

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)

and

CLEVELAND ELECTRIC ILLUMINATING
CO. et al.

(Perry Nuclear Power Plant, Units 1
and 2)

Place - Silver Spring, Maryland
Date - Tuesday, 10 February 1976

Docket Nos.

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

50-440A
50-441A

Pages

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of: : Docket Nos.
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TOLEDO EDISON COMPANY and : 50-346A
CLEVELAND ELECTRIC ILLUMINATING CO. : 50-500A
: 50-501A
(Davis-Besse Nuclear Power Station, :
Units 1, 2 and 3) :
:
and :
: 50-440A
CLEVELAND ELECTRIC ILLUMINATING CO. : 50-441A
et al. :
:
(Perry Nuclear Power Plant, :
Units 1 and 2) :
:
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First Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland

Tuesday, 10 February 1976

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

BEFORE:

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

APPEARANCES:

As heretofore noted.

C O N T E N T S

<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Robert Hart	4661			

<u>EXHIBITS:</u>	<u>MARKED</u>	<u>RECEIVED</u>
DJ Exhibits 19 thru 23; DJ Exhibits 26 thru 33; DJ Exhibits 35 thru 39; DJ Exhibits 41 thru 65		4616
DJ Exhibits 71 thru 76		4619
DJ Exhibits 78, 79, 81 and 82		4631
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(letter from Robert Hart to Karl Rudolph, dated July 9, 1975, with attachment, two-page letter to John Engle, and attachment, letter from Howard Cummins to Ralph W. Meister, dated April 15, 1975)		
DJ Exhibit 178		
(Letter from Mr. Hart to Mr. R. M. Coppers, dated October 9, 1975)		
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P R O C E E D I N G S

MR. CHARNO: The Department would like to begin this morning by offering into evidence some of the introduced documents/yesterday and identified on the record at that time.

CHAIRMAN RIGLER: All right.

MR. CHARNO: We would like to offer into evidence DJ Exhibits 19 through 63.

MR. STEVEN BERGER: May I have one second, please?

First of all, if I may, on behalf of Ohio Edison, the documents which were put in against Ohio Edison and now with regard to Pennsylvania Power manifest what the contractual relationships were and presently are--not necessarily with regard to the Department of Justice's documents here--but certainly through Mr. Guy, the existing contracts between the company and the small systems in its area are in evidence with regard to the small systems in their area.

The contractual relationships with the small systems and the particular provisions in contracts that are no longer in effect from 1965 until 19-- that were in effect from 1965 to 1972, we believe, and we have stated on the record and we have objected to their admission as not having a sufficient relationship to the existing situation so as to justify their admission into this record as having any probative value.

From 1965 to the present, the Board has taken a different view notwithstanding the fact that these provisions are not in effect.

As to contractual relationships and those provisions in contracts that existed prior to 1965, we believe they cannot have any probative value even under the Board's view.

They are not the present contracts in effect with the small systems in the company's area. We don't feel they should be admitted into the record for purposes of showing what the relationships were with the parties in the '50s, 1960, 1961, '62, '63, '64, and 1965 to the extent that the Board feels there is a specific cut-off date, namely September 1965. If any of these contracts were in effect for a two-month period in 1965, we would object on the earlier bases that we objected that we don't think they have probative value to the existing situation because they do not affect the existing contractual relationships with the parties.

Under the Board's present ruling, we don't believe the contractual relationships in existence between the parties prior to September 1, 1965 have probative value for purposes of the Board's review.

end 1

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That is a general objection with regard to many of the documents that we are talking about. If you want me to specify which ones in particular we are talking about, I will do so.

I thought at the outset, since many of our objections will be going to this, it was better at the outset to set it forth more generally.

CHAIRMAN RIGLER: Do the pre-1965 contracts tell us anything about a continued course of dealing on behalf of Ohio Edison or Pennsylvania Power? Can we look to the pre-1965 contracts with respect to motive or intent of the company respecting its treatment or its course of dealings with municipalities within its service area?

MR. STEVEN BERGER: Well, the fact they had contractual relationships, yes, sir. Beyond that, as far as the course of conduct -- let me try to state it this way: As I understand it, as to those contractual relationships and particular provisions that were in effect from '65 until 1972 and are no longer in effect, it is whatever inferences the Department of Justice would want the Board to draw from the contracts, as far as motive and intent, if the Board is willing to go back to 1965 for purposes of drawing those inferences.

Going back further than 1965, the Board has made the conclusion we will not draw inferences with regard to

conduct or relationships that existed prior to that time.

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We have now three sets of contracts that are being sought to be introduced against us, some having different provisions and some with regard to different charges that the Department of Justice is alleging with regard to certain provisions in the most early contracts that were not in effect in the intervening contracts and certainly are not in effect today.

As to those contracts, if they were in effect for a two-month period, from let's say September to November 1965, if the Board believes that those two months are sufficiently probative so as to bring into this record those bulk of documents and to consider the charges with regard to the provisions in those contracts that are different than the '65 contracts or the existing contracts, we still object on the basis that we earlier objected, but that is for the Board to decide.

CHAIRMAN RIGLER: I understand your point. I'm just saying let's take a contract in effect from '60 to '64 which was then superseded by a '64 to '70 contract and perhaps in '70 superseded by another contract.

I'm asking if the '60 to '64 contract which comes out of the limits of the time period we set for discovery might none the less be probative of the intent or motive of Ohio Edison, let's say, to --

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MR. STEVEN BERGER: Sell power at wholesale.

CHAIRMAN RIGLER: To prevent, let's say, a municipality from reselling power which it acquired from Ohio Edison.

MR. STEVEN BERGER: You are asking me if it is probative of that?

CHAIRMAN RIGLER: Yes. If the '60-'64 contract contained a provision which was repeated in the later contracts.

MR. STEVEN BERGER: You have raised a problem with regard to -- if you are going to be considering documents, relationships and particular provisions of contracts dating back until the mid-50s for purposes of drawing inferences as to continuing course of conduct and motive and intent, then we are in a different ball game, if you will, with regard to what we are going to be doing on our cases and what we are going to be doing with regard to the cross-examination of witnesses and should be entitled to with regard to the cross-examination of witnesses, to probe the questions of motive and intent in the 50s.

You are broadening the case by doing it, I think. If that is what we are talking about. Then it is certainly an impression I had that it was from '65 until the present action, even if something is not in existence today and doesn't show the existing situation, that we are going to motive

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and intent in '65, but certainly not prior to '65 for purposes of showing that motive and intent.

The Board's view, I think, has been that it has no probative value for our purposes.

Of course, if they are bringing it in for that purpose, then I don't think we can be barred from cross-examination, nor can we be barred in our direct case from going back as far as we can to show that was not our motive or intention.

MR. CHARNO: It is the Department's intention that exhibits 24 through 43, which were contracts in effect prior to 1966 contain restraints upon alienation, which were perpetuated in effect, though not in identical form, in the contracts which became effective in 1966 which are exhibits 44 through 61.

In addition to being probative of intent, it is the Department's position that longstanding restraints on alienation when they take the form of customer or territorial allocations over a period of several decades can rigidify the competitive relationships or rigidify the structure and territorial boundaries, so that there is no opportunity when such restraints are lifted for competition at that point.

You can have systems built up to each other to such an extent that the duplication of facilities required

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for competition would make it uneconomic to actually engage in competition.

If that posture could be brought about by territorial allocation over several decades we feel they have a great bearing over the competitive structure and competitive relationships in the Ohio Edison area.

CHAIRMAN RIGLER: If the restraints in alienation contained in these contracts to which you refer were included in the 1966 revisions or new contracts, why do you have to go earlier than '66 to establish your point?

MR. CHARNO: We would feel that it is probative, the duration of time for which these contracts have been in effect.

In addition, the statement in the pre-66 contracts are somewhat less sophisticated statements, and I think are helpful in construing the positions we regard as comparable in the post-66 contracts.

CHAIRMAN RIGLER: Mr. Berger, are there any contracts which terminated before the September '65 discovery cut-off date?

MR. STEVEN BERGER: Not that I am aware of, your Honor.

CHAIRMAN RIGLER: If we have a contract --

MR. STEVEN BERGER: When you say any, do you mean any municipal or cooperative contract?

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CHAIRMAN RIGLER: Any included in the list of Justice Department exhibits.

MR. STEVEN BERGER: Not that I am aware of, your Honor.

CHAIRMAN RIGLER: If we had a contract signed in 1958, but continued in effect until 1968 --

MR. STEVEN BERGER: I don't think we have that kind of situation.

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As to the co-ops, perhaps, but as to the municipalities, we are really talking about, as I believe -- the effective dates of the new contracts, '65 to '72 contracts are from November 1, 1965.

We are talking about a two-month period. I'm sorry, I didn't mean to interrupt your train of thought.

(The Board conferring.)

MR. CHARNO: Mr. Chairman, for clarification, although Exhibits 44 through 61 became effective as of the 1965 date, a number of them were not signed until 1966 and therefore the earlier exhibits, 24 through 43, were actually in effect until 1966, though the subsequent contracts were made retroactively effective in terms of rates.

In terms of restrictive provisions, they were beyond the end of 1965 and into '66 for one, two or three months.

CHAIRMAN RIGLER: You are saying the parties continued to deal in accordance with the terms of the earlier contracts during the period of negotiation and signing of the later contracts?

MR. CHARNO: That's correct.

MR. STEVEN BERGER: I can't accept that representation. I think Mr. Charno is doing it on the basis of those facts.

As to what the parties were actually dealing with

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in terms of the contracts in the months we are talking about after November 1, 1965, I think we really need some facts if the Board intends to make any determination on the basis of that representation.

CHAIRMAN RIGLER: Okay.

Although the Board is in substantial agreement with Mr. Berger's point that it is not fruitful to look into the '50s to determine if a situation inconsistent with the antitrust laws is being maintained today, nonetheless, the September 1 cut-off date strikes us as one which was urged upon us by the Applicants.

We will admit all contracts which were in effect on September 1, '65, even though they extended only for a few months into the period.

The Board deferred in substantial part to the Applicant's wishes in selecting that as a termination date.

For that date to mean anything, it means even though November, October or shortly after that date, they would still be relevant for purposes of this proceeding.

So if a contract was signed earlier, but was in effect, we will accept that contract into evidence during that two-month period.

MR. STEVEN BERGER: Let me make this statement:

I think you know I was not involved in

discovery. Mr. Reynolds, on behalf of all the Applicants, was involved.

The September 1, 1965 cut-off date was a date selected for purposes of discovery and the discovery being for purposes of determining what evidence should be -- allowing people to discover to determine evidence that might be admissible at the time of a trial.

The September '65 date that was urged upon you was urged upon you for purposes of discovery and the burden it would be placing upon the Applicant, and really the lack of any possible probative value to go back beyond that date, even for purposes of discovery.

I don't believe that the Applicants have ever urged upon you a September '65 date for any purposes other than discovery, and it has only been as far as how the Board is willing to go back to determine what the existing situation is in terms of looking to past relationships no longer in effect as it casts some probative value upon the existing situation; that is something that the Board is not by any means established a September '65 date at the urging of the Applicants or others.

CHAIRMAN RIGLER: We will place substantially more reliance on the terms and provisions of the post-'66 contracts. We would give only limited weight to the earlier contracts, but we will admit them and that

would be our ruling.

If there are any contracts included in that group which expired earlier, we would look at that.

MR. STEVEN BERGER: Do I understand to the extent that the Board is admitting contracts that were in effect prior to September 1965 that the Board is not looking to the existence of those contracts prior to 1965 as being evidence of anything that they are going to be considering?

The reason that you are admitting them is because they were in effect on September 1965, and whatever probative value you attach to it, it is going to be on the basis of the two months that may have -- that these contracts may have been in existence from September 1965 until November 1965.

CHAIRMAN RIGLER: It is a condition which was in existence as of that cut-off date.

MR. STEVEN BERGER: Okay.

Just one further example:

We have Pennsylvania Power contracts here dated 1938. Now, if it is from 1938 until 1965, December 1965, let's say --

CHAIRMAN RIGLER: It would not be fruitful for you to call a Pennsylvania Power witness to explain the motives and intents of Pennsylvania Power in 1938.

MR. STEVEN BERGER: In terms of making proposed findings and conclusions, the Department cannot make conclusions based on anything prior to 1965 as to the relationship between the parties.

CHAIRMAN RIGLER: Mr. Charno obviously has indicated he would like to look at the contracts during the earlier period for purposes of seeing if the industry structure was rigidified, I believe was his word.

MR. BERGER: I think we need something more definitive from the Board in regard to this.

If we are going to be admitting pre-'65 documents on anything other than the generalized statement made by the Department, we need something more to work with.

CHAIRMAN RIGLER: Mr. Charno may be able to argue a condition in existence as of September '65, and that would give you essentially what you want.

So I believe that we would receive them only to indicate that these contract provisions were in existence as of September '65. How they came into existence, I think, may be getting a little remote in time for our purposes.

MR. STEVEN BERGER: Could we possibly have a five-minute recess on this? It is a matter of some importance, I think, for all of the Applicants in terms of -- I think we are establishing something in the way of a rule in a more formal context today than it has been

established heretofore. I think our counsel should have the benefit.

CHAIRMAN RIGLER: I don't think it is necessary. We have ruled. You have our ruling.

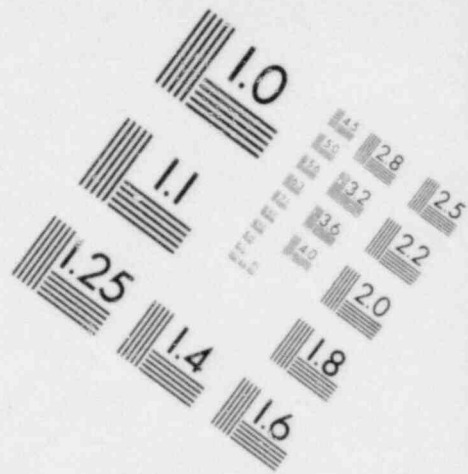
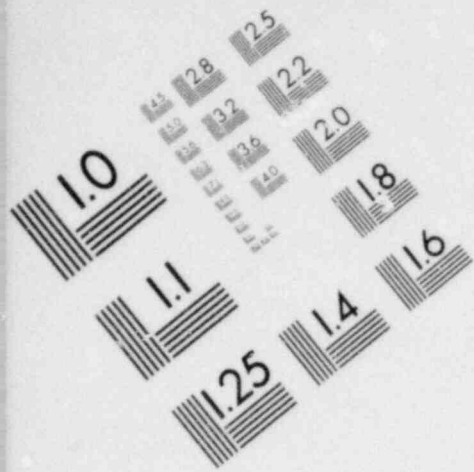
Secondly, I want to remind you that we have always stated that for good cause shown, we will go back prior to that 1965 period.

I'm not convinced under the circumstances that these contracts need to be examined prior to that period.

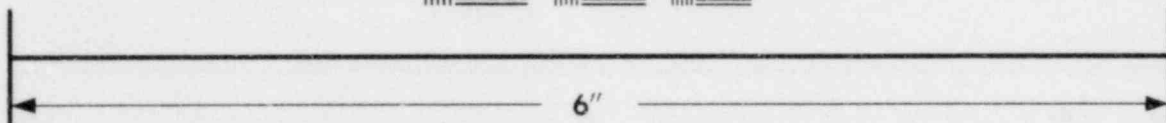
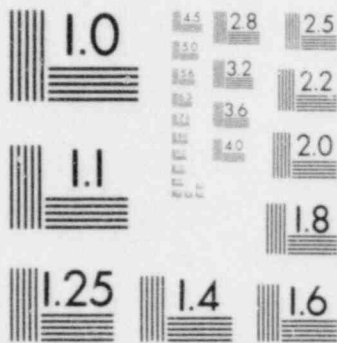
If you take the fact of their existence as of September 1, '65, the Department, I think, can proceed from there.

But in another individual instance on a particular and specific matter, if someone can demonstrate good cause for going back earlier than '65, we may permit it.

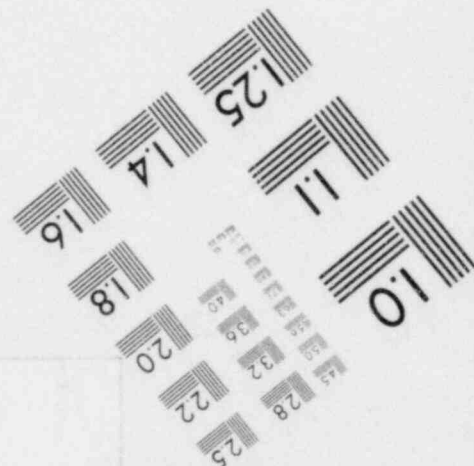
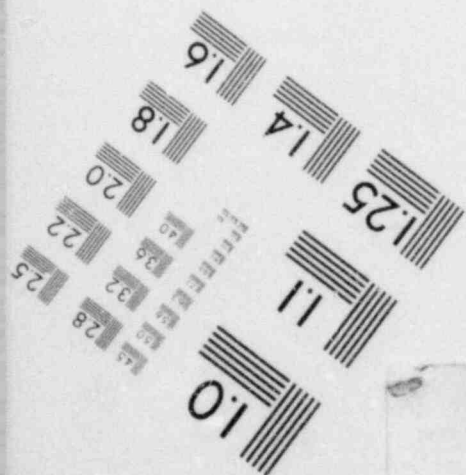
MR. STEVEN BERGER: Just so that I understand it as clearly as I can. For example, a provision in a contract that was in existence from 1957 or '56 until November 1965 that had a provision in it some way restricting the right of a municipality to serve to an industrial customer which provision was not in the contracts from November 1965 onward, in any contract, do I understand from what the Board is saying that the only probative

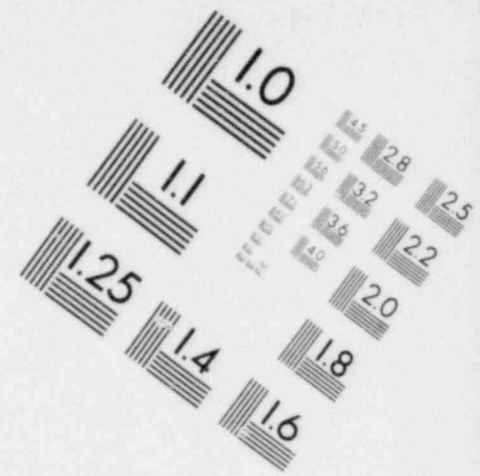
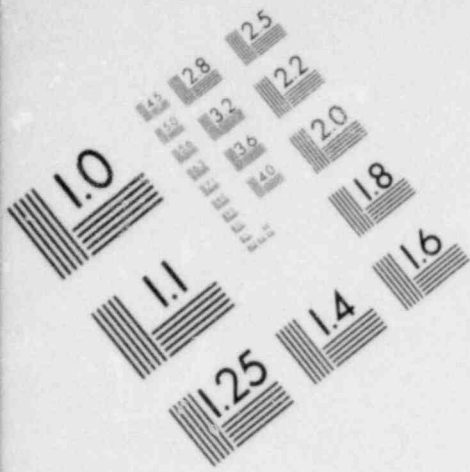


**IMAGE EVALUATION
TEST TARGET (MT-3)**

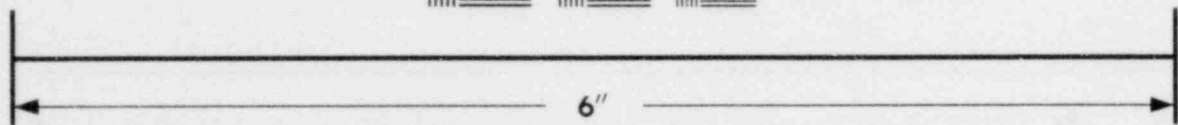
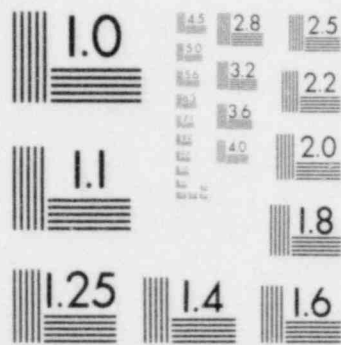


MICROCOPY RESOLUTION TEST CHART

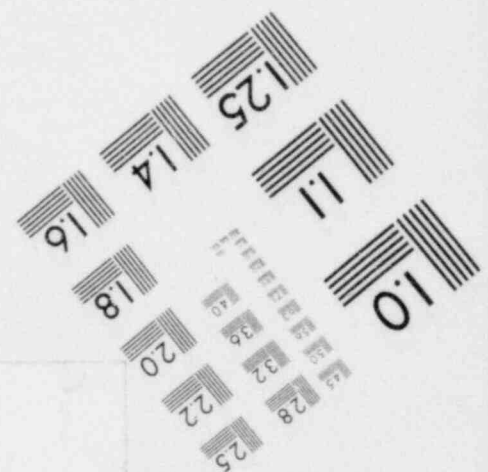
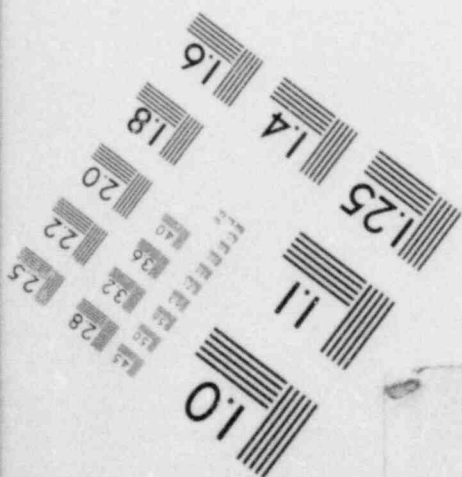




**IMAGE EVALUATION
TEST TARGET (MT-3)**



MICROCOPY RESOLUTION TEST CHART



value they will attach to that contract is that such restrictive provision, allegedly restrictive provision, was in the contract from September 1, 1965 for the two months that such provision was in effect?

