irreparable. To the
11 extent that it could be repaired, the only thing I can see
12 or suggest is striking certain defenses.

13 CHAIRMAN RIGLER: Which defenses? Are they set
14 forth in your paper?

15 MR. HJELMFELT: They are referred to in the paper,
16 and I think I've attached an excerpt from Mr. Kadukis'
17 testimony which will again show the areas in which SS&D had
18 knowledge.

19 It's very difficult because CEI has never been
20 called upon to step forth and say this is our defense, this
21 is our defense and this is our defense. But so far as the
22 record reveals the sorts of defenses they're making, I
23 think it's fairly apparent which defenses, the managerial,
24 whether or not we really wanted nuclear power, certainly
25 the financing.

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1 CHAIRMAN RIGLER: You're using the term "defenses"
2 advisedly, I assume. You mean responses to charges made
3 in the licensing proceeding?

4 MR. HJELMFELT: Yes.

5 CHAIRMAN RIGLER: I'm sorry I cut you off. Go
6 ahead.

7 MR. HJELMFELT: I think I've said basically what
8 can be said on the subject.

9 MR. SMITH: Mr. Hjelmfelt, when the question was
10 posed to you of course we were aware that the City may have
11 been prejudiced in their litigation in areas not appearing
12 on the record but off the record. That's why the question
13 was very carefully narrowed to record indications of pre-
14 judice.

15 And of course we've observed that throughout the
16 hearing the City has only rarely brought them up, and then
17 only to object to their participation but never to complain
18 about the results of the participation.

19 Will you agree that that would probably be where
20 we are now?

21 MR. HJELMFELT: I suppose that's true. I have
22 objected at various points, both to questions in specific
23 areas and to participation. I have never stood up afterwards
24 and said Aha, that's where they did it to us.

25 MR. SMITH: Now we're asking you to do it. You

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1 know, if you feel there are record signs that you have not
2 been heard, tell us about it and tell us if there's anything
3 we can do about it.

4 For example, if you could have your way, would
5 you have this case retried again without Squire, Sanders
6 and Dempsey?

7 MR. HJELMFELT: If I can have my way it won't be
8 necessary to have it retried. I don't think that retrying
9 the case without Squire, Sanders and Dempsey can really
10 cure any prejudice that City has received.

11 MR. SMITH: So you're not asking for that?

12 MR. HJELMFELT: I'm not asking for that now. I
13 think under the law if the City does not prevail on the
14 merits we're entitled to it. And while that might not give
15 us complete relief, we're entitled to that much relief.

16 MR. SMITH: What aspects of the case would you
17 ask to be retried? Let's assume that you get an order from
18 this Board or an opinion from this Board that there are no
19 conditions required. What aspects of the case would you ask
20 to be retried?

21 MR. HJELMFELT: Certainly all portions dealing
22 with relationships between CBI and the City.

23 MR. SMITH: Would you limit it to that?

24 MR. HJELMFELT: I think it may be that it would
25 be impossible to segregate out our conspiracy charge. I

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1 don't think we would be asking, for example, for matters
2 dealing with Pitcairn or Napoleon or WCOE.

3 MR. SMITH: In any event, as of now, you are not
4 asking us to do anything?

5 MR. HJELMFELT: Well, no. I don't think the time
6 is ripe at this point. SS&D has not been disqualified. We
7 have not finally prevailed.

8 CHAIRMAN RIGLER: Let's take another alternative.
9 Suppose that the Board does determine that some
10 conditions are appropriate or are required, but they don't
11 coincide or agree with the conditions that you have urged
12 on us.

13 In that case, what sort of rehearing, if any,
14 would you be requesting and on what issues?

15 MR. HJELMFELT: I would have to see the order. I
16 don't know on what basis that you're finding against us
17 and in which particulars.

18 CHAIRMAN RIGLER: But under those circumstances,
19 even the City might content that an entire rehearing would
20 be necessary? Is that correct?

21 Suppose you win a few and you lose a few when it
22 comes to relief. Does the fact that you lost a few
23 necessarily indicate that the entire case has to be retried?

24 MR. HJELMFELT: I guess I can conceive of situa-
25 tions where it wouldn't, and I think there could be situations

eb7 1 where it could. I'm speculating in a vacuum.

2 MR. SMITH: Has there been any frustration-- Let
3 me restate it.

4 Has the failure of this Board or the regulations
5 or the Commission's procedures to disqualify SS&D, has that
6 in any way frustrated you in presenting your case before
7 this Board, your affirmative case or any part of the case
8 that you have had to present?

9 Tell us if it has, and if there is anything we can
10 do to help you now.

11 MR. HJELMFELT: From us going ahead with our
12 affirmative case, I don't know that I can say--

13 MR. SMITH: Well, can you say that you have been
14 or have not been? I think we're entitled to a specific
15 answer on that. Here we are. We're asking before the record
16 is closed, how have we hurt you and what can we do to make
17 up for it? And you're not answering us. And I don't think
18 that you want to answer us. I think you want to keep it.

