

Regulatory Docket File

NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING CO.
(Davis-Besse Nuclear Power
Station, Units 1, 2 and 3)

Docket Nos.

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

and

CLEVELAND ELECTRIC ILLUMINATING
CO., et al.
(Perry Nuclear Power Plant, Units 1 & 2)

50-440A
50-441A

Place - Silver Spring, Maryland
Date - Friday, 26 March 1976

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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<u>et al.</u>	:	50-441A
	:	
(Perry Nuclear Power Plant	:	
Units 1 and 2)	:	
	:	
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First Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland

Friday, 26 March 1976

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

BEFORE:

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

APPEARANCES:

(As heretofore noted.)

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		<u>C O N T E N T S</u>				<u>Voir</u>
<u>Witness</u>		<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>	<u>Dire</u>
1						
2						
3	Raymond Kudukis	7472	7500	---	---	---
4	Sesler Titus	7504	7506	7512		
5						
6						
7	<u>Exhibits</u>			<u>For Identification</u>		<u>In Evidence</u>
8	Applicants Exhibit (CEI) 106			7511		7512
9	C-154 (25258 thru 62)			7520		
10	C-155 (25263-74)			"		
11	C-156 (26276)			"		
12	C-157 (25290-92)			"		
13	C-158 (17222-223)			"		
14	C-159 (17224-25)			"		
15	C-160 (68614 thru 68618)			"		
16	C-1, C-3 and C-4					7524
17	C-6					7525
18	C-9					7528
19	C-11					7529
20	C-12					7530
21	C-13					7534
22	C-14					7535 ✓
23	C-15					7536
24	C-19					7538
25	C-20					7539
	C-21					7539

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C O N T E N T S

	<u>Exhibits (Cont'd)</u>	<u>For Identification</u>	<u>In Evidence</u>
1			
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3	C-22		7539
4	C-23		7540
5	C-24		7540
6	C-25		7541
7	C-27 and C-28		7543
8	C-29		7543
9	C-30		7545
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24	C-45		7553
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C O N T E N T S

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	<u>Exhibits (Continued)</u>	<u>For identification</u>	<u>In evidence</u>
3	C-47		7554
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25	C-71		7583

C O N T E N T S

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	<u>Exhibits (Continued)</u>	<u>For Identification</u>	<u>In Evidence</u>
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3	C-72		7584
4	C-74		7591
5	C-76		7592
6	C-77		7593
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P R O C E E D I N G S

2 MR. HJELMFELT: The City will call as its first
3 witness, Mr. Ray Kudukis.

4 Whereupon,

RAYMOND KUDUKIS

5
6 was called as a witness on behalf of the City of Cleveland,
7 and having been first duly sworn, was examined and testified
8 as follows:

DIRECT EXAMINATION

9
10 BY MR. HJELMFELT:

11 Q State your name for the record.

12 A Raymond Kudukis, K-u-d-u-k-i-s.

13 Q Your business address?

14 A 1201 Lakeside Avenue, Cleveland, Ohio.

15 Q What is your occupation?

16 A Director of public utilities for the City of
17 Cleveland.

18 Q As a part of your duties as director of public
19 utilities, do you attend meetings of the Public Utilities
20 Committee of the City Council of the City of Cleveland?

21 A Yes, I do.

22 Q Did you attend a meeting in June of 1973 at
23 which the Committee was considering the issuance of a \$9.8 million
24 bond ordinance for rehabilitation of the city electric
25 system?

1 A Yes, I did.

2 Q Do you know who drafted that ordinance?

3 MR. BUCHMANN: I object to that.

4 What relevance does it have? I am aware of
5 nothing on that subject in the statement of the nature of
6 the case filed by the City of Cleveland.

7 MR. HJELMFELT: This line of testimony is going
8 to the problems that the City has had in financing its
9 electric system with respect to interference by CEI.

10 The formulation of a bond ordinance being a
11 technical matter; the changes and amendments in an ordinance
12 also involve the same technical field.

13 The City will be attempting to demonstrate
14 that the ordinances -- that the amendments to the ordinance
15 were prepared by CEI and that these amendments made it more
16 difficult for the City to sell its bonds, and that while the
17 City at the hearing was represented -- or the City's
18 bond counsel who prepared this technical matter was at the
19 meeting, bond counsel which is also the firm that represents
20 CEI, when asked about the effect of these amendments
21 made -- gave no indication to City Council members that
22 these ordinances or these amendments would make it more
23 difficult, perhaps impossible for the City to finance the
24 rehabilitation of its system.

25 MR. BUCHMAN: May I respond, Mr. Rigler?

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CHAIRMAN RIGLER: Just a minute.

2 Mr. Hjelmfelt, will you indicate where in the
3 state of the City of Cleveland's case these allegations are
4 made? Or, the City's attempt to rely upon this proposed
5 line of evidence is set forth?

6 Mr. Buchmann, I think the record should indicate
7 that an interval has gone by. I won't cut you off from
8 continuing in your serve.

9 MR. HJELMFELT: I am ready to respond now.

10 As pointed out in our September 5 filing, we
11 did not there undertake to elucidate a description of
12 all of the evidence we would be presenting on all of the
13 parties in controversy, but rather to set out the nature of
14 the case we intended to prove.

15 In the nature of the case we pointed out that we
16 intended to prove -- and this is certainly clear not
17 to rely from the September 5 filing, but I think it goes
18 back to the prehearing conferences and to the argument on
19 discovery requests, that one of the problems the City faced
20 was the ability to rehabilitate its system. And that this
21 was tied in not only with the lack of an interconnection
22 which would provide the City with an opportunity to
23 obtain tenants' power, but with such other matters as
24 declining revenue base which made it more difficult to
25 finance the expansion. And with this declining revenue base

and 1 and the inability to finance -- or the difficulty in
2 financing additional generation or rehabilitation, we have
3 CBI moving to cause the City to sell its bonds on the
4 open market rather than to the sinking fund which Mr. Hart
5 indicated was the more normal method of proceeding.

6 CHAIRMAN RIGLER: Well, but my question is
7 where in the statement of the City's case is this alleged or set
8 forth?

9 MR. HJELMFELT: For example, on the bottom of page
10 21, the last sentence, talking about the reduction in
11 Cleveland's load reduces Cleveland's demand for power,
12 limiting the size of generating units that can be installed,
13 and reduces its revenue base needed for financing installation
14 of bulk power generating units.

15 CHAIRMAN RIGLER: What does that have to do with
16 your contentions with respect to the passage of the bond
17 ordinance?

18 We understand your point about the diminishing
19 revenue base. There has been evidence presented on that
20 point. But you have been unable to show me anything
21 specific in the September 5 filing which puts the Applicants
22 on notice that we are going to be required to defend against
23 a specific charge that they, in essence, sabotage the 1973
24 bond issue.

and 1
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b7d 1 MR. HJELMFELT: Perhaps they are claiming
2 surprise, although I haven't heard them say that.
3 Certainly, the course of our representations throughout
4 has been that that -- it seems to me I have continually
5 pointed out that that is part of our case.

6 The fact we didn't specifically indicate in our
7 September 5 filings that that was part of the
8 evidence we would be presenting with respect to the issues
9 we were raising, doesn't seem to me to be a cause for
10 excluding this testimony.

11 CHAIRMAN RIGLER: What was the purpose of the
12 September 5 filing?

13 MR. HJELMFELT: The September 5 filing was, as I
14 understand it, to give the Applicants a statement of the
15 nature of the case, not a statement of --

16 CHAIRMAN RIGLER: Why did we wait until after
17 the close of discovery so that the evidence could be
18 accumulated and set forth in the statement? Surely you
19 understood that was one of the purposes of delaying the
20 statement until after the close of discovery.

21 MR. HJELMFELT: My understanding of what the
22 Applicants were asking for and what we were required to
23 give was that the Applicants were saying the statement of
24 issues set forth by this Board were not sufficiently clear
25 to put them on notice.

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1 CHAIRMAN RIGLER: That is true.

2 MR. HJELMFELT: I find a vast difference between
3 the Board saying --

4 CHAIRMAN RIGLER: It is true that they made that
5 statement. Whether it was correct, I don't know.
6 In response to that allegation we did require the September
7 5 statement.

8 MR. HJELMFELT: Of the nature of the case to
9 be presented, but not, as I understand it, a statement
10 in delineation of the evidence to be adduced on each of
11 the issues that we intended to prove.

12 MR. BUCHMANN: If I may, Mr. Rigler, there were
13 three petitions to intervene filed in this proceeding by
14 the City of Cleveland, none of which mentioned this issue.
15 Discovery was had and this subject was discussed in the
16 deposition of Mr. Kudukis in mid-1975 and in the deposition
17 of Mr. Riebe, Finance Director of the City of Cleveland,
18 well before the September 5, 1975, statements
19 were filed. So that the City of Cleveland cannot say it
20 didn't know about this. I take it we now have, in effect,
21 a concession from Mr. Hjelmfelt that it is not mentioned
22 in the September 5 filing.

23 We have your order, that is the Board's order
24 of November 20, 1975, which, among a number of other things,
25 provides that the City would be limited in its case

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1 in chief to contentions set forth in its petitions to inter-
2 vene which doesn't include this, as those contentions have
3 been particularized in a statement of the nature of the
4 case.

5 MR. SMITH: Wasn't that statement in relation to
6 evidence of activity in service areas other than CEI?

7 MR. BUCHMANN: It certainly was. It wasn't
8 directed toward this in particular but, as I understand it,
9 that was a confirmation -- the parties selected the issues
10 that they were going to proceed upon.

11 Having made that selection, they ought to be
12 bound by it. I let pass whether any of this is really
13 relevant to the case. That is a further objection later on.

14 CHAIRMAN RIGLER: Mr. Hjelmfelt, isn't it also
15 conceded that the opposition of CEI to the bond
16 ordinances originally proposed was open, and notorious within
17 the City Council?

18 MR. HJELMFELT: I can certainly state insofar
19 as I know, that CEI desire to have the amendments that
20 were passed or similar amendments passed was known and
21 that --

22 CHAIRMAN RIGLER: Not only did they not make it
23 a secret, but they openly espoused their position, didn't
24 they?

25 MR. HJELMFELT: Based on Mr. Hauser's deposition,

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1 he handed out copies of the proposed amendment to City
2 Council members. I would say, yes, I have to agree with
3 you.

4 MR. REYNOLDS: I was going to object, in that
5 Mr. Hauser's deposition, portions of it, have only been
6 marked at this particular time, and the Board has yet to
7 entertain whatever objections may be made.

8 CHAIRMAN RIGLER: The Board has become aware
9 of the existence of this evidence, because a collateral matter
10 setting forth some of this evidence has referred to it.
11 We are not operating in a vacuum.

12 I am making the point that the City was well
13 aware that CEI was seeking changes in the Board ordinance.

14 MR. REYNOLDS: I was addressing Mr. Hjelmfelt's
15 comment as to Mr. Hauser's deposition or portions of it
16 being in evidence at this time.

17 That is a matter still to be dealt with.

18 MR. HJELMFELT: The City has clearly made it
19 plain that CEI has been out to destroy the municipal light
20 system from the beginning.

21 It has approached this in a wide variety of
22 places. It has denied coordination. It has denied inter-
23 connection. It's made efforts to whittle away at the
24 City's revenues.

25 CHAIRMAN RIGLER: We have admitted evidence which

1 The City says supports each of these contentions, but
2 these contentions were set forth and CEI indicates that
3 it is prepared to defend against them.

4 At least the issue is joined as to those
5 contentions. We are going to sustain the objection.

6 MR. HJELMFELT: Does the sustaining of the
7 objection to the -- any discussion by this witness of that
8 utilities meeting and the bond ordinance?

9 CHAIRMAN RIGLER: I would have to hear the
10 objections. It seems to me your original response, if
11 taken as an offer of proof, covered a fairly wide area
12 that may be subject to the same objection, but I can't rule
13 on a vacuum on that.

14 BY MR. HJELMFELT:

15 Q At that meeting, Mr. Kudukis, was the bond
16 ordinance amended?

17 A Yes, it was.

18 Q How was it amended?

19 MR. BUCHMANN: I object.

20 CHAIRMAN RIGLER: By that do you mean what
21 were the changes?

22 MR. HJELMFELT: Yes.

23 MR. BUCHMANN: The ordinance speaks for itself,
24 if your Honor please.

25 CHAIRMAN RIGLER: I will permit the Witness to

1 summarize the changes for us.

2 THE WITNESS: The original ordinance and
3 indenture was geared so that these bonds would be sold
4 to the City sinking fund.

5 After the changes were made, the changes
6 precluded this from taking place, and we then had to
7 proceed and try to sell these on the open market.

8 That was the basic nature of the change.

9 BY MR. HJELMFELT:

10 Q At that committee meeting did you raise any
11 objection to the proposed amendments?

12 MR. BUCHMANN: I object.

13 CHAIRMAN RIGLER: What is the grounds of the
14 objection?

15 MR. BUCHMANN: What relevance does it have?

16 I don't mean to phrase that as a question to you. I
17 object on the grounds of relevance to this issue.

18 MR. HJELMFELT: I think the relevance is that
19 the Municipal Electric Light Plant administration was not --
20 to show they were not in favor of these amendments.

21 CHAIRMAN RIGLER: This meeting was before the
22 City's utility commission?

23 MR. HJELMFELT: Correct.

24 CHAIRMAN RIGLER: There were competing points
25 of view being expressed?

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1 MR. HJELMFELT: Yes.

2 CHAIRMAN RIGLER: Objection is sustained.

3 BY MR. HJELMFELT:

4 (Beginning of testimony designated by Chairman.)
5 Q Who prepared the amendments?

6 MR. BUCHMANN: I object. This is the same
7 line of inquiry we have gone through.

8 (Board conference.)

9 CHAIRMAN RIGLER: It is difficult to tell at this
10 time if that objection is sustainable. We will permit the
11 witness to answer, subject to a possible motion to strike
12 down the line when we see a little more clearly where
13 this testimony is going.

14 MR. BUCHMANN: I don't mean to argue with the
15 Board on it. We have had an extensive offer of proof on this
16 subject. I point out that while previously and I do adhere
17 to the fact that this is not particularized in the claims
18 made, if this line is to be pursued, it is plainly subject
19 to a Noerr-Pennington protection.

20 CHAIRMAN RIGLER: The Board was just discussing
21 that a Noerr-Pennington objection may be made. One
22 reason I'm withholding ruling and considering making it
23 subject to a motion to strike is that right now we don't
24 have enough before us to tell if the Noerr-Pennington
25 claim lies.

Secondly, there is the further point that was

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1 expressed in the objection or offer of proof, if you will,
2 which relates to subversion of Counsel. That is the
3 delicate point that may cause rethinking as to whether
4 that is protected by Noarr-Pennington. That is why it is
5 premature for us to rule on that at this point.

6 MR. BUCHMANN: If we are in that issue which
7 has been mentioned before here, the same principles
8 apply. You cannot find it in the petitions to intervene
9 or in the September 5 statements, and the same objection to
10 that, Noarr-Pennington or not.

11 CHAIRMAN RIGLER: All right. What was your
12 pending question?

13 MR. BUCHMANN: Who proposed the amendment?

14 MR. REYNOLDS: Let me, at this point, interject
15 the continuing objection of all Applicants other than
16 CEI to any of the testimony of this Witness.

17 CHAIRMAN RIGLER: Overruled.

18 Your pending question was, who proposed the
19 amendment?

20 MR. HJELMFELT: That is correct.

21 CHAIRMAN RIGLER: Does that assume
22 there was only one party proposing amendments?

23 MR. HJELMFELT: Not necessarily.

24 THE WITNESS: As the amendments came out in
25 committee, Francis Gaul, who was Chairman of the Public
Utilities Committee of the Council presented the amendments.