CHAIRMAN RIGLER: We would take it as probative value that as of September 1, '65, it was by contract agreed between Ohio Edison and some other party that the other party would not serve industrial customers.

MR. STEVEN BERGER: The other contracts indicating that two months later the provision was no longer in effect?

CHAIRMAN RIGLER: Obviously we would consider it.

MR. REYNOLDS: On behalf of all of the Applicants, in light of your ruling, I would like to reserve the right to introduce evidence to the extent it is necessary to explain whatever the condition is that the Board is going to look at as of September 1, '65.

To the extent we are going to admit contractual arrangements that go back earlier than that time, but were in existence as of it, may be incumbent on the Applicants to go back prior to '65 to explain to the Board why the condition was in existence as of that time as part of the Applicant's direct case.

I want to reserve the right so we don't get to the situation of saying we will look at '65 for purposes of

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the contract that the Department is looking at and not let the Applicants explain the content of the agreement or what the situation was at the time the agreement was at the time the agreement was entered into as part of its affirmative case in order to demonstrate or counter the claim or rigidity which Mr. Charno is trying to infer, by saying there was a condition as of a certain date.

CHAIRMAN RIGLER: If we permit you to do that, we might as well let the contract come in for all purposes. We might as well take away the relief we gave to Mr. Berger.

If you are able to argue motive and intent of the parties at the time the contract was signed, why would we prevent Mr. Charno from doing the same thing?

MR. REYNOLDS: The problem I have is that we have Section 2 allegations which go to the acquisition, and maintenance of monopoly power. If we take a condition being in existence as of a certain date, and we are going to move from that point on the Applicant facing charges under Section 2, should be able to go back on their affirmative case and explain how the situation arose, came to be, and what the situation is.

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Now, I don't have any problem having a cut-off point which starts with any contracts in effect after '65, but if we are going to start with contracts that were in effect from a '53 through to '63 or whatever it is, if the Applicants have a story to tell as to how that situation arose and what the structure was at that time and what impact that has on this case, I don't think they should be barred from giving that side of the story, once the Department has interjected an inference of rigidity by virtue of the fact that as of a certain date there were contracts in existence that had been in existence for a certain number of years.

CHAIRMAN RIGLER: We will approach that when and if the problem arises.

I caution you that what you could be doing is opening the door for the Department to come in on rebuttal and tell its side of the story, too.

MR. STEVEN BERGER: We have specific points of clarification as to some of these documents.

First of all, I believe the Department's exhibits marked for identification as numbers 24, 25, 34 and 40, have as the first page after the cover page, the rate schedule which refers to the contract between the municipality and the company and no contract is attached, although, in all of the other ones they are.

MR. CHARNO: The Department can only state that this is the entire filing with the Federal Power Commission and that their records do not disclose the filing of the contract.

We specifically inquired about these four exhibits. They do not have a contract in their official files.

If the Applicants would care to submit the contract that was in effect, we will append it to the exhibit.

MR. STEVEN BERGER: Your Honor, I assume that this was just an oversight on the part of the Department. The Department states in their offer of proof with regard to these documents that the offer of proof on this documents is that this document is being submitted in support of the Department's allegation that Ohio Edison has restraints upon alienation, anticompetitive provisions in its contracts with its municipal wholesale customers.

Now, this tariff, the tariffs that are set forth in here specifically refer to contracts and the tariff is not the contract.

And the red-lined portions specifically are referring to a document that is not part of the exhibit.

MR. CHARNO: I don't believe I understood the last statement that you made.

MR. STEVEN BERGER: Well, the first portion of the tariff states that available to incorporating

communities only in operating electric distribution system prior to January 1, 1954 for resale of electricity to its customers at retail and for municipal installations served from its distribution system.

This rate is not available to such municipalities for the resale of electric service for industrial power service, except as provided for in the contract between the municipality and the company.

Now, the contract between the municipality and the company, to the extent it allows for such sales, has not been made a part of the exhibit.

It reflects the contractual relationships between the parties and certainly with regard to all other similar documents, other than the ones I mentioned the Department has identified them as exhibits with the contracts.

Again, I had raised it just as a matter of oversight on the part of the Department.

I didn't realize it was something they had seen and determined that this was all they really needed.

MR. CHARNO: Is Counsel offering to supply copies of the contracts that would be appropriate for Exhibits 24, 25, 34 and 40?

MR. STEVEN BERGER: Does the Department believe they now need the contract as part of this exhibit for purposes of completeness? Then, we will determine how

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we will provide it.

MR. CHARNO: We have indicated our willingness to include that contract. If Counsel will make it available, we will be happy to do so.

CHAIRMAN RIGLER: The contract was not appended appended to the filing in the FCC?

MR. CHARNO: That is correct.

CHAIRMAN RIGLER: So you do not have a copy of the contract?

MR. CHARNO: That is right.

CHAIRMAN RIGLER: So it seems to me you are entitled to have the contract included, Mr. Berger, but given the Department's response, I would think you would supply it.

MR. STEVEN BERGER: I'm informed by Mr. Kayha that the contracts were made available during discovery.

CHAIRMAN RIGLER: If they were, let's not quibble over it. Let's supply them.

MR. STEVEN BERGER: I would assume the Department has them.

CHAIRMAN RIGLER: Well, he said they don't have them.

MR. STEVEN BERGER: Do I understand from the Department that they have nowhere in their files in the discovery they obtained from the Applicants, the contracts

we are referring to and if that be the case, we will
try to secure those contracts.

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CHAIRMAN RIGLER: We will take you up on your offer.

The Department will let you know if they have them. If they don't have them, then Ohio Edison will supply them.

MR. STEVEN BERGER: The offer of proof made reference to a contractual relationship between the parties. It is an unsponsored exhibit, and I'm objecting on the basis now of the tariff coming in without the contract. I suggest we withhold it until we find the contracts and we will reserve decision on the admission of the document.

CHAIRMAN RIGLER: We will reserve admission until the contracts can be appended, but I will direct you to make sure that they are available to the Department, if the Department cannot locate them in their files.

Now which numbers were those?

MR. CHARNO: 24, 25, 34, and 40.

Mr. Chairman, yesterday you raised a question, I believe, with respect to the Department's exhibits for identification, DJ 17 through 23, as to the date at which those contracts were terminated.

I was unable to answer you at that time. Review of those documents indicates that each of those exhibits has a notice of cancellation appended to it in the last pages which indicate the dates of termination of the contract.

CHAIRMAN RIGLER: All right.

MR. STEVEN BERGER: Your Honor, additionally, I know the Board is anxious to move on, we do have problems with certain of the documents that they really aren't legible.

I think we can work with the Department in trying to make the record as clear as it can be with the documents that can be read, and rather than specify each document that can't be read and the particular portions that can't be read, we will try to work that out.

If we have problems, I think it best to come back to you at that time rather than burden the record with it at this point.

CHAIRMAN RIGLER: Fine.

Mr. Berger, does that conclude your objections?

MR. STEVEN BERGER: With regard to the documents 24 through -- 19 through 65, yes, Your Honor.

CHAIRMAN RIGLER: Mr. Reynolds?

MR. REYNOLDS: I make a continuing objection on behalf of all Applicants other than Ohio Edison with respect to those documents.

CHAIRMAN RIGLER: The continuing objection is overruled.

Documents 19 through 23 are hereby admitted.

Documents 26 through 33 are admitted.

Documents 35 through 39 are hereby admitted,
and Documents 41 through 65 are hereby admitted.

(DJ Exhibits 19 thru 23,
26 thru 33, 35 thru 39, and
41 thru 65, previously marked
for identification, were
received in evidence.)

CHAIRMAN RIGLER: You may renew your motion for admis-
sion of 24, 25, 34, and 40 when the problem with the
contracts is resolved.

MR. CHARNO: The Department would like to withdraw
Exhibit 66, and will not offer it into evidence.

The Department would like to offer into evidence
at this point Exhibits 67 through 76. We realize there are
some legibility problems, and we will work with the
Applicants to supply completely legible copies of all of
the contracts therein.

MR. STEVEN BERGER: May I just have a moment,
Your Honor?

Your Honor, the 67 through 70 are the Pennsylvania
Power wholesale contracts that were in existence prior
to 1966. They are wholly illegible. I'm not saying that
I don't know that there are copies of these documents in
existence that may be more legible. I certainly
couldn't, on the basis of the offer of proof that was made by

Mr. Charno yesterday with regard to the Pennsylvania Power contracts, refer to those contracts in determining whether or not the offer of proof was sufficient, and in formulating whatever objections I have. I didn't have a readable copy.

CHAIRMAN RIGLER: We will defer receipt of these into evidence until we can solve the legibility problem.

MR. STEVEN BERGER: Your Honor, as to the offer of proof made with regard to the admission of these documents as showing a territorial agreement or showing that the company has enforced certain restrictive provisions against the municipal wholesale customers of Pennsylvania Power, I have objection on the grounds that there isn't sufficient nexus between those contracts and the situation alleged to be inconsistent with the antitrust laws and the activities under the license, and I realize that there are issues in this proceeding dealing with the contractual relationships between the parties that it does go to, so that I'm a little bit -- I'm certainly not in a position to say I have no objection to the admission of these documents.

It has been more or less understood that with regard to other documents that come in, they come in with regard to certain issues that the Department says that

they relate to.

But with regard to the offer of proof made as to these documents, I think we object on the basis of the offer of proof that was made.

Page 4512 in the transcript, it says, "Since mid-1966, PPC has enforced territorial allocation -- pardon me, territorial and customer allocation provisions in its contract with its municipal wholesale customers, thereby eliminating those systems' ability to compete with it for industrial, commercial and residential customers at retail."

When that offer of proof was made, I'm not subscribing to that offer of proof when I don't raise objection with regard to the admissibility of the document otherwise to the issues that the Board has delineated for determination in this proceeding.

MR. CHARNO: It is the Department's position, of course, that as we explained in brief a restraint on alienation can also be construed to be a territorial or customer allocation.

MR. STEVEN BERGER: I'm saying by admitting a document without objection because of the offer of proof, it doesn't mean I'm acquiescing or stipulating to what the Department's offer of proof says that it shows.

CHAIRMAN RIGLER: That is understood.

MR. REYNOLDS: Continuing objection on behalf of all Applicants other than Pennsylvania Power.

CHAIRMAN RIGLER: Continuing objection is overruled, and Nos. 71 through 76 are admitted into evidence at this time.

(DJ Exhibits 71 thru 76, previously marked for identification, were received in evidence.)

MR. CHARNO: The Department would like to offer exhibits for identification DJ 78, 79, and 81 through 83.

77 and 80 we will withhold until we can secure a more legible copy or type a more legible copy to present to Applicants for their concurrence in its translation.

MR. KLEE: Your Honor, with respect to these documents which were marked for identification, we have some qualifications which we would like to get from Mr. Charno.

Yesterday he offered three separate offers of proof, the substance of which was Toledo Edison was party to a Buckeye agreement, which was anticompetitive in nature.

The second was that we have the Applicants of this Buckeye agreement to the cities of Napoleon and Bryan.

The third was to support the allegations relating to Ohio Edison's participation in the Buckeye arrangements.

Transcript 4521, 22 --

MR. CHARNO: And 23.

MR. KLEE: The clarification I would like to get from Mr. Charno is with respect to each of these documents which one or more of these offers of proof is equivalent to each specifically with respect to No. 78, is it Mr. Charno's intent to introduce this document for any purpose other than to support his offer of proof with respect to Ohio Edison?

MR. CHARNO: It is the Department's intention to introduce 78 and 79, which are a letter request and telegram reply as evidence of a discussion of the anticompetitive restraint and its implementation by the chief executives of both Ohio Edison and Toledo Edison.

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MR. KLEE: It is not your purpose to introduce this for any other purpose than described in your general offer of proof?

MR. CHARNO: It would be applicable to all three general purposes stated.

MR. KLEE: We would object to the introduction of these two exhibits, 78 and 79, as they relate to Napoleon and Bryan, as far as that offer of proof goes, because neither of these documents either mention Napoleon or Bryan concerning any matter relating to them.

MR. CHARNO: We would take exception to Counsel's latter characterization in that it is -- both of these documents deal with the implementation of contractual provisions which subsequently were implemented in a manner to anticompetitively affect both Bryan and Napoleon.

We grant neither Bryan nor Napoleon is mentioned in either of the document in question.

MR. KLEE: Your Honor, I would further like to point out that neither of these two documents make any mention of what Toledo Edison's position is. They strictly related to discussions or conversations between Ohio Edison and Ohio Power. There is no mention at all of Toledo Edison in either of them.

MR. CHARNO: We would again take exception to that characterization, though not to the fact that is stated.

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78, which came from the files of Toledo Edison, which I believe they have admitted contains a note, handwritten which bears the initials of the president relating a conversation presumably between himself and the president of Ohio Edison and that was the basis for my reference that this documents constitutes evidence of the discussion of restraint and the implementation thereof, since the paragraph directly indicated above is a discussion of the language which appears both in the Ohio Edison, Ohio Power agreement and in the Toledo Edison agreement which are part of the Buckeye arrangement which we alleged to be the anticompetitive restraint upon resale that is embodied in the Buckeye arrangements.

MR. KLEE: Your Honor, these are different Buckeye arrangements. This is not the same contract that Toledo Edison has with Buckeye Power.

We would characterize any notes on this page as merely referring to the arrangement between Ohio Edison and Ohio Power.

It has nothing to do with Toledo Edison and Buckeye Power.

CHAIRMAN RIGLER: Mr. Klee, it says Mansfield of the opinion that the above would be applicable to all companies' rate.

MR. KLEE: I believe it continues to say, I'm not --

CHAIRMAN RIGLER: However, above refers to application to Ohio Power

MR. CHARNO: The contractual provision, if not --

CHAIRMAN RIGLER: Are you suggesting that Mr. Mansfield is told -- whose initials are these?

MR. CHARNO: Mr. Davis, the president of Toledo Edison.

CHAIRMAN RIGLER: Can we read this as indicating Mr. Mansfield told Mr. Davis that this applies to all companies, which would include Toledo Edison?

MR. KLEE: I don't see how it could be read that way.

MR. CHARNO: We would like to point out one small addition. The two agreements, one, the TE agreement and the other, the Ohio Edison agreement are both specifically referenced in paragraph 2 and the anticompetitive restraint is contained in the definition of delivery points energy in one agreement and the b Buckeye Power requirement in the other agreement.

They are both identified and the language is almost identical, if not absolutely identical.

I don't have copies of the two before me at this point.

CHAIRMAN RIGLER: All right.

MR. KLEE: Your Honor, that is exactly the

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problem with this type of unsponsored document. If he wants to introduce the other agreement and introduce evidence about that, he should do it in that manner and not try to decipher the meaning, whatever it may be out of the marginal note which is to my way of thinking susceptible to many interpretations.

MR. CHARNO: Both agreements are in evidence at this time.

MR. FLEE: I don't see the purpose.

CHAIRMAN RIGLER: Any other objections?

We have had sufficient argument.

MR. KLEE: No, your Honor. Not to these two.

MR. STEVEN BERGER: Your Honor, the Department's offer of proof with regard to these documents refers specifically to the Department's charge in its September 5 filing that in 1966 on -- with regard to Ohio Edison -- entered into an agreement with Ohio Power Company that restrict the sale of power by rural electric cooperatives by municipal wholesale customers of Ohio Edison, thereby foreclosing competition and supplying bulk power.

Just prior to the execution of the so-called Buckeye agreements which would include the investor-owned utilities entering into relationships directly with Buckeye and Ohio Power entering into a relationship with Ohio Edison with regard to the cooperatives in Ohio Edison

territory, the precise question with regard to the Department of Justice's charge and the reference to the antipirating statute in Ohio and whether or not it applied to retail, as well as wholesalw was something that was specifically discussed with, and generated documents by the Department of Justice, in which the Department of Justice agreed on the basis of a letter interpretation of the antipirating statute by an attorney for Ohio Power which stated that in his view there had not been a definitive interpretation of the antipirating statute in Ohio and its applicability to wholesale, as well as retail, but in his opinion, it applied to wholesale, as well as retail.

At that time, the Department of Justice said that they had not intended to, in any way, institute proceedings with respect to the Buckeye project contracts as ammended in the manner indicated above.

The manner indicated above was making specific reference to the antipirating statute and the inclusion in those contracts of language which would specifically refer to the antipirating statute.

On the basis of Mr. Turner's -- the representative of the Department of Justice -- agreement not to institute proceedings, those agreements were amended and were signed off on the precise language suggested by Mr. Turner.