19 MR. HJELMFELT: Well, in the first place, I
20 think on the law that I am not required to show specific
21 prejudice. I think that as far as my putting in my case
22 on an affirmative basis, I don't know that SS&D's partici-
23 pation altered it.

24 It did prejudice us. I think as a matter of law,
25 the mere fact that they had earlier been privy to the types

eb8 1 of understanding and knowledge of our system that they
2 had prejudiced us in their presenting their defense
3 and their attack against our case.

4 MR. SMITH: When you say you don't know if it has
5 frustrated or hurt you though, aren't you saying it hasn't?
6 Has it? We've given you plenty of notice.

7 MR. HJELMFELT: I can't say that because I don't
8 know what defenses, what objections Mr. Buckman raised
9 to certain documents that were raised because of what he
10 knew.

11 MR. SMITH: At least you can't point to any.

12 MR. HJELMFELT: No, I can't point to anything.

13 MR. SMITH: And you're not asking for anything?

14 MR. HJELMFELT: I'm not asking for anything at
15 this time. But if we lose this case and if Squire, Sanders
16 and Dempsey are found to have been improperly permitted to
17 continue, I'm sure the City is going to ask for a new hearing.
18 I think that's been the City's position from the first time
19 Mr. Davis spoke on the issue.

20 MR. LESSY: Would the City ask for a new hearing
21 on a non-grandfathered basis or on a grandfathered basis?
22 Would you hold up the construction permits and operating
23 licenses for five nuclear units on your request for a new
24 hearing?

25 MR. HJELMFELT: I've not given that any consideration.

ab9 1 and I think under the Appeal Board ruling on grandfathering
2 it might not make any difference.

3 MR. SMITH: I'm wondering if it might make some
4 difference now that there's a record.

5 MR. HJELMFELT: Well, I'm just not prepared to
6 speak to that. I've not talked with my client about that,
7 and I simply don't know.

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1 MR. LESSY: One thing I know of interest to us is
2 some sort of time frame for briefing.

3 CHAIRMAN RIGLER: We'll get to that.

4 Do the parties desire closing arguments?

5 MR. CHAFNO: The Department does not.

6 MR. REYNOLDS: Applicants do not.

7 MR. LESSY: Since no one else does, neither do we.

8 MR. HJELMFELT: The City does not.

9 CHAIRMAN RIGLER: We have had some discussions
10 I guess both on and off the record with respect to findings
11 of fact and conclusions of law. The Board's preference has
12 been for a four week period. The Applicants tried to persuade
13 us that that period would prevent them from giving us the
14 type of findings that would be most useful in our considera-
15 tion of these issues.

16 The Applicants indicated they wanted eight weeks
17 at a minimum. We continue to feel that that's a little
18 unreasonable. We continue to be impressed by the splendid
19 state of record preparation that the Applicants have shown
20 throughout these hearings and even with deference to the
21 problems of coordinating proposed findings among several
22 parties rather than just a single party, we're not inclined
23 to give the full eight weeks.

24 I think that we will have to give a little extra
25 time to the Applicants more than the four weeks that the

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1 Board prefers, however, in deference to the arguments they
2 raised about extensive coordination being necessary. We're
3 thinking of mid-August, which is approximately six weeks.

4 I think that -- how does Friday, the 13th
5 strike you, Mr. Reynolds? It can't be any more unlucky for
6 you than for any of the other parties.

7 (Laughter.)

8 MR. REYNOLDS: I guess I would prefer Monday, the
9 16th, just because knowing how these things develop it
10 seems to me that it may be necessary for purposes of final
11 getting copies done and getting everything in final form to
12 file. So if we're talking about Friday the 13th, I would
13 prefer Monday the 16th.

14 CHAIRMAN RIGLER: All right.

15 So we'll have simultaneous filings of proposed
16 findings of fact and conclusions of law on Monday, the 16th
17 of August. We would prefer the form of the findings to be
18 findings of fact first and conclusions of law second and
19 although the Board intends to review the record independently
20 and to draw its own conclusions and not to merely pro forma
21 adopt the findings of the parties, it would be most conven-
22 ient and useful for us if the findings came out in a form
23 whereby the Board could adopt them if it were of a mind to do
24 so.

25 We would expect and require that the proposed

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1 findings be supported by specific transcript references so
2 that if we wished to use your findings or add those to our
3 own that we will have an immediate input into the transcript
4 and into the record.

5 In terms of length I think that it should be
6 possible to control your input to make it most effective
7 hopefully to a length of no more than 100 pages. I think
8 if you exceed 125 or 150, you're working against yourselves.
9 Be as specific and as precise as you can.