1 Subsequently, I found out these were presented
2 to him by Mr. Hauser.

3 MR. BUCHMANN: I move the last part go out,
4 because it is nonresponsive.

5 CHAIRMAN RIGLER: We will strike the portion of the
6 answer beginning with the phrase "Subsequently, I found
7 out."

8 Mr. Kudukis, there were a group of amendments
9 submitted.

10 THE WITNESS: There were word changes.
11 More than one sentence. There were changes in the number
12 of paragraphs.

13 CHAIRMAN RIGLER: All of these changes were
14 presented by Mr. Gaul.

15 BY MR. HJELMFELT:

16 Q Was Mr. Hauser present at the presenting
17 meeting?

18 A Yes, he was.

19 MR. BUCHMANN: I object on the ground of relevance
20 and Noerr-Pennington applies there.

21 CHAIRMAN RIGLER: Sustained. We will strike the
22 answer.

23 BY MR. HJELMFELT:

24 Q Did the Committee consult with the City's head
25 counsel with regard to the proposed amendments?

1 MR. BUCHMANN: I object.

2 CHAIRMAN RIGLER: We will hear the
3 answer.

4 THE WITNESS: Mr. Bruchels of Squire, Sanders
5 and Dempsey was sitting next to me at that committee
6 meeting.

7 He was our bond counsel. As the
8 changes were prepared Mr. Gaul frequently turned to
9 him, as I did, from time to time and asked whether
10 this change would be acceptable, whether this would be
11 detrimental to any great degree, so basically, yes, the
12 bond counsel was consulted as the changes were being made.

13 CHAIRMAN RIGLER: When you say the changes would
14 be detrimental or were acceptable, did you understand this
15 advice to be in the nature of legal advice with respect
16 to whether the ordinance would meet legal requirements, or
17 did you understand this to be advice relating to the salability
18 of the bond?

19 THE WITNESS: The questions were basically two-
20 fold. Primarily, on the legality, but also there were
21 other questions that addressed themselves to the salability
22 of the bonds.

23 BY MR. HJELMFELT:

24 Q What advice did Mr. Bruchels give the Committee?

25 MR. BUCHMANN: I object.

1 CHAIRMAN RIGLER: What is the basis for the
2 objection?

3 MR. BUCHMANN: If your honor please, there
4 has been no indication, except statements not
5 particularized, that this has any connection with the issues
6 in this case.

7 CHAIRMAN RIGLER: I will allow the witness
8 to answer, subject to a possible motion to strike.

9 THE WITNESS: Yes, Mr. Bruchels did respond
10 and his response left the impression with those
11 present that the changes were legal and that it would not
12 substantially effect the salability of these bonds.

13 MR. BUCHMANN: I move to go out, the testimony
14 about the impression on other people.

15 He said left the impression with those present.
16 How does he know?

17 CHAIRMAN RIGLER: Sustained.

18 We will strike the portion of the answer con-
19 taining the phrase "left the impression."

20 BY MR. HJELMFELT:

21 Q Mr. Kudukis, from Mr. Bruchels' advice to the
22 Committee, did you understand that the amendments would
23 not affect the marketability or salability of the bonds?

24 MR. BUCHMANN: I object to that. He answered
25 that question, and said it would not substantially affect it.

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1 I object on the ground of relevance as to
2 what impression was left in the mind of Mr. Kudukis.

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

5 MR. BUCHMANN: What relationship does the
6 answer to that question have to any particularized issue
7 in this proceeding, if your Honor please. I see none.

8 CHAIRMAN RIGLER: I'm going to sustain it on
9 the asked and answered basis.

10 BY MR. HJELMFELT:

11 Q Were the proposed amendments passed?

12 A Yes, they were.

13 Q Was the City able to market those bonds?

14 MR. BUCHMANN: I object.

15 In the first place, we have evidence in the
16 record, as to what happened to those bonds, from the
17 Department of Justice. In the second place, what relevance
18 does it have? And, in the third place, what does "able"
19 mean?

20 CHAIRMAN RIGLER: I'm going to overrule first the
21 and third ground, and I will hear from Mr. Hjelmfelt on the
22 second ground as to relevance.

23 MR. HJELMFELT: The relevance is that the
24 amendment passed, the City was then not able to market the
25 bonds, were not able to rehabilitate their plant, affected

1 their ability to compete, made them more subject to
2 acquisition by CEI. It is completely in line with
3 our entire theory that we have argued from the start.

4 CHAIRMAN RIGLER: Let's bypass the issue of
5 the role of the attorneys.

6 MR. HJELMFELT: Yes.

7 CHAIRMAN RIGLER: Let's assume that bond
8 ordinance had been presented, that CEI appeared in opposition
9 and, as a result of that opposition, changes were made
10 and the bonds were difficult to sell.

11 On that set of facts, would we be able or justified
12 in making a finding that CEI had acted to create or maintain
13 a situation inconsistent with the antitrust laws.

14 MR. HJELMFELT: I don't think Noerr-Pennington
15 would prevent you from it.

16 CHAIRMAN RIGLER: Why not?

17 MR. HJELMFELT: Because I don't think
18 Noerr-Pennington applies to a hearing before this licensing
19 board.

20 CHAIRMAN RIGLER: But does Noerr-Pennington give
21 CEI the right, privilege, to oppose bond ordinances in the
22 City of Cleveland, even though the municipal system may find
23 those ordinances desirable?

24 MR. HJELMFELT: The right exists with or without
25 Noerr-Pennington. What Noerr-Pennington does is say the

1 fast they did that cannot be considered a violation of the
2 antitrust laws. We are not concerned with the violation.
3 We are concerned with actions that are contrary to the
4 policies behind those laws and the situations inconsistent
5 with those laws.

6 Secondly, this is not the only fact situation
7 before this Board. It is part of a big picture, and it
8 is evidence of the entire scheme of CEI.

9 CHAIRMAN RIGLER: All right, but in this big
10 picture CEI is doing a lot of things that have an effect
11 on the City's municipal system. Some of them, even though
12 they may affect the competitive visibility of MRLP might be
13 considered legal, plainly, they might not conflict in
14 any sense with the policies of the antitrust laws.

15 The policies of the antitrust laws do not
16 insulate a system from competition. They allow for give
17 and take and exchange of customers, providing that the
18 factors leading to those exchanges are competitive factors.

19 Then we come to the question of whether their
20 actions with respect to the bond ordinance would fall into
21 the category of permissible competitive acts and Noerr-
22 Pennington suggests that open acts before the legislature
23 may not be subject to antitrust sanction.

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1 MR. HJELMFELT: Even assuming that Noerr-
2 Pennington did apply and I could not point to this under
3 Noerr-Pennington and say this is a violation of the antitrust
4 laws, does not mean as I understand Footnote 3 to
5 Pennington that I can't use this evidence to show the nature
6 and intent of other acts in the course of conduct.

7 Furthermore, with Noerr-Pennington not being
8 applied, which I don't think it should be applied, even
9 assuming the acts were perfectly legal, when they become
10 part of an overall scheme that is not lawful, I think they
11 are relevant again and can be used as part of the unlawful
12 overall acts, the bundle of acts that go to make the
13 situation inconsistent.

14 MR. SMITH: Can they also be used to show the
15 simple existence of a scheme notwithstanding whether that
16 was a lawful -- possibly a lawful aspect of the scheme?

17 MR. HJELMFELT: Yes, I would think they could be.

18 MR. REYNOLDS: May I ask a question, Mr. Smith,
19 because I am not sure I understood your question.

20 Was your question contemplating an application of
21 Noerr-Pennington in the administrative context in this
22 particular context, or did it assume no application?

23 MR. SMITH: It assumed the application, narrow
24 application of the acts under evaluation now.

25 MR. REYNOLDS: I just wanted to understand your

ma2 1 question. I understand it.

2 (The Board conferring.)

3 MR. BUECHMANN: I would like to be heard.

4 I want to point out to the Board before we get
5 carried too far down the line of the intricacies of the
6 Noerr-Pennington Doctrine, and I vehemently disagree with
7 Mr. Hjelmfelt, we are not here at this moment facing the
8 Noerr-Pennington Doctrine in any form here.

9 What we are facing is the fact that if the City
10 is going to rely on this sort of thing to sustain a broad
11 scheme they were entitled to be advised of that fact last
12 September. That being the case, this line should be brought
13 to a halt.

14 I will say this, however, why it should be
15 inconsistent with the policies of the antitrust laws for
16 the principal, the largest single taxpayer in the City
17 of Cleveland to wish to have the City's bonds sold on the
18 general market as distinguished from the taxpayers' sinking
19 fund, is beyond me. That is a fact.

20 Nonetheless, I adhere to this. I think we have
21 gone far enough and I object to the whole line and move to
22 strike.

23 CHAIRMAN RIGLER: We are going to permit an
24 answer, and then we are going to take the motion to strike
25 under consideration.

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2 MR. REYNOLDS: I will join in that motion to
strike on behalf of all of the other Applicants.

3 CHAIRMAN RIGLER: You have already objected on
4 behalf of all of the other Applicants.

5 MR. REYNOLDS: I was overruled.

6 MR. HJELMFELT: First, with respect to --

7 CHAIRMAN RIGLER: Your pending question was, as I
8 recall, were you able to sell the bonds.

9 You may answer that.

10 MR. BUCHMANN: Does that call for a yes or no
11 answer, if your Honor please?

12 CHAIRMAN RIGLER: Probably not.

13 MR. BUCHMANN: The answer could hardly be maybe.

14 CHAIRMAN RIGLER: It may not be yes or not, but
15 it may be in part, or some explanation as to how saleable
16 they were.

17 THE WITNESS: Yes, there were a series of events
18 that ensued. We had great difficulty in selling these
19 bonds.

20 First of all, we were not able to, after the
21 ordinance was passed, sell the bonds because we had to
22 prepare a prospectus which delayed us by six months. That
23 took us out of even trying to sell for the first six months.

24 After that we did attempt to sell them and we
25 couldn't.

BY MR. HJELMFELT:

Q Did the inability to sell the bonds hinder the City's ability to rehabilitate its system?

MR. BUCHMANN: I object.

I thought we were now on my motion to strike.

CHAIRMAN RIGLER: I am going to hear the entire line and then we will take the entire issue under advisement, Mr. Buchmann.

MR. BUCHMANN: I'm sorry, I misunderstood.

CHAIRMAN RIGLER: I should have been clearer.

I will hear the entire line and then the Board will break and consider it. You may not get an immediate ruling on it.

MR. BUCHMANN: I am sorry, I misunderstood.

I am sorry I interrupted you, Mr. Hjelmfelt.

MR. HJELMFELT: May I have the question?

(Whereupon the reporter read from the record as requested.)

THE WITNESS: Absolutely, since the intent of the capital dollars was to rehabilitate the system.

MR. HJELMFELT: That is the end of that line.

Did you want to break now?

CHAIRMAN RIGLER: No, I would prefer to continue.

MR. BUCHMANN: I would like to be heard before you rule if need be.

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CHAIRMAN RIGLER: You should be heard on this line now then.

We understand your objection about the lack of notice, and the asserted failure to comply with the Board's procedural rules.

MR. BUCHMANN: I formally renew my motion to strike, going back to the spot marked in red on the tape.

I point out to you, if your Honor please, that what we have now is testimony in the record that the ordinance was amended at a given point in time, pursuant to an amendment submitted by Councilman Gaul and that -- it is asserted that as a result of the amendments they had difficulty selling bonds and that the conclusion is drawn from that that they had difficulty rehabilitating their municipal plant.

It is not connected to the Cleveland Electric Illuminating Company by one iota of evidence, and I move to strike.

MR. HJELMFELT: If I might respond.

We have already marked Mr. Hauser's deposition for identification, which in effect connects up -- it is the first evidence of connecting up CEI position to these amendments.

We have had other evidence showing the effect of the inability to rehabilitate the system. The Board might not agree, or Mr. Buchmann might not agree with the

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1 inferences I want to draw, but there is evidence in the
2 record from which inferences can be drawn.

3 I might also point out that throughout CEI action
4 perhaps the other Applicants argued the ability of the
5 City to finance its system. It is one of their defense
6 contentions. This certainly goes to the heart of that
7 matter. It is relevant on that ground.

8 The question was raised --

9 CHAIRMAN RIGLER: If they raise that as you
10 characterize it, a defense, during part of the Applicants'
11 response case, wouldn't that be a more appropriate time to
12 get into this subject matter?

13 MR. HJELMFELT: I think it is legitimate on the
14 basis of my case to get into it now.

15 If it is not, I think it is still legitimate in
16 response to the assertions they have made.

17 Now, in the normal course of putting on a case
18 in that situation it would be incumbent on me to wait and
19 put it on in rebuttal. We are putting it on now because
20 we think it is part of our case.

21 If the only effect of the Board's ruling is to
22 say no, you come back and put it on in rebuttal later, it
23 seems to me to be a waste of judicial economy. It is a
24 judicial diseconomy.

25 I would point out earlier a question that rose in

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1 the discussion which would indicate that this might be
2 considered in isolation.

3 I refer to the ALCOA case in regard to
4 taking what itself may be a legal act, and isolate it and
5 then take another legal fact and isolate it, that that is not
6 proper.

7 MR. BUCHMANN: There is substantial evidence in
8 this record adduced on the part of the Department of
9 Justice that this ordinance was subsequently amended back
10 and they still couldn't sell the bonds.

11 There was extensive testimony when Mr. Hart
12 was here the last time on that subject. They are not bonds,
13 they are notes. But be that as it may, maybe the Department
14 of Justice and the City don't have to be consistent one with the
15 other, but that evidence is in this record.

16 MR. SMITH: As I recall that testimony is that
17 there is now pending a draft prospectus and the whole issue
18 is dangling.

19 MR. BUCHMANN: I won't give you record references,
20 but I have it in here.

21 The testimony was that-- I will put it to you
22 this way. As the record shows, because we are talking about
23 an amendment to an existing ordinance, the ordinance
24 was in the one form. It was then amended as testified here to
25 today.

1 As Mr. Hart testified, it was subsequently
2 amended back and at that time when he testified they had
3 sold approximately one million one out of the nine point
4 eight, after all of this time, and he was about to sell
5 another half million at that time.

6 I presume he sold it. I don't know. That is
7 where the thing stands.

8 I don't know how we can draw the inference
9 even if he connects CEI with this, that the nonmerchantability
10 of these were due to CEI at all.

11 They have it as they want it, and they still
12 haven't sold it.

13 CHAIRMAN RIGLER: Do you want to respond to that?

14 I think we have gone as far as we are going to go.

15 BY MR. HJELMFELT:

16 Q In December of 1972, did the City request
17 service from CEI over the 69 kv line?

18 A Yes, we did.

19 Q Did CEI agree to provide that service?

20 A No, they indicated that if certain conditions
21 were met that specifically we had at that time. I believe they
22 had a request in to raise the rates for street lights that
23 they provide for approximately 50 percent of the City.
24 These were being reviewed. We had some objections.

25 I think they indicated at the time if we would

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1 approve that increase, that they would then give us the
2 69 service.

3 Q And did you approve that increase?

4 A Well, at that point we had no choice.

5 MR. HJELMFELT: I have no further questions.

6 MR. REYNOLDS: I move to strike that as
7 unresponsive.

8 CHAIRMAN RIGLER: I agree that it was either
9 unresponsive or unclear.

10 Do you want to rephrase that?

11 MR. HJELMFELT: Could I have the question and
12 answer?

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

15 MR. REYNOLDS: Are you granting my motion?

16 CHAIRMAN RIGLER: I will grant your motion, but
17 I will give Mr. Hjelmfelt the opportunity to ask the question
18 again.

19 BY MR. HJELMFELT:

20 Q Did you approve the increase?

21 A We approved the increase and sent it on to the
22 proper committee of the City Council, and it subsequently
23 passed and was granted.