The basis of the agreement on the Department of

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Justice's part was that until such time as there has been a definitive interpretation under Ohio law as to whether or not the antipirating statute applies to wholesale, as well as retail, we will not institute any proceedings with regard to the competitive nature of that particular provision.

To my knowledge, there has never been a definitive interpretation under Ohio law of the particular statute, namely, the antipirating statute, construing it to be applicable to wholesale, as well as retail.

I believe the Department of Justice at this point in time to be including this in this proceeding, is inappropriate.

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MR. CHARNO: If I may reply briefly.

I disagree with a number of characterizations by counsel of what the Department did and didn't do.

As they have stated on brief, they submitted a request for a business review letter, which is a procedure by which the Department gives tentative advice as of a given date as to whether or not they will institute criminal proceedings.

And the nature and the basis of that, I don't believe, is relevant to this proceeding.

If the Board would like to go into it, the Department certainly will.

CHAIRMAN RIGLER: Wait a minute.

Do you agree that this is a business review letter as the letters were then being written by the Department in 1968, Mr. Berger?

MR. STEVEN BERGER: I believe so, Your Honor.

CHAIRMAN RIGLER: My recollection is that of Mr. Charno's and that the advice would relate to the instigation of criminal proceedings only. You said proceedings generally.

Was there anything in that business review letter which precluded the Department from instigating civil proceedings?

MR. STEVEN BERGER: I don't know as a matter of

law what precludes the Department from instituting proceedings at this time. I can quote from the letter of Mr. Turner, which said on the basis of the information submitted, and the representations you have made in connection with this matter, you are hereby informed that the Department does not presently intend to institute proceedings with respect to the Buckeye project contracts as amended in the matter indicated above.

What "institute proceedings with respect to this matter" means, I do not know. I do not know what intention the parties had at the time.

Whether the intention was at the time, we do intend at some future time before the NRC to make a charge that this is activity inconsistent with the antitrust laws, although it may not rise to the level of a violation, I don't know that that was the intent of the parties at that time.

CHAIRMAN RIGLER: Any other objection?

MR. CHARNO: I think one more clarification.

The Department presently has a departmental position that these contracts do constitute a restraint of trade and that to the extent this represents an alteration of the opinion expressed in the letter, and I believe it does, we are prepared to pursue that at this time.

MR. STEVEN BERGER: Do I understand the

alteration of opinion, though, is not based on any definitive interpretation under Ohio law that the Department of Justice is aware of that would indicate that the anti-pirating statute does not apply to wholesale, but does not apply to retail?

MR. CHARNO: It is based on our analysis of the law that that statute does not apply to wholesale, but only retail.

MR. STEVEN BERGER: Is there anything the Department is aware of today in the way of analysis of that statute that they were not aware of in 1968, when the letters were exchanged, that they are aware of now?

MR. CHARNO: We couldn't come to a totally different conclusion to the extent it is totally different without being aware of additional facts.

I don't think this is germane to this proceeding unless you are arguing estoppel by virtue of agreement, which is a business letter is not and cannot be, under the regulations of the Department of Justice.

MR. STEVEN BERGER: I think it is germane, and what I would like, if I could have it from the Board, would be for the Board to have the Department of Justice indicate at the earliest possible time to the parties what it is that has taken place between 1968 and the time of the filing in September to have changed the Department's

view with regard to the particular provisions in the contract that they indicated in the business review letter was perfectly fine with them at the time, but now is not.

MR. CHARNO: I think counsel's initial question was, has anything come to our awareness rather than has anything changed.

I think also business review letters are issued in the context of circumstances at a time and assurances of the parties as to how the arrangement that is submitted for review will be implemented and will function.

I think there is clear evidence which we intend to introduce in this proceeding that this agreement has been implemented in a highly anticompetitive manner.

CHAIRMAN RIGLER: Mr. Berger is asking whether you will tell him what the facts of the implementation are.

MR. CHARNO: We certainly will. We intend to place it into evidence as part of our direct case.

MR. STEVEN BERGER: Do you think we can get notice of it beforehand, Your Honor?

CHAIRMAN RIGLER: I suspect you can, Mr. Berger. I'm inclined to agree with Mr. Charno.

First of all, I'm not sure of the relevance in terms of NRC jurisdiction of the advice the Department gave. The review letters, by their own terms, are

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restricted to the present intentions of the Department.

Thirdly, to the extent that Ohio Edison relied on that advice or acted consistent with that advice, that is something you can bring to our attention. You have done so, and I presume you can do so further on your own case.

The objections will be overruled.

MR. REYNOLDS: I would like to make the continuing objection on behalf of Applicants other than Toledo Edison.

CHAIRMAN RIGLER: The continuing objection will be overruled as well, and we will receive into evidence --

MR. KLEE: I misinterpreted what you said about further objections. I have a further objection as to the document marked for identification as 83.

CHAIRMAN RIGLER: We will receive Nos. 78 and 79 and 81 and 82 into evidence, and I will hear your further objection as to 83.

(DJ Exhibits 78, 79, 81, and 82, previously marked for identification, were received in evidence.)

MR. KLEE: With respect to the document marked as DJ 83, in light of Mr. -- of what Mr. Charno has said about the applicability of all these documents under his general offer of proof, this document is irrelevant to any of the offers of proof that Mr. Charno made.

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The article of the Buckeye agreement referenced therein has nothing whatsoever to do with the 90-day disconnect period or the limitation on where power can be distributed and the document itself has nothing to do with the cities of Napoleon or Bryan.

The document speaks for itself. I guess there is nothing else to say except for the purposes of what Mr. Charno has stated, it has no relevance whatsoever in this proceeding.

Specifically I refer you to transcript pages 4521 and 22, where Mr. Charno made the following offer of proof, and I will quote it for you, if you like.

CHAIRMAN RIGLER: We have that.

MR. CHARNO: We would note that the implementation of contractual provisions with respect to delivery points has a direct and immediate impact on the availability of service as, for example, the establishment of a delivery point which is the present point of service between Toledo Edison and one of its municipal wholesale customers, as the establishment of a Buckeye delivery point would have on the immediate impact of availability of power for resale to that municipal customer by Buckeye.

CHAIRMAN RIGLER: Well, but the objection is that the document doesn't conform to your offer of proof.

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MR. CHARNO: I think what I'm saying is that the implementation of a contract --

CHAIRMAN RIGLER: Let's go back to your offer of proof and you show me the lines or provisions as to which this document would apply.

MR. CHARNO: As stated, I don't believe I can bring that document within this offer of proof. That is with respect to Toledo Edison, not Ohio Edison. I'm sorry. I thought the objection was on behalf of Toledo Edison.

I think it is clearly within the Ohio Edison since the establishment of delivery points is one of the specific allegations that the Department was put forward, and I think that would fall within the language the Department also offered this documentary material in support of its allegations relating to Ohio Edison's participation in the so-called Buckeye agreement.

CHAIRMAN RIGLER: Where is that?

MR. CHARNO: That is on page 4522, lines 13 through 16 is the general statement. The specific allegation appears on the Department's answers to interrogatories, on page 9.

Since 1968, Ohio Edison has repeatedly refused and/or delayed providing new delivery points to rural electric cooperatives thereby inhibiting their ability

to compete for new customers.

CHAIRMAN RIGLER: Are you amending your offer of proof with respect to Toledo Edison?

MR. CHARNO: Well, we would -- no, we are not.

CHAIRMAN RIGLER: All right.

The document DJ 84 will be received into evidence at this time.

MR. REYNOLDS: I note a continuing objection on behalf of all Applicants, including Toledo Edison.

CHAIRMAN RIGLER: By receiving it, I am not suggesting that Mr. Klee has not prevailed in attacking receipt of the document against Toledo Edison within the terms of the offer of proof.

MR. REYNOLDS: I want to include the continuing objection.

CHAIRMAN RIGLER: The continuing objection is overruled.

I said 84, and I meant DJ 83:

(DJ Exhibit 83, previously marked for identification, was received in evidence.)

MR. STEVEN BERGER: Your Honor, let me just understand.

I want there to be on the record a specific objection of Ohio Edison on the basis of the offer of

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proof made by the Department of Justice with regard to the admission of this document as an unsponsored exhibit.

CHAIRMAN RIGLER: We were satisfied as to that, although your objection is noted.

MR. CHARNO: At this time the Department would like to offer documents identified as DJ 84, 86, 87, and 90.

The Department will withdraw Exhibit 85, since we have been unable to reach a stipulation at this time concerning the authenticity and we will defer offering 88 until a more legible copy can be secured from Toledo Edison.

MR. KLEE: Toledo Edison has no objection.

MR. REYNOLDS: Continuing objection on behalf of all other Applicants.

CHAIRMAN RIGLER: The continuing objection is overruled, and we will receive into evidence Nos. 84, 86, 87, 89, and 90.

(DJ Exhibits Nos. 84, 86, 87, 89 and 90, previously marked for identification, were received in evidence.)

MR. CHARNO: The Department would offer into evidence at this time documents for identification 91 through 104, and note for the record a stipulation that has been agreed upon between counsel for representing all of the Applicants, and the Department with respect to Exhibits 98 and

104 that those exhibits are minutes of CAPCO and copies of them are available and may be found in the files of all of the Applicants.

That stipulation would not extend to any marginal notations, but only to the text of the minutes.

Is that a correct statement?

MR. REYNOLDS: That's correct.

CHAIRMAN RIGLER: Hearing no objection, Exhibits 91 through 104 --

MR. STEVEN BERGER: Excuse me, Your Honor. We have some objections in regard to those documents.

Your Honor, I don't recall the specific offer, if one was made, as to Exhibit 94. I would like, if I may, to get from the Department what they intend to prove with regard to Exhibit No. 94.

To the extent we didn't hone in on it yesterday or to the extent I personally did not, I apologise; but I would like a specific offer in regard to 94, if I may.

MR. CHARNO: The Department is offering Exhibit 94 as a stipulated authentic business record of Toledo Edison as of 1973 for the truth of the comparative costs of coal and nuclear units contained therein, from which we would attempt to draw the inference that there are benefits both in terms of economies of scale and of nuclear generation which are available from large-scale units.

MR. STEVEN BERGER: If I may, I'm not to construe from that, am I, Mr. Charno, that the comparative costs of coal and nuclear units which admittedly you state to be Toledo Edison's, is in any way to be offered in as a comparison on behalf of Ohio Edison or Pennsylvania Power Company?

MR. CHARNO: Not on the basis of this exhibit. We are not alleging that Ohio Edison or Pennsylvania Power participated in the preparation of this or that it constitutes a business record of theirs.

MR. STEVEN BERGER: Or that it concurs?

MR. CHARNO: Not on the basis of this document.

MR. KLEE: Your Honor, I would like to get a little clarification from Mr. Charno with respect to the marginal notes on the documents of 91 to 95.

Are you entering the documents with or without the marginal notes which are illegible in the copies we have?

91, they are figures.

MR. CHARNO: On 91, we have a date in the upper right-hand corner which is the same date typed in the lower right-hand corner and we have the initials -- pardon, in the lower left-hand corner. In the lower left-hand corner, we also have the initials MWK handwritten.

On page 2, only to the extent that the initials

MWK appear in the lower left-hand corner.

MR. KLEE: Thank you.

We have no problem with that.

However, with respect to the document identified as 92, is the same understanding applied with respect to the marginal comments written on that document?

MR. CHARNO: With the exception of the underlining on page 3, that is emphasized by the Department, we have not red-lined any portion that carries marginal notations.

Therefore, we will not rely on any marginal notation.

MR. KLEE: That was my mistake.

We have no objection. We just wanted clarification. Thank you.

MR. STEVEN BERGER: If I may, as to Department of Justice Exhibit No. 96, marked for identification, the Department made the offer as follows with regard to this document:

This document is evidence in support of the Department's allegations concerning the refusal to allow Pitcairn to participate in the CAPCO pool and also is **evidence** relating to the relationship between Ohio Edison, Pennsylvania Power and the Municipal Electric System of Grove City.

First I would note that I believe the offer fails

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with regard to this document as to Ohio Edison and Pennsylvania Power as stated by the Department.

And in addition, I would note that the response of the Department of Justice to Ohio Edison Company's and Pennsylvania Power Company's motion for additional discovery from the Department of Justice and the Nuclear Regulatory Commission Staff, dated December 30, 1975, did not as to all of the charges against Pennsylvania Power and Ohio Edison designate this as a document upon which the Department would rely.

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MR. CHAPNO: With respect to Counsel's last point first, the request for additional discovery from the Ohio Edison and Pennsylvania Power did not cover all of the Department's charges. It covered certain specific charges and we listed the documents for those certain specific charges.

MR. STEVEN BERGER: That is correct, your Honor. As to the ones that the discovery request did not relate to, the charges that the discovery requests did not relate to Ohio Edison and Pennsylvania Power were specific in their omission of charges. They were on notice of, prior to the time they filed their discovery requests.

Specifically, the Pitcairn matter mentioned in the advice letter, and the delivery point matter in regard to how the company has been operating under the Buckeye arrangement.

With regard to all of the charges involving Pennsylvania Power, other than the Pitcairn incident, particularly, the ones with Grove City request was made as to all of those and document exhibit number 96, more specifically because the response came in that way, the Department of Justice document number 306553 was never designated on that list, and I think the offer of proof fails with regard to Ohio Edison and Pennsylvania Power.

I believe that the only thing in the document we

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we are talking about is the last sentence on page 2.

MR. RIESER: Before we move on to another document, I would like to repeat what we said yesterday on behalf of Duquesne Light that with respect to this document we have no objection to it as long as it is not coming in for the truth of the matter asserted therein.

I believe Mr. Charno on behalf of the Department of Justice indicated that that was the case.

MR. CHARNO: That is correct.

CHAIRMAN RIGLER: Do you have a response on the Grove City matter, Mr. Charno?

MR. CHARNO: We have nothing to add.

CHAIRMAN RIGLER: Mr. Charno, was the issue of Grove City participation in CAPCO included in the new charges which were subject to additional discovery by the Department?

MR. CHARNO: It was not.

MR. SMITH: I think that this document should be received into evidence, Mr. Charno.

MR. CHARNO: On the issue of Grove City?

MR. SMITH: Yes.

MR. CHARNO: No.

CHAIRMAN RIGLER: I'm confused, Mr. Charno. You tell me we should not rely on the last paragraph in which it is reported that general counsel for Ohio Edison was conferring with outside counsel for Toledo

Edison about a request for participation in CAPCO and, yet, I thought the theme of participation in CAPCO ran throughout your case.

MR. CHARNO: Mr. Smith is asking me if I feel we are barred by not having made a prior allegation with respect to Grove City, and I think we are. That is the manner in which I interpreted your question.

MR. SMITH: Yes, right.

I wondered what you thought of the merits of his argument.

MR. CHARNO: Oh. I was responding to what I thought your question was, rather than the merits of his argument.

MR. STEVEN BERGER: I didn't count up the number of lines of hearsay that that last paragraph has in it, but I think the probative value of that last sentence is nil.

CHAIRMAN RIGLER: Mr. Charne apparently is willing to disregard it, so the Board will disregard it and the other objection will be overruled.

MR. REYNOLDS: Mr. Chairman, this is at least one appropriate place, and I think it probably can be stated a number of times and will be. I want to make a general objection with respect to the Department of Justice's procedure in putting in unsponsored documents in those

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situations where the Department has carefully selected certain items of correspondence and has not given to the Board the full story by putting in all of the correspondence relating to the subject matter.

I feel that particularly with the Department of Justice, it has an affirmative obligation to this Board to give it all of the facts relevant to this proceeding and the full story.

If we are going on an unsponsored basis, it seems to me highly objectionable to put in only selected portions of correspondence, and then to go forward as if that meets the Department's burden and to place on the Applicant's an additional burden in their affirmative case to collect all of other correspondence, in order to give the Board the full story.

I find it highly objectionable. The Department of Justice has carefully selected correspondence throughout and has picked items to put in on an unsponsored basis without giving the Board the rest of the correspondence.

We are not to have live witnesses, and I think if the Department is proceeding on an unsponsored basis, it particularly has an obligation and it is the Department of Justice's obligation in this proceeding or any other proceeding to give to the Board all relevant facts.

I find it objectionable.

For that reason I object to any introduction on an unspoken basis of documentation which is not complete.

The Applicants will, I guess, if we proceed in this way, be forced to complete the record by putting in a full series of correspondence, and we, of course, will do it.

I think it is an unfair shifting of the burden, and I think it is a complete and total abrogation of responsibility that the Department owes to this Board and to any court or proceeding.

MR. CHARNQ: We take exception, and we have presented to the Board and are presenting into evidence these documents which we feel are relevant and probative of our case.

We have not excluded anything that was exculpatory, although the bulk of the documents that we are producing, all of the documents we are producing are in Applicants' possession.

I don't think the Department has abrogated its responsibility to this Board or in the enforcement of the law in any way.

CHAIRMAN RIGLER: We will receive into evidence numbers 91 through 104, noting the stipulation of the parties with respect to numbers 98 and 104.

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(The documents previously marked Exhibits DJ-91 through 104 for identification, were received in evidence.)

MR. REYNOLDS: I think I noted, but if not, I would like the record to be clear that, as to 91 through 97, the Applicants, other than Toledo Edison, have a continuing objection.

Wait a minute. I misspoke. The continuing objection would go to all of the documents in this grouping, but for 98 and 104, where the stipulation was applicable.

CHAIRMAN RIGLER: All right. And the continuing objection was overruled.

MR. REYNOLDS: I didn't know whether it was clear that I had made it.

CHAIRMAN RIGLER: What is the next group, Mr. Charno?

MR. CHARNO: We would now offer into evidence, Exhibits for Identification DJ-105 through 131. With the exception of 118. We would withdraw 118 and indicate on the record that it is identical with NRC Exhibit 53.

MR. SMITH: What NRC was that?

MR. CHARNO: 53.

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CHAIRMAN RIGLER: All right, and this seems to be a good time to take a ten minute break.

(Recess.)

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CHAIRMAN RIGLER: All right, we have Nos. 105 through 131. Is there objection?

MR. KLEE: Your Honor, we have a number of objections and qualifications.

The only orderly way to proceed is to go through them one at a time and try to do this as expeditiously as possible.

With respect to the document bearing identification No. DJ 107, we would make the same objection as was raised earlier and upon which the Board ruled. That is to the use of this document except to -- after the September 1, '65 cut-off date, that any inferences to be drawn prior to that date are objectionable.

CHAIRMAN RIGLER: All right. This document was in effect at least as late as October 21, 1966, wasn't it? I see an amendment to it under that date.

MR. KLEE: That's correct.

CHAIRMAN RIGLER: Objection noted.

MR. REYNOLDS: Mr. Chairman, on document 108, I had indicated to the Board and -- during the proceeding yesterday that I would make an objection to this document.

The Department had indicated that they were introducing the document which is an affidavit by Secretary of Agriculture and a number of attachments for the truth of the matters asserted therein.

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I have an objection first because it seems to me that to submit a document of this sort on an unsponsored basis when it contains what are labeled field activity reports which were prepared by witnesses which are designated to appear in this proceeding at some later date by the -- at the request of the government is inappropriate.

These documents, if they come in, should come in only at the time that those witnesses are on the stand, and at that time that the parties have an opportunity to cross-examine them.