10 MR. LESSY: Is that for the entire document, 125
11 for the entire document?

12 CHAIRMAN RIGLER: Yes.

13 MR. LESSY: Thank you.

14 CHAIRMAN RIGLER: And we would expect each of the
15 parties in these findings and conclusions to address the
16 issue of relief, again, as if they were urging the Board
17 merely to put its signature at the conclusion of the document.

18 MR. LESSY: Relief would be the final section, is
19 that right?

20 CHAIRMAN RIGLER: Yes.

21 MR. REYNOLDS: I have a couple of questions.

22 The first one, which goes to the Board's
23 suggestion as to how many pages are involved, is that a
24 limitation the Board is setting or is that a suggestion, Mr.
25 Chairman? Or in what form is that?

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1 CHAIRMAN RIGLER: Well, with a record of approxima-
2 ly 13,000 pages and with 1000-odd documents, some of which are
3 multipage documents we still would like to see you in the 100
4 page range or less. We will not impose that limitation on
5 you. I think that we will impose a 200 page limitation.

6 MR. REYNOLDS: Okay. This gets to my second point
7 which is: I was assuming that if we're talking about 125
8 pages, by the other parties that's 375 pages that the opposi-
9 tion has that they're putting in against the Applicants and
10 all of them have indicated that there is a variance with
11 respect to the nature of the cases that they're talking
12 about and I would therefore request that as far as the
13 limitation of the Applicants that they get at least as many
14 pages as the opposition.

15 CHAIRMAN RIGLER: Well, there's a substantial
16 overlap there. We can give you 50 extra pages if you want
17 it but then you'll go ahead and use it and I think you're
18 going to have to anticipate that these other parties, if they
19 hand in 100 page documents are going to have many conclusions
20 that are repetitious or overlapping.

21 In other words if all three of the other parties
22 ask us to conclude that the CAPCO agreement constituted
23 joint action and restraint of trade we're only going to make
24 that finding one time, if indeed we do adopt it.

25 MR. REYNOLDS: I appreciate that but in

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1 simultaneous briefing I have no way of knowing at this
2 juncture the extent to which there is going to be that kind
3 of identity in overlap.

4 CHAIRMAN RIGLER: You can anticipate that right
5 now. There was that kind of identity in overlapping documents
6 they produced, there was that kind of identity in overlap
7 in the September 5 filing. There was that kind of identity
8 in overlap even among your expert witnesses.

9 We'll give you 50 extra pages if you feel you need
10 them.

11 MR. REYNOLDS: Well, all right. In light of that,
12 then, the question is if each of the parties file a separate
13 brief I assume there will be 125 in each?

14 CHAIRMAN RIGLER: No.

15 MR. REYNOLDS: Well, we got an indication that
16 they are separate parties and that they each have their
17 own cases they need to put on.

18 CHAIRMAN RIGLER: Well, if they do that then
19 would there be a joint brief? I mean you can't have it both
20 ways. If you want to file a joint brief then you can go to
21 250 pages. Otherwise you can't.

22 MR. REYNOLDS: Well, I don't intend to -- I don't
23 have time to add a lot of surpluses. I do intend to treat
24 fully the matters. I do not have an indication as to -- or.
25 I'm sorry, strike that. I should not put it that way.

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1 What I'm trying to say is that the other parties
2 have not been required to conform their allegations to the
3 proof and given that there's a much more difficult time for
4 Applicants to deal with the evidence in this case and to, on
5 a simultaneous filing, address all the possible arguments
6 that that evidence might be directed to.

7 Given that the problem I have is that a 250 page
8 limitation may not permit me to respond to or to give the
9 Board the full brief that the Applicants feel they should
10 be entitled to give this Board and to address fully the
11 factual matter of record and also the legal analysis.

12 I'm not trying to suggest to the Board at this
13 juncture that I have any idea that it's going to be over
14 250 pages and I can come in, I guess, with an application
15 for leave to file additional pages if it turns out that I am
16 in a predicament where I feel it's necessary to file addi-
17 tional pages. I can appreciate how it's to everybody's
18 advantage the shorter we keep the briefs and I don't intend
19 to prolong it any more than I have to, and I don't have time
20 to do it.

21 But it does -- well, I'm not going to belabor it.
22 I have a problem with the 250 limitation because I have five
23 clients with a number of charges being made against each of
24 them. I've got a separate conspiracy charge, if you will,
25 against all of them and in order to deal effectively with

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1 the record that we have here and the number of documents
2 that are in this record with respect to various allegations,
3 I can conceive of it taking a good 20 or 25 pages as to
4 certain allegations and there are an awful lot of allegations
5 in this case. And 200 pages does not give much room. 250
6 pages, it sounds like a lot until you start putting down
7 how many pages you therefore are allowed to devote to the
8 allegations as they're made, the number of allegations and
9 it really comes out to very few. And that was what concern
10 ed me.