24 Q Why did you approve the increase?

25 A Because without the 69 service and the fact that

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2 some of our equipment was not functioning, we couldn't
3 continue to provide electrical power to our customers,
4 and since the condition of getting that 69 service was the
5 approval of these rates, as I said earlier, we were put into
6 a situation where we had to make a choice and that was the
7 choice we made.

8 MR. HJELMPELT: I have no further questions from
9 this witness.

10 MR. BUCHMANN: I would really, if I might have the
11 indulgence of the panel, like to have a ruling on my motion
12 to strike before I commence cross.

13 Other than his address, there is nothing else
14 for me to go into.

15 CHAIRMAN RIGLER: I think you better proceed
16 with cross-examination, because I doubt we will have that ruling
17 until the Board has an opportunity to study the transcript
18 and reflect upon it.

19 MR. BUCHMANN: Do I understand cross-examination
20 on that subject is not a waiver of the motion to strike?

21 CHAIRMAN RIGLER: That is correct.

22 MR. BUCHMANN: That would go too then?

23 CHAIRMAN RIGLER: In the event we rule favorably
24 on the motion to strike, that is right, there would be no point
25 having the cross-examination material in the record.
You could include that in your motion to strike, in the

mm11 1 event we grant your motion.

2 MR. BUCHMANN: May we have five minutes?

and 4 3 (Recess)

part 5 4 CHAIRMAN RIGLER: The Board has had an opportunity
5 to confer during the recess with respect to the motion to
6 strike, and we are going to grant the motion to strike the
7 testimony separated by the two markings, which we asked
8 the reporter to mark on the transcript, namely that line
9 of testimony dealing with the bond ordinance.

10 And the reason for the ruling is the City's
11 failure to comply with the Board's procedural ruling
12 regulating the course of this proceeding with reference to
13 the intervention letters and the September 5 file.

14 We find that the City did not adhere to our
15 instructions with respect to notification.

16 The Board has considered whether, in view of
17 the evidence, it would be worthwhile to permit the City
18 to make a plea that this evidence be considered on the
19 basis of good cause. In doing so we have had to take into
20 account the overall probative effect of the evidence as
21 presently presented.

22 Although arguable inferences could be drawn,
23 nonetheless the overall weight of the evidence is insufficient
24 in our opinion to make the exercise of consideration of
25 good cause appropriate at this time.

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1 So that for those reasons, the motion to strike
2 is being granted.

(End of testimony designated by Chairman.)
3 MR. BUCHMANN: Thank you, your Honor.

4 MR. GOLDBERG: The Staff has no questions for
5 Mr. Kudukis.

6 MR. MELVIN BERGER: The Department would also
7 like to note on the record that we have no questions.

8 CROSS-EXAMINATION

9 BY MR. BUCHMANN:

10 Q Mr. Kudukis, you made reference to a street
11 lighting contract.

12 Just so the panel understands what we are talking
13 about, presently I suppose the City of Cleveland- Illuminating
14 Company have a contract approved by ordinance for the
15 provision of street lighting energy to the City of Cleveland?

16 A Roughly, and I am speaking of rough numbers of
17 50,000 lights in the city, 25,000 are served by MUNY
18 light and 25,000 are served by CHI.

19 The rates are established by ordinance. If
20 there is any change this would have to be approved.

21 Q The ordinances are for specified terms, the
22 contracts, they are for a year or two years or whatever,
23 and then they expire?

24 A I am not sure about that.

25 Q Directing your attention back to December 1972,

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1 this is the timeframe you were talking about, was it not?

2 A That is correct.

3 Q The City of Cleveland and the illuminating company
4 at that time did not have in effect an ordinance contract
5 for street lighting, did they?

6 A They had a set of rates previously approved and
7 CEI wanted to raise those rates, and we were in that
8 particular situation.

9 Q The ordinance contract had expired, had it not,
10 or were you unaware of that?

11 A The City was paying CEI for street lights under
12 the rates that were in effect at that time.

13 Whether technically there was a date on the
14 old contract, I don't know.

15 Q As a matter of fact, the City wasn't paying com-
16 pletely for those street lights. In December of '72 they
17 owed over \$300,000 to the company on that item.

18 A Which was subsequently paid.

19 Q But they owed -- in December ...

20 A Again this is something --- if a bill is sent
21 and due within 30 days, one day after you send it, you
22 can say you owed it. Just because it was owed, doesn't
23 necessarily mean that the City didn't pay. That money was
24 paid by the City.

25 MR. BUCHMANN: I move to strike and have an

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answer to my question.

CHAIRMAN RIGLER: What was the question?

MR. BUCHMANN: Did they owe us \$300,000 some odd at that time?

CHAIRMAN RIGLER: It was responsive as to what the witness understood by the term owed.

BY MR. BUCHMANN:

Q Mr. Kudukis, directing your attention to the 69 kv service, is it not true that the work on the City's terminal, the 69 kv interconnection was essentially completed only by January 11, 1974?

MR. HJELMFELT: Objection.

I don't see any relevance of that to the direct examination.

MR. BUCHMANN: First, to put a condition on the 69 kv service in December 1972 when the City's work wasn't finished or essentially finished until January 1974.

MR. HJELMFELT: Is Mr. Buchmann representing it wasn't utilized until ...

MR. BUCHMANN: No, I am not.

CHAIRMAN RIGLER: Read the question again.

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

MR. BUCHMANN: To relieve the Board of any trouble, I withdraw the question. I have nothing further.

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1 MR. HJELMFELT: I have no redirect.

2 CHAIRMAN RIGIER: Thank you.

3 (Witness excused.)

4 MR. BUCHMANN: If there is any curiosity about
5 that, that fact is in evidence.

6 MR. SMITH: It is no trouble.

7 What is your point? That there were no conditions,
8 or the conditions were reasonably applied?

9 MR. BUCHMANN: The work on the 69 kv line so
10 that it could operate as intended and as ordered by the
11 Federal Power Commission wasn't accomplished on the part of
12 the City of Cleveland until the year afterwards.

13 MR. SMITH: But the line of your earlier questioning
14 was that it was good reason to apply the condition.

15 MR. BUCHMANN: Yes, sir.

16 MR. SMITH: Which is it then?

17 MR. BUCHMANN: I see your point.

18 The line of my earlier questions was that we
19 have always got problems with the City, getting paid.

20 To try to put conditions on the -- on anything in
21 order to get our money out of them is reasonable.

22 I am suggesting that we could not have refused
23 to operate. The two things are not -- they are alternatives,
24 they are not inconsistent. But we could not have operated
25 that 69 kv interconnection as ordered by the Federal Power

1 1/16; Commission for physical reasons at that point.

2 MR. MELVIN BERGER: Can I ask for a clarification?

3 Is Mr. Buchmann saying the 69 kv line was not
4 operated at all prior to January '74?

5 MR. BUCHMANN: I have not so stated. I have not
6 stated what either way.

7 MR. MELVIN BERGER: Thank you.

8 MR. HJELMFELT: The City will call as its next
9 witness, Mr. Sesler Titus.

10 Whereupon,

11 SESLER TITUS

12 was called as a witness on behalf of the City of Cleveland,
13 and having been first duly sworn, was examined and testified
14 as follows:

15 DIRECT EXAMINATION

16 BY MR. HJELMFELT:

17 Q Could you please state your name for the record?

18 A My name is Sesler Titus, S-e-s-l-e-r T-i-t-u-s.

19 Q Your business address?

20 A 1201 Lakeside.

21 Q Your occupation?

22 A Assistant Administrator for Light and Power of the
23 City of Cleveland.

24 Q Were you employed by the City of Cleveland,

25 Division of Light and Power in 1969?

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A Yes, I was.

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Q As of January 1969, was the municipal electric light system of Cleveland interconnected with any other electric system?

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A No, it wasn't.

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Q Was there a time in 1969 when the City light system sought to obtain an interconnection with another system?

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A During the summer to early fall of '69, there was meetings to meet together to get an interconnection for purposes of installing precipitators at the light plant.

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Q Did you participate in those meetings?

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A Yes, I did.

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Q What sort of interconnection did the City seek?

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A The City asked for a tie-in. We wanted an interconnection, synchronous interconnection.

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Q What sort of tie-in did CEI offer?

A There answer was a transfer of load to satisfy our conditions.

Q And by transfer of load, did they mean the load transfer service?

A Yes, they did.

Q Are you familiar with the operation of the 69 kv tie between CEI and the City?

A Yes, I am.

Q Was that tie energized in December of 1969 -- excuse me, December of 1972?

A Yes, it was.

MR. HJELMPFELT: I have no further questions.

MR. BUCHMANN: Can I check to see if some of my exhibits are ready?

CHAIRMAN RIGLER: Yes.

CROSS-EXAMINATION

BY MR. BUCHMANN:

Q Mr. Titus, in 1969, who was the utilities director of the City of Cleveland?

A Mr. Stefanski.

Q Did you participate in any meetings between Mr. Stefanski and Mr. Howley?

A Not with Mr. Stefanski and Howley. I meet with the engineers to relate information to Mr. Stefanski.

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1 Q Which engineers?

2 A Mr. Turkel of the Engineering Division of the
3 Light and Power.

4 Q Did you negotiate anything with the Illuminating
5 Company yourself?

6 A No, I didn't.

7 Q Did you attend any meetings where things
8 were negotiated with the Illuminating Company?

9 A I sat in meetings where they discussed Mobile
10 substation, negotiating putting that in. Is that
11 negotiating?

12 Q Is that the extent of what you did with
13 the Illuminating Company?

14 A Basically, yes.

15 MR. BUCHMANN: I move that the direct testimony
16 on negotiations and so on, go out.

17 CHAIRMAN RICLER: Is there a response?

18 MR. HJELMFELT: He indicated that he was familiar
19 with the fact that the City sought an interconnection, that
20 he had attended some of the meetings, and he stated on
21 cross that he met with Mr. Turkel to advise Mr. Stefanski,
22 and it seems to me that that is sufficient ground for
23 him to have knowledge of the testimony that he has given.

24 MR. BUCHMANN: The meetings with Mr. Turkel
25 were on engineering aspects.

CHAIRMAN RICLER: Is Mr. Turkel an employee

bw3 1 of the City or CEI?

2 MR. BUCHMANN: Of the City at that time. He
3 so testified. I point out to you he has shown
4 no basis for testifying as to what CEI offered.

5 CHAIRMAN RIGLER: I'm going to have to hear
6 it question by question on direct.

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

9 CHAIRMAN RIGLER: We will grant the motion to
10 strike with respect to the questions, by transfer of load
11 did they mean a load transfer service on the basis that
12 the Witness has indicate he had no direct knowledge of what
13 was offered during these negotiations. With respect to the
14 question, what sort of tie-in did CEI offer, we will take
15 note of that answer only insofar as he is aware of what tie-
16 in ultimately was granted, but responsive to the objection,
17 I think, it is plain, that he did not have direct access
18 to offers made during the course of the negotiations.

19 With those exceptions, the motion to strike
20 is denied.

21 BY MR. BUCHMANN:

22 Q Mr. Titus, you said in the summer and
23 fall of '69 the City wanted an interconnection for the
24 purpose of installing precipitators.

25 A Yes, sir.

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1 Q You have to say, yes or no.

2 A I didn't think you were finished with your
3 question.

4 Q By that you mean air pollution control devices
5 on the municipal light plant?

6 A That is right.

7 Q And they were put into operation within a relatively
8 few months, were they not?

9 A Put in operation in a few months.

10 Q Early '70?

11 A The precipitators.

12 Q When were the load transfer points put in
13 operation?

14 A The load transfer points were put in operation
15 the first of the year, 1970.

16 Q If a 138 synchronous interconnection had been
17 decided upon at that point in time, how long would it
18 have taken, in your judgment, to get that into operation?

19 A That would have taken time, depending on
20 materials; how long I can't say.

21 Q It would have taken longer, would it not, than the
22 load transfer arrangement?

23 A Probably. Yes, sir.

24 Q At the time that the load transfer service
25 was instituted, the engineers of both the Illuminating

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1 Company and the Cleveland Municipal Light were studying
2 the problem of a permanent interconnection, in order to
3 come up with engineering recommendations and costs for
4 such an interconnection, were they not?

5 MR. HJELMFELT: Objection. Beyond the
6 scope of direct.

7 CHAIRMAN RIGLER: Let me hear the question.

8 (Whereupon, the reporter read the pending
9 question as requested.)

10 MR. BUCHMANN: He has testified, and you have left
11 in that they only offered load transfer, CEI only offered
12 load transfer.

13 CHAIRMAN RIGLER: Actually, I granted your
14 motion to strike on the question of by transfer of load,
15 did they mean a load transfer service.

16 MR. BUCHMANN: But you left in the prior question
17 and answer.

18 CHAIRMAN RIGLER: You mean what sort of tie-in did
19 CEI offer?

20 MR. BUCHMANN: Yes.

21 CHAIRMAN RIGLER: Overruled. You may answer.

22 (Whereupon, the reporter reread the pending
23 question, as requested.)

24 THE WITNESS: That is correct. They had made
25 a proposal for Phase One, Phase Two and Phase Three.

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1 CHAIRMAN RIGLER: Who is they?

2 THE WITNESS: Illuminating Company.

3 BY MR. BUCHMANN:

4 Q Phase Three was the permanent interconnection?

5 A Right. Phase One was the transfer of loads
6 which became known as the load transfer.

7 Phase Two was a shuffle of transfer points, because
8 of the summer.

9 Phase Three was supposed to immediately follow
10 the Phase Two in a permanent interconnection.

11 The reason for not granting --

12 Q I didn't ask anything more.

13 MR. BUCHMANN: I have marked as Applicants
14 Exhibit 106, (CEI), a memorandum of Mr. Stefanski, dated
15 February 17, 1970.

16 (The document referred to was
17 marked Applicants Exhibit 106
18 (CEI) for identification.)

19 BY MR. BUCHMANN:

20 Q Have you had a chance to look at that?

21 A Yes, I have.

22 Q Mr. Stefanski describes three phases of the
23 CEI interconnection; is that essentially the way you
24 remember the arrangement at the time?

25 MR. HJELMFELT: This is clearly beyond the scope

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1 of anything he testified to on direct.

2 CHAIRMAN RIGLER: What is the pending
3 question?

4 MR. BUCHMANN: He has just described the three
5 phases or Phase Three.

6 I'm asking whether Mr. Stefanski's
7 description of the three-phase program accords with his
8 recollection of the status of the matter at that time.

9 CHAIRMAN RIGLER: Overruled.

10 THE WITNESS: Will you read the question, please?

11 MR. BUCHMANN: Is that the way you remember
12 the situation?

13 THE WITNESS: Yes, it is.

14 MR. BUCHMANN: I have nothing further, and I
15 move the admission of Applicant's Exhibit 106.

16 CHAIRMAN RIGLER: Hearing no objection, 106 will
17 be received at this time.

18 (Whereupon, the document hereto-
19 fore marked Applicants Exhibit
20 106 (CEI) for identification,
21 was received in evidence.)

22 REDIRECT EXAMINATION

23 BY MR. HJELMFELT:

24 Q Mr. Titus, did the City of Cleveland obtain a
25 synchronous interconnection with CEI, as a result of

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1 negotiations with CEI?

2 MR. BUCHMANN: I object.

3 How does he know, if he wasn't in on the negotiations?

4 CHAIRMAN RIGLER: He knows whether or not they
5 obtained the interconnection, I suppose.

6 MR. BUCHMANN: That question I won't object to.

7 CHAIRMAN RIGLER: Do you want to rephrase your
8 question?

9 BY MR. HJELMFELT:

10 Q Did the City eventually obtain a synchronous
11 interconnection with CEI?

12 A Not from -- not a tie with the Illuminating
13 Company. Only the one ordered by the FPC.

14 MR. HJELMFELT: May I have the answer back?

15 MR. BUCHMANN: I move to strike.

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

18 CHAIRMAN RIGLER: Are you going to explore that
19 further?

20 MR. HJELMFELT: I think the answer is
21 responsive to the question.

22 CHAIRMAN RIGLER: I'm going to deny the motion to
23 strike, but I am a little confused by the answer.

24 BY MR. HJELMFELT:

25 Q Was the intertie, the synchronous interconnection

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1 which the City eventually obtained with CEI, obtained
2 as a result of the City's requesting an order for such
3 intertie from the FPC?