CHAIRMAN RIGLER: Are you referring to Robert Badner?

MR. REYNOLDS: Mr. Badner and Mr. Darling.

CHAIRMAN REYNOLDS: What is your response to that, Mr. Charno?

MR. CHARNO: The Department's response is that by submitting these under seal, they fall within the provisions of the Federal Rules of Evidence of 9017 with respect to authenticity, and Rule 8038(a) and (b) with respect to exceptions to hearsay.

We believe they are relevant and probative. I don't think that is being questioned.

CHAIRMAN RIGLER: That doesn't meet the heart of Mr. Reynolds' objection, which is why not present

them at the time your witness is there, so that he can be cross-examined with respect to their content?

MR. CHARNO: I don't believe Mr. Reynolds would be denied cross-examination if we call the witnesses. If we don't call the witnesses, it will shorten the record.

MR. REYNOLDS: I don't believe that there is anything that is contained in these documents that would support introducing them for the truth of the matters asserted therein without doing it through a witness. Certainly not under 8038(a) and (b), I guess it was.

The offering affidavit by Mr. Butz does not address those two matters. There is nothing I can determine on the face of the documents that would support that the reports were reports or activities of the office or agency that the reports concerned matters observed pursuant to duty imposed by law, as to which matters there was a duty to report.

The thing I'm concerned about is that we have these come in on an unsponsored basis for the truth of the matters asserted therein, and then we don't see the witnesses.

I think that is an inappropriate way to proceed. It does handicap the witnesses. If the witnesses are on the designated list, the appropriate way to put these in and establish that they are authentic records is through the witnesses.

The affidavit by the Secretary of Agriculture does not go at all to the business record aspect of these.

MR. CHARNO: It is not asserted, Mr. Chairman, that the affidavit does go to the business record. It goes to the authenticity where documents/^{are} submitted under seal under Rule 902(2). These are public documents and records being submitted under seal. That would establish the authenticity.

With respect to 803 and absent the affidavit or any consideration of it, the Department contends that these are records, reports specifically, and statements and data compilations of public officers, offices, and agencies setting forth the matters observed pursuant to duty imposed by law.

I think --

MR. REYNOLDS: Where is that stated? How do I know that?

MR. CHARNO: You are challenging that these are reports of matters observed by a federal employee pursuant to his duties.

MR. REYNOLDS: You have told me already that one was not a federal employee in response to a question by the Board yesterday.

MR. CHARNO: I said he was no longer a federal employee.

MR. REYNOLDS: I will not quibble with that. My point is, if I do not have the opportunity to cross-examine these people, I object to having them come in for anything other than to show that in fact a field report may have been made by the individual, but not for the truth of the matters contained therein.

I think as to the last two documents that there is serious question even on the authenticity argument, Nos. 10 and 11, which are under this affidavit that apparently gives it the gloss of authenticity.

CHAIRMAN RIGLER: All right. I think probably we could receive the documents into evidence.

However, I think that the better procedure here would be to afford the Applicants the opportunity for cross-examination as to the truth of the content therein.

We will defer receipt of the documents into evidence at this time. That would be of Document 108.

MR. KLEE: Your Honor, with respect to certain of the --

CHAIRMAN RIGLER: Wait one minute, please.

For convenience, we will defer receipt of the entire exhibit 108 into evidence at this time.

However, irrespective of whether the Department

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calls witnesses, we would be amenable at some appropriate point to renewal of the motion to introduce with respect to Document No. 5 on the Butz affidavit, which was proffered by a Mr. Lee, who is not on the Department's list, and the same is true of 10 and 11 on the list, those being letters to or from Mr. Davis.

It seems to me they might stand on a different footing.

CHAIRMAN RIGLER: Is there objection to anything else on the 105 through 131 list?

MR. KLEE: Your Honor, for the record, during the break counsel for the Department of Justice and Applicant Toledo Edison agreed to stipulate with respect to the following documents marked for identification:

DJ Nos. 117, 119, 120, 121, 122, and 110, that with respect to these and only these documents that these were taken from the files of the Toledo Edison Company, and each is a true and correct copy of the document located in our files.

As to the others, we are not in agreement as to their authenticity.

CHAIRMAN RIGLER: Which numbers were you stipulating on, please?

MR. KLEE: 110, 117, 119, 120, 121, 122.

MR. MELVIN BERGER: Excuse me. I may have

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misunderstood what Mr. Klee just said here. I was under the impression that with regard to all of the other documents in this set, there would be -- to which request for admissions had been given the Department, there was no dispute as to the fact that they came from TE files or the other things that were admitted in the request for admissions.

MR. KLEE: To the extent I indicated otherwise, I was in error. That was not what I meant to say.

MR. MELVIN BERGER: Okay.

CHAIRMAN RIGLER: Any other objections?

MR. REYNOLDS: I think there is confusion on the record as to what was said and what was not said.

Just to make sure the record is clear as to the documents, specific documents that were just referred to by number, the position is that while we can determine they came from the files of Toledo Edison, there is no authentication as to the business record character of those numbered documents.

As to the other documents in this grouping, the Toledo Edison Company has entered into a stipulation with the Department of Justice going both to the fact that the documents were in their files and to the fact or question of authenticity.

CHAIRMAN RIGLER: Any other objections?

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MR. KLEE: Toledo Edison has no further objection.

MR. REYNOLDS: The continuing objection.

CHAIRMAN RIGLER: The continuing objection is overruled and we will receive into evidence DJ Exhibits 105 through 107, and 109 through 131 at this time.

MR. ZAHLER: Your Honor, I believe 112 was withdrawn by the Department.

CHAIRMAN RIGLER: That's correct.

(DJ Exhibits 105 through 107, 109 thru 117, and 119 thru 131, previously marked for identification, were received in evidence.)

MR. CHARNO: The Department would offer at this time exhibits for identification 132 through 138, 140 through 145, 149 through 166 into evidence.

MR. KLEE: Toledo Edison Company has no objection to these documents.

MR. REYNOLDS: Mr. Chairman, I don't want to make an objection, but I do want to make it clear on the record why I'm not making an objection with respect to the Department of Justice Exhibit 137, which is an attachment to the Toledo Edison Company's answers to the interrogatories and document requests served upon it by the other parties

and dated December 2, '74, identified as Department of Justice Exhibit 136.

The Applicants have an objection in this proceeding which goes to the use of the depositions for any purposes in the evidentiary hearing.

However, in this instance, it is clear that the deposition portion, portion of Mr. Sullivan's deposition that is identified as Department of Justice Exhibit 137, is a supplement or a modification or correction of the answers to interrogatories which was made by counsel to Toledo Edison Company, Mr. Les Henry.

I therefore think that it is in essence no different from the answers to interrogatories and within that context, I do not have an objection to using this particular portion of the deposition in order to show the amendment or supplement to the answers to interrogatories; but I don't want this to be construed at a later date as to some waiver by Applicants to their overall or general objection to their use of deposition testimony.

I have a continuing objection with respect to the entire group on behalf of Applicants other than Toledo Edison Company.

CHAIRMAN RIGLER: The continuing objection is overruled, and we will admit at this time Department Exhibits 132 through 138, 140 through 145, 149 through 166.

(DJ Exhibits 132 thru 138, 140 thru 145, and 149 thru 166, previously marked for identification, were received in evidence.)

MR. CHARNO: The Department would like to note that Exhibits 139 and Exhibits 146 through 148 had not been withdrawn, and we will defer offering them until we can secure a better copy of the document.

We would also like to note the existence of a stipulation with respect to documents -- Exhibits 140 and 160, and 166, which is identical with the stipulation set forth earlier with regard to CAPCO documents, CAPCO minutes, that they exist in the files of all of the companies, absent the marginal notations that may appear on those copies.

MR. REYNOLDS: What are the numbers?

MR. CHARNO: 160 and 166.

CHAIRMAN RIGLER: That was 160 and 166?

MR. CHARNO: That was a misstatement on my part. I previously misspoke. The stipulation has been reached with respect to Exhibits 160 through 165.

CHAIRMAN RIGLER: All right. These are CAPCO minutes or agendas?

MR. CHARNO: Yes, sir.

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CHAIRMAN RIGLER: Mr. Reynolds, do I understand you have a continuing objection on behalf of all Applicants with respect to these exhibits?

MR. REYNOLDS: No.

CHAIRMAN RIGLER: The continuing objection was withdrawn as to those?

MR. REYNOLDS: It was never made as to those.

MR. CHARNO: We have further stipulations with respect to Exhibits 141 and 154 with counsel from Toledo Edison, who has stipulated that the initials WHS appearing on those documents are the initials of Mr. Schwalbert.

CHAIRMAN RIGLER: Which exhibit numbers?

MR. CHARNO: 141 and 154.

CHAIRMAN RIGLER: What position did Mr. Schwalbert occupy at the time the documents were written?

MR. REYNOLDS: We don't know, offhand, but we can get that information. We would have to look at the organization chart.

CHAIRMAN RIGLER: Let's move along.

MR. CHARNO: The Department would offer in evidence exhibits for identification DJ 149 through -- I'm sorry. 167 through 176.

MR. LERACH: Mr. Chairman, I have an inquiry on Document 172.

Number one, there are some handwritten notations on that document which I can't read, and I would like it to be made clear that at some point whether it is Justice or Duquesne will get a copy in the record that people can read. I would ask Mr. Charno whether or not he intends to demonstrate by Document 172 that the handwritten changes on the draft letter were written by Mr. Gilfillin.

CHAIRMAN RIGLER: You are referring to page 2 of the exhibit, Department No. 115381 letter?

MR. LERACH: Yes, sir. Or do you offer it to prove there was a draft and there were suggested changes made?

MR. CHARNO: We had not intended to offer the document to prove that Mr. Gilfillin made the changes.

MR. LERACH: All right, I'm satisfied on 172.

Document 175 is a multi-page document. The most significant aspects of which are a three-page memorandum dated 1966.

Counsel engaged in discussion regarding this document yesterday, and prior to Mr. Charno responding as to whether or not he intended to offer this entire document for the truth of the matters asserted therein, the Chairman terminated the discussion to raise another procedure matter.

I understand that Mr. Charno is willing to state that this entire memorandum comes in for the truth

of the matter stated therein.

If that is true, I have no objection.

MR. CHARNO: We request we not be restricted to the portions we have red-lined, since --

CHAIRMAN RIGLER: I thought that was consistent with Mr. Lerach's request yesterday.

MR. LERACH: As we read the record last evening, he did not get a chance to respond on the record, and I want the record to be clean.

MR. CHARNO: Yes.

end 9

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CHAIRMAN RIGLER: Any other objection?

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MR. LERACH: I have no other objection.

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

CHAIRMAN RIGLER: The continuing objection is overruled, and we will receive into evidence at this time the Department documents Exhibits 167 through 176.

(The documents heretofore marked Exhibits DJ-167 through 176 for identification, were received in evidence.)

MR. CHARNO: Would it be the Board's desire to take a break before the beginning of testimony?

CHAIRMAN RIGLER: No.

MR. CHARNO: Could we have three or five minutes to clear away the papers and bring the Witness out? Mr. Hart will be the Department's first witness.

MR. MELVIN BERGER: I have documents I wish to use with Mr. Hart which are in the notebooks that are at the foot of the Bench. I would like to take them out and give them to you, since they are out of order, and they will be the next exhibits we will use.

CHAIRMAN RIGLER: Please, no one go away or leave the room. I would like to start as soon as the Department is ready.

(Pause.)

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MR. MELVIN BERGER: On behalf of the Department of Justice I would now like to call Mr. Robert Hart.

CHAIRMAN RIGLER: Will you rise and be sworn, please.

x Whereupon,

ROBERT HART

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

DIRECT EXAMINATION

BY MR. MELVIN BERGER:

Q Will you please state your name.

A Robert Hart.

Q What is your business address?

A My business address is 213 City Hall, Cleveland, Ohio. That is zip code 44114.

Q Would you briefly review your educational background.

A I graduated from colleged, undergraduate school, from Vanderbilt University with a bachelor of engineering.

I went to the Army for two years, if I may put this in, in chronological order.

Then I graduated from the School of Law of Vanderbilt. That was in 1963.

Q Would you please briefly trace your employment

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history?

A My employment history was, in 1963 I came to Cleveland, Ohio, and joined a patent law firm by the name of McCoy, M-c-c-o-y, Greene, with an "e" on the end, and Howell, H-o-w-e-l-l, and I worked for them for a period of a couple of years, and then I went to work with a patent law firm of Kramer and Sturgeis, K-r-a-m-e-r and S-t-u-r-g-e-i-s.

Then after about a year, I came back with the original firm I was with, McCoy, Greene and Howell.

In '69 I went to work with the then County Auditor of Cuyahoga County, Ralph J. Purk, who is now the Mayor of the City of Cleveland.

In November of 1971 Ralph Purk was elected Mayor of the City of Cleveland and six days thereafter I came on the payroll of the City of Cleveland, and I have been there as Executive Assistant to the Mayor in the latter part of '71 and '72.

In the latter part of '72 I moved from his executive assistant to the law department, which I am the Chief Assistant Director of Law there at this time.

Q Mr. Hart, will you briefly review your responsibilities in the Law Department.

A My responsibilities in the Law Department include almost everything. I do get involved in many other things, other than what we are here for today.

It is my responsibility in more or less a fashion to stay on top of everything. I can generally keep informed, but I don't know a lot of details.

Q Mr. Hart, when did you first become acquainted with MELP?

A I would have become acquainted with it, when I moved over to the Law Department which had been in the latter part of 1972 or the early part of 1973, and I would have then become aware of it and would have started working with the Division of Light and Power at that time.

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Q In late '72 or early '73, who was the Director of Public Utilities?

A At that time it was Fred Kudukis, and still is.

Q In late '72 or early '73, who was the Commissioner of Power and Light for the City of Cleveland?

A The Commissioner of Power and Light was Warren Hinchee.

Q Is Mr. Hinchee still Commissioner of Power and Light?

A No, Mr. Hinchee is now with the City of Burbank, California.

Q Can you tell us who replaced Mr. Hinchee as the Commissioner of Power and Light, and then work forward to the present commissioner?

A The man who replaced Mr. Hinchee was George Chuplis.

The man who replaced George Chuplis would have been a gentleman by the name of Ralph Meister, who was the commissioner for one day, I believe.

Then the man who is the present acting Commissioner of Light and Power is a man by the name of Ray Miller.

Q In late '72 or early '73, what was your understanding of the condition, the physical condition of the MELP system?

A Well, the MELP system was under the supervision

of Warren Hinchee at that time. I always considered Warren Hinchee a very capable person. With all sorts of power systems, you need capital improvements, capital improvement dollars.

At that time there was a \$5 million bond anticipation note of which \$2 million had been spent at that time. Warren Hinchee was trying to make improvements with those capital dollars.

MR. REYNOLDS: I object and move to strike the answer as unresponsive.

MR. MELVIN BERGER: I believe the witness has just told us what the condition of the plant was. If you wish, I will ask him a direct question.

CHAIRMAN RIGLER: I agree that the answer was not responsive to the question.

Will you respond more directly to Mr. Berger's question, please?

MR. REYNOLDS: Mr. Chairman, while we are at an interrupting point, I make a continuing objection on behalf of Applicants other than Cleveland Electric Illuminating Company with respect to testimony by this witness.

CHAIRMAN RIGLER: Overruled.

MR. BUCHMANN: I would like to object to the witness responding to that question on the ground that

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he isn't qualified to state what the condition of the Cleveland Municipal Light Plant was and the question was his understanding; and if he was qualified, I don't know what his understanding would mean to the case.

CHAIRMAN RIGLER: We will have the question rephrased to get another answer.

MR. MELVIN BERGER: May I have the question repeated?

BY MR. MELVIN BERGER:

Q Mr. Hart, in late '72 or early '73, were you involved in any way with attempting to improve the condition of the MELP system?

A I was involved, but only in a very indirect way. May I explain this?

CHAIRMAN RIGLER: Yes.

THE WITNESS: The only thing that I would really do on that basis is that Warren Hinchee and my own self would sit down and he would explain to me what had to be done.

He would also explain to me the means by which he was going about this.

BY MR. MELVIN BERGER:

Q At that time was there an attempt to raise some money for capital improvements?

A Yes, there was.

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Q What efforts were being made along those lines?

A There had been introduced into our City Council in 1971, I believe, what we refer to as a 1971 bond ordinance which later came into being as a 1971 bond issue.

This was a \$5 million bond issue for capital improvements for the Division of Light and Power. Of that \$5 million, there was about \$2 million that was actually spent for the purpose of capital improvements.

Q At that time was there any consideration for trying to seek additional money for capital improvements?

A At that time there was, yes.

Q What was done in order to seek this additional money?

A There was a bond issue -- a bond ordinance -- I have to correct myself there -- that was drafted up in 1972. It was introduced into our City Council, the bond ordinance, that is, around November of 1972, and this was what was called the \$9.8 million bond issue.

This bond issue, the first \$2 million of it were to be used to pay off the \$2 million that I just referred to as the 1971 bond issue.

Q Who drafted up the bond ordinance?

A That was John Brueckle of the firm of Squire, Sanders & Dempsey.

Q Why didn't the city draft this bond issue -- this ordinance itself?

MR. BUCHMANN: I object, Your Honor, as to the relevance in this proceeding of this testimony.

CHAIRMAN RIGLER: What is the relevance?

MR. MELVIN BERGER: This goes to the ability or the steps taken by MELP to help improve its own condition.

CHAIRMAN RIGLER: What difference does it make who drafted the bond ordinance? What you are after is the fact that they wanted bond money for capital improvement purposes.

MR. MELVIN BERGER: I believe this will be connected up in the next couple of questions.

CHAIRMAN RIGLER: I will let you go two more, subject to a renewed motion to strike.

THE WITNESS: At that time the city had no expertise whatsoever to draft an ordinance like that.

BY MR. MELVIN BERGER:

Q Was this ordinance eventually discussed at a City Council meeting?

A Yes, it was.

MR. BUCHMANN: May I inquire by whom?

BY MR. MELVIN BERGER:

Q By members of the City Council, or those who were

present at that particular meeting?

A Yes, it was.

Q Can you tell us the approximate time of this meeting and what happened at that meeting?

A The approximate time of the meeting would have been some time prior to July 11, 1973. The ordinance was passed on July 11, 1973, so it would probably have been one or two weeks prior to that time.

What was discussed at the meeting was the general subject matter of the bond ordinance and -- well, I will stop there.

How far do you want me to go into this?

Q Can you relate to us if any changes were made in the ordinance at that meeting?

A There was a change made in the ordinance. In Section 3 of the ordinance, it had originally run in conformity with what is called the Ohio Uniform Bond Act, which provides, number one, for sale to the sinking fund.

If the sinking fund turns it down, then to the treasury and investment account.

Then if the treasury and investment account turns it down, it can then be sold at private sale. That was the original Section 3 of the 1972 bond ordinance. Now what happened then, there was an amendment put in.

What I locally call -- this thing was turned upside

down -- wherein there was a new Section 3 put in which required the City of Cleveland to go out for public sale on these bonds, and then if that should fail it required the City to go back to the City Council for sale to the treasury and investment account, or back to the City Council for a sale to the sinking fund.