11 I guess the way to proceed is to come back with
12 a request for leave of the Board to file a brief that
13 includes extra pages, if indeed it looks like that's going
14 to be necessary.

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CHAIRMAN RIGLER: I agree.

MR. REYNOLDS: The next question that I would raise is as to the Board's comments on relief. I don't have a difficult problem addressing the matter of relief. However I would assume that the understanding is that once we have learned from the Board what the situation is, if indeed it finds any situation, that the parties would have an opportunity to address the matter of remedy in light of whatever the situation is that this Board might determine to exist, if it finds one.

MR. LESSY: That's not correct.

This was decided a year and a half ago, Mr. Reynolds, at the prehearing conference that this is a combined hearing, that we were free to present evidence as to liability, if you will, and as to relief. And we have. And many of the expert witnesses have.

This is not a bifurcated hearing; it's a joint decision. That has been clear from the beginning.

MR. REYNOLDS: If you look at Prehearing Order No. 2 it says,

"The Board will not address issues and matters in controversy with respect to remedy until a situation inconsistent with the anti-trust laws or underlying policies thereof has been established. Consequently, at this time

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no discovery specifically directed to potential
remedy is appropriate."

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MR. LESSY: Mr. Reynolds, in the prehearing conference in the District Court Building in April of '75 this was discussed in detail. And it was agreed upon, and it was reflected in a subsequent Prehearing Order.

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And there have been license conditions as proposed relief in almost every expert's testimony.

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And you know it.

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And especially in the context of a case which is on a non-grandfathered basis. Everybody has been going for it on that basis.

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Now, come on.

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CHAIRMAN RIGLER: Mr. Charno.

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MR. CHARNO: Mr. Reynolds just indicated he wasn't finished.

16

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MR. REYNOLDS: If you want to hear from him first I can come back.

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CHAIRMAN RIGLER: Yes, go ahead.

20

MR. CHARNO: It's very definitely my impression that Mr. Lessy has correctly stated the issues, that we determined it would not be a bifurcated hearing; that the Department, as I recall, favored such a hearing, and we were soundly trounced by all parties who joined in opposition to such a suggestion because of the time problem.

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CHAIRMAN RIGLER: Including Applicants.

MR. CHARNO: That was one of my recollections.

MR. LESSY: Mr. Charnoff specifically.

CHAIRMAN RIGLER: Mr. Hjelmsfelt?

MR. HJELMFELT: I agree with Mr. Lessy and Mr. Charno. And I recollect that I full opposed a bifurcated hearing. And I think Mr. Pace's testimony in this case was really remedy-oriented anyway.

MR. REYNOLDS: Im not suggesting a bifurcated hearing, Mr. Chairman, and I was not suggesting that we're going to have to come back out here to Silver Spring for an extended stay for any additional evidentiary hearing.

On the other hand, it seems to me clear, and it was not resolved at any time prior to this, that before anybody can address the matter of appropriate remedy they have to know what the situation is, if, indeed, any situation exists at all.

All I'm suggesting is that if this Board should find, or should rule that there is a situation, and then the question is What is the most effective way to remedy that situation, I would hope that the parties have an opportunity to address that matter once they understand what the situation is, if the Board finds that there's one.

CHAIRMAN RIGLER: You should have an understanding of what the situation found by the Board, if any, would be:

wb3 1 because that's what the hearings have been all about.
2 That's why we had the issues in controversy. And that's what
3 a great deal of the evidence has been all about.

4 Some of it has been on the issue of relief,
5 including Applicants' own proposed license conditions,
6 their so-called policy statement; the Pace testimony.

7 MR. REYNOLDS: I wasn't suggesting coming back
8 into the record. What I'm saying is I do not know, after
9 sitting through this hearing, what might possibly be defined
10 as a situation inconsistent with the antitrust laws.

11 We have an argument as to bungling all sorts of
12 things, and that goes in, and at some point you can, from
13 that, infer a situation. We have an argument that there's
14 an isolated act here, there or another place, which might
15 consist of a situation.

16 We certainly have much different matters to deal
17 with if indeed the Board should determine that the situations
18 we're talking about would require the remedying of only
19 certain aspects of one Applicant's area and other aspects
20 of another Applicant's area. If we do not have a determination
21 here that there has been any violation of Section 1, and
22 we do have a determination here of some Section 2 violations
23 that differ with respect to different applicants, that would
24 cause another consideration as to what would be the appropri-
25 ate remedy.

wb4 1

2 I'm not suggesting a bifurcated hearing in
3 terms of coming in and introducing additional evidentiary
4 material here. I think that we have in the record evidence
5 in a number of places that go generally to the matter of
6 remedy.

7 What I am suggesting is that Applicants have
8 never given up, and they never intended to give up their
9 opportunity to address separately the question of remedy in
10 the event that this Board should determine that there is a
11 situation, once they have found out what the Board believes
12 the situation to be.