4 A Yes, it was.

5 MR. HJELMFELT: I have no further questions.

6 MR. BUCHMANN: I have nothing further.

7 CHAIRMAN RIGLER: Thank you, Mr. Titus.

8 (Whereupon, the Witness was
9 excused.)

10 MR. RE. NOLDS: Mr. Chairman, I would like to make
11 the motion under Section 105, Rule 105 of the Rules of
12 Evidence, on behalf of the testimony by Mr. Titus and the
13 testimony of Mr. Kudukis.

14 CHAIRMAN RIGLER: We will defer ruling on that,
15 and I am glad you brought that up, because after we identify
16 another handful of documents, all of the parties opposed
17 to a license without restriction will have completed
18 their case.

19 MR. HJELMFELT: I still have Mr. Mayben, and I
20 believe Mr. Lewis will be here.

21 CHAIRMAN RIGLER: I beg your pardon. Nonetheless,
22 we are winding down.

23 Mr. Mayben is an expert and Mr. Lewis is
24 testifying on a very narrow area to supplement his previous
25 testimony.

bw10

1 I am going to be asking the staff and the
2 Department and the City for comments with respect to the
3 continuing motion, as to which we have deferred ruling, and
4 the question is going to be whether or not there has been
5 established joint action, a conspiracy, or a combination,
6 and, if so, at what point each of these parties contends the
7 evidence permits us to make a finding that Applicants were
8 engaged in joint action or a conspiracy.

9 Those are separate, joint actions or
10 conspiracy or combinations. I want you to address each
11 one of them and be prepared to respond to the Board on that be-
12 fore making a ruling on the Applicants continuing motion.

13 MR. REYNOLDS: May I ask a question on that?
14 When you framed your question that way, did you intend to
15 exclude the phrase "in restraint of trade following joint
16 action, conspiracy or combination"?

17 CHAIRMAN RIGLER: I meant it in a Section 1 sense
18 or the Section 2 Sherman Act sense. This relates back to
19 the procedural ruling, we made earlier, as we are aware.

20 MR. REYNOLDS: I wanted it clear in my own mind
21 what it was you were asking them to address.

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1 CHAIRMAN RIGLER: I was using a shorthand form,
2 but it involves the same issues that were involved in the
3 procedural ruling.

4 I think when all of the evidence is in, we think
5 we will ask the parties if they have established a violation
6 and if, so on what date the violation commenced.

7 MR. MELVIN BERGER: Do you want this in writing?

8 CHAIRMAN RIGLER: No, I want oral argument on
9 it, but I want to rule on the continuing objection prior to
10 the Applicants commencing their case, because at the time
11 they commence their case, I think they should know
12 what the contentions of the other parties are with respect to
13 any time period in which a violations occurred.

14 I think that the Board should make its ruling
15 so they can be prepared to conduct their portion of the case
16 accordingly.

17 CHAIRMAN RIGLER: Do you have more documents to
18 identify or do you have any other witnesses?

19 MR. HJELMFELT: I have some additional documents.

20 I am ready for Book 34. Pages 25258 through 62.

21 I ask that be marked for identification as C-154.

22 MR. BUCHMANN: What were those pages again?

23 MR. HJELMFELT: 25258 through 62.

24 MR. BUCHMANN: Could we have an offer of

25 proof on that one?

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1 MR. HJELMFELT: It is CEI utilizing the
2 argument of reliability, based upon its interconnections
3 as opposed to the City's system. And contrasting the
4 reliability of the systems in an effort to gain customers
5 at retail.

6 While at the same time CEI was denying the City
7 opportunity to gain access to interconnection.

8 Pages 25263 through 74. I ask that that
9 be identified as C-155.

10 MR. BUCHMANN: Is the offer the same on that?

11 MR. HJELMFELT: Yes, that is the same offer.

12 MR. HJELMFELT: 26276, I ask that that be
13 identified as C-156.

14 MR. BUCHMANN: Is that the same offer?

15 MR. HJELMFELT: Yes, it is the same offer.

16 MR. HJELMFELT: Document 25290 through
17 92 will be identified as C-157.

18 MR. BUCHMANN: Could I have an offer on
19 this?

20 MR. HJELMFELT: This indicates CEI reliance on
21 its greater reliability. It demonstrates the denial of that
22 reliability to CEI. It also demonstrates the fact that the
23 FPC regulation did not give the City complete relief in
24 this situation and that the City could not rely upon the
25 regulatory agency for protection.

1 17222 through 223 will be marked as C-158.

2 MR. BUCHMANN: Can I have an offer on this one?

3 MR. HJELMFELT: This shows the --

4 again it shows the same use of reliability as an argument
5 in connection -- I mean in attracting customers.

6 It shows that the operation of the load transfer
7 service was a factor in the reliability of the City system
8 and could be used -- manner of its operation could be used
9 by CEI in its argument to attract customers in competition
10 with the City.

11 17224 through 25 will be marked as C-159.

12 MR. BUCHMANN: Is that the same offer?

13 MR. HJELMFELT: Same offer. 68935 through 37 will
14 be marked as C-160.

15 MR. BUCHMANN: You skipped some. Did you mean
16 to?

17 MR. HJELMFELT: If there are documents in your
18 booklets intervening -- excuse me.

19 May I have the last number I read?

20 MR. BUCHMANN: 17225.

21 MR. HJELMFELT: Okay. The next document I
22 would like to have marked is 68614 through 68618,
23 and I ask that that be marked as C-160.

24 MR. BUCHMANN: Can I have an offer?

25 MR. HJELMFELT: This shows a five-year

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1 listing of the customers that had switched and shows the trend
2 of the customers, as a result of anticompetitive activities
3 of CEI.

4 Pages 68935, 36, which I erroneously asked to
5 be marked as 160, previously, should be discarded.

6 I have no other documents to mark now.

7 I have one document to red-line.

8 I would ask that we take five-minute
9 break, and I will red-line it, and then we can go
10 on to the objections.

11 (The documents referred to
12 were marked Exhibits C-154
13 through 160 for identification.)

14 CHAIRMAN RIGLER: We will take a ten-minute
15 break.

16 (Recess.)

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1 MR. HJELMFELT: With respect to Document C-100,
2 I would ask that on page 73060, the page down through the
3 end of the first full paragraph be redlined.

4 CHAIRMAN RIGLER: All right.

5 MR. HJELMFELT: I would ask that page 72917 be
6 redlined but for the last paragraph.

7 CHAIRMAN RIGLER: All right.

8 MR. HJELMFELT: That is it.

9 At this time I move Exhibit C-1 through 160 into
10 evidence.

11 CHAIRMAN RIGLER: Before you do that I want to
12 change the subject for one second.

13 In connection with the ruling made earlier
14 this morning on the motion to strike the portion of
15 Mr. Dukakis' testimony relating to the '72-73 bond issue, it
16 is clear to us and notwithstanding our ruling, the City may
17 contest that at some point during Appellate proceedings.

18 Because of that we wanted to make sure that the
19 parties are aware, in the opinion of this Board, the issue
20 should not become moot in terms of the collateral
21 controversy before the Appeal Board on the attorney
22 situation.

23 I see you nodding. Do you understand, Mr. Buchmann?

24 MR. BUCHMANN: You are saying this panel does
25 not believe that has become moot.

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CHAIRMAN RIGLER: Obviously we can't control what the parties argue to the Appeal Board. Just because we have indicated we would not receive that evidence, it would not alter our opinion with respect to its relevance in terms of the collateral proceedings, particularly since we may be -- we may not be -- but it is possible we would be reversed somewhere up along the lines.

8 MR. BUCHMANN: We may take the position that that mootness question is not open and that the question is moot.

11 CHAIRMAN RIGLER: You may argue that, but I wanted the position of this Board on the record.

13 MR. REYNOLDS: Do you want to hear the -- all the objections running right through?

15 CHAIRMAN RIGLER: Yes.

16 MR. REYNOLDS: Do you, on a document-by-document basis, the objections that CEI might have and then all of the other Applicants, if it happens to be that situation? Or do you want to have CEI run through the documents with its objections and then have me go through the documents with all of the other objections?

22 CHAIRMAN RIGLER: Yes.

23 MR. REYNOLDS: I asked an either/or and got a yes.

24 CHAIRMAN RIGLER: I thought I was the or.

25 Namely, it would be most helpful if CEI gave us a serial

mm3 1 listing of all of its objections, and then the other Applicants
2 made such additions as it felt are necessary.

3 MR. BUCHMANN: If your Honor please, I have no
4 objection to City Exhibit 1.

5 With respect to City Exhibit 2 which is a piece
6 of a deposition of Mr. Hauser, I ask to reserve the right
7 when I have had an opportunity to -- Mr. Reynolds reminds
8 me in view of the ruling this morning, and of the redlining
9 in this excerpt, I believe that ruling should apply here
10 as well and I object on the grounds that the subject matter
11 has been held not within the pleadings, if that is the right
12 word, September 5, 1975 filing. I would have other
13 objections to it.

14 In addition, of course, I object although I
15 understand the Board has ruled on this, to the receipt of
16 deposition evidence of this sort in this fashion, and I
17 would also wish, if my objection should be overruled, to
18 reserve the right to add to this exhibit, City Exhibit 2,
19 other portions of Mr. Hauser's deposition which I have not had
20 a chance to review at this time, and which this exhibit
21 shows to exceed 200 pages.

22 I also would insist, if my principle
23 objection is overruled, that the City be required to redline
24 complete answers rather than excerpts from answers.

25 Finally I make a Noerr-Pennington objection to

1 this document on behalf of the illuminating company.

2 CHAIRMAN RIGLER: I think I am going to change
3 my mind on the way we handle these objections. It may be
4 easier for the Board to have objections on a document-by-
5 document basis.

6 MR. BUEHMANN: You can rule on it by document.

7 CHAIRMAN EGLER: I will take all of the
8 objections before we make any ruling, but I would like the
9 other Applicant comments on a document-by-document basis.

10 MR. BUEHMANN: I have exhausted my objections on
11 that. I will not reargue what I did this morning.

12 MR. REYNOLDS: The other Applicants have no
13 objection to City Exhibit C-1.

14 And in addition to the objections of CEI with
15 regard to City Exhibit 2, the other Applicants would make
16 their continuing objection. That means Applicants other
17 than CEI.

18 MR. BUEHMANN: City Exhibit C-3, I object on
19 behalf of Illuminating Company.

20 This is a document discussing a specific incident
21 of retail competition and the proffer was that this was
22 evidence that this was not normal competition but a desire
23 to injure the competitor.

24 The document doesn't comply with the proffer
25 even if it was otherwise pertaining to a subject that was

1 involved in this case.

2 MR. REYNOLDS: The continuing objection on behalf of
3 all Applicants other than CEI.

4 CHAIRMAN RIGLER: I think the Board will rule on
5 these objections as made.

6 The objection to City Exhibit 2 will be sustained
7 on the procedural basis.

8 The objection to City No. 3 is overruled.

9 MR. REYNOLDS: While I hesitate to say it,
10 Mr. Chairman, am I correct in assuming if you don't say
11 otherwise, the continuing objection is overruled?

12 CHAIRMAN RIGLER: That is correct.

13 MR. BUCHMANN: I have no special CEI Objection to
14 C-4 which isn't a CEI document. Although I suppose I have
15 a continuing objection.

16 MR. REYNOLDS: I will make the continuing objection
17 on behalf of all Applicants other than Ohio Edison with
18 respect to C-4.

19 CHAIRMAN RIGLER: That is overruled. C-4 is
20 admitted.

21 (The documents heretofore marked
22 Exhibits C-1, C-3 and C-4 for
23 identification, were received
24 in evidence.)

25 MR. BUCHMANN: On C-5, I object, as the document

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1 shows on its face it is prior to the cutoff date in this
2 case. AND while it is proffered to show that CEI was
3 recognizing the benefits of coordination and so on back in
4 May and June of 1965, I don't think that is pertinent to the
5 issues here.

6 MR. REYNOLDS: I will make the continuing objection
7 on behalf of all Applicants other than CEI.

8 CHAIRMAN RIGLER: The objection is sustained on
9 the basis of timeliness.

10 MR. BUCHMANN: I object to City Exhibit 6 which
11 shows on its face that it is dated September 30, 1964.
12 Same objection as I made to the last one.

13 MRE. REYNOLDS: I would make the continuing objection
14 on behalf of all Applicants other than CEI.

15 MR. EVELMPELT: I would like to respond that this
16 is, in effect, contemporaneous with the continuing price-
17 fixing proposal and is just the other hand trying to do
18 the same thing.

19 CHAIRMAN RIGLER: The objection is overruled.
20 We will receive C-6 into evidence.

21 (The document heretofore marked
22 Exhibit C-6 for identification,
23 was received in evidence.)

24 MR. BUCHMANN: I object to C-7.

25 One, it is plainly a pre-cutoff date, dated

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1 February 1965.

2 Two, it is patently, in my view, irrelevant. The
3 proffer on this was that this was to deal with whether or
4 not the City of Cleveland Water and Sewage Utility would
5 install its own electric generation.

6 I suggest that that is irrelevant and I find
7 nothing on the September 5, 1975 statement which provokes
8 generation cables or possibilities of City of Cleveland
9 sewage and water plants.

10 MR. REYNOLDS: Continuing objection on behalf
11 of all Applicants other than CEI.

12 MR. HJELMFELT: C-7 with other documents on a
13 similar subject show an attempt to prevent the City from
14 the possibility of obtaining other generating resources
15 and is going on at the same time that CEI is preventing the
16 City from obtaining an interconnection without price-fixing
17 and that is good cause to go beyond the cutoff date.

18 MR. BUCHMANN: I don't know why the fact that
19 things are contemporaneous is good cause for anything.

20 CHAIRMAN RIGLER: Moreover, as I read it, all it
21 is is an analysis of Ohio constitutional provisions.

22 The objection is sustained.

23 MR. BUCHMANN: I object to C-8 which is a -- as
24 being prior to the cutoff date, and the proffer was that
25 this would show or tend to show the efforts by CEI to

1 eliminate price competition and I direct the panel's
2 attention to the portions which have been redlined and other
3 than the date which doesn't tend to show anything as far as
4 I am concerned except that this is a prior document, the
5 only redlining is the first paragraph on the first page.

6 I fail to see how that conforms with the offer
7 of proof.

8 CHAIRMAN RIGLER: Yes, of course, I see what
9 you are saying.

10 MR. HJELMFELT: These documents don't always,
11 each one taken by itself, prove a point.

12 CHAIRMAN RIGLER: We understand that, Mr. Hjelmfelt.
13 However, looking at the redlined portions and looking at the
14 offer and the date, considering all of these factors, we
15 will sustain the objection.

16 MR. BUCHMANN: I object to C-9 on which the proffer
17 was that it would tend to show efforts by CEI to prevent the
18 City from expanding or improve its ability to improve
19 electric service.

20 We find that C-9 simply, again, is a report
21 with respect to the possibility of onsite generation by
22 the City Water Department. Again it is a subject which was
23 not shown in the September 5, 1965 period.

24 MR. HJELMFELT: The document also refers to
25 that this onsite generation might be used for peaking

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1 purposes for the benefit of MELP.

2 MR. BUCHMANN: It shows Mr. Howley's speculation
3 as to that point.

4 I don't see how that tends to prove that there
5 were efforts by CEI to do anything whatsoever, much less
6 prevent this.

7 MR. REYNOLDS: Continuing objection on behalf of
8 all Applicants other than CEI.

9 CHAIRMAN RIGLER: Objections are overruled.

10 We will receive C-9.

11 (The document heretofore
12 marked Exhibit C-9 for
13 identification was received in
14 evidence.)