This is very unusual, for something like this to be done.

MR. BUCHMANN: I move that that last characterization go out, if Your Honor please. He said the city, including himself, had no expertise in these matters, which is the reason they went outside.

How he can characterize it as unusual, I do not know.

THE WITNESS: If I may explain that, Your Honor.

CHAIRMAN RIGLER: All right.

MR. REYNOLDS: Before he explains, Mr. Chairman, I am going to object to any further probing or testimony in this area.

We are getting into matters before City Council and activities before City Council, which I think come within the Knorr-Pennington doctrine, and are not permissible areas for examination within the scope of this antitrust proceeding.

CHAIRMAN RIGLER: I don't know how we would rule

on that. I think it may be premature until I find where the question is going.

MR. REYNOLDS: I'm not sure what it is we are going to get an explanation on, so I think it is better to have the objection on the record.

CHAIRMAN RIGLER: We will get an explanation as to why Mr. Hart has knowledge that the amendment was unusual, taking into account his earlier statement that he was not -- that the City of Cleveland did not have expertise in the bond financing area.

THE WITNESS: If I may jump forward in time a little bit, we took this bond ordinance we are talking about here to underwriters in New York, and the underwriting firm was Kuhlman-Sachs. They had someone else there at this meeting, a smaller firm, MacKinnon and something else. I forget the exact name.

At this time they raised a certain number of issues that were problem areas or questionable areas with this particular bond ordinance.

Based on the information I gave then, I read the ordinance and sure enough, what they were saying appeared to be true. That is the reason I offer that.

MR. BUCHMANN: I renew my motion now to strike.

CHAIRMAN RIGLER: Denied.

BY MR. MELVIN BERGER:

Q Mr. Hart, with regard to this meeting in New York, were you informed of other problems with the bond ordinance?

A Yes, I was.

Q What were some of these other problems?

MR. BUCHMANN: I object to the hearsay testimony, Your Honor. This is the question of problems in this area are financial or legal.

The witness is not a financial expert. That is clear. He has said he has no expertise in the legal area involved. He is not qualified to testify on this subject.

CHAIRMAN RIGLER: The question is whether he was informed by experts with respect to any deficiencies.

MR. BUCHMANN: That is what I used to call hearsay, Your Honor, and I object.

CHAIRMAN RIGLER: Overruled.

MR. MELVIN BERGER: Can we have the question re-read, please?

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

MR. MELVIN BERGER: That were related to you, I would add.

THE WITNESS: If I may explain something

that the counsel is getting into --

MR. BUCHMANN: I object. There is no question pending.

CHAIRMAN RIGLER: Respond to Mr. Berger's question.

THE WITNESS: The other areas are there were questions about why these were registered bonds rather than coupon bonds, since the coupon bonds would have a lower rate of interest than the registered bond.

Generally bond ordinances of this nature had interchangeability between a registration type bond and coupon where the holder of the bond could exchange it. He could exchange it for a coupon bond or exchange it as a registered bond. There was a second bond ordinance also which provides any, and I underscore any, lawsuit is brought against the Division of Light and Power, there can be a default on these bonds. Any sort of personal injury case or anything at all, I interpreted it, there could be a default on the bond.

They questioned the fact this was a mortgage revenue bond and why a mortgage revenue bond rather than a general obligation bond of the City of Cleveland, that question was raised.

I'm trying to think off the top of my head. Those are the main issues.

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BY MR. MELVIN FERGER:

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Q After this meeting in New York, what did the City do with regard to this bond ordinance?

A Well, it was very clear we had to educate our ourselves as to how to sell bonds, what bonds were all about. We had to start developing expertise in the bond area which we had had to do, of course.

We have been able to move in that direction. Now what we had to do and it wasn't until about January of 1974 that we finally knew that we had to prepare what they call an offering statement and this offering statement took a great deal of detail work.

We contacted an engineering firm called the R. W. Beck Company. We contacted other bond counsel, the Wood-Dawson firm from New York.

We contacted them. Then we started putting together this whole offering statement. The offering statement was put together and the thing -- the bond issue went out for public sale pursuant to the ordinance around or May 10 of 1974.

CHAIRMAN RIGLER: Were you personally involved in the preparation of the offering statement?

THE WITNESS: I was, your HONOR.

CHAIRMAN RIGLER: Did this require you to do any research into the areas of municipal bond financing?

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THE WITNESS: It required me to do a great deal of research into these areas. My name appears on the face of the offering statement.

CHAIRMAN RIGLER: Between the time you joined the Law Department and today, you have acquired expertise or knowledge with respect to municipal bond financing?

THE WITNESS: I have attended the American Law Institute courses in New York. I am going to a course in New Orleans next week. I attended courses in New York.

BY MR. MELVIN BERGER:

Q. You indicated you contacted another bond counsel and you named Wood Dawson as that counsel.

Would you tell us why you contacted another bound counsel.

MR. BUCHMANN: I object, your Honor. We all know what this is an attempt to do.

CHAIRMAN RIGLER: I don't, but I don't see the relevance of it either.

Mr. Berger, it doesn't seem to me that where they go for bond advice has any relevance to any of the issues in this proceeding. And I would entertain the motion to strike the earlier question with respect to where the City of Cleveland was obtaining its legal advice.

MR. BUCHMANN: I so move.

CHAIRMAN RIGLER: Because I don't think you have

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connected it, Mr. Berger.

MR. MELVIN BERGER: The reason for going to the other bond counsel was what I was trying to get at here. Mr. Hart has testified that Squire, Sanders and Dempsey had been the City bond counsel and that there was a change to another bond counsel. I guess I'm inquiring into the reason for that change.

MR. BUCHMANN: I'm trying to figure out, if your Honor please, why it is relevant in this proceeding to the issues here.

I object.

CHAIRMAN RIGLER: Do you want to make an offer of proof, Mr. Berger?

MR. CHARNO: Could we have a moment, please?

(Pause.)

CHAIRMAN RIGLER: Mr. Berger, as you make your offer of proof, if you intend to make one, we would want you to relate that either to your September 5 interrogatory answers or to your pretrial brief.

MR. REYNOLDS: If we are going to have an offer of proof, I would like to request that the Witness leave the room.

MR. MELVIN BERGER: Mr. Chairman, would this be a good place to break for lunch?

MR. BUCHMANN: I would like to have the proffer

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now, if your Honor please.

CHAIRMAN RIGLER: Since I have directed him to go back to the earlier statements, I am going to permit him to do that over the lunch hour. I probably will excuse the Witness, Mr. Reynolds, although this strikes me as a somewhat different situation than our ordinary situation, because I don't believe the proffer in this instance could have any effect on the Witness' answers.

MR. REYNOLDS: I don't know what the proffer is. Out of an abundance of caution, I suggest it would be wise to have him leave.

CHAIRMAN RIGLER: Plus, Mr. Reynolds, we have a different situation in that Mr. Hart has been active in the preparation of the City's case. He is, I believe, your counsel of record in these proceedings, are you not?

THE WITNESS: I am, your Honor.

MR. REYNOLDS: My point is to the extent he is now on the stand and he is going to testify, I think if the Counsel that is interrogating him is going to make an offer of proof as to the direction he is going to go --

CHAIRMAN RIGLER: You don't want Mr. Hart influenced by the proffer?

MR. MELVIN BERGER: We have no objection to that.

CHAIRMAN RIGLER: All right.

Can we take a short lunch, again, and come back at

ten of, by the clock on the wall back there?

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(Whereupon, at 1:00 p.m., the hearing was recessed, to reconvene at 1:50 p.m., this same day.)

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AFTERNOON SESSION

(2:15 p.m.)

MR. MELVIN BERGER: The Department has considered the pending question and the offer of proof, and we have concluded that the matter is of such tangential relevance that we will withdraw the pending question.

CHAIRMAN RIGLER: All right.

MR. REYNOLDS: Did the Board grant the motion to strike the earlier questions that were in the same area?

CHAIRMAN RIGLER: It has not, pending receipt of the offer of proof.

So I gather you would not oppose the motion to strike, Mr. Berger?

MR. MELVIN BERGER: I'm not sure exactly what the motion to strike is covering here.

CHAIRMAN RIGLER: Let's have counsel for the Applicants state what is covered by the motion to strike.

MR. BUCHMANN: Motion to strike, if your Honor please, began back at the beginning of the series of questions which related to who had drafted the ordinance in question and why did not the City draft it.

At that time I objected and I believe my recollection is correct, the statement was made that it would be connected up in a couple of questions.

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You permitted it to go forward on that basis inviting a motion to strike if it was not connected up.

In view of the withdrawal of the last question, I think it is quite clear, and I move to strike all of the testimony beginning back -- of course, I don't have a page reference here, the testimony as to who drafted the ordinance and why the City didn't.

MR. MELVIN BERGER: I believe the problem faced by the City in financing improvements is relevant to this proceeding. We would not object to a motion to strike the question asked in regard to who drafted the ordinance.

MR. BUCHMANN: And why they didn't do it themselves. That is what I originally put it to.

CHAIRMAN RIGLER: Mr. Buchmann has asked the Department if it concurs in the motion to strike the basis for going to outside counsel.

MR. MELVIN BERGER: Before we state a position on that, I wonder if we might be able to get that answer read back to see what was contained in it.

MR. BUCHMANN: I hope I'm clear that I'm talking about a whole line of testimony that was elicited apparently, or ostensibly, to show why the City did not draft the ordinance itself.

CHAIRMAN RIGLER: As to that, we would probably

grant the motion to strike.

However, the subsequent testimony with respect to the provisions of the bond ordinance which were commented upon by investment counsel in New York, I believe we would allow to remain on the record.

I think that what we will do is permit counsel to come in after they have the transcript tomorrow morning and we can designate specific questions and lines to be stricken, but that will be the general ruling of the Board.

MR. BUCHMANN: That is agreeable.

MR. MELVIN BERGER: That is agreeable to us, too.

CHAIRMAN RIGLER: Mr. Berger, you have additional questions for Mr. Hart?

MR. MELVIN BERGER: Yes, I do.

CHAIRMAN RIGLER: The Board has been discussing some of the questions which were before us before the luncheon break. We have a series of comments or rulings to give to the parties for their guidance.

In light of Justice's withdrawal of certain questions, the issue has become moot as to whether or not Justice was entitled to pursue these lines, because they were not included within its charges and allegations.

The Board's preliminary view was that that line of question probably was outside the announced scope of the

Department's case, and on that basis, would be subject to a motion to strike.

The City of Cleveland is in a different posture. The question of Knorr-Pennington was raised. We are going to state the preliminary view of the Board in order to assist all parties in the presentation of their case and argument.

The so-called Knorr-Pennington doctrine confers immunity from prosecution. Accordingly, different considerations may apply with respect to license proceedings.

First we know that one is not entitled to a government license as a matter of right.

Second, there is a benefit being conferred by the public or by the government. The conferring of the benefit may require a showing that the grant of the benefit is in the public interest or at least will not assist in maintaining a situation contrary to the public interest.

Third, and referring in particular to the Nuclear Regulatory Commission, we are not restricted to consideration of whether the antitrust laws are being violated, but must consider whether the policies underlying those laws are being jeopardized.

Based on those considerations, we will permit evidence as to an alleged attempt by CEI to influence bond issue legislation in a fashion detrimental to MELP

financial viability.

We will consider the use and effect of this evidence at the time we make our decision.

We will indicate right now that CEI did not violate the antitrust law by opposing MELP or MELP financing in the Cleveland City Council, but that may not end our inquiry for the reasons just stated.

Any findings we ultimately may make in reliance on activities of CEI before the City Council will be separately set forth in our opinion and findings in order to preserve the issue on appeal.

Fourth, the issue of CEI, possible CEI subversion of the MELP's legal position before the City Council by causing MELP's bond counsel to accede in detrimental amendments is not covered within the scope of the Noerr-Pennington doctrine.

Nonetheless, such an attempt, if any, could be relevant to our consideration.

The City has made such charges. Specifically, the counsel Brueckel failed to oppose detrimental amendments in the City Council, and the Brueckel affidavit, albeit in a different context, in the context of the disqualification proceedings directly controverted that issue.

It is apparent to use right now that there is a conflict, that there is a charge, and there is a rebuttal

to that charge which denies the charge in its entirety.

This means that we will be forced to consider evidence on this point.

This also points to the problems of Squire, Sanders' representation separate and apart from the disqualification issue.

We can see right now that in order for the City to prevail, if it does prevail, on the charges that it has made, it may be necessary for them to call as witnesses in these proceedings Attorneys Brueckel and Lansdale, and then you would have the most unfortunate situation of the City trying to impeach counsel which formerly represented it, and I think that might become an extremely untenable situation for Squire, Sanders.

We have also considered the fact that there is, I don't believe, any allegation and we know of no evidence, certainly none has been received, but none has been alleged to exist with respect to whether CEI induced its counsel to have another member of the firm give advice in the course of the City Council proceedings which would not be entirely consistent with the best interests of the City.

Going back to Knorr-Pennington, we have indicated that for CEI itself, either through its counsel or even through its law firm to attack the position of MELP before the City Council would not violate the antitrust laws.

We do consider that to at least be within the "immunity from prosecution" provisions of Knorr-Fennington.

The problem is further complicated, however, by the fact that Mr. Lansdale is both a director of CEI and a member of Squire, Sanders, and apparently engaged at least in peripheral conversations with Mr. Brueckel.

We are wrestling with this problem. It is very delicate. It is very troublesome. We make no accusations. We make no charges. But they are before us, whether we like it or not.

I will ask you to take these factors into consideration, Mr. Buchmann, and confer further with respect to the advisability of your firm to withdraw separate and apart from any motions that are now pending.

In the meantime, with respect to Mr. Hart's testimony, we are shutting that door to Justice since it was not included within their charges.

We have had the rule that once a witness is called, all parties should question that witness to develop his full line of testimony so that it is not necessary to recall him.

Under the circumstances before us now, I think it would not be appropriate for Mr. Hjelmfelt to go into these areas with Mr. Hart at this time, even if it necessitates

the recall of Mr. Hart at some further time.

Hopefully, at some point along the line, we will have the benefit of Appeal Board thinking, plus the benefit of the second Licensing Board which considered the disqualification motion.

That may be obviated if Squire, Sanders reconsiders the pressures which are inherent in having its people on the stand being cross-examined with respect to their fidelity to one of their clients.

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CHAIRMAN RIGLER: If the Department has other lines of questions to address to Mr. Hart, they can proceed at this time.

MR. BUCHMANN: If Your Honor please, I will, of course, take this matter back.

Would it be appropriate at this time, however, in regard to your rulings on Knorr-Pennington to take the exception now?

And I also would make one inquiry. With due respect, I tried to take down what you were saying as clearly as possible. Do I understand the Board to have accepted the fact that changes in the bond ordinance in question that were detrimental to MELP were made?

CHAIRMAN RIGLER: Absolutely not.

That charge has been made, however, and we have indicated because of the nature of the charge and because

we find that charge to be outside of the scope of Knorr-Fennington, if there was subversion of counsel, that we would have to consider evidence relating to that point.

The Board, I want to emphasize, has made absolutely no -- and I underline that -- prejudgment of any of these issues.

MR. REYNOLDS: Mr. Chairman --

CHAIRMAN RIGLER: Wait. Before you go on, it is not necessary to take specific exceptions to Board rulings, of course.

We did indicate that we would treat this issue discreetly in our opinion. Nonetheless, Mr. Reynolds has had it before us earlier.

I also indicated our views were tentative. They may be subject to change upon final argument, but I wanted you to know our thinking at this time.

MR. REYNOLDS: I was going to note an exception on behalf of all Applicants, and that has been taken care of.

I would like to add that Mr. Hart has not been designated as a witness on behalf of the City. In view of that fact, I do have some question as to the Board's statement that the City would have opportunity at some later date to call Mr. Hart.

It seems to me that the City's -- availability

of Mr. Hart to the City is within the confines of the direct case of the Justice Department at best, and he has not been designated as a City witness.

CHAIRMAN RIGLER: Let me amplify our ruling.

It may be that having made these charges, the City intends to present evidence relating to them through some witness other than Mr. Hart.

I was indicating that the City would not be estopped from trying to support its allegations. They may do it through someone other than Mr. Hart.

The usual rules would apply with respect to the scope of cross-examination here.

MR. REYNOLDS: Fine. That is all I was trying to clarify.

CHAIRMAN RIGLER: Mr. Hart, will you resume the stand.

Whereupon,

ROBERT HART

resumed the stand as a witness on behalf of the Department of Justice and, having been previously duly sworn, was examined and testified further as follows:

CHAIRMAN RIGLER: Mr. Hjelmfelt, was I correct in my understanding of the City's position?

MR. HJELMFELT: Well, yes, I intend to have another witness who will testify as to this matter.

CHAIRMAN RIGLER: But was I correct with respect to the charges the City has made?

MR. HJELMFELT: Yes.

CHAIRMAN RIGLER: Was I correct with respect to the City's intent to pursue these charges?

MR. HJELMFELT: Yes, that's correct. I'm not -- if I'm precluded at this point from going into these matters on cross-examination, and the Department is precluded from bringing them out on direct, even though they may be related to other matters on direct, and normally I could cross-examine on them, may I seek leave to amend my witness list to include Mr. Hart as one of my witnesses?

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CHAIRMAN RIGLER: I don't know how we would rule on that, Mr. Hjelmfelt.

I see no basis for you to have anticipated cross-examination on the subject, since it probably was not within the scope of direct by the Department, since it was not included in their charges and allegations.

MR. HJELMFELT: I might address this latter in a formal motion.

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DIRECT EXAMINATION (Contd)

BY MR. MELVIN BERGER:

Q Mr. Hart, has MELP made any attempts to obtain bulk power supply from sources other than by self-generation?

A It it may please the Board, I wonder if I could say something before I answer that question?

I'm appearing here today pursuant to a subpoena issued by the Department of Justice. I wanted to state that for the record.

CHAIRMAN RIGLER: I'm aware of that. I believe I signed it.

THE WITNESS: Okay. To answer your question, sir, yes.

BY MR. MELVIN BERGER:

Q What attempts has MELP Made?

A We have been to other entities. We have been to Buckeye Power, and they have indicated to us

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that there is a bulk power supply there available.

We have been to the City of Richmond, Indiana. They have indicated to us that there is a supply of bulk power.

We have also talked to the City of Orrville, and that is Orrville, Ohio, and they have indicated to us that there was a supply of bulk power available.

We have also previously been to talk to the power authority of the State of New York, the acronym, of course, is PASNY. They have indicated to us that there is a supply of bulk power there also.

Q With regard to your discussions with PASNY, have you ever attended meetings with PASNY officials?

A Yes, I have.

Q When would you have -- how much such meetings have you attended?

A I only attended one such meeting.

Q When was that meeting?

A That was the spring or late winter of 1973.

Q Would that be the winter of '73-74 or '72-73?

A No, I'm sorry. It would have been around March or April of 1973.

Q Where was this meeting held?

A It was held at the offices of PASNY in New York City.

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Q Who attended this meeting?

A There were a whole group of us who attended. There was my ownself. There's a gentleman by the name of Bob Decatur from the City of Cleveland. John Engel, who represented AMP-O. Warren Hinchee was there. There were also representatives from the engineering firm of O'Brien and Gear that were there.