13 And I don't understand Prehearing Order No. 2
14 to contemplate that. And we have been operating under that
15 Prehearing Order.

16 I would refer to-- In response to the reference
17 to the April prehearing conference, it was in terms of a
18 bifurcated hearing, and in the interests of expediting the
19 schedule and getting this matter over with as fast as we
20 could, Applicants certainly were not interested in having
21 a second full-blown hearing after we got through with the
22 liability side. But that to me is a much different considera-
23 tion than the one I am raising now, which I think is a very
24 appropriate consideration.

25 MR. LESSY: I just want to state a couple of things
One is, I think we have to be guided by basic

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1 antitrust law to the effect that relief, or the remedy need
2 not track the violation. --in this case, the inconsistency.
3 And, secondly, the Waterford decisions in the Commission
4 would say that the Board shall determine the relief it deems
5 appropriate.

6 And I really think that -- I'm shocked to think
7 that at the last day of the hearing you're going to stand
8 up and scream that you want a special hearing on relief.

9 Mr. Reynolds, a review of the transcript of the
10 prehearing conferences and the Board orders would indicate
11 that the clear consensus of the parties, all the parties and
12 the Board, was that this was to be done at once. And you
13 know it.

14 CHAIRMAN RIGLER: Let's see: In Waterford
15 the Board started with an assumption arguendo of an incon-
16 sistent situation, and then proceeded to consider the issue
17 of relief. The relief, while related obviously to the
18 inconsistent situation, was not contingent upon particular
19 aspects of that situation.

20 MR. LESSY: That's correct. And it doesn't have
21 to be, under antitrust law.

22 Of course relief can be fashioned to remedy the
23 situation. But the relief doesn't have to track the violation.

24 MR. SMITH: Can it exceed what is necessary to
25 remedy the situation?

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1 MR. LESSY: Yes. Certainly.

2 MR. CHARNO: I think the purpose of relief is
3 to restore status quo ante. Wherever you go to do that may
4 or may not track the violation.

5 I presume that that's what counsel for Staff is
6 saying.

7 Certainly to that extent we would agree, absolu-
8 tely.

9 MR. SMITH: It would be helpful to me if there
10 was a discussion of the relationship between relief and the
11 situation.

12 (The Board conferring)

13 CHAIRMAN RIGLER: Who had proposed license
14 conditions in his expert testimony?

15 MR. LESSY: Maybe. Pace.

16 MR. CHARNO: We certainly commented on them.

17 MR. LESSY: So did we.

18 The order setting forth the testimony, the filing
19 of testimony, the scope of the testimony to be filed -- which
20 I've asked Mr. Goldberg to go back and get -- specifically
21 sets forth the scope of the testimony to be filed would in-
22 clude matters where they needed relief.

23 And we'll get that order. It's approximately
24 October 15th of 1975. And this was pursuant to discussions
25 wherein the matter was discussed.

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1 CHAIRMAN RIGLER: Didn't one of the experts have
2 as an appendix a particular set of licence conditions?

3 MR. HJELMFELT: Mr. Mayben did. We made that
4 Exhibit 162.

5 MR. LESSY: The question of relief has been presen-
6 ed through the testimony of many witnesses, both fact and
7 expert. It has never been challenged before. I really
8 think that this is an attempt to alongate this hearing
9 process for purposes other than relating to this application,
10 for matters relating to the provenance of the pre-licensing
11 antitrust review program of the NRC. If I have time to look
12 up transcript references in pre-hearing conferences and
13 orders -- I remember arguing it myself.

14 CHAIRMAN RIGLER: Plus, Mr. Reynolds, so much of
15 your case has revolved around Applicants' policy commitments
16 which you have contended satisfied any need for relief,
17 even assuming there were an inconsistent situation.

18 MR. REYNOLDS: I guess we're missing, or we're
19 not on the same wave length. I'm not standing up here and
20 suggesting to you that we ought to hold an evidentiary hear-
21 ing with regard to the matter of relief. I'm aware Mr.
22 Mayben's testimony addressed license conditions, Dr. Pace's
23 testimony did, that there was discussion with other witnesses
24 throughout this hearing as to license conditions and the
25 appropriate conditions that might attach different certain

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1 situations -- given certain situations. What I am saying
2 to the Board is that in the event this Board should find
3 on the liability side that there exists a situation or a
4 number of situations inconsistent with the antitrust laws
5 with respect to the Applicants, what Applicants want is an
6 opportunity to address themselves to the question of relief
7 given what the situation is that the Board determines to
8 exist.

9 CHAIRMAN RIGLER: But I think you have addressed
10 that throughout the hearings with your policy commitments
11 and all of the arguments that you made relating to them are
12 integrally connected with the issue of relief because you
13 have contended, as you just agreed with me, that those policy
14 commitments are supposed to provide relief even in the event
15 that an inconsistent situation did exist.