15 MR. BUCHMANN: I object to C-10 on essentially
16 the same basis.

17 This is clearly the response to C-9 and
18 demonstrates -- again it is simply an analysis of Ohio
19 statutes. It was offered to show continuing efforts by
20 CEI to prevent expansion or improvement of the city light
21 plant. It does not conform to that offer.

22 MR. REYNOLDS: Continuing objection on behalf
23 of all Applicants other than CEI.

24 CHAIRMAN RIGLER: Objection will be sustained
25 on the basis that the document does not support the offer

1 of proof sufficiently.

2 MR. BUCHMANN: I object to C-11.

3 C-11 was offered to show that CEI relied on
4 MUNE City of Cleveland outage rate as a selling tool. I
5 suppose that is the redlining on the first page. That goes
6 to retail competition which I believe is irrelevant here,
7 at least in that particular context, and similarly the red-
8 lining on the fourth page again relates to retail
9 competition.

10 I find no connection in this document between --
11 drawn between the dealings with the City by the Company
12 and the fact that there was retail competition.

13 MR. REYNOLDS: Continuing objection on behalf
14 of all Applicants other than CEI.

15 CHAIRMAN RIGLER: The objections are overruled.
16 We will admit C-11 at this time.

17 (The document heretofore
18 marked Exhibit C-11 for
19 identification was received
20 in evidence.)

21 MR. BUCHMANN: C-12, I object on behalf of
22 the Illuminating Company.

23 The document was offered to show the effect of
24 outages on conversions tied in with the effect of inability
25 to obtain an interconnection.

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1 All that this document shows is that there
2 are conversions, a fact which I don't believe has ever been
3 denied.

4 CHAIRMAN RIGLER: Well, Mr. Hjelmfelt is right
5 when he made his earlier statement that it takes a series
6 of documents sometimes linked up to establish a point.

7 MR. BUCHMANN: I understand that, sir.

8 I notice yesterday Mr. Hjelmfelt was most careful
9 on a number of occasions to say this taken with other
10 evidence, or this together with other documents. He did
11 not say so with this one.

12 CHAIRMAN RIGLER: The objections are overruled
13 and C-12 will be admitted.

14 MR. REYNOLDS: Could I sneak my continuing objection
15 in there.

16 CHAIRMAN RIGLER: The continuing objection is
17 overruled.

18 (The document heretofore
19 marked Exhibit C-12 for
20 identification, was received
21 in evidence.)

22 MR. BUCHMANN: I object to C-13 which is a
23 presentation or memo prepared for a prospective individual
24 conversion customer.

25 There is no showing that the presentation was

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in fact made, or in fact given for the customer and for
all we know it was a purely internal job.

Secondly, it does not -- it relates to a specific
retail customer and I don't think that is relevant within
the issues of this case.

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1 CHAIRMAN RIGLER: The Board has indicated it is not
2 concerned with the conversion of a particular customer.

3 Nonetheless, for the limited purpose of
4 demonstrating the type of presentation made, and the argument
5 advanced ---

6 MR. BUCHMANN: How can it demonstrate that when
7 you can't show that it was made.

8 CHAIRMAN RIGLER: It indicates these were arguments
9 under consideration by CEI.

10 MR. BUCHMANN: Under consideration by
11 Mr. Sach, S-e-c-h, of the industrial sales department. We
12 don't know that that thing was delivered.

13 MR. HJELMFELT: A number of such documents
14 were prepared and were identified in this proceeding.
15 I think it is doubtful that CEI continually prepared
16 documents that were not used.

17 MR. BUCHMANN: I suggest that discovery in this
18 case reveals that studies of all sorts are
19 consistently made and presentations are not necessarily
20 communicated outside.

21 CHAIRMAN RIGLER: This isn't exactly a study.
22 is a prepared presentation.

23 MR. BUCHMANN: If it is offered to show this
24 what we tell people, at least some witness should get on or
25 somehow we should have evidence that this is what was told to

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1 the people. The City's case, except for expert witnesses
2 is over.

3 It may no effort do do that.

4 CHAIRMAN RIGLER: Looking down the line to
5 the exhibits which are identified, we can see many of them
6 reflect cover letters that went out to the customers, so
7 your argument that there is no evidence that CBI actually
8 presented this type of information to sales prospects
9 isn't going to square with what we know is going to appear
10 down the line.

11 MR. BUCHMANN: I don't mean to base it on the
12 fact that those things have been admitted into evidence
13 or not.

14 But, insofar as C-13 there is no evidence
15 that this went out to the Kindt -- K-i-n-d-t hyphen
16 Collins Company.

17 CHAIRMAN RIGLER: That goes to the weight of
18 it. At a minimum we could take this as argument, which
19 Mr. Sech, in the industrial sales department was contemplating
20 making to a customer.

21 The objections are overruled and we will
22 receive it.

23 MR. REYNOLDS: I want to note the
24 continuing objection on behalf of all Applicants other than
25 CBI.

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(The document previously
marked Exhibit C-13 for
identification, was
received in evidence.)

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CHAIRMAN RIGLER: Mr. Frysiak points out that
page 68542 constitutes a signed letter from Mr. Sech
to the customer.

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MR. BUCHMANN: You are absolutely right and to the
extent I was suggesting there was no such cover letter here,
I withdraw that argument. I didn't see that.

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CHAIRMAN RIGLER: The continuing objection is
overruled.

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MR. SMITH: I thought that was the basis for
it.

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MR. BUCHMANN: I missed the letter, Mr. Smith.
I'm apologizing.

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MR. SMITH: Why would a signed letter remain in the
company's files? I think his point may have been well-taken.
I don't think he should concede it that fast.

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MR. BUCHMANN: I think Mr. Smith's point is
well-taken and I don't withdraw my objection.

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MR. SMITH: I think you are wrong for other
reasons, but not on that.

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CHAIRMAN RIGLER: C-13 is admitted.

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1 MR. BUCHMANN: I object to C-14 on the same
2 ground. In this case there is no cover letter. I have an
3 additional objection, which is that the offer or proof
4 said that this would demonstrate the injury to the City
5 from being denied -- let me withdraw that. The offer said
6 this indicated that the interconnection which the
7 Federal Power Commission did order, did not give the municipal
8 electric light plan reliability and it was still unable to
9 compete.

10 I say that is barred as an argument to the
11 City.

12 That whatever the FPC ordered it ordered, and
13 this issue was litigated there.

14 The fact that the FPC -- there is no compulsion
15 for the FPC to give the City of Cleveland everything it
16 wants.

17 MR. REYNOLDS: Continuing objection on behalf
18 of all Applicants other than CEI.

19 CHAIRMAN RIGLER: The objections are overruled,
20 and we will receive C-14 into evidence.

21 (The document previously
22 marked Exhibit C-14 for
23 identification, was received in
24 evidence.)

25 MR. BUCHMANN: Based on the offer of proof given

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1 to this, I object on the same basis that I objected to C-13
2 and C-14, but not raising the collateral estoppel issue,
3 because the offer did not invoke the FPC.

4 Here we have a cover letter that was not
5 signed.

6 CHAIRMAN RIGLER: C-15?

7 MR. BUCHMANN: Yes.

8 MR. REYNOLDS: Continuing objection.

9 CHAIRMAN RIGLER: Objections are overruled.
10 We will admit C-15 into evidence.

11 (The document previously
12 marked Exhibit C-15 for
13 identification, was
14 received in evidence.)

15 MR. BUCHMANN: I object to C-16. The proffer
16 was that this showed the magnitudes of municipal and REA loads
17 in Ohio in 1971. I suppose it may or may not. I don't
18 know how accurate it is.

19 I see the reference as to source. What relevance
20 does that have?

21 MR. REYNOLDS: I would, in addition to making
22 the continuing objection, also object because I believe
23 that this document is outside the scope of the City's case
24 and, indeed, it refers to a number of municipalities that
25 are outside the CAPCO area, and I don't think it is an

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exhaustive list and, therefore, it isn't even representative of -- a fair representation of what the offer of proof indicates is represented here.

MR. HJELMFELT: The City will withdraw C-16.

MR. BUCHMANN: I object to C-17.

The offer of proof was that CEI was attempting to attack the credibility of Mr. Hinchee with respect to the regard in which he was held by Director Kudukis. In the first place this is a memo, accompanied by a draft. There is no indication that the letter was sent, and if it was sent, it would have been in the files of the City of Cleveland. So if there is any inference in this case, you can conclude that it was not.

Which I believe to be the fact. In any event, I think it is irrelevant to anything that has been stated in the September 5 pleadings.

MR. REYNOLDS: Continuing objection.

CHAIRMAN RIGLER: I'm going to sustain it on the ground that there is no showing that the letter was sent.

MR. BUCHMANN: C-18 is, in effect, an analysis or proposed City ordinance 2104-72, which was offered to show that CEI was desirous of preventing the municipal electric light plant from selling bonds, as part of its attempt to acquire the municipal light plant. I make

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1 the same argument I made this morning with respect to the
2 testimony of Mr. Kudukis, that this is not a subject
3 flagged in the City's pleadings. Even if that were not so,
4 the fact that the Illuminating Company has someone to do
5 analysis of the ordinance, it seems to me, doesn't tend to
6 prove anything.

7 MR. REYNOLDS: Continuing objection.

8 CHAIRMAN RIGLER: The objection is sustained.

9 That is Mr. Buchmann's objections are sustained. Nto
10 yours, Mr. Reynolds.

11 MR. BUCHMANN: C-19, was offered to show that CEI
12 had the knowledge of the relationship between the reliability
13 fo service and conversions. I suggest that this entire
14 memo relates to retail competition, which we all know occurs
15 between the two parties and notes the fact that outages
16 generate a lot of publicity. I don't see what conclusions
17 can be drawn relative to that conclusion in this matter.

18 MR. REYNOLDS: Continuing objection.

19 CHAIRMAN RIGLER: Both objections are overruled.

20 We will receive C-19,

21 (The document previously marked
22 Exhibit C-19 for identification,
23 was received in evidence.)

24 MR. REYNOLDS: There is no objection C-20.

25 CHAIRMAN RIGLER: C-20 is admitted.

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(The document previously marked Exhibit C-20 for identification, was received in evidence.)

MR. REYNOLDS: C-21, the only objection is a continuing objection on behalf of all Applicants, other than Duquesne Light Company.

CHAIRMAN RIGLER: That objection is overruled and C-21 is admitted.

(The document previously marked Exhibit C-21 for identification, was received in evidence.)

MR. REYNOLDS: C-22, there is no objection.

CHAIRMAN RIGLER: C-22 is admitted.

(The document previously marked Exhibit C-22 for identification was received in evidence.)

MR. REYNOLDS: C-23, there is the continuing objection, with respect to all Applicants other than Ohio Edison Company.

THE CHAIRMAN: The continuing objection is overruled. C-23 is admitted.

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1 (The document, previously
2 marked Exhibit C-23 for
3 identification, was received
4 in evidence.)

5 MR. REYNOLDS: C-24. Do you know who
6 Harold and Ralph are? I think I do.

7 MR. HJELMFELT: I believe that is Harold Williams
8 and Ralph Besse.

9 Does CEI agree?

10 MR. REYNOLDS: I didn't want any new characters
11 in here at this late date.

12 MR. BUCHMANN: I don't know, not recognizing the
13 handwriting. I think that is right.

14 MR. REYNOLDS: Well, the continuing objection of
15 all Applicants, other than CEI.

16 CHAIRMAN RIGLER: Overruled, and we will
17 receive C-24.

18 (The document previously
19 marked Exhibit C-24 for
20 identification, was received
21 in evidence.)

22 MR. REYNOLDS: As to City Exhibit C-25 the
23 continuing objection with respect to all Applicants, other
24 than CEI.

25 CHAIRMAN RIGLER: Overruled. It will be admitted

1 (The document, previously marked
2 Exhibit C-25 for identification
3 was received in evidence.)

4 MR. REYNOLDS: As to City Exhibit C-26,
5 the -- Mr. Hjelmfelt, do you know whose writing this is.

6 MR. HJELMFELT: No.

7 CHAIRMAN RIGLER: Two of the pages have the
8 initials "LP" and the date at the bottom.

9 MR. BUCHMANN: Which pages?

10 CHAIRMAN RIGLER: 6803 and 6804.

11 MR. HJELMFELT: Those are another document.

12 MR. BUCHMANN: What exhibit were you looking
13 at, sir?

14 CHAIRMAN RIGLER: I was looking at 27.
15 I had gone too far.

16 MR. REYNOLDS: I don't think that the document
17 meets the offer of proof in any event, and I would object
18 to its introduction on that ground.

19 The only place it is red-marked is at 68739.
20 The offer was that this document shows or tends to show that
21 Mr. Flegler was worried if a nuclear application was filed
22 that there would be some challenge to it, by the municipalities.

23 And that this was a concern of CAPCO. But
24 I point out this is a 1967 document, long before there was
25 any indication that you were going to have Section 105(c)

bwl1 1 hearings before this Commission.

2 I don't think that the red-lined portion begins
3 to meet the offer of proof.

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EX9

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CHAIRMAN RIGLER: The objection is sustained.

2 MR. REYNOLDS: C-27, the continuing objection on
3 behalf of all of the Applicants, other than Ohio Edison.

4 The same with C-28.

5 CHAIRMAN RIGLER: The continuing objections are
6 overruled and C-27 and C-28 will be admitted.

7 (The documents heretofore
8 marked Exhibits C-27 and C-28
9 for identification, were
10 received in evidence.)

11 MR. REYNOLDS: C-29, the continuing objection on
12 behalf of all Applicants other than Duquesne Light Company.

13 CHAIRMAN RIGLER: The continuing objection is
14 overruled.

15 C-29 is admitted.

16 (The document heretofore
17 marked Exhibit C-29 for
18 identification, were received
19 in evidence.)

20 MR. REYNOLDS: As to C-30, the offer of proof
21 was that this document would go toward showing that the
22 original locations in periods A and B, capacity allocations
23 in periods A and B by the CAPCO companies were arbitrary.

24 Then the City has stated as an offer of proof
25 for its next document, i., that these capacity allocations

MR. 2

1 were the result of negotiations and in 44 it also, in
2 connection with that document said that these allocations,
3 the original allocations were the result of negotiations in
4 its offer of proof.

5 In document 50 the City comes in and states
6 that it intends to prove that the original allocations
7 were the result of judgments that were made.

8 It seems to me there is a clear inconsistency
9 in terms of what the City intends to prove with respect
10 to the allocations. I don't see anything in document 31
11 that would -- in document C-30 to start with that one at
12 this time which would give any suggestion that those
13 allocations were made on an arbitrary basis.

14 CHAIRMAN RIGLER: How about the line that says
15 the allocation in periods A and B were rather arbitrary?

16 MR. REYNOLDS: Yes.

17 I guess the problem I am having is that if the
18 City's intention is to use the word "arbitrary," arbitrary
19 after negotiations and careful judgments made, then I
20 would have no problem then with all of the documents coming
21 in with that offer.

22 If we are going to play games with the word
23 "arbitrary," it seems to me that ought to be clarified in
24 the offer for these documents or this document.

25 CHAIRMAN RIGLER: Any other objection?

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1 MR. REYNOLDS: The continuing objection on behalf
2 of all of the Applicants other than Toledo Edison Company.

3 CHAIRMAN RIGLER: I don't see any inconsistency
4 in the offers.

5 The objection is overruled.

6 C-30 is admitted.

7 (The document heretofore
8 marked Exhibit C-30 for
9 identification, was received
10 in evidence.)

11 MR. REYNOLDS: 31, the continuing objection.

12 CHAIRMAN RIGLER: Overruled.

13 C-31 is admitted.

14 MR. REYNOLDS: We better get on the record who
15 it is on behalf of. It would be on behalf of all
16 Applicants other than Dquesne Light Company. Here the offer
17 was that this is to show that the allocation was made as
18 a result of negotiations.