There was a gentleman by the name of Charles Ellworth. Adam Kubik was there.

They also were represented by their legal counsel, a gentleman by the name of Wallace Duncan.

There was George Barry, who was the Executive Secretary, or what have you, of the Power Authority of the State of New York.

There was one other gentleman, I believe, that represented the PASNY group and I can't think of his name at this time.

There may have been other people there also.

I just don't remember.

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Q Can you relate to us what happened at that meeting?

A We, of course, made our request to PASNY or FOR BULK POWER AND PASNY indicated to us, yes, there was bulk power available in a small quantity to the State of Ohio, and that if we could do two things that they would be willing to start the process of reallocation of the power

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from one of the other adjoining states to be delivered to the state of Ohio.

They indicated to us that number 1, that AMP-O which was the group, the bargaining group with which we were there, had to be the bargaining agent for the State of Ohio on this issue.

They indicated to us that we had to have assurances that we could get the power down to Cleveland.

Q Were these two matters discussed at that meeting?

A These two matters were discussed at that meeting, yes, sir.

Q With regard to the PASNY power that you said was available in small quantities; do you remember what that quantity was?

A The quantity is set forth in the Niagara Development Act. When you get to the quantity figure, it was 30 megawatts.

Q Were you or was anyone from AMP-O told that this 30 megawatts would be available to AMP Ohio?

MR. REYNOLDS: Objection. I think it is a proper question if he asks if the Witness was told, but the question asked whether the Witness was told or anybody was told.

I think if it is rephrased, it would be a proper question.

BY MR. BERGER:

Q Mr. Hart, were you told by anyone representing PASNY that this power would be available to AMP-O?

A Yes, I was. I was told by Mr. George Barry at that meeting.

Q Did he make a definite commitment about this?

A He made a definite commitment verbally, now, as long as we could meet these two contingencies.

Q Was there any mention of a written commitment at that meeting?

A I think we made a request of him to put this down on paper, but I don't think we ever had that. I could be entirely wrong on that, but I don't think he ever did that.

Q In what form was the request for a written commitment?

A We would have just verbalized it.

Q You indicated that you asked for a written commitment. What was the form of the written commitment that you asked for?

A Well, we would have made a request that he state in writing, just what we were asking here. In other words, that the power was available to the State of Ohio and that we could have the power, if we could meet these two contingencies.

Q Did he accede to that question?

A I don't think he ever did.

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Q Did he say that he would accede to that request?

A I don't think he said either one way or the other at that time.

Q After this meeting, did MELP attempt to meet the two conditions set forth by Mr. Barry?

A We tried to meet those two conditions.

Remember, we were working through the bargaining agent called AMP-O. Anything that was done was at our instigation but AMP-O had to actually do everything.

AMP-O did, in fact, try to accomplish both of those things.

Q Did they actually accomplish both of those things?

A Well, no, because, remember, in order to get the power to Cleveland, you have to cross the service area of CEI and CEI has never allowed us to wheel that PASNY power.

However, that was the number two contingency.

Number one contingency was that AMP-O would be the bargaining agent for the State of Ohio, and we would get assurances from Governor Gilligan saying there was no other bargaining agent and so AMP-O did turn out to be the bargaining agent.

Q Were any arrangements for the transmission of that power from PASNY to the City of Cleveland made?

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A Yes, they were.

Q What arrangements were made?

A The arrangements were that pending the -- pending CEI giving their consent to wheel the power across their service area, that there would be a reallocation and that these 30 megawatts would go to Allegheny Co-op.

So that is what is happening at the present time.

Q Were any arrangements made to transmit the power from PASNY to the City of Cleveland?

A Well, the arrangement that we have worked out is that the legal counsel for AMP-O contacted PENELEC, which is one of those services areas that has to be crossed to get down to Cleveland and PENELEC agreed in principle to allow the wheeling of power down to the Cleveland area.

The Counsel for AMP-O also contacted CEI. They asked them if they would wheel the power down to the City of Cleveland.

Of course, CEI came back and said no.

Q Was this CEI response in writing?

A Yes, it was.

Q Were there any arrangements made to get the power from the PASNY station to PENELEC?

MR. REYNOLDS: Mr. Chairman, I would like to

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have a little more specificity in the question. As I understand the Witness' testimony this whole area has concerned arrangements or activities regarding an entity called AMP Ohio and not having anything to do with activities by the City of Cleveland or this Witness, particularly.

I think that if we don't have, before we continue down this road, some indication of the basis for this Witness testifying to it, that it is an objectionable question and an answer should not be permitted.

CHAIRMAN RIGLER: Do you have any comments to supply, Mr. Berger?

MR. MELVIN BERGER: Perhaps I can ask the Witness a few questions to arrive at the foundation.

BY MR. MELVIN BERGER:

Q What is AMP-O?

A AMP-O is a nonprofit corporation of some 52 municipals in the State of Ohio of which Cleveland, Ohio, is one of them.

CHAIRMAN RIGLER: We have testimony relating to AMP-O. Infact, we have a lot of duplicative testimony right here which I'm permitting for the moment.

Concentrate on Mr. Hart's knowledge of how AMP-O was making the arrangements and his personal knowledge of Cleveland membership in AMP-O, if you will.

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BY MR. MELVIN BERGER:

Q Mr. Hart, following the meeting with the PASNY official, were you kept informed or were you informed of the progress that was made toward completing the two requirements that PASNY had set down in that meeting?

A Yes, I was.

Q And do you know what arrangements, if any, were made to transmit the power from the PASNY station to PENELEC?

MR. BUCHMANN: I think I will object to that. We don't know by whom he was informed or anything of the sort. Even if he was informed, it is hearsay.

CHAIRMAN RIGLER: The question as stated can be answered, the question of whether he was informed.

THE WITNESS: Yes, I was.

MR. MELVIN BERGER: Can I have the last question back?

MR. BUCHMANN: He had answered that, your Honor please.

The question was, what was it.

(The reporter read the record as requested.)

THE WITNESS: Is it all right to answer?

CHAIRMAN RIGLER: Yes.

THE WITNESS: Yes, I do.

BY MR. MELVIN BERGER:

Q What arrangements were made?

A The arrangements were that PASNY would allocate the entire 30 megawatts to Allegheny Co-op and Allegheny Co-op would keep that 30 megawatts until the City of Cleveland could wheel the power through the CEI service area and that for a period of ad infinitum Allegheny Co-op would keep seven and a half megawatts.

So the only amount of power available today to the City of Cleveland from PASNY would be at 22 and a half megawatts.

Q I believe you may have misunderstood the question. Perhaps I did not phrase it quite correctly.

Do you know what arrangements were made to transmit the PASNY power from the PASNY station in New York to PENELEC?

A No, I don't because that was an arrangement between PASNY and Niagara Mohawk.

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Q You say that was an arrangement between PASNY and Niagara-Mohawk?

A Right.

Q But that was available?

A That was available, right.

Q Do you know if that PASNY power is still available to the City of Cleveland today?

A It is my understanding it is still available to the City of Cleveland today if we could wheel it.

Q Since the time when the City received CEI's letter indicating that they would not wheel the PASNY power, has the City made other inquiries of CEI about wheeling that PASNY power?

MR. REYNOLDS: I will object to the form of the question,

CHAIRMAN RIGLER: Rephrase it.

BY MR. MELVIN BERGER:

Q Mr. Hart, I believe you testified about --

CHAIRMAN RIGLER: Just ask if there were any subsequent inquiries.

MR. MELVIN BERGER: Thank you.

BY MR. MELVIN BERGER:

Q Mr. Hart, were there any subsequent inquiries about wheeling PASNY power, subsequent to CEI's letter?

A Yes, there have been.

Q Can you tell us when these inquiries have been made?

A We have made the inquiry every time we have gotten together with CEI, whether on an informal basis or a formal basis, and this has been an ongoing thing.

Q You say "we" have been the inquirers. Who do you mean by "we"?

A I have made the inquiry. I think the Director of Public Utilities, Fred Kudukis, has made the inquiry. Mayor Purk has made the inquiry. Carl Rudolph, president of CEI. It has been an ongoing thing.

Q Has CEI responded at all to these requests?

A They have responded, all right.

Q What have they responded?

A Their continuing response is that we cannot wheel the power through their service area.

Q Who at CEI has made this response?

A As I mentioned, Carl Rudolph made it. Donald Hauser has made it. Lee Howley. The ex-general counsel has made it.

If you want me to keep going, I can keep on going.

Q I think that is sufficient.

MR. REYNOLDS: Excuse me.

Could I get read back the answer just before the witness identified a number of people and said they said

it?

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

BY MR. MELVIN BERGER:

Q I believe you mentioned that attempts had been made by MELF to obtain power from Buckeye?

CHAIRMAN RIGLER: Before you go to that, what do you mean by cannot, or what did CEI tell you they meant by cannot?

THE WITNESS: They didn't indicate anything by "cannot." They meant would not.

CHAIRMAN RIGLER: There is a big difference. You testified they said they could not. Are you referring to physical impediment in the system, not enough capacity?

THE WITNESS: No, sir. This has never been an issue. At any time I have talked to CEI, there has never been that type of issue.

In other words, the fact was that they said we would not do it. It was never a question of whether they could or had the capacity. It was always we would not do it.

I am referring to the Don Hauser letter of August 1973, when he said for competitive reasons we will not wheel the power. That has been their standard policy statement.

MR. BUCHMANN: If Your Honor please, there is no

fact issue on that point.

CHAIRMAN RIGLER: I just wanted to clear it up in my mind. When he said "cannot," I was thinking there might be some --

MR. BUEMANN: If it assists you to clear it up, there is no issue taken on that point.

BY MR. MELVIN BERGER:

Q Mr. Hart, you stated before that MELP has attempted to get power from Buckeye; is that correct?

A That's correct, sir.

Q Have you personally been involved in that attempt?

A Yes, I have.

Q Who have you contacted or spoken with at Buckeye?

A We went down and talked to Mr. Howard Cummins, down there, and he is one of the chief officials.

We talked to the engineer down there. His name is Jack.

Q You said "we." Who do you mean by "we"?

A There was another gentleman. Ralph Meister.

Q What was Mr. Meister's position at the time you went to Mr. Cummins and Mr. Jack?

A His title with the City of Cleveland is system analyst, I believe, which is the same title he might have had when he worked for CEI.

Q What inquiry did you make to Buckeye Power at that time?

MR. REYNOLDS: Excuse me, Mr. Chairman.

If we could interrupt -- could we get the time? We have been talking about a time. Could we get the witness to tell us what the time period is?

BY MR. MELVIN BERGER:

Q Mr. Hart?

A The time period would have been, I believe, April of 1975.

Q What inquiry was made of Buckeye Power?

A We made the standard inquiry to them, asking them if they had any excess capacity or, in other words, if they have electricity that they could sell to the City of Cleveland.

Buckeye Power, or at least the two gentlemen we were talking to, indicated they did have what they called seasonal power. And seasonal power was that power that would be available from May 15 of the year up until about September 15.

Q What did you do after this meeting with Mr. Cummins and Mr. Jack?

A We then -- not after the meeting, but at that meeting with them -- we drafted a letter to be addressed to the City of Cleveland, saying this power was available

and then we took this letter back with us to the City of Cleveland.

We then sent a copy of this letter along with a letter from Ohio Power which we had previously solicited from Ohio Power, and we then made inquiry of CEI as to whether they would wheel this power to the City of Cleveland.

MR. MELVIN BERGER: I would like to have marked for identification as DJ 177 a letter from Robert Hart to Karl Rudolph, dated July 9, 1975, with an attachment which is a two-page letter from Frank N. Eien, B-i-e-n, to John Engle, E-n-g-l-e, noting a copy to R.H. Meister, and a second attachment which is a letter from Howard Cummins to Ralph H. Meister, dated April 15, 1975.

(The documents referred to were marked DJ Exhibit 177 for identification.)

BY MR. MELVIN BERGER:

Q Is this the letter you just referred to in your testimony?

A Yes, it is.

MR. BUCHMANN: Which letter? There are three of them there.

BY MR. MELVIN BERGER:

Q Mr. Hart, was the first letter sent, the letter of July 9, 1975, sent to Mr. Rudolph with attachments?

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A Yes, it was.

Q What were those attachments?

A It was sent with the attachments dated July 2, 1975 from Frank N. Bien to Mr. John Engle, and this letter, by the way, is a letter I referred to as being solicited from Ohio Power saying that Ohio Power would wheel the power from Buckeye and there was also attached to it this letter that I have referred to earlier that was drafted the day -- April 15, when we were in the offices of Buckeye Power.

The four of us sat down and drafted up this letter, and these two attachments are attached to the letter that I wrote dated July 9, 1975 to Mr. Karl Rudolph.

MR. MELVIN BERGER: I would like to move DJ 177 into evidence at this time.

MR. BUCHMANN: No objection.

MR. REYNOLDS: Continuing objection on behalf of Applicants other than the Cleveland Electric Illuminating Company.

CHAIRMAN RIGLER: The continuing objection is overruled. Justice Exhibit 177 is admitted into evidence.

(DJ Exhibit 177,
previously marked for
identification, was received
in evidence.)

BY MR. MELVIN BERGER:

Q Mr. Hart, after the July 9 letter, did you have any discussions with CEI regarding this letter?

A As I remember, we did have discussions. There might not have been any discussions directly involved with this, but there was a meeting in Mayor Furr's office and Don Hauswer and Karl Rudolph were in attendance.

We did informally discuss this. We asked that this power be wheeled up to Cleveland.

MR. REYNOLDS: Excuse me just a minute.

Mr. Chairman, on the copy that I have of this document that just came into evidence, the top right-hand corner, the names Mr. Saunders and Mr. Charno appear. I don't know whether that is part of the document that Mr. Hart can help us with, or whether it is something that Mr. Charno can help us with; but I think we ought to have an explanation of what that is.

CHAIRMAN RIGLER: Perhaps we should disregard it.

MR. CHARNO: That would be appropriate. As indicated, this copy was sent to the Department of Justice.

CHAIRMAN RIGLER: Are those internal Justice

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names?

MR. CHARNO: Yes, they are.

MR. MELVIN BERGER: Is there a pending question?

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

BY MR. MELVIN BERGER:

Q Mr. Hart, what was the response by CEI?

A Negative.

Q What do you mean, negative?

A I mean that they said that they would not wheel the power up to the City of Cleveland. I should possibly qualify that by saying that they put in the requirement that yes, they would wheel, but they then said based on our being able to buy a like kind at a like price, that was stipulation number one, and stipulation number two was that there would be no conspiratorial impediment to the supplying of this power to the City of Cleveland.

I asked them on numerous occasions at that meeting what they were talking about, and I have yet to find out the answer.

So if you come full circle on the things, you come up with the answer I indicated earlier. The answer is still no, that they will not wheel power.

Q Have you specifically asked as to what those terms meant?

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A I asked the president of the company, and I asked their general attorney, and neither one of them would answer me. The answer is still I don't know.

Q Who are these two gentlemen?

A Karl Rudolph, the president of the company, and Don Hauser, who is the general attorney.

Q I believe you also mentioned earlier -- testified earlier that the City had sought bulk power supply from Richmond, Indiana; is that correct?

A That's correct.

Q What is the nature of the contact that the City had with Richmond, Indiana?

A I went with Ray Crystal to the state of Indiana because I understood that they had excess capacity.

I talked to the superintendent of the Municipal Light System there. He did indicate that they did have excess capacity, and that they would sell the electricity to the City of Cleveland.

Q Do you recall the amount of excess capacity?

A To the best of my recollection at this time, it is 50 megawatts.

Q You mentioned that Mr. Ray Crystal went to Richmond with you. What position does he occupy?

A What his legal title is, I don't know. But he has been assigned to being with me when we go trying

to solicit different companies or entities, trying to find bulk power supply.

Q Does Mr. Crystal work for the City of Cleveland?

A He is an employee of the City of Cleveland in the Division of Light and Power, yes, sir.

Q Were inquiries made as to how the power would be transmitted from Richmond, Indiana to the City of Cleveland?

A Yes, it would be transmitted through the -- let me back up.

The City of Richmond, Indiana is interconnected with the Indiana and Michigan Power Company. Indiana and Michigan would wheel the power to Ohio Power.

Ohio Power would wheel the power to CEI, and then it would come to the City of Cleveland.

Q Have you had any indications that Indiana and Michigan and Ohio Power would be willing to wheel that power?

A Yes, I have, on parts of your question there. That is a two-pronged question you asked there.

The one power company, Ohio Power, has an agreement with Amp-O, under Schedule A of that agreement would be able to wheel power across the service area of Ohio Power.

So the answer to your question there is yes, they would wheel.

The other part of your question is would Indiana and Michigan wheel the power. My best answer there is I don't know.

We went in and at the same time talked to Mr. Coppers, I believe his name is, who is the executive vice president of Indiana and Michigan Power Company.

We asked him if he would give us an indication that they would wheel the power across Indiana and Michigan service area, and what Ray Crystal and I came away with was we will not wheel until you work out your differences with CEI.

I asked him if he would put something like this down on paper with me. He flatly refused to do so.

I wrote him, indicating that this is the way I perceived the meeting to have gone, and he wrote back to me and said no, I was all wrong, that what he was really saying was that -- you would have to read the correspondence because it comes out the same way.

MR. BUCHMANN: I object, Your Honor. The correspondence is the best evidence in that case.

THE WITNESS: It was addressed to me, if I may, sir.

CHAIRMAN RIGLER: I would sustain that objection.

Do you intend to make the correspondence a matter of record?

MR. MELVIN BERGER: I believe that correspondence was on our document list, although I'm not sure that we had all of that correspondence.

CHAIRMAN RIGLER: Particularly where Mr. Hart is testifying as to the contents of the letters, the letters should be put in evidence.

MR. MELVIN BERGER: We will make that available as soon as possible. Perhaps at the next break.

BY MR. MELVIN BERGER:

Q Mr. Hart, I also believe that you testified that the City had some contact with Orrville with regard to obtaining bulk power; is that correct?

A Right. Right. Right.

Q Could you explain what the nature of that contact was?

A Well, it was a very informal contact. I was at a meeting. The superintendent of the plant there, his name is Ray Williams. I indicated to Ray Williams that the City of Cleveland would be interested in buying excess capacity that the City of Orrville had.

Ray Williams said there would be excess capacity and there would be an interconnection with Ohio Power in December of 1975, and yes, we could have any excess capacity.

Q What is Mr. Williams' position?

A He is the superintendent of the light plant, I believe. What his official legal title is, I don't know.

Q With regard to the power from Richmond and from Orrville, have you spoken with CEI about the possibility of them wheeling that power to the City?

MR. BUCHMANN: I'm sorry, I didn't catch which power you were talking about.

BY MR. MELVIN BERGER:

Q The power from Richmond, Indiana and the power from Orrville.

CHAIRMAN RIGLER: Take them separately.

BY MR. MELVIN BERGER:

Q With regard to the power from Richmond, Indiana, has there been any discussion with CEI about possibly wheeling that power?

A To the best of my recollection, there hasn't been, other than the meeting in Mayor Purk's office in August of 1975.

Q What about the -- have you spoken to CEI with regard to the possibility of wheeling power that may be available from Orrville?

A No, I haven't.