16 MR. REYNOLDS: We believe those policy commitments
17 erase any possibility of an inconsistent situation existing,
18 Mr. Chairman.

19 CHAIRMAN RIGLER: Okay.

20 MR. REYNOLDS: What I'm getting to, and it relates
21 somewhat to Mr. Smith's question, as I understand the opposing
22 parties' position, there is no limitation on the scope of
23 relief once you have determined, if you will, that there
24 exists some situation inconsistent with the antitrust laws.
25 The Applicants feel on the other hand and feel very strongly

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1 that the relief aspects must be limited or defined by the
2 nature of the situation and that the nexus aspect, if you
3 will, of 105 has an application in that area as well.

4 In order to have an opportunity to address that
5 in a meaningful way it depends largely on what the liability
6 disposition is with regard to the situation. I don't want
7 to be foreclosed or deprived of making an argument that would
8 be available to me once I understood what the situation was
9 if the Board should find that there is one.

10 CHAIRMAN RIGLER: But you contended that your
11 policy commitments respond to any of the situations which
12 the opposition parties have alleged.

13 MR. REYNOLDS: I'm not arguing with that.

14 The question is whether, if this Board -- if the
15 other parties are alleging -- well, it can go either way.
16 If the other parties are alleging another aspect of relief
17 and it is in no way related to the nature of the situation,
18 until I know what the situation is I don't know whether
19 that other aspect, if you will, should be additional relief.

20 In other words, it's not only -- there is not
21 only the argument that my conditions cure all problems.
22 There is the argument on the other side that what they are
23 proposing in light of what the situation is is clearly
24 inappropriate for additional reasons.

25 MR. LESSY: And you have that argument as a matter

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1 of law on appeal. That's what was contemplated. The ques-
2 tion of appropriate relief based on the situation is a legal
3 argument based on the record already established.

4 MR. CHARNO: Mr. Chairman, I would point out simply
5 that the entire question of the necessity for nexus between
6 relief and activities under the license is a legal issue
7 that can be fully briefed without any determination of what
8 Applicant is referring to as liability.

9 MR. LESSY: There doesn't have to be one. In
10 addition I would refer Mr. Reynolds to the Staff's opening
11 statement on the first day of this hearing which specifically
12 addressed relief and this hearing has addressed relief all
13 through.

14 For example, Mr. Mozer's testimony.

15 CHAIRMAN RIGLER: All right.

16 MR. REYNOLDS: I'm not arguing with that, Mr.
17 Lessy.

18 CHAIRMAN RIGLER: All right. I think we have had
19 enough discussion.

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eb1 1 We're not inclined toward the two bites at the
2 apple approach on relief. We will adhere to our original
3 judgment that the proposed findings should address relief.

4 If, for any reason when we read these proposed
5 findings the Board is troubled by the scope of the proposed
6 relief versus any conclusions it may reach with respect
7 to a situation inconsistent, we always have available the
8 option of re-opening the hearings and seeking additional
9 advice from the parties if we deem it necessary.

10 I see no basis right now to conclude that it
11 would be necessary but that protection is always available.

12 So we will not permit at this juncture addi-
13 tional briefing with respect to the issue of relief in
14 the event we determine a situation inconsistent with the
15 antitrust laws would be created or maintained.

16 MR. LESSY: I would just point out that -- and
17 we'll do it in more specificity in our brief --

18 CHAIRMAN RIGLER: We ruled in your favor.

19 MR. LESSY: I know, but I just wanted-- This is
20 clarification, not argument, that the Commission's rules --

21 CHAIRMAN RIGLER: We ruled in your favor. We
22 don't need anything more.

23 MR. REYNOLDS: One last item. I guess the Board
24 and the parties have not had any discussion with regard
25 to the matter of reply briefs given the simultaneous filing

eb2 1 of the principal briefs. And my question goes to what the
2 Board's view is toward reply briefs, the opportunity to
3 respond?

4 CHAIRMAN RIGLER: We'll give you one week on
5 reply briefs, 25 pages or less, addressed only to clarifica-
6 tions of the record, not additional argument.

7 MR. LESSY: Consistent with the Commission's
8 Rules of Practice, actually more than the Commission's Rules
9 of Practice which gives five days only to the party that
10 has the burden under 2.7542).

11 CHAIRMAN RIGLER: You say that is consistent?

12 MR. LESSY: Yes, I was saying that is consistent.

13 MR. REYNOLDS: Can I ask for a clarification of
14 that? Does that mean that an argument which is made by one
15 of the other parties in their simultaneously filed briefs
16 which was not anticipated by the Applicants is an argument
17 which the Applicants have no opportunity to respond to?

18 CHAIRMAN RIGLER: Right.

19 (The Board conferring.)

20 We're going to change our mind on that. The
21 time period remains the same, and you can address whatever
22 you want in the reply brief of no more than 15 pages.