19 (The document heretofore
20 marked Exhibit C-31 for
21 identification, was received
22 in evidence.)

23 MR. REYNOLDS: C-32, I would object to this
24 document coming into evidence.

25 It is a proposed press release, but we have no

1 indication whether it was or was not in fact released, and
2 based on the City's case, as we now see it developing,
3 there is no indication that the City intends to offer any
4 evidence as to whether it was or was not released.

5 Certainly with the markings on it, it does seem
6 to me to raise serious question as to whether it was a
7 release that did go out.

8 CHAIRMAN RIGLER: I would agree that it appears
9 that certainly C-32 as written, was not released. However,
10 I assume that its purpose goes more to describing the
11 company's, i.e. Toledo Edison's concept of the workings of
12 the CAPCO arrangement.

13 Is that correct?

14 MR. HOELMPELT: That is correct.

15 MR. REYNOLDS: I would make the continuing objection
16 on behalf of all of the companies other than Toledo Edison,
17 in addition to the other objection.

18 CHAIRMAN RIGLER: I think if we could place
19 weight on the other company's agreement with the concept
20 set forth by Toledo Edison's public relations department, I
21 agree with you.

22 Subject to that caveat we will admit C-32.
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(The document heretofore

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marked Exhibit C-32 for

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identification, was received

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in evidence.)

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MR. REYNOLDS: C-33, the --

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CHAIRMAN RIGLER: I appreciate the point that the

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other Applicants' press departments may have stated it

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differently.

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MR. REYNOLDS: Or not stated it at all, or it

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may never have been released by Toledo Edison, and therefore

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never stated by anybody. That is the basis for it.

12

C-33, the continuing objection on behalf of all

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Applicants other than Duquesne Light Company.

14

CHAIRMAN RIGLER: Overruled.

15

We will admit C-33.

16

(The document heretofore

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marked Exhibit C-33 for

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identification, was received

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in evidence.)

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MR. REYNOLDS: C-34, the continuing objection on

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behalf of all of the Applicants other than Toledo Edison

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Company. And I would also object to the introduction of

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this document on the basis of the offer as stated, which

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indicates that this document is being offered to demonstrate

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that Pitcairn's requests for membership were discussed, and

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1 also that the response of CAPCO to that request was on a
2 joint basis.

3 I have seen no evidence either introduced or
4 proposed to be introduced by the City or any other parties
5 in this proceeding that would support the inference if there
6 is one, that at the meeting of December 11, 1967, among the
7 drafting representatives of the CAPCO companies, there was
8 any discussion whatsoever of the Pitcairn letters of November
9 20, '67, or of December 5, '67.

10 I would remind the Board that the November 20, '67
11 letter was a letter of Pitcairn to Duquesne Light
12 discussing the matter of wholesale power, and that alone.
13 I don't think that this document supports the offer of
14 proof as stated.

15 CHAIRMAN RICLER: Do you agree with the
16 character of the content of the November 20 letter,
17 Mr. Hjelmfelt?

18 MR. HJELMFELT: I don't have a November 20 letter
19 here. But the December 5 letters, which were introduced
20 were clearly requests by the solicitor of the Borough of
21 Pitcairn to join CAPCO.

22 I would agree that this particular Document C-34
23 does not, by itself, show a joint response. It does show
24 a joint discussion, which coupled with the other evidence
25 of the responses that were made, I think can demonstrate

mm7 1 they were opposed to coordination.

2 CHAIRMAN RIGLER: The objection goes to weight.
3 The objection is overruled, and we will receive
4 C-34.

5 (The document heretofore
6 marked Exhibit C-34 for
7 identification, was received
8 in evidence.)

9 MR. REYNOLDS: C-35 -- I will make the continuing
10 objection on behalf of all of the Applicants, other than
11 Ohio Edison.

and 10
start: 11

12 CHAIRMAN RIGLER: The continuing objection is
13 overruled.

14 We will receive C-35 into evidence.

15 (The document heretofore
16 marked Exhibit C-35 for
17 identification, was received
18 in evidence.)

19 MR. REYNOLDS: C-36, there is the continuing
20 objection on behalf of all of the Applicants other than
21 Duquesne Light Company.

22 CHAIRMAN RIGLER: The continuing objection is
23 overruled.

24 C-36 is admitted.
25

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1 (The document heretofore
2 marked Exhibit C-36 for
3 identification, was received
4 in evidence.)

5 MR. REYNOLDS: C-37, the continuing objection on
6 behalf of all Applicants other than Toledo Edison Company.

7 CHAIRMAN RIGLER: The continuing objection is
8 overruled and we will receive C-37 into evidence.

9 (The document heretofore
10 marked Exhibit-C-37 for
11 identification, was received
12 in evidence.)

13 MR. REYNOLDS: C-38, I have no objection.

14 CHAIRMAN RIGLER: C-38 is admitted.

15 (The document heretofore
16 marked Exhibit C-38 for
17 identification, was received
18 in evidence.)

19 MR. REYNOLDS: C-39, I have no objection.

20 CHAIRMAN RIGLER: C-39 is admitted.

21 (The document heretofore
22 marked Exhibit C-39 for
23 identification, was received
24 in evidence.)

25 MR. REYNOLDS: C-40, again I have no objection.

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CHAIRMAN RIGLER: C-40 is admitted.

(The document heretofore
marked Exhibit C-40 for
identification, was received
in evidence.)

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MR. REYNOLDS: C-41, I will have a continuing
objection on behalf of all Applicants other than Toledo
Edison Company.

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CHAIRMAN RIGLER: The continuing objection is
overruled and C-41 is admitted.

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(The document heretofore
marked Exhibit C-41 for
identification, was received
in evidence.)

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MR. REYNOLDS: C-42, the continuing objection
on behalf of all companies other than Toledo Edison.

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CHAIRMAN RIGLER: Overruled.
C-42 is admitted.

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(The document heretofore
marked Exhibit C-42 for
identification, was received
in evidence.)

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MR. REYNOLDS: As to C-43, the continuing objection
on behalf of all companies other than the Toledo Edison
Company.

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CHAIRMAN RIGLER: Overruled.

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C-43 is admitted.

3

(The document heretofore

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marked Exhibit C-43 for

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identification, was received

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in evidence.)

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MR. REYNOLDS: C-44, the continuing objection on behalf of all companies other than Ohio Edison.

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CHAIRMAN RIGLER: Aren't these in the nature of minutes of a meeting on behalf of all CAPCO companies?

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MR. REYNOLDS: I guess that that would be one characterization.

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They are, as I understand it, a summary or a reiteration of notes taken by Mr. Lyn Firestone during the course of a meeting he attended which were then circulated internally only to other people at Ohio Edison.

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And I don't have any indication that the document ever left Ohio Edison's offices or were seen by anybody other than Ohio Edison personnel or recounting anything other than Mr. Firestone's personal account of what he understood to have gone on at that meeting.

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CHAIRMAN RIGLER: The cover page does have the handwritten notation, "File CAPCO Minutes."

23

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MR. REYNOLDS: I don't know where that came from.

25

CHAIRMAN RIGLER: Okay. The objection is overruled.

1 and we will receive 44.

2 (The document heretofore
3 marked Exhibit C-44 for
4 identification, was received
5 in evidence.)

6 MR. HJELMFELT: That notation was on the
7 document when we got it.

8 MR. REYNOLDS: I have no problem in characterizing
9 it as Mr. Firestone's personal minutes.

10 MR. HJELMFELT: I would say on the record with
11 respect to C-44, it is not in the format of the other final
12 CAPCO minutes that we found in the files.

13 MR. REYNOLDS: As C-45, for example?

14 MR. HJELMFELT: Yes.

15 MR. REYNOLDS: No objection to C-45.

16 CHAIRMAN RIGLER: C-45 is admitted.

17 (The document heretofore
18 marked Exhibit C-45 for
19 identification, was received
20 in evidence.)

21 MR. REYNOLDS: No objection as to C-46.

22 CHAIRMAN RIGLER: C-46 is admitted.
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(The document heretofore
marked Exhibit C-46 for
identification, was received
in evidence.)

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MR. REYNOLDS: C-47, I have continuing objection
on behalf of all of the Applicants other than Duquesne
Light Company.

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CHAIRMAN RIGLER: Overruled.

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C-47 is admitted.

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(The document heretofore
marked Exhibit C-47 for
identification, was received
in evidence.)

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end §11 13

§12 14

MR. REYNOLDS: C-48, I have the continuing objection
on behalf of all the companies other than Duquesne Light
Company.

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CHAIRMAN RIGLER: Overruled.

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C-48 is admitted.

19

(The document heretofore
marked Exhibit C-48 for
identification, was received
in evidence.)

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MR. REYNOLDS: C-49, again the continuing objection
on behalf of all companies other than Duquesne Light
Company.

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1 CHAIRMAN RIGLER: Overruled.

2 C-49 is admitted.

3 (The document heretofore
4 marked Exhibit C-49 for
5 identification, was received
6 in evidence.)

7 MR. REYNOLDS: C-50, there is a continuing
8 objection on behalf of all companies other than Ohio Edison.

9 CHAIRMAN RIGLER: Overruled.

10 C-50 is admitted.

11 (The document heretofore
12 marked Exhibit C-50 for
13 identification, was received
14 in evidence.)

15 MR. REYNOLDS: I will object to City Exhibit C-51
16 as failing to meet the offer of proof which it is intended
17 to meet.

18 The City has stated that this document is to be
19 admitted to demonstrate that the CAPCO companies agreed
20 that municipalities should not be admitted to CAPCO
21 membership and the only redlined portion of the document is
22 26278 and that portion certainly does not give any weight
23 whatsoever to the offer of proof.

24 CHAIRMAN RIGLER: You may argue weight.
25 However, the objection is overruled.

1 We will admit C-51.

2 (The document heretofore
3 marked Exhibit C-51 for
4 identification was received
5 in evidence.)

6 MR. REYNOLDS: My argument was it didn't give
7 any weight whatsoever to it. This is totally irrelevant
8 to that issue.

9 CHAIRMAN RIGLER: Yes, and we disagree.

10 MR. REYNOLDS: I also make the continuing
11 objection on behalf of all of the Applicants other than
12 Duquesne Light Company.

13 CHAIRMAN RIGLER: Overruled.

14 C-51 is admitted.

15 MR. REYNOLDS: C-52, the continuing objection on
16 behalf of all of the Applicants other than Duquesne Light
17 Company.

18 CHAIRMAN RIGLER: Overruled.

19 C-52 is admitted.

20 (The document heretofore
21 marked Exhibit C-52 for
22 identification, was received
23 in evidence.)

24 MR. REYNOLDS: C-53, same continuing objection
25 on behalf of all Applicants other than Duquesne Light Company.

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CHAIRMAN RIGLER: Overruled.

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C-53 is admitted.

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(The document heretofore

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marked Exhibit C-53 for

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identification, was received

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in evidence.)

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MR. REYNOLDS: C-54, the continuing objection on behalf of all of the Applicants other than Ohio Edison.

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CHAIRMAN RIGLER: Over ruled.

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C-54 is admitted.

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(The document heretofore

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marked Exhibit C-54 for

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identification, was received

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in evidence.)

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MR. REYNOLDS: C-55, a continuing objection on behalf of all of the Applicants other than the Cleveland Electric Illuminating Company.

18

CHAIRMAN RIGLER: Overruled.

19

C-55 is admitted.

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(The document heretofore

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marked Exhibit C-55 for

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identification, was received

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in evidence.)

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MR. BUCHMANN: If your Honor please, on behalf of CEI, I object to C-55. The offer of proof was that we were

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nm16 1 desirous of avoiding FPC regulation.

2 Maybe we were and maybe we weren't, but there
3 is nothing illegal about trying to avoid regulation, nor
4 does it show anything anticompetitive.

5 CHAIRMAN RIGLER: While this relates directly back
6 to argument that Applicants have raised with respect to
7 whether their offers of service, coupled with the presence
8 of regulation presents a situation inconsistent and the
9 objection is overruled.

10 MR. REYNOLDS: C-56, this document is already in
11 evidence as Department of Justice Exhibit 257.

12 The marking of the document precipitated the
13 discussion yesterday with regard to simultaneous offers of
14 proof, or subsequent offers of proof.

15 I think it is already in and I would object to
16 at this time the City offering an alternative or
17 different offer of proof with respect to this document.

18 MR. HJELMFELT: I see no reason to have the
19 same document in twice, but I would like my offer of
20 proof to be applied to 257.

21 CHAIRMAN RIGLER: How does your offer differ from
22 the Department of Justice' prior offer?

23 MR. HJELMFELT: The document appears --

24 CHAIRMAN RIGLER: We will defer ruling on C-56 at
25 this time.

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1 MR. RIESER: Mr. Chairman, it might help the
2 parties to know that DJ-257 was introduced on February 17.
3 That should make it easier to locate.

4 MR. MELVIN BERGER: Thank you.

5 MR. REYNOLDS: C-57, continuing objection on
6 behalf of all the Applicants other than the Duquesne Light
7 Company.

8 CHAIRMAN RIGLER: The continuing objection is
9 overruled.

10 We will admit C-57.

11 (The document heretofore
12 marked Exhibit C-57 for
13 identification, was received
14 in evidence.)

15 MR. REYNOLDS: I would object to C-58 as not
16 being supportive in any way of the offer of proof, which
17 was that this document -- and in fact it is the -- I
18 guess the three lines on the first page that are redlined,
19 are introduced to show a concern by CAPCO executives that
20 the City will attempt -- that the transcript is not
21 quite clear.

22 The offer is that the document shows that CAPCO
23 executives were concerned that under their one proposed
24 allocation method it would be beneficial to the municipal
25 system and that would be no good.

1 I submit in the first place that to the extent
2 there is anything in the redlined portion that might begin
3 to suggest that, I suspect that the City is relying on
4 the phrase, or phrases that follow the name of Arthur,
5 which would indicate that if that were a concern expressed
6 there, it was a concern of his alone and not a concern of
7 the CAPCO executives.

8 I would further submit that if you read the portion
9 that is redlined, it is hardly susceptible to a reading that
10 it indicates any concern on a part of that individual that
11 the admission of a municipality under a proposed method
12 would be undesirable. At least I don't see it as I
13 understand the reading there.

14 I don't know of any documentation or testimony
15 in the City's case that could go to further clarify this in
16 any way.

17 It seems to me it totally misses the offer of
18 proof.

19 end #12
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1 CHAIRMAN RIGLER: I think your argument goes to
2 weight.

3 The objection is overruled. We will receive 58.

4 (The document previously marked
5 Exhibit C-58 for identification,
6 was received in evidence.)

7 MR. REYNOLDS: Let me also make the continuing
8 objection, not with a whole lot of hope, but on behalf of
9 all of the Applicants, other than Ohio Edison Company.

10 CHAIRMAN RIGLER: Your despair was justified.
11 The continuing objection is overruled.

12 MR. REYNOLDS: I have no objection to City
13 Exhibit C-59.

14 CHAIRMAN RIGLER: C-59 is admitted.

15 (The document previously marked
16 Exhibit C-59 for identification,
17 was received in evidence.)

18 MR. REYNOLDS: With respect to City Exhibit
19 C-60 -- with respect to C-60 I would object to the
20 introduction of this on the basis of the offer of proof.
21 The offer of proof says that it is a document that
22 demonstrates joint action by the companies regarding a proposal
23 of CEI to the City of Cleveland. It does not say that it is
24 joint action in restraint of trade which I think is certainly --
25 would be necessary, if we are going to consider it at all

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1 relevant. I would suspect that the City carefully avoided
2 saying that since this is on its face, and also I can
3 represent it to be the fact part of a negotiation, if you
4 will, or discussion with the City of Cleveland and CEI that
5 was directly related to the matters involved in this suit
6 and an effort to resolve those matters without becoming
7 embroiled in the kind of hearing we are now into.