CHAIRMAN RIGLER: What was the response at the meeting at which you brought up the possibility of wheeling power from Richmond, Indiana?

THE WITNESS: The response was the same we heard all along; that we would be willing to wheel non-preference power if you could meet these two requirements:

Number one, that we be able to buy a like kind and like price.

And, number two, that there be no conspiratorial impediment.

You have to treat the bulk power and Richmond as about the same thing, I suppose. At least, I do.

MR. REYNOLDS: Excuse me, Mr. Chairman.

Since we have asked the witness for the response, could he also give us what the request was so we know what they were responding to?

There has been no testimony as to what the nature of discussion was except that it was a matter discussed in Mayor Purk's office.

Since you asked him to relate the response, it would be helpful to know what it was that was requested.

THE WITNESS: Mayor Purk was asking that CEI wheel this power from third-party sources. And then as part of those third-party sources, Buckeye came up and Richmond also came up.

BY MR. MELVIN BERGER:

Q Mr. Hart, have you had any discussions with CEI with regard to the possibility of CEI selling the City

firm power?

A Yes, I have.

Q When would those discussions have taken place?

A They would have taken place, I think we made our first request some time around -- first request we -- we made a request around July of 1975, and that is a request that is continuing also.

Q Mr. Hart, to whom was the request made?

A To the best of my recollection, I think I wrote a letter off to Karl Rudolph, the president of CEI.

Q Did you ever discuss the possibility of CEI selling the City firm power at any meetings you had with CEI?

MR. HJELMFELT: I have to raise an objection here, because I think we may be treading on matters that are confidential at this point and are not appropriate for discussion.

The witness is more familiar with the context of these. He should be aware of it. Maybe Mr. Hauser --

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

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

MR. BUCHMANN: We do not regard the discussion of firm power at any meetings with the City of

Cleveland as confidential to CEI.

MR. HJELMFELT: That is fine with me, then.

MR. MELVIN BERGER: Can I have the question read back?

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

MR. BUCHMANN: Could we have a minute to talk with Mr. Hjelmfelt?

CHAIRMAN RIGLER: Yes.

(Pause.)

MR. HJELMFELT: Mr. Chairman, I would like leave to discuss this with the witness for a moment, if I might, with CEI's permission and agreement.

What I want to do is ascertain what the City's impression of these discussions is.

CHAIRMAN RIGLER: He is Justice Department's witness; but hearing no objection, the Board won't raise any.

MR. MELVIN BERGER: We have no objection to that.

CHAIRMAN RIGLER: We will take a five-minute break.

(Recess.)

MR. HJELMFELT: My objection is withdrawn.

MR. MELVIN BERGER: Could we have the last question?

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

CHAIRMAN RIGLER: Do you want to rephrase it?

BY MR. MELVIN BERGER:

Q Mr. Hart, did you participate in discussions with CEI regarding the sale of firm power by CEI to MELP?

A Yes, I did.

Q When would that have occurred?

A It would have occurred all during the latter part of 1975 and is continuing up until the present time. We are talking to Mr. Jack Lansdale of Squire, Sanders & Dempsey.

Q Has an agreement been reached?

A No, there hasn't.

Q Have you received any assurance from CEI with regard to any agreement on firm power?

A No, I just continued with the same thing. It comes out the same way. No. We would be glad to give you firm power, let's sit down and talk about it. That is all we end up doing.

Q You mean negotiating?

A Negotiating, yes.

CHAIRMAN RIGLER: Has Cleveland presented any firm proposal to CEI?

THE WITNESS: Yes, sir. My recent proposal .

went over there on February 6, which was just four days ago.

CHAIRMAN RIGLER: When you say your most recent proposal, did you have an earlier written proposal?

THE WITNESS: Yes, we did, sir.

As I mentioned, we made a formal request, to the best of my recollection around July. At that time I sent a proposal over and there have been counterproposals that have gone back and forth since that time.

MR. MELVIN BERGER: Before the break, I believe Mr. Hart had referred to two letters or exchange of correspondence between himself and Mr. Coppers of Indiana and Michigan.

I would like to have marked for identification as DJ 178 a letter from Mr. Hart to Mr. R. M. Coppers, dated October 9, 1975.

(The document referred to
was marked DJ 178, for
identification.)

BY MR. MELVIN BERGER:

Q Mr. Hart, I would like to ask you if this is the letter you had reference to before?

A Yes, it is.

CHAIRMAN RIGLER: Now this is being marked
DJ 178?

MR. MELVIN BERGER: Yes, sir.

CHAIRMAN RIGLER: And can you read for us the internal identification number at the bottom?

MR. MELVIN BERGER: I believe it is 70000669. I would like to move that DJ 178 be admitted into evidence.

MR. BUCHMANN: I object, if Your Honor please, unless we see the response of Mr. Copper. The controversy over this, if you remember, was the interpretation.

MR. MELVIN BERGER: I have looked for the response to it. I do not have that document. Mr. Hart says he may have a copy of it in his car, but he is not sure.

CHAIRMAN RIGLER: We will defer receipt of 178 into evidence until the response letter has been located.

MR. BUCHMANN: May I inquire of counsel from the Department if that means that the Department never received a copy of Mr. Coppers' letter? They received a copy of DJ 178.

MR. MELVIN BERGER: To the best of my knowledge we have never received a copy of that letter. I can't find it in my files.

BY MR. MELVIN BERGER:

Q Mr. Hart, at the time you first became familiar with the MELP situation in late '72 or 'ate '73, was there an interconnection between the MELP system and the CEI system?

A No, there was not. To the best of my recollection.

Q Subsequent to that time, was there any construction work that was done on effecting an interconnection?

A Yes, there was the 69 kV interconnection. Then from that we went to the 138 kV interconnection.

Q With regard to the 69 kV interconnection, was there a dispute at one time between CEI and NELP about payment for that interconnection?

MR. BUCHMANN: This matter has been handled before the Federal Power Commission. I don't know what connection it has with the issues in this case, in any event.

MR. MELVIN BERGER: I believe we had already had a similar objection with regard to matters that were handled before the FPC. A ruling was handed down on that. I believe the matters I will be inquiring into here were not directly related to the specifics of the FPC order. But dealing with another matter that is tangential to that order.

MR. BUCHMANN: I inquired as to how it is relevant here.

CHAIRMAN RIGLER: Where are you going on this line?

MR. MELVIN BERGER: Well, do you want me to say that in the presence of the witness or not?

MR. BUCHMANN: I have no objection.

MR. MELVIN BERGER: Could I have the last question read back, please?

(Whereupon, the reporter read the question, as requested.)

CHAIRMAN RIGLER: The question to you is where are you going if we permit you to continue with this line.

MR. MELVIN BERGER: There are two documents that I will be using in this line relating to efforts by CEI to delay the interconnection, and this dispute was part of that effort.

CHAIRMAN RIGLER: We will permit it for a while.

MR. MELVIN BERGER: Can I have the last question read back, please?

(Whereupon, the reporter read the question, as requested.)

THE WITNESS: Shall I answer?

Yes, there was.

BY MR. MELVIN BERGER:

Q What was the nature of that dispute, Mr. Hart?

A The nature of the dispute was whether we had actually tendered payment. We had sent over to CEI a purchase order and the dollar amount was \$62,000, as I remember. A purchase order to the City of Cleveland is like a certified check.

CEI did not consider that good enough, however, and so the dispute arose as to whether they should finish doing the work at their end, and if they had finished this 69 kV interconnection, we wanted to use it in a synchronous mode which would have made all of the difference in the world to the City of Cleveland.

CEI continued to insist it could only be used in a nonsynchronous mode, which really put a burden on the City of Cleveland and made -- any time there was a breakdown, there was an outage.

In other words, the service in the municipal service area was interrupted. Whereas if it had been on a synchronous basis, the electricity would have flowed back and forth, and there would have been no outage to the customers of MELP.

Now, this \$62,000 purchase order was sent over to CEI by, I will say, August of 1972. They kept the purchase order for 16 months. They refused to act on it. And they refused to complete their work.

So consequently, as they said, we can't use this interconnection in a synchronous mode. And so -- well, that is what the fight was over at that time.

MR. BUCHMANN: If Your Honor please, I'm sorry. I don't want to interrupt the witness, but if the witness is finished, I move to strike all of that answer

after the reference to the purchase order of the City of Cleveland being like a certified check.

After that, the references to the synchronous or nonsynchronous modes up to the resumed testimony about the \$62,000 purchase order, and finally on the last sentence again about the synchronous mode; that matter was before the Federal Power Commission and there is no question about that.

MR. REYNOLDS: I join in that objection on behalf of all of the other Applicants.

CHAIRMAN RICLER: That will be denied.

MR. REYNOLDS: May I make an inquiry? At the earlier point in time when the matter of the Federal Power Commission litigation came before the Board, the Board deferred ruling until such time as the Applicants had an opportunity to furnish the Board a brief.

We are in the process of doing that.

You have now overruled the objection in this instance. I would like to request that we get the same treatment with respect to this particular motion until such time as we have had opportunity to present that position to the Board, and whatever the other side wishes to present.

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CHAIRMAN RIGLER: I see a difference in the ruling we just made and the earlier rulings requested with respect to FPC activities.

It seems to me his answer to the pending question does not necessarily get us into an area where the primary expertise of the FPC comes into play.

If the testimony is directed to the delay tactics which is its announced purpose, according to the Department, then this evidence would be received with respect to that allegation, despite what went on at the FPC.

I do see sufficient difference to cause me not to pause and await your brief, before we overrule the pending objection.

I had not forgotten your earlier reservations.

MR. REYNOLDS: I'm trying to get that to you, as soon as I can with everything else.

Let me just ask the Board, though, the question of delay, specifically, in the context which the Witness testified was a matter that was in litigation and is in litigation before the Federal Power Commission in that very sense.

The charge was made there of delay similar to the one here and is being fully litigated.

I'm not sure that the Board is, at this point, aware of that. If that is the case, then my question is

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whether the Board's ruling at this particular time might be reconsidered when we are able to establish that the matter in litigation before the Federal Power Commission is identical with the one that is now being discussed and was referenced by the Witness.

CHAIRMAN RIGLER: If the FPC rendered a decision, I think we might like to take that decision under advisement.

On the other hand, I don't see that one necessarily excludes the other.

MR. BUCHMANN: Your Honor, with respect, may I make one point. I know I shouldn't argue after you have ruled.

I trust the Board is aware that I did not attempt to strike the portions about us sitting on a purchase order or something of that sort.

I wanted to strike that part saying we could have been operating synchronously in the face of the fact that the Federal Power Commission had ordered us to function nonsynchronously.

CHAIRMAN RIGLER: Are you saying there is an F.C. Order which forbids you from operating in a synchronous fashion with the City?

MR. BUCHMANN: Which ordered that 69 kv interconnection to be operated nonsynchronously. Those

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orders are in evidence here.

MR. HJELMFELT: I don't believe there is any order of the FPC that would prohibit the operation of the interconnection in a synchronous manner. It required as a minimum that there be a nonsynchronous temporary emergency interconnection which is not free of ambiguity in itself. In any event, the order did not prohibit the parties from operating synchronously.

(Board conference.)

CHAIRMAN FIGLER: We hear your argument. We are going to adhere to our ruling.

BY MR. MELVIN BERGER:

Q Mr. Hart, was the City advised of CEI position in this matter by letter?

A We were advised by the City -- by CEI of CEI position by letter. Yes, I believe Lee Howley of CEI wrote the City of Cleveland on at least one occasion.

And the City of Cleveland wrote back to him also, by the way.

MR. MELVIN BERGER: I would like to have marked for identification as DJ-179, a letter from Lee Howley to Raymond Kudukis, December 21, 1975. I believe it is in the packet of papers which I gave you earlier this morning.

The subject is "Re 69 kv interconnection."

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(The document referred to
was marked Exhibit DJ-179
for identification.)

BY MR. MELVIN BERGER:

Q Mr. Hart, is this the letter you just referred
to?

A Yes, it is.

MR. MELVIN BERGER: I would like to have marked
ad DJ-180 a letter from Raymond Kudukis to Lee C. Howley,
dated January 18, 1974.

CHAIRMAN RIGLER: You marked as 179, Department
Document 00016656, and you are marking as Department
Exhibit 180, the document with the internal department
number 011226?

MR. MELVIN BERGER: That is correct.

(The document referred to
was marked Exhibit
DJ-180 for identification.)

BY MR. MELVIN BERGER:

Q Mr. Hart, have you seen DJ-180 before?

A I'm sorry; which is DJ-180?

Q The January 18, 1974, letter.

A Yes, I have. I have a draft of that.

Q Is this the letter you referred to before in your

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testimony?

A. Yes, it is.

MR. MELVIN BERGER: I would like to move that DJ-179 and 180 be admitted into evidence.

MR. BUCHMANN: Continuing my objection, because of the FPC matter and by the way I point out to you that DJ-180 was copied to the Federal Power Commission which, I think, confirms my view that this controversy was there.

Other than that, your Honor please, I have no objection.

MR. REYNOLDS: I will make the continuing objection on behalf of the other Applicants and also will join the objection, because these were documents that were part of a litigation before the FPC and, therefore, should not be used here.

CHAIRMAN RIGLER: The objection will be overruled and we will receive them into evidence.

(The documents heretofore marked Exhibits DJ-179 and 180 for identification, were received in evidence.)

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BY MR. MELVIN BERGER:

Q Mr. Hart, subsequent to the January 18, 1974 letter, did CEI cash the purchase order?

A I believe they did.

CHAIRMAN RIGLER: Did the City go to them during the 16-month period and ask CEI why they had not cashed the purchase order?

THE WITNESS: Yes, sir.

As a matter of fact, at this time the letter of January 18 was written, the purchase order had not been cashed. It was issued back in the middle of 1972, I believe it was.

So here you have a continuing period here where this purchase order had not been cashed or used.

CHAIRMAN RIGLER: Did the City go back to CEI after 16 months or so and ask what was happening?

THE WITNESS: The City went back on occasion to ask what the problem was. It was to your advantage to use this piece of equipment in a synchronous mode rather than nonsynchronous mode.

MR. SMITH: Is your purchase order a draft on a bank?

THE WITNESS: No, sir. According to Section 105, I think it is, of our City Charter, money cannot be decertified once a purchase order has been issued, which

means that any supplier knows that there are always funds behind that purchase order. If you understand what I mean. The fund can't be used for any other purpose. They have a purchase order outstanding and the funds are encumbered at that point.

That, sir, is the same as a certified check, but it is slightly different because a municipality works on an appropriation. We do not work on the -- like in the sense of a certified check, but that is the closest thing we can come to in trying to describe what a purchase order is.

MR. SMITH: This would be presented to the city treasurer and upon demand, then they could get --

THE WITNESS: That's correct, sir.

We are saying by this, there is \$62,000 in funds standing behind this purchase order. Any time you present this to the City of Cleveland, we will then pay you.

BY MR. MELVIN BERGER:

Q Mr. Hart, has the City of Cleveland had an interest in membership in CAPCO?

A We have had an interest in CAPCO, yes, sir.

MR. BUCHMANN: Could I have that question and answer read?

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

BY MR. MELVIN BERGER:

Q Do you know if a request was ever made of CEI or any of CAPCO companies requesting membership in CAPCO?

A Yes. The City of Cleveland did make a request for membership in CAPCO.

MR. MELVIN BERGER: I would like to have marked as DJ 181 a letter from Herbert Whiting to Karl Rudolph, dated April 4, 1973, and bearing Justice document number 00006955.

(The document referred to was marked DJ Exhibit 181, for identification.)

BY MR. MELVIN BERGER:

Q Mr. Hart, is this the request you just referred to?

A Yes, it is. I helped draft this.

Q Mr. Hart, has the City also had an interest in obtaining participation in nuclear units?

A Yes, it has.

Q Has the City made a written request of --

A Yes, they have. I'm sorry.

Q Has the City made a written request of CEI for access to nuclear units?

A Yes, they have, sir.

MR. MELVIN BERGER: I would like to have marked as

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DJ 182 a letter from Herbert Whiting to Karl Rudolph dated April 1973, and bearing Justice document number 00006954.

(The document referred to was marked DJ Exhibit 182, for identification.)

BY MR. MELVIN BERGER:

Q Mr. Hart, is this the request you just spoke of?

A Yes, it is. I helped draft this.

Q With regard to DJ 181 and 182, do you know if copies of these letters were sent to parties other than the addressee?

A No, I don't think they were.

MR. MELVIN BERGER: I would like to move that DJ 181 and 182 be received into evidence.

MR. BUCHMANN: I object to introducing pieces of this correspondence, please.

CHAIRMAN RIGLER: I think he will probably get to the whole series. If he doesn't you can renew your objection.

MR. BUCHMANN: The Justice Department hasn't even designated the whole series.

CHAIRMAN RIGLER: Well, in the group of documents that Justice has put before us for use in connection with this witness, I notice the next one appears to be a reply

from Mr. Rudolph.

MR. BUCHMANN: I'm suggesting, Your Honor, that that is not the whole series.

CHAIRMAN RIGLER: We will take it up when we come to it.

MR. BUCHMANN: If I can do it on cross, fine.

CHAIRMAN RIGLER: Yes.

BY MR. MELVIN BERGER:

Q Mr. Hart, was a response received from Mr. Rudolph?

CHAIRMAN RIGLER: Wait a minute. Didn't you move these two into evidence?

MR. MELVIN BERGER: Oh, yes. I'm sorry.

MR. REYNOLDS: Continuing objection on behalf of other Applicants.

CHAIRMAN RIGLER: That will be overruled.

DJ 181 and 182 will be received into evidence.

(DJ 181 and 182, previously marked for identification, were received in evidence.)

BY MR. MELVIN BERGER:

Q Mr. Hart, was a response from Karl Rudolph received?

A I forget whether or not it was from Karl Rudolph, but there was a response received on both of these.

MR. MELVIN BERGER: I would like to have marked for identification as DJ 183 a letter from Karl Rudolph to Herbert Whiting, dated April 17, 1973, and bearing Department of Justice document number 00006953.

(The document referred to was marked DJ 183, for identification.)

BY MR. MELVIN BERGER:

Q Mr. Hart, is this the response you had reference to a moment ago?

A Yes, sir.

MR. REYNOLDS: I object to that. The question asked earlier went to the two pieces of communication.

I withdraw it.

MR. MELVIN BERGER: I would like to move that DJ 183 be received into evidence.

MR. REYNOLDS: Continuing objection.

CHAIRMAN RIGLER: The continuing objection will be overruled. We will receive DJ 183 into evidence.

(DJ 183, previously marked for identification, was received in evidence.)

BY MR. MELVIN BERGER:

Q Mr. Hart, did the City eventually have some discussions with CEI with regard to -- in response to Mr.

Rudolph's letter of April 4?

A Yes, we did. You said April 4. You mean April 17, do you not?

Q I stand corrected. It is April 17.

MR. MELVIN BERGER: I would like to have marked as DJ 184 a letter from Herbert Whiting to Lee Howley, dated April 27, 1973, and bearing Department of Justice document number 00006952.

(The document referred to was marked DJ 184, for identification.)

BY MR. MELVIN BERGER:

Q Mr. Hart, have you seen that document before?

A Yes, I have.