23 MR. LESSY: I just have one other thing I have
24 been asked to bring up and that's the question of extensions.

25 We're going to-- The Staff is, Mr. Vogler and

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1 myself and Mr. Goldberg, now that we know that the date is
2 the 16th of August, are going to work like beavers and do
3 it and not take vacations and get it done.

4 Now if the City of Cleveland files a conference
5 call on the 13th and says Geez, I can't do it, I need an
6 extra week, I want to state right now before we start that
7 the Staff is unalterably opposed to an extension because
8 we're going to commit our time and our manpower, in light
9 of the case load, to getting it done on the date set.

10 CHAIRMAN RIGLER: Do you hear that, Mr. Hjelmfelt?

11 (Laughter.)

12 MR. HJELMFELT: If I have a conference call
13 Mr. Lessy is not invited.

14 (Laughter.)

15 MR. LESSY: That was only an example to set
16 forth. I want it to be clear on the record what our position
17 is.

18 CHAIRMAN RIGLER: All right.

19 Does anyone with vacation plans want to speak?

20 MR. JACK GOLDBERG: Yes.

21 MR. LESSY: My last comment has nothing to do
22 with the fact that the City of Cleveland or that Mr.
23 Hjelmfelt requested an extension before the close of the
24 proposed findings in the Alabama proceeding which the Staff
25 opposed.

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1 MR. HJELMFELT: I didn't do it, but it was for
2 good cause shown. We had a witness, an expert witness,
3 who was unavailable and it was to rebut evidence which was
4 offered on about the last day or two.

5 CHAIRMAN RIGLER: Let the record show a substan-
6 tial degree of laughter during these exchanges, with the
7 possible exception of Applicants.

8 (Laughter.)

9 MR. REYNOLDS: If you want to go back through,
10 I'll laugh.

11 (Laughter.)

12 Let me ask for one further clarification. Am I
13 correct or incorrect in assuming that your 15-page limita-
14 tion means I can file a 15-page reply brief as to each brief
15 that's filed against the Applicants?

16 CHAIRMAN RIGLER: No. That's a good point. You
17 may file a 25-page brief addressed to all three reply
18 briefs.

19 No, that's not fair. I'll let you have 15
20 apiece.

21 MR. REYNOLDS: Thank you.

22 CHAIRMAN RIGLER: Mr. Smith reminds me that now
23 that we've given you some latitude in the reply briefs be
24 advised that they are reply briefs and not opportunities
25 to save your last arguments for the last briefs so that they

eb5 1 can't be answered.

2 So if a brand-new argument that is not responsive
3 to something that appears in another brief appears, it is
4 probably going to be rejected out-of-hand.

5 MR. REYNOLDS: Mr. Rigler, I don't believe I
6 would ever take that kind of a gamble in any kind of liti-
7 gation.

8 CHAIRMAN RIGLER: That wasn't addressed to you,
9 Mr. Reynolds.

10 Okay. So we'll close the record as of Tuesday
11 afternoon, subject to hearing from the parties which can
12 be done by letter with respect to those open items.

13 If any party feels that additional live testi-
14 mony is required as a result of the receipt of those few
15 open items they will advise the Board and we will arrange
16 for a hearing date.

17 MR. LESSY: With respect to the Cannon letter
18 which is in the mail, that will be treated as -- it will
19 be put in the Public Document Room I assume, or distributed
20 to the parties?

21 CHAIRMAN RIGLER: Yes, indeed.

22 MR. LESSY: Mr. Goldberg was just saying the
23 reply briefs, other than Applicants, is how many pages?

24 CHAIRMAN RIGLER: Fifteen.

25 MR. LESSY: Can we get 20?

eb6

1 CHAIRMAN RIGLER: No.

2 MR. CHARNO: I take it what all of these page
3 limitations refer to is standard size typewriter on 8-1/2
4 by 11 and we're not going to get any reduced printing which
5 sometimes happens? At least it's been my experience in
6 an ICC case where you get shrunken type that you can hardly
7 read.

8 CHAIRMAN RIGLER: Don't the Commission's rules
9 provide for brief size?

10 MR. CHARNO: That's fine.

11 MR. REYNOLDS: At the risk of exhausting every-
12 one's patience, Mr. Berger just called me from the airport.
13 He reminded me about a matter which I had mentioned earlier
14 that the Applicants were interested in looking into and I
15 had not listed it here, which goes to the new allegations
16 that the Department of Justice made as to when the co-ops
17 started taking power from the Buckeye plant.

18 MR. CHARNO: I thought that material came in today.
19 That was my understanding, that that was the nature of that.
20 That was the reason that I--

21 CHAIRMAN RIGLER: No.

22 MR. REYNOLDS: No, as to whether the co-ops in
23 the Buckeye area were capable of receiving Buckeye power
24 at a time -- or when they were capable of receiving it.