8 I would object to it as being wholly irrelevant
9 to the issues.

10 If it is being introduced to show joint action
11 and that alone I don't see how that is a matter in controversy
12 or relevant to a matter in controversy here.

13 CHAIRMAN RIGLER: Mr. Hjelmfelt?

14 MR. HJELMFELT: What is being talked about here,
15 as I understand it, is a proposal with respect to what offer
16 CEI might make in response to the City's requests to be
17 admitted to CAPCO or participate in nuclear units.

18 It seems quite clear from the document that the
19 response that was developed was clear, meaning apparently
20 approved by the other CAPCO members.

21 The effect would seem to me of a jointly
22 formulated response and joint response.

23 MR. REYNOLDS: I'm not denying that. It was
24 in the context of the Department of Justice's ongoing
25 antitrust investigation that was related to the advice letters

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1 of the Department of Justice in this proceeding. Necessarily,
2 it had to be cleared in that context and discussed in that
3 context with the Applicants to those licenses. Especially,
4 when the Department of Justice was also involved in these
5 discussions at that time.

6 CHAIRMAN RIGLER: I can go along with you part-
7 way, Mr. Reynolds. It seems to me where five Applicants
8 are presenting a joint proposal, they necessarily must
9 discuss the implications of that proposal among themselves.
10 In response to anticipated proceedings to which they are
11 joint applicant, that would require joint consultation.
12 The problem is if in the context of formulating this joint
13 response, you also mix in elements of the proposal that would
14 be beyond the agency supervision or peripheral to it
15 or collateral to it, then you get into a mixed
16 question as to how you separate out part of the response that
17 deals purely with the government action and the private
18 part of the response.

19 I think maybe we will think about that over
20 the lunch hour and come back in 50 minutes.

21 Do you want to comment??

22 MR. REYNOLDS: I would like to request if that,
23 indeed, is where we are going with this document, that the
24 City be required to amend its offer of proof to advise
25 the Board and Applicants that that is, indeed, where the

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1 City intends to go with this, and what documentary
2 evidence or additional testimonial evidence we can anticipate
3 seeing to support that offer.

4 I do not think there is anything in the City's
5 document or the witnesses' testimony so far that would begin
6 to support what the Chairman is suggesting.

7 That is not part of the City's case, and I don't
8 think it is part of what the City has alleged in the September
9 5 filing.

10 CHAIRMAN BIGLER: The City is alleging that
11 offers which CAPCO companies have made, either for access
12 to nuclear units or to provide other services which have
13 been included under the phrase "regional power exchange
14 market" are insufficient or are defective and if their
15 purpose is to maintain a situation inconsistent with the
16 antitrust laws to the maximum extent possible.

17 They are arguing, that the Applicants consider
18 how far they are willing to go and how much they are still
19 willing to withhold that that bears on the question of
20 maintenance of the situation.

21 Even though I agree with you that part of this
22 response may be necessary or desirable in the context
23 of agency action, nonetheless you have to weigh the other
24 part of it. It is a complex problem and that is why I
25 would like to think about it over the lunch hour.

(Whereupon, at 1:15 p. m., the hearing was
recessed, to be reconvened at 2:05 p.m., this same day.)

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EAK1AFTERNOON SESSION

(2:10 p.m.)

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3 MR. HURLMFELT: I am satisfied that the offer
4 of proof that the Department of Justice made on 257 was
5 similar to the one I made for C-56 and I withdraw C-56.

6 MS. URBAN: Mr. Chairman, could you possibly
7 clarify or elaborate on the statements you made this
8 morning concerning the Department's and Staff's and City's
9 comments to be made on matters relating to joint action
10 and conspiracy; we are unclear as to whether legal arguments
11 will be expected or you want factual statements in the
12 context of your order on the procedural action.

13 CHAIRMAN RIGLER: In terms of what we are
14 expecting, and we are not expecting anything -- that is the
15 Board has no burden to sustain on this objection.

16 The objection under consideration is the
17 objection which has been posed under Rule 105 on
18 limited admissibility which states when the evidence which
19 is admissible as to one party or one purpose, but not
20 admissible as to another party or another purpose, the Board
21 will restrict the evidence to its proper scope.

22 That is what the Applicants have asked us to do.
23 The continuinn objection deals with the question of whether
24 the acts of one of the Applicant companies are attributable
25 or can be inferred to apply to the others.

That is the basis of your objection, is it not,

PAGE

1 Mr. Reynolds?

2 MR. REYNOLDS: Yes, it is.

3 CHAIRMAN RIGLER: I am asking you to tell us
4 if the parties have established an antitrust violation,
5 consisting of joint action in one of its forms, such that
6 from that point on, evidence relating to one party would
7 be admissible as to the other parties.

8 If that is your contention tell us which
9 facts and circumstances justified that and what date they
10 occurred on so that we will have some date to use as a reference
11 in considering the objection.

12 At the conclusion of the factual case of all three
13 of the opposition parties, I think it is more than appropriate
14 that we should know exactly where they think they have been.
15 We are not asking for an entire summation.

16 We wouldn't want that. But we would
17 want comment addressed to the particular motion under Rule 105
18 of the Federal Rules of Evidence.

19 MS. URBAN: I guess I have two questions that I
20 am not sure of.

21 One, do you have in mind a very detailed factual
22 statement including transcript references and basically
23 something one would find in a post-trial brief or will
24 a statement as to -- a general statement supported by the record
25 as to the situation as a particular sequence of facts

1 without say, direct transcript references.

2 CHAIRMAN RIGLER: I will have to leave that to
3 your judgment. You have heard the motion. You know what
4 the Board is being asked to decide. What your response
5 is is in your hands. The Board can't offer you any guidance
6 on that.

7 The one possible exception might be if you contend
8 some particular event or date is significant, then I think
9 you should point that out to us.

10 MS. URBAN: The second questions is whether that be
11 done in the context of your order or are you assuming that
12 we will have full-scale argument on the law of conspiracy
13 as related to the antitrust laws.

14 CHAIRMAN RIGLER: I was not anticipating a
15 brief as to the law. If you wish to make reference to
16 it, you may. I indicated that written briefs were not being
17 sought. Neither am I looking for extensive argument.
18 It seems to me you should be able to crystalize your
19 response on that point and give it to us in just a few
20 minutes of argument.

21 I anticipate that the entire presentation will
22 be oral.

23 MS. URBAN: Thank you. Fine.

24 CHAIRMAN RIGLER: That left us with a discussion
25 of C-60.

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CHAIRMAN REGLER: I had indicated that where one has a mixed question of joint response to a governmental inquiry coupled with joint response for other purposes it is sometimes difficult to separate the two. We have talked about C-60 during the lunch break and the Board has concluded that we would be correct as a matter of law in admitting evidence where the interconnection is so complex that you can't separate out one purpose from the other.

However, in the case of C-60 measuring the offer of proof, against the weight and probative value of the content of the document and coupling that with the undisputed fact that at least a substantial part of this joint consultation was in reference to discussions with the Department of Justice, in the case of this document, we will sustain the objection.

MR. REYNOLDS: As to Exhibit C-61, I would make the continuing objection on behalf of all of the Applicants other than the Ohio Edison.

CHAIRMAN REGLER: Overruled. C-61 is admitted.

(The document referred to, marked C-61, for identification, was received in evidence.)

MR. REYNOLDS: C-62, the offer of proof for C-62 was that this document goes toward proving a joint action on behalf of the members of CAPCO in denying the

EAK5 1 City membership in CAPCO.

2 I think that the document on its face indicates
3 that what was the subject matter of the CAPCO meeting, was
4 negotiations with the City of Cleveland regarding their
5 request to obtain power from CAPCO units.

6 There was no indication that membership in CAPCO
7 was a matter of discussion at that meeting nor that any
8 joint action was taken with regard to a question for
9 membership in CAPCO at that meeting or at any other time.

10 I don't think that this document is relevant
11 to the offer of proof in any way.

12 CHAIRMAN RIGLER: Do you agree with that, Mr.
13 Hjelmfelt? Or are you going to amend your offer?

14 MR. HJELMFELT: I don't agree with -- I agree that
15 this particular letters refers to request to obtain power
16 from the CAPCO units. The minutes of the meeting on
17 December 7 indicate they considered our participation by
18 the City as a member in CAPCO as well as any other form
19 of access.

20 The two were dealt with together.

21 CHAIRMAN RIGLER: I don't understand. Are you
22 saying your offer is limited to membership in CAPCO
23 because that is what is encompassed in this letter or are you
24 saying your offer is more inclusive because it deals with
25 things other than membership?

BAK6 1

2 MR. HJELMFELT: It deals with participation
3 or obtaining . of power from the CAPCO units as well as
4 simple membership in CAPCO.

5 MR. REYNOLDS: What does the "this" refer to?

6 MR. HJELMFELT: This letter does not directly
7 on its face refer to participation in CAPCO. It does,
8 however, refer to the CAPCO meeting of DECEMBER 7 which the
9 parties, the City believes the evidence demonstrates,
10 the CAPCO companies agreed that the City would not be allowed
11 to enter CAPCO. It talks of the negotiations and
12 requests of the City to obtain power from the CAPCO units
13 and CEI was keeping the other parties informed
14 from which the City would attempt to demonstrate the joint
15 action of the CAPCO companies in dealing with the City's
16 request for participation in nuclear units as well as member-
17 ship in CAPCO.

18 MR. REYNOLDS: Well, I think in the first
19 place that the letter, if it speaks to anything, speaks
20 of unilateral action and not joint action. Apart from
21 that, if Mr. Hjelmfelt is telling me he is not
22 prepared to amend his offer of proof --

23 CHAIRMAN RIGLER: He just restated it.

24 MR. REYNOLDS: He restated his offer of proof?

25 CHAIRMAN RIGLER: That is right.

MR. REYNOLDS: Then I will have to get it read back

BAK7

1 because it was carefully buried in all of the other
2 things he was stating. Could you read back to me what he
3 said?

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

6 MR. REYNOLDS: If the City's position is that
7 it is offering this document to demonstrate joint action
8 by the CAPCO members with regard to the City's request
9 to obtain power from CAPCO units I would -- well, I would
10 not agree that that is what it shows, but I would be able
11 to understand the offer of proof.

12 But if we are tacking on to that as well some
13 joint action by the CAPCO members with regard to a request
14 by the City for membership, I still fail to see how this
15 document begins to go toward that point in any way.

16 As I understood his amended statement of his
17 offer of proof, he still has indicated that he is
18 lumping together those two concepts as part of this offer of
19 proof with this document.

20 To that extent, I think that it is objectionable.
21 If it is limited to the matter of the request to obtain power
22 from CAPCO units, then it seems to me to be properly limited
23 in scope.

24 If he has other evidence to present to this Board
25 on the other matter, that is well and good and he may do so,

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1 but I object to having unsponsored documents come in under
2 that broad offer of proof when there is nothing on the face
3 of the document that would warrant support for it.

4 CHAIRMAN RICLER: The objection is overruled.

5 MR. REYNOLDS: I make the continuing objection on
6 behalf of all Applicants other than the Cleveland Electric
7 Illuminating Company.

8 CHAIRMAN RICLER: We will admit C-62 into evidence
9 then.

10 (The document referred to,
11 marked C- 62 for identifica-
12 tion, was received in
13 evidence.)

14 MR. REYNOLDS: There was no offer on C-63.
15 I think it was deferred until we had resolved the matter
16 of admissions that were associated with this document. If
17 we could have an offer now on C-63.

18 MR. HJELMFELT: Through Document C-63, the City
19 will attempt to demonstrate the joint action of the CAPCO
20 companies in responding to the City's request for membership
21 in CAPCO.

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

24 MR. REYNOLDS: Well, I would object to that as being
25 an offer of proof that cannot be met by this document.

1 This document shows exactly the opposite. In fact,
2 it indicates that CEI letters were already in the mail -- that
3 Duquesne's letters were already in the mail and to tell
4 CEI that the letter had been mailed.

5 CHAIRMAN RIGLER: That certainly doesn't preclude
6 consultation between the two companies with respect to the
7 content of the letters.

8 MR. REYNOLDS: That is not what the offer was.
9 The offer was they formulated through joint communications,
10 the contents of the letter and that this particular
11 document shows that. It would preclude that on its face.
12 It may be from some other evidence that the City wishes
13 to make that kind of showing but certainly this document
14 doesn't support it.

15 MR. EJMELFELT: I don't recall that phrasing
16 in my offer of proof. I believe my offer was through this
17 document, C-63, the City would attempt to demonstrate
18 joint action of the CAPCO companies in responding to
19 the City's request for membership in CAPCO.

20 CHAIRMAN RIGLER: Overruled. We will admit
21 C-63.

22 MR. REYNOLDS: I would like to record to now
23 note a continuing objection on behalf of all Applicants other
24 than Duquesne Light Company with respect to C-63.

25 CHAIRMAN RIGLER: Noted and overruled.

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(The document referred to, marked C-63, for identification, was received in evidence.)

MR. REYNOLDS: I will make the continuing objection on C-64 for all Applicants other than the Toledo Edison Company.

CHAIRMAN RIGLER: Overruled. We will admit C-64.

(The document referred to, marked C-64 for identification, was received in evidence.)

MR. REYNOLDS: C-65 I will make the continuing objection on behalf of all Applicants other than the Duquesne Light Company.

CHAIRMAN RIGLER: Overruled. We will admit C-65.

(The document referred to, marked C-65 for identification, was received in evidence.)

MR. REYNOLDS: I would make a continuing objection on behalf of all companies other than Duquesne Light Company.

CHAIRMAN RIGLER: To C-66?

MR. REYNOLDS: Right. To the draft of a

SAK11 1 memorandum by Mr. Munsch of Duquesne Light Company,
2 circulated within Duquesne Light Company.

3 CHAIRMAN RIGLER: Overruled. We will admit
4 C-66.

5 (The document referred to,
6 marked C-66, for identifica-
7 tion, was received in
8 evidence.)

9 MR. REYNOLDS: On C-67, I would object
10 on the grounds that the red-lined portions of the document
11 do not support the offer of the City. The City's offer
12 is that through C-67, the City will attempt to demonstrate
13 that the CAPCO companies did not want to engage in
14 wheeling transactions with municipal systems or other
15 small entities and thereby deny them the benefits of coordinated
16 operation and development.

17 The only portion red-lined on this document con-
18 cerning the question of whether a general wheeling provision
19 in license conditions is something which the company finds
20 objectionable is an entirely different question.

21 CHAIRMAN RIGLER: Overruled. We will admit C-67.

22 MR. REYNOLDS: I would make the continuing
23 objection on behalf of all companies other than Toledo
24 Edison.

25 CHAIRMAN RIGLER: Overruled.

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(The document referred to, marked C-67, for identification, was received in evidence.)

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MR. BUCHMANN: If your Honor, please, on behalf the Illuminating Company, I object to C-68, which was offered to show that CEI was attempting to eliminate rate competition between the City and CEI through urging -- and I emphasize the word urging -- free street lighting by the municipal system.

This is a memo which simply contains data about other municipalities. The large majority of which do, in fact, do what CEI is said to be urging on the City of Cleveland.

In any event, nothing in this document shows that we were urging anything.

CHAIRMAN RIGLER: Well, that is correct, Mr. Buchmann, and obviously standing by itself the document would have no probative value.

Whether it could ever prove anything, I suppose would depend upon reading it in conjunction with other documents. With that observation, however, we will admit it.

MR. BUCHMANN: Our problem goes to the fact that when we asked for offers of proof on these things, it is Mr. Hjelmfelt who makes the statements and not us. He is the

20113 : one that categorizes these things in that fashion.

2 I don't mean to argue with the Board after
3 its ruling but that is pervasive through the City's offers.

4 CHAIRMAN RICLER: Right, but at the time he submits
5 his proposed findings of fact, obviously this document
6 standing alone could not support a finding related to his
7 offer.