Q Was this sent to Mr. Howley of CEI in preparation for a meeting?

A Right. I helped prepare this one also.

MR. MELVIN BERGER: I would like to move that DJ 184 be admitted into evidence.

MR. REYNOLDS: Continuing objection.

CHAIRMAN RIGLER: Continuing objection is overruled. 184 will be received into evidence.

(DJ 184, previously marked for identification, was received in evidence.)

BY MR. MELVIN BERGER:

Q Mr. Hart, did the City subsequently submit a proposal to CEI regarding CAPCO membership and participation in nuclear units?

A Right. We sent a joint document over to them that provided for both of these things, both CAPCO membership and participation in nuclear units.

MR. MELVIN BERGER: I would like to have marked for identification as DJ 185 a letter from Herbert Whiting to Karl Rudolph, dated August 3, 1973, which contains an attached proposal entitled "Proposal for Membership in Central Area Power Coordination Group and Participation in Nuclear Units."

CHAIRMAN RIGLER: What is the internal number?

MR. MELVIN BERGER: 00006942 through 51.

(The document referred to was marked DJ 185 for identification.)

BY MR. MELVIN BERGER:

Q Mr. Hart, is this the proposal you had reference to a few moments ago?

A Yes, it is.

Q Do you know why this proposal was prepared?

A It was in response to a whole series of correspondence that was going through here. It was our

proposal to them. Our specific proposal in order to try to get membership in CAPCO and participation in nuclear units.

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Q Did the City ever have meetings with the CAPCO members other than CEI?

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A No. I think CEI was designated as the person we should deal with.

You notice that this document here you have just identified, was sent to the CAPCO members and it is my understanding that CEI indicated to us that they were the negotiating arm for CAPCO in their dealings with the City of Cleveland.

So we never did deal with any of the other members of CAPCO.

CHAIRMAN RIGLER: Who made that representation to you that CEI was the authorized agent of the other members?

THE WITNESS: There is some correspondence, I believe. I don't know who the individual was, but I can dig back and find out who it was.

MR. LERACH: I move to strike the Witness' answer. It is obviously based on speculation, if he cannot remember who told it to him.

CHAIRMAN RIGLER: May I hear the answer?

(The reporter read the record as requested.)

MR. LERACH: I add to my objection the ground that it violates the best evidence rule.

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MR. MELVIN BERGER: Mr. Chairman, I believe that document is already in evidence as Applicants 25.

MR. REYNOLD: Mr. Chairman, I would like to move to strike on the basis that the answer was non-responsive to the Chairman's question. I believe the Chairman asked the Witness who it was that informed the Witness.

CHAIRMAN RIGLER: The objection will be overruled. The Board has referred to Applicants Exhibit 25, which is addressed to Mr. Whiting. It does indicate that Mr. Rudolph is responding after discussion with other members of the CAPCO group.

MR. BUCHMANN: Can we have the date on that, so it is in the record at this point?

CHAIRMAN RIGLER: August 13, 1973.

MR. REYNOLDS: If I may, I don't believe that is the question you asked the Witness. I have no problem refreshing the Witness' recollection or going with the correspondence, but I believe you asked the Witness who it was who informed the Witness with respect to the fact that CEI was operating as a negotiating arm for the other CAPCO members.

I don't believe the Witness has responded to that.

THE WITNESS: Would you mind if I answer that?

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CHAIRMAN RIGLER: Yes.

THE WITNESS: This letter you have a copy of there, the originals of all of these letters are kept in my own files, so it would have gone from, as you have indicated, Carl Rudolph to J. Whiting, who was the man I work for.

He would have given it to me and it is in my files.

CHAIRMAN RIGLER: Did anyone inform you personally or did your knowledge come about as a result of the Rudolph letter of August 13.

THE WITNESS: It came about as a result of this letter.

MR. MELVIN BERGER: I would like to move that DJ-185 be admitted into evidence.

CHAIRMAN RIGLER: Hearing no objection, Department Exhibit 185 will be admitted at this time.

MR. BUCHMANN: Could we inquire as to the underlinings in that exhibit, please?

I don't mind them being here. I want to know who put them there. In the letter. I'm sure they weren't in the original and in the attachment.

MR. MELVIN BERGER: This document was produced to the Department by CEI. We have no way of knowing who underlined portions of the document, and we are not relying on the underlining.

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(The document previously marked Exhibit DJ NO. 185 for identification, was received in evidence.)

BY MR. MELVIN BERGER:

Q Mr. Hart, subsequent --

CHAIRMAN RIGLER: Let me go back a step in 184, Mr. Whiting, in the letter Mr. Hart assisted in drafting, requested certain basic CAPCO documents. Do you intend to find out what became of that request?

MR. MELVIN BERGER: Yes, I will.

BY MR. MELVIN BERGER:

Q Mr. Hart, referring to the April 27, 1973, letter for a moment, request for certain CAPCO documents, a request for certain CAPCO documents was made.

Do you know whether that request was acceded to by CEI?

A It was at least a portion of it that they sent back over to us.

There were three items we had asked for in that letter. I don't think they supplied us with everything we asked for, but they had gone as far as they felt they possibly could. I think possibly that some of the documents as of that time, April 27, 1973, had not been finalized yet among the members of CAPCO.

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I think there is correspondence on that that is subsequent to this also.

MR. CHARNO: Mr. Chairman was there a ruling on 185?

CHAIRMAN RIGLER: It was admitted.

MR. CHARNO: Thank you.

BY MR. MELVIN BERGER:

Q Mr. Hart, subsequent to the August proposal, for participation in nuclear unit and membership in CAPCO, did the City meet with CEI to discuss that proposal?

A Yes, we did.

Q Do you know on how many occasions you might have met with CEI to discuss that proposal?

A As I remember we put it off and put it off and it was some time in December of 1973 that we finally got down and met with each other.

Q Where was this meeting held?

A It would have been held over at CEI.

Q Who was present at that meeting, do you recall?

A I was present. I believe George Chuplis was present. Mr. Goldberg, Lee Howley was there. Don Hauser was there.

CEI had a whole staff of engineers. We might have had one engineer also and I forget who that would have been at that time.

- Do you recall what the purpose of that meeting was?

A. Well, the purpose of the meeting was supposedly to discuss what you are talking about here, membership in CAPCO and participation in nuclear units.

Q. At the start of that meeting or some time during that meeting, were you handed a document by CBI which was in response or which was -- well, in response -- a response by one of the other CAPCO companies to the August proposal?

A. Yes, we were. There was a letter by a Mr. John Arthur, who I believe at that time and maybe still is, president of Duquesne Light and Power.

The letter said, in effect, no, you cannot become a member of CAPCO.

MR. BUCHMANN: I object to move that last out. He wasn't asked to summarize the letter, and he is not entitled to do it, in any event.

CHAIRMAN RIGLER: We will strike the portion that reads "The letter said, in effect, you cannot become a member of CAPCO."

MR. MELVIN BERGER: I would like to have marked for identification as DJ-186, a letter from John Arthur to the City of Cleveland, Ohio, attention, Honorable Ralph Purk, Mayor, which bears Justice Document Number

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011131. This is a one-page document.

(The document referred to was
marked Exhibit DJ-186 for
identification.)

MR. LERACH: I wonder if I could request the source
of this document from the Justice Department?

MR. MELVIN BERGER: The source of this document
is from the files of CEI.

MR. LERACH: How do you know that?

MR. MELVIN BERGER: From our internal document
number.

MR. LERACH: Fine.

MR. BUCHMANN: Could you ho'd up the document
you are looking at, because we have some confusion.

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BY MR. MELVIN BERGER:

Q Mr. Hart, with regard to this document, do you recall seeing this document or something similar to it before?

MR. LERACH: I object to that question. It is vague, ambiguous, compound.

MR. REYNOLDS: I object.

BY MR. MELVIN BERGER:

Q Mr. Hart, do you recall seeing this document before?

A Yes.

Q Was this a document you just referred to?

A This is a document I just referred to, yes, it was.

Q Was the copy you received signed by Mr. Arthur?

A No, it was not. Because I believe a couple of days before we had received a signed copy from Mr. Arthur. There are two documents that say the same thing. This is a reconstituted document. There was an original which Mayor Purk received in the mail, which I subsequently received.

MR. MELVIN BERGER: I would like to mark for identification as DJ --

CHAIRMAN RIGLER: How did you receive the document which has been designated Justice Exhibit 136?

THE WITNESS: Your Honor, this was handed

out in the meeting in December 1973 by Lee Howley.

MR. MELVIN BERGER: I would like to mark for identification as DJ 187 a letter from John Arthur to the City of Cleveland, attention Honorable Ralph Purk, Mayor, bearing Department of Justice document number 011129.

(The document referred to was marked DJ 187, for identification.)

CHAIRMAN RIGLER: That continues to 011130 internal department number.

MR. MELVIN BERGER: That's correct. This is a two-page document.

BY MR. MELVIN BERGER:

Q Is there a copy of the signed letter you referred to in your testimony?

A Yes, this is a signed of the original which Mayor Purk had received.

CHAIRMAN RIGLER: What was the date of the meeting where you received a copy from Mr. Howley?

THE WITNESS: To the best of my recollection, sir, and I don't want to push it here, but I think it was December 13.

MR. MELVIN BERGER: I would like to move that DJ 186 and 187 be admitted into evidence.

MR. LERACH: I would like an offer of proof on

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186.

CHAIRMAN RIGLER: I don't know that you are entitled to it. This is not an unsponsored exhibit.

MR. LERACH: I am unfamiliar with the distinction that you are not permitted an offer of proof as to any piece of documentary evidence. But if that is the Board ruling, that is the Board ruling,

CHAIRMAN RIGLER: I think this also speaks for itself. I won't require that.

MR. LERACH: It is an unsigned letter not on my client's letterhead that was shown to the witness three days after he received a signed copy of the communication on the company's letterhead.

CHAIRMAN RIGLER: I thought you were referring to the one that was signed by an officer of your company. I will permit the offer.

MR. MELVIN BERGER: This document would be offered as proof that this letter was given to Mr. Hart by CEI at this December 13 meeting as explained in Mr. Hart's testimony.

CHAIRMAN RIGLER: That has been testified to.

In other words, what conclusion can we draw from that? I want to leave a little problem that some of the Board members have been having about the Department's case thus far with you:

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On some of your documents or evidence, you hand them to us and when we ask you for the offer of proof, it is a little vague and it doesn't quite jell.

This is a good example. If you have something you want us to consider about the letter, tell us what it is so we know.

MR. SMITH: If you don't do that, and then in your proposed findings you come up with something else, then your candor will be suspect.

MR. MELVIN BERGER: My delay is not that I don't wish to give the offer of proof, but I'm attempting to frame one that I think would be appropriate for this document.

I think we would try to show by using this document that there was some type of joint action between the CAPCO companies in responding to Cleveland's request for CAPCO membership.

MR. BUCHMANN: If Your Honor please, on behalf of CEI, I want to join in that objection. If there was joint invidious actions by the Illuminating Company. Certainly by revealing this letter as has been testified was behaving in an odd fashion. There is no indication as to the time when the Illuminating Company got this document in relationship to the time when the original letter was mailed to the City of Cleveland. There is no indication that there is preknowledge here.

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CHAIRMAN RIGLER: There was no pending objection. There was merely a request for an offer of proof. Taking your objection as an objection, it will be overruled.

I might say that your argument seems to go to the weight that the Board should accord to this letter. The offer of proof was that there was joint action. I don't believe it rises to that level.

It may show joint consultation between the CAPCO members.

MR. BUCHMANN: Consultation in regard to what, if it is not in conveyance of the action.

CHAIRMAN RIGLER: In response to granting CAPCO membership to the City of Cleveland.

MR. BUCHMANN: How can that inference be drawn if there is no testimony in this record as to when we got the DJ 186.

CHAIRMAN RIGLER: The document itself may create the inference which might be rebuttable, by you, if Mr. Howley could explain when it came in.

The fact that the draft document was in the possession of CEI and was delivered does create in my mind that there was joint consultation.

MR. BUCHMANN: May I suggest for the record that there is no indication that it is a draft.

CHAIRMAN RIGLER: There is if you compare it and I'm not going to prolong this by arguing with you. If you compare it to 187.

MR. BUCHMANN: With respect not unless you know which came first.

CHAIRMAN RIGLER: You may argue time and weight on it.

MR. LERACH: Mr. Chairman, since I was the one that asked for the offer, I never got a chance to make my objection.

The evidence is repetitive. It does not go to prove things for which it is offered. I appreciate that cases have to be built slowly and so forth, but it is more or less like putting a cow in evidence and saying you are going to prove it is a horse.

You don't have an absolute right to put something in a record and say I'm going to show X, Y, Z happened when it has no relationship to it.

MR. REYNOLDS: May I have a turn?

CHAIRMAN RIGLER: You may.

MR. REYNOLDS: I do want to make an objection on behalf of Ohio Edison, Toledo Edison and Pennsylvania Power with respect to both of these documents in addition to the objections that Duquesne has separately made, and CEI had made.

To the extent that the Justice Department is seeking to establish by virtue of its code numbers on the bottom of its document that this is a document that came from CEI files that is not probative and I would object to this document on its -- I would object to any effort by the Department of Justice to relate this document to CEI files simply by virtue of code numbers on the bottom of it.

CHAIRMAN RIGLER: They could come back and request an admission. We don't have that problem with respect to this document because the witness identified it as identical to one he was furnished by Mr. Howley at a meeting early in December.

MR. REYNOLDS: I would like to make a final point:

This document was never turned over to Applicants in response to discovery request of the City of Cleveland, and it was one that was called for and I would object on the ground that if this was indeed handed to the City as we have heard testimony to today, it should have been produced in response to the discovery request.

CHAIRMAN RIGLER: By the City?

MR. REYNOLDS: By the City.

CHAIRMAN RIGLER: The City isn't offering it, so that won't go to the Department's attempt to introduce it

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at this time.

MR. REYNOLDS: Then it goes to the weight.

CHAIRMAN RIGLER: All right. The objections are overruled. We will receive 186 and 187 into evidence.

(DJ 186 and 187, previously marked for identification, were received in evidence.)

CHAIRMAN RIGLER: I remind you again, Mr. Berger, come to the point on the offers of proof. I hope you see that the Board does have a problem with just telling us it means something that your witness has said or on the face of the document is apparent.

If you want to go somewhere or establish something, you have to start telling us what it is.

BY MR. MELVIN BERGER:

Q Mr. Hart, were you also given another letter by CEI officials at that December meeting?

A Yes, we were.

MR. MELVIN BERGER: I would like to mark for identification as DJ 188 a letter from Lee Howley to Herbert Whiting, dated December 1, 1973, and bearing internal document number 00006936 through 37.

(The document referred to
was marked DJ 188 for
identification.)

BY MR. MELVIN BERGER:

Q Is this the letter you just referred to as being
handed to you by CEI?

A Yes, it is.

Q Was this letter discussed at all at this
meeting?

A Yes, it was.

In fact, the almost entire meeting was taken
up with discussing the paragraph down at the bottom.

CHAIRMAN RIGLER: Which paragraph?

THE WITNESS: It is the last paragraph, Your
Honor. It starts "one of the provisions." And then it is
the paragraph at the top of the next page also.

CHAIRMAN RIGLER: So that the record is clear
without reference back to the document, the first paragraph
to which you refer provides that CEI would have the
right of first refusal to purchase power from the
city's participation not required by the City?

THE WITNESS: That's correct.

CHAIRMAN RIGLER: The second paragraph refers
to a condition precedent to entering into negotiations
being that the City withdraw any informal or formal

petitions or request for antitrust review or opposition in any pending proceeding before any administrative agency or court pertaining to the Davis-Besse or Perry Units.

THE WITNESS: That's correct, sir.

There are two additional things in there, if I may draw your attention to it. Is it proper to do so?

MR. MELVIN BERGER: I was going to cover that.

MR. REYNOLDS: Is there a pending question?

CHAIRMAN RIGLER: There is no pending question, but Mr. Berger indicates that is his next subject.

MR. BUCHMANN: When you referred to Davis-Besse and Perry Units, the reference would include, as you can tell from the third paragraph, Beaver Valley, too.

BY MR. MELVIN BERGER:

Q Mr. Hart, were some of the items mentioned on the last paragraph of the first page of this document discussed at that meeting?

A Yes, they were.

Q Which of the items in the paragraph were discussed?

A Number one there is the item of first refusal, which has been mentioned by Your Honor.

Item No. 2, that the City of Cleveland could not or would not, as it states there, sell electricity below

cost and the discussion there centered around what was cost.

Then the third item in that paragraph is that the City would not utilize its other proprietary functions or governmental functions to promote tie-in arrangements to compete with the Illuminating Company.

There is the fourth item which Your Honor mentioned, which as a condition precedent to any sort of agreement we would have to withdraw our petitions in the antitrust proceedings.

BY MR. MELVIN BERGER:

Q Mr. Hart, with regard to the item -- the last paragraph of page 1 about selling below cost, what was the nature of that discussion?

A To tell you the truth, what it centered around was the exact definition of what is cost and cost, I guess, is something that is not easy to define. What Mr. Goldberg pointed out to the other people in the room was the fact that CEI would herewith be able to control the price that the City would be charging its customers and CEI would in effect dictate what the cost was, i.e., they would then dictate what the cost at retail would be.

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MR. SMITH: May I interpose, please.

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Was it your understanding that the electric energy referred to in that clause was any electric energy produced or sold by the City of Cleveland or sold by the City of Cleveland or was that limited to unit power, if I'm using the correct expression, from nuclear facilities.

THE WITNESS: It was my understanding that this was a broad brush approach at controlling the prices that the City would be selling to everybody.

It would be an across-the-board, whether it was nuclear power or what.

BY MR. MELVIN BERGER:

Q For the record, perhaps you can tell us who Mr. Goldberg is our outside counsel.

Q What response was made by CEI to Mr. Goldberg's comments?

A There was lots of discussion back and forth and I don't think anybody ever came up with a clear meaning or definition as to what costs would be, because Mr. Goldberg has a great deal of expertise before the FPC in what cost is, and he was pointing out all of the different methods or techniques of costing and what costing really means to different people.

CEI never did get a response back as to what they

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meant, though.

Q You indicated that there was also a discussion with regard to the first item in the last paragraph of the first page on the right of first refusal.

A That is correct. They were insisting if we got any nuclear power and let's assume, for instance, that we had an excess of capacity, we would have to offer to resell it back to CEI, and then if they at that point turned down the excess capacity, then we could go and sell it someplace else, but they would have the first refusal to purchase.

So, any excess capacity that came over a nuclear unit, we would have to sell back to them at prices they would determine.

MR. MEVIN BRUGER: Could I have the answer?

(The reporter read the record as requested.)

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BY MR. MELVIN BERGER:

Q Did CEI explain a reason for this proposed condition?

A Well, I don't think they came out and said in so many words. I can give you a reason if you would like to hear it. But I don't think they came out and said it in so many words.

MR. REYNOLDS: I will object if we are going to get into that.

CHAIRMAN RIGLER: All right. I think we are at a good breaking point for the day. We will resume at 9:30 tomorrow morning.

(Whereupon, at 4:45 p.m., the hearing was adjourned, to reconvene at 9:30 a.m., Wednesday, 11 February 1976.)