25 CHAIRMAN RIGLER: I thought that was resolved.

eb7 1 There was an argument--

2 MR. REYNOLDS: You're right. There was a problem
3 with the stipulation because we could not ascertain the
4 date to our satisfaction and the Department had suggested a
5 date. And because we did not reach an agreement and we
6 weren't able to verify it, that part of the stipulation
7 was removed. And the stipulation came in without a stipula-
8 tion as to when they started receiving power.

9 I don't anticipate that we're talking about
10 anything more than a document when we find out the informa-
11 tion. I have not yet been able to find it out, and we've
12 been making an effort to find it out.

13 MR. CHARNO: Mr. Chairman, first there is a set
14 of interrogatory answers that are very specific under oath,
15 signed by Mr. Henry, who is no longer available for cross-
16 examination, that are in this record that set forth with
17 great precision, which has been referred to Applicants'
18 Counsel and to Mr. Berger.

19 Further, at his request the Department, prior
20 to submitting the stipulation which has no reference to
21 it, that in order to set his mind at rest, called Buckeye
22 Power, Inc. and asked them the date on which service
23 commenced to everyone except Ohio Edison and the answer we
24 got from Buckeye Power, INC. was the same date that was in
25 the Toledo Edison answers to interrogatories.

eb8

1 It is not understanding that there is any --
2 the record has been held open with respect to this, and I
3 see no reason that it should be, and I think it's based upon
4 a misrepresentation.

5 MR. REYNOLDS: I think we're missing each other
6 again. We are not disputing when the co-ops in Toledo
7 Edison's area took power from the Buckeye plant. The ques-
8 tion that is unresolved and we're trying to ascertain is
9 when the co-ops in the Ohio Edison area were capable of
10 taking the power from the Cardinal Plant, whether it was
11 before or after the date when the co-ops in Toledo Edison's
12 area actually did.

13 And we've been trying-- It is really that limited
14 aspect, and we've been trying to determine when that was.
15 And the problem really goes to-- And it's a very difficult
16 one because of the bookkeeping nature of these kind of
17 transactions, when the co-ops in Ohio Edison's area were
18 capable of receiving the power from the Cardinal Plant.

19 I don't know whether it was before or after the
20 date that Toledo Edison --

21 CHAIRMAN RIGLER: I remember the argument but I
22 just had it in my mind that the parties subsequently entered
23 into a stipulation that resolved that issue.

24 MR. CHARNO: The only part that was left out of
25 the stipulation was the date at which the Toledo Edison

eb9 1 parties -- the Toledo Edison cooperatives could receive
2 the power. The rest of it was stipulated and is the subject
3 of that stipulation.

4 MR. REYNOLDS: That's right. The only question
5 is not when they actually started taking the power but when
6 they could have received it.

7 CHAIRMAN RIGLER: Yes, but I thought the stipula-
8 tion was intended to close the issue and the absence of
9 that information from the stipulation was a waiver of any
10 further opening of the record to satisfy that point.

11 There was controversy; there was a stipulation
12 which was intended to resolve the controversy.

13 MR. REYNOLDS: After the stipulation we got the
14 Department's reformulated allegation, and that's the problem.
15 And all we're trying to do is given the nature, the limited
16 nature of the stipulation if you will, and the reformulation
17 of the allegation, we want an opportunity to confirm when
18 the co-ops in Ohio Edison's area were first capable of
19 receiving the power from the Cardinal Plant.

20 MR. CHARNO: The stipulation specifically speaks
21 to that.

22 MR. REYNOLDS: Not when they were capable of it.

23 MR. CHARNO: I don't know what you're talking
24 about, capability. Physiologically? Engineering? It's
25 very clear they were already receiving power from Ohio

eb10 1 Edison. There was absolutely no problem.

2 Contractually? That's what the stipulation deals
3 with.

4 I think this is going back on the stipulation and
5 I think that can be the only intent of it.

6 MR. REYNOLDS: I think if we had had the reformulated
7 allegation at the time of the stipulation we probably could
8 have waited and resolved it. The problem is we did have
9 the reformulated allegation and at the time we got it we
10 advised the Board that we wanted an opportunity to look
11 into this matter.

12 And Mr. Berger called from the airport and indi-
13 cated that he was looking into it and has been looking into
14 it. And I will represent to this Board, because I know
15 for a fact he has been and he has not yet gotten the response
16 back that he has been -- whatever the response is.

17 CHAIRMAN RIGLER: All right. I'll tell you what
18 to do. You tender it in the form of a stipulation if you
19 deem it necessary, and the Department can either accept
20 it or oppose it. We understand your arguments and we'll
21 make a decision.

22 MR. REYNOLDS: If that's the Board's ruling
23 that's how we'll handle it.

24 MR. HJELMFELT: I now have copies of my filing
25 if anybody wants it hand-delivered.