8 MR. BUCHMANN: I want to know whether there is a
9 claim because a study is made of something that that is evidence
10 that the company is planning to do it.

11 You make a lot of studies to find out you don't
12 want to do something. This confuses things in here. This
13 is what I am trying to get out on the record.

14 CHAIRMAN RICLER: I will let Mr. Hjelmfelt
15 respond to that.

16 MR. HJELMFELT: I am not going
17 to be trying to prove anything from this document standing
18 alone but as a piece of evidence. As to whether a
19 piece of evidence of a particular study shows an intent,
20 that depends on the particular study.

21 Certainly a study shows the possibility
22 intention to move in a particular direction if the study
23 shows it to be warranted.

24 It certainly shows an interest. Again, an
25 individual study may or may not be the only item of evidence

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1 and may be taken in with other evidence to show intent.

2 CHAIRMAN RIGLER: All right.

3 MR. BUCHMANN: The objection was overruled
4 eventually?

5 CHAIRMAN RIGLER: Yes.

6 MR. REYNOLDS: I have a continuing objection
7 on behalf of all of the Applicants other than CEI. I also
8 think if it is Mr. Hjelmfelt's intent to introduce unsponsored
9 documents that in and of themselves are probative of
10 nothing, but that he feels he may be able to use at a later
11 date to demonstrate intent, that he ought to state in his
12 offer of proof this document goes to proving the intent on the
13 part of the Applicant to do something.

14 That is what the purpose of requesting
15 an offer of proof is. He has amended this one to indicate
16 that this document is to the extent it is probative of
17 anything, indicative of CEI's intent with regard to the
18 matter of street lighting.

19 If you are going to have an offer of proof
20 on a document that is admittedly probative of nothing
21 in and of itself, the Applicants are entitled to be
22 advised at the time the document comes in that the City
23 is looking to this document as an element of proof of
24 intent, if that is what it is looking to it for.

25 If we are going to simply allow the documents to come

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1 in under a very broad generalized assertion that this may
2 relate to the matter of street lighting, that does not further
3 this proceeding.

4 It is not helpful to the Board had it is not
5 helpful to the Applicants. That is the purpose of the
6 offer of proof, so that we know what it is that it is
7 being offered to prove.

8 If it goes to the question of intent, we ought
9 to be advised of that.

10 CHAIRMAN RIGLER: The offer was more specific
11 than you have made allowances for. The objections are
12 overruled. C-68 will be received in evidence.

13 (The document referred to,
14 marked C-68 for identifica-
15 tion, was received in evi-
16 dence.)

17 MR. BUCHMANN: I have no objection to C-69.

18 MR. REYNOLDS: I object on behalf of all
19 Applicants other than CEI?

20 CHAIRMAN RIGLER: Overruled. C-69 will be
21 admitted.

22 (The document referred to,
23 marked C-69 for identifica-
24 tion, was received in evidence.)

25 MR. BUCHMANN: I object to the admission of C-70,

EAK 1 which simply reflects if it reflects anything, action or
2 potential action before the utilities committee of the
3 Cleveland City Council. Basing my objection, of course,
4 on Noerr-Pennington.

5 The offer, I may say, is that this was offered
6 to show that CEI considered opposing a financing plan which
7 might reduce the obligations of the City. Passing the
8 fact that we are surely entitled to consider this, it doesn't
9 show that we did anything.

10 CHAIRMAN RIGLER: It says firm opposition to
11 this move would seem in order and while it doesn't on its
12 terms authorize that action --

13 MR. BUCHMANN: Mr. Loshing would not be in a
14 position to authorize that.

15 CHAIRMAN RIGLER: We can consider his recommendation.
16 The objection is overruled.

17 MR. BUCHMANN: Do I gather the Noerr-Pennington
18 objection is overruled as well?

19 CHAIRMAN RIGLER: Most certainly. Because
20 with respect to this document, it says firm opposition
21 would be in order but it doesn't state what form the opposition
22 will take. We have no notice that the observations would
23 be within or without the scope of the Noerr-Pennington
24 doctrine.

25 MR. BUCHMANN: Did you look at the next two pages

EAR 1 which clearly relate this to City Council activity?

2 CHAIRMAN RIGLER: I understand the report
3 relates to City Council activity. The question is what the firm
4 opposition which is contemplated by CEI might be.
5 So the objection is overruled.

6 MR. REYNOLDS: This is going to prove what?
7 Now I don't understand what the offer of proof is. That
8 there was or wasn't firm opposition?

9 MR. BUCHMANN: The offer was that he considered
10 firm opposition.

11 MR. REYNOLDS: The continuing objection on
12 behalf of all Applicants other than CEI.

13 CHAIRMAN RIGLER: Overruled.

14 (The document referred to,
15 marked C-70, for identifica-
16 tion, was received in
17 evidence.)

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MR. BUCHMANN: No objection on behalf of
CEI.

MR. REYNOLDS: Continuing objection of all
Applicants other than CEI.

CHAIRMAN RIGLER: Overruled and C-71 will be
admitted into evidence.

(The document previously marked
Exhibit C-71 for identification,
was received in evidence.)

MR. BUCHMANN: On C-72, we have several
problems. One, again, the offer was that CEI studied the
effect of the loss of revenues to the municipal light
plant and that this demonstrated an intent to acquire.
As I said before, the fact that a study is made, doesn't
seem to me to go to demonstrate any intent.

Secondly, there is as part of this exhibit
a lot of handwritten notes, and it is not clear
to me that they are in fact part of the memorandum of
Mr. Moore which constitutes the first three pages of this
and, as I look forward through it -- well, maybe, it is
not important.

None of it seems to be red-lined.

MR. BUCHMANN: I was going to say it is
apparent from the handwriting, even to a nonexpert like
myself, that it was done by several people, but we don't

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1 know how they are. I will withdraw that statement,
2 however. I object to the offer as not relating to the
3 offer of proof.

4 MR. REYNOLDS: Continuing objection of all
5 Applicants other than CEI to admission of Exhibit 72.

6 CHAIRMAN RIGLER: The objections are overruled.
7 We will admit C-72.

8 (The document previously marked
9 Exhibit C-72 for identification
10 was received in evidence.)

11 MR. BUCHMANN: If the Panel please, I object
12 on behalf of Illuminating Company to Exhibit 73, which
13 relates -- among other things the offer was that it
14 showed we had a desire to acquire Painesville Municipal
15 Light Plant.

16 In fact, the whole memo deals with Painesville.
17 Painesville in this form was not part of any
18 forum, was not part of any of the three petitions to intervene
19 filed by the City of Cleveland, not part of the September 5,
20 1975, statement of issues stated by the City.

21 Acquiring the isolated system of Painesville,
22 I am advised the Panel has held that as being outside the
23 City's direct case.

24 MR. HUELMEFELT: This one demonstrates generally
25 CEI assessment of the effects of what an interconnection
with the City would be.

1 CHAIRMAN RIGLER: I am going to interrupt you,
2 because I didn't want a restatement of the offer of proof.

3 Turning to the City statement of September 5,
4 page 4, at the end of the first full complete paragraph,
5 it says Cleveland may rely on document and depositions
6 showing retail competition between CEI and the City of
7 Painesville. I note a further reference to questions of
8 access and transmission which includes the City of
9 Painesville. This is in the last paragraph on page 8.

10 It continues on page 9, additional references
11 to Painesville. Page 10, page 13.

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1 MR. BUCHMANN: Your Honor is perfectly correct.

2 I have the September 5 filing in front of me.

3 Perhaps I have stated this inarticulately.

4 There were a lot of things in that September 5 filing which
5 were not in the Petitions to Intervene.

6 As I understand the Court's Order of November 20,
7 1975, it says the City --

8 "City will therefore be limited in its case
9 in chief to contentions set forth in its Petitions
10 to Intervene as those contentions have been
11 particularized in the statement of the nature of
12 the case."

13 Painesville is not in the Petitions to Intervene.
14 Neither is Pitcairn, nor all of the other stuff added in
15 the September 5 filing with respect to other municipals.

16 CHAIRMAN RIGLER: Do you have a response?

17 MR. HJELMFELT: Certainly at the time we filed
18 our petitions we hadn't had the benefits of discovery.

19 CHAIRMAN RIGLER: Were the petitions limited to
20 the City of Cleveland, or did they include references to
21 other municipalities?

22 MR. HJELMFELT: I don't have them before me,
23 but I don't recall references to other municipalities. I
24 don't think that that means that matters relating to other
25 municipalities aren't relevant to Cleveland's situation as

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1 that situation and contentions in the nature of our case
2 were spelled out.

3 MR. BUCHMANN: I don't want to be in the position
4 of reading yourself back to you, if the panel please, but
5 at page 2 of the November 20, 1975 order, the statement
6 is made:

7 "In any event the City recognizes that
8 Justice and Staff have intended to produce such
9 evidence."

10 We are speaking to evidence which were not set
11 forth in the Petitions.

12 "The Board is confident that Justice and
13 Staff will competently pursue the additional
14 areas of concern to the City."

15 MR. SMITH: You are referring to the order
16 referring to activities outside the CEI service area?

17 MR. BUCHMANN: It refers to activities outside
18 CEI's service area, I understand that.

19 CHAIRMAN RIGLER: Doesn't the original Petition
20 to Intervene focus on the issue of City's failure to
21 obtain interconnections with any other system, to reinforce
22 its own system in trying to preserve emergency power?

23 MR. SMITH: Bear in mind that the order refers
24 to the City's interests as discernible from its Petition
25 and not specific contentions.

1 MR. BUCHMANN: I apologize for taking so long.
2 I am looking at the Petition to Intervene in Davis-Besse 2
3 and 3.

4 But I am given to understand this is pretty much
5 the same. The only reference to the City of Painesville
6 other than the allegation that the only independent entities
7 in the CEI area are Painesville and Cleveland is a
8 quotation from a memorandum which I suppose is in evidence
9 by now, which says that a company objective was to reduce
10 and eliminate Cleveland and Painesville municipal systems.

11 Then the allegation is that CEI has long used a policy
12 of anticompetitive practices to eliminate NEEP.

13 There is no statement that we pursued practices
14 related to Painesville. Exhibit 73 doesn't go to a
15 question between Painesville and the City of Cleveland.

16 CHAIRMAN RIGLER: That is too narrow a reading,
17 particularly in light of the September 5 filing, and that
18 objection will be overruled.

19 MR. REYNOLDS: I will make the continuing
20 objection on behalf of all Applicants other than CEI.

21 CHAIRMAN RIGLER: The continuing objection is
22 overruled.

23 MR. BUCHMAN: I object on behalf of the Illuminating
24 Company to Exhibit C-74.

25 The only part of this which is redlined is page 25

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1 of the document which is City number 15649.

2 In the first place, parts of that statement
3 that is redlined is clearly protected by Noerr-Pennington.
4 What it shows is that one of the plans of the financial
5 group in the Illuminating Company is to provide requested
6 material for hearings before Cleveland City Council.

7 All of this relates to a 1971 general rate case.

8 CHAIRMAN RIGLER: That may be relevant even
9 though not illegal. The mere fact that somebody is
10 responding to a regulatory agency doesn't bring it within the
11 ambit of Noerr-Pennington.

12 MR. BUCHMANN: I wonder if the panel realizes
13 that in this instance described here, that the Cleveland
14 City Council is the regulatory agency; that it has rate
15 regulatory powers in the State of Ohio.

16 CHAIRMAN RIGLER: All right.

17 Just the objective fact that Cleveland is
18 preparing to file rate materials before that agency, I
19 don't see is protected one way or the other. That is an
20 objective fact.

21 Now we have to look further to the offer of
22 proof.

23 MR. BUCHMANN: That is right. This is supposed
24 to demonstrate that CEI is interested in acquiring
25 Municipal Electric Light and Power.

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1 CHAIRMAN RIGLER: And that relates to the
2 handwritten comment.

3 I don't think you have any basis whatsoever to
4 rely on Neorr-Pennington.

5 MR. BUCHMANN: I will proceed to relevance, sir,
6 and whether it fits in with the offer of proof.

7 The fact that Mr. Borthwick asks a question as
8 to whether there would be impact on the rate case because
9 of acquisition doesn't go anywhere.

10 CHAIRMAN RIGLER: Doesn't that demonstrate
11 consideration by CEI of an interest in acquiring MELP?

12 MR. BUCHMANN: I think not.

13 CHAIRMAN RIGLER: As they were making their
14 various corporate plans, they take into account the possibility
15 that they wish to acquire MELP.

16 MR. BUCHMANN: This doesn't take into account the
17 possibility that they wish to acquire MELP.

18 CHAIRMAN RIGLER: They are asking the question,
19 what the effect of the acquisition of MELP would be on
20 ordinary corporate activities.

21 MR. BUCHMANN: Isn't it just as logical, sir, the
22 response is this would injure our rate case and therefore
23 we should continue our present policy of trying to
24 acquire MELP? It goes to the offer of proof.

25 CHAIRMAN RIGLER: I see your argument, but I

mm6 1 will overrule you on it.

2 MR. REYNOLDS: Continuing objection on behalf of
3 all Applicants other than CEI.

4 CHAIRMAN RIGLER: Overruled.

5 We will admit C-74.

6 (The document heretofore
7 marked Exhibit C-74 for
8 identification, was received
9 in evidence.)

10 MR. BUCHMANN: I object on behalf of the Illuminating
11 Company to Exhibit C-75, which was offered, if I have
12 my notes correct, just to show the trend in conversions
13 from MUNY to CEI.

14 I object on the ground that it relates to retail
15 competition which is outside the scope of this case.

16 CHAIRMAN RIGLER: Retail competition is not
17 outside the scope of the case.

18 We indicated we are disinterested in transfers of
19 individual customers as having no bearing on the issues
20 on controversy.

21 MR. BUCHMANN: All this is is tabulation which
22 shows that. It is fortified by the fact that the
23 offer was just to show the trend.

24 MR. REYNOLDS: Continuing objection on behalf
25 of all the Applicants other than CEI.

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CHAIRMAN RIGLER: Sustained.

MR. BUCHMANN: That was my objection?

CHAIRMAN RIGLER: Yes.

MR. BUCHMANN: I have no objection on behalf of Illuminating Company to 76, which is the document that shows that it would be good for the City of Cleveland if CEI acquired the Municipal Light Plant.

MR. REYNOLDS: Continuing objection on behalf of all Applicants other than CEI.

CHAIRMAN RIGLER: Overruled.

We will receive C-76 into evidence.

(The document heretofore marked Exhibit C-76 for identification, was received in evidence.)

MR. BUCHMANN: Well, the offer on 77 was that it shows that CEI recognizes the effect on MUNY's costs apparently from operation of the large 85 megawatt unit, and that they will demonstrate with other evidence that CEI was interested in preventing the City from making effective use of the 85 megawatt unit.

I suppose that was a proffer that this would come in only if such other evidence was in the record. I am unaware of any such evidence.

I therefore object to 77.

1 I further object to it on behalf of Illuminating
2 Company because I do not know what the recognition by
3 CEI of the effect of various things upon costs of the City
4 of Cleveland shows with respect to the issues in this case.

5 CHAIRMAN RIGLER: Overruled.

6 MR. REYNOLDS: Continuing objection on behalf of
7 all Applicants other than CEI.

8 CHAIRMAN RIGLER: Overruled.

9 We will admit 77 at this time.

10 (The document heretofore
11 marked Exhibit C-77 for
12 identification, was received
13 in evidence.)

14 CHAIRMAN RIGLER: I think we have reached the
15 stopping point for the day.

16 The Board mentioned earlier we would quit
17 early today. We will resume Tuesday morning at 9:30 and
18 Mr. Mayben will be our witness.

19 Is that correct?

20 MR. HJELMFELT: That is correct.

21 (Whereupon, at 3:15 p.m., the hearing in the
22 above-entitled matter was adjourned, to resume at 9:30 a.m.
23 Monday, 29 March 1976.)
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