

Regulatory Docket File

NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING
CO.

Dockets Nos.

50-346A

50-500A

50-501A

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

and

CLEVELAND ELECTRIC ILLUMINATING
CO., et al.

50-440A

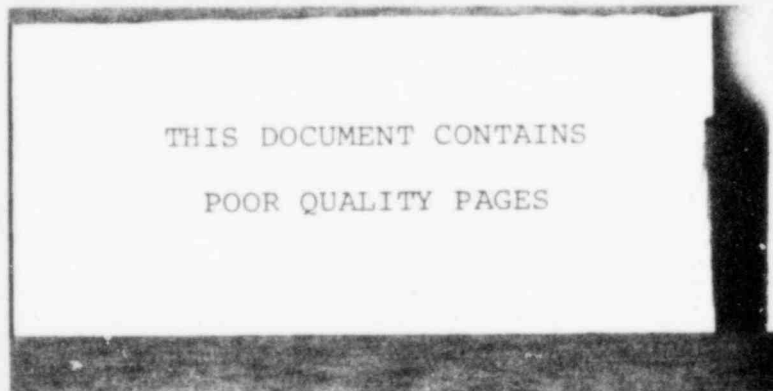
50-441A

(Perry Nuclear Power Plants, Units 1 & 2)

Place - Silver Spring, Maryland

Date - Monday, 23 February 1976

Pages 317-
3447



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

13 First Floor Hearing Room
14 7915 Eastern Avenue
15 Silver Spring, Maryland

15 Monday, February 23, 1976

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

18 BEFORE:

19 MR. DOUGLAS RIGLER, Chairman

20 MR. JOHN FRYSLAK, Member (not present)

21 MR. IVAN SMITH, Member

22 APPEARANCES:

23 As heretofore noted.
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C O N T E N T S

	<u>WITNESS:</u>	<u>DIPECT</u>	<u>CROSS</u>	<u>FEDIRECT</u>	<u>ENCLOS</u>
3	Robert Hart (recalled)		5339 (Contd)	5469	5433
4					
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9					
10	<u>EXHIBITS</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>		
11	DJ-314 (1900001)		5319		
12	DJ-258 through 271				5334
13	DJ 277 through 285				5338
14	DJ 288 through 299				5338
15	Applicants 94 (CEI)		5339		5392
16	(ltr. dated Oct. 21, 1975 from Mr. Hauser to Mr. Hart.)				
17	to				
18	Applicants 95 (CEI)		5341		5392
19	Ltr. dated Nov. 25, 1976 from Mr. Hart to Mr. Lansdale.)				
20	Applicants 96 (CEI)		5343		5392
21	(ltr. dated Dec. 3, 1975 from Mr. Lansdale to Mr. Davis.)				
22	Applicants 97 (CEI)				
23	(letter from Mr. Rudolph to Mr. Davis, dated December 29, 1975)		5344		5392
24					
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6	Applicants 99 (CEI) (Purchase Order No. 104-69267 of the City of Cleveland)	5357	5392
8	Applicants 100 (CEI) (ltr. dated June 27, -1972, with attached memorandum, dated May 9, 1972, from Mr. Woods to Mr. Roth.)	5364	5398
11	Applicants 101 (CEI), ltr. > dated Sept. 6, 1972, from Mr. Woods to Mr. Howley, with attached report, dated August 28, 1972)	5366	
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P R O C E E D I N G S

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MR. CHARNO: Initially the Department would like to identify for the record a two-page unnumbered document bearing the caption "Resolution," and we would supply this document as the attachment to DJ 2, and we would move DJ 3 into evidence.

CHAIRMAN RIGLER: The two-page document just supplied as DJ 3 attachment will be received and will be added to DJ 3 already in evidence.

MR. CHARNO: The Department, as the next order of business, would like to attempt to duplicate something that we have done in the past with the applicants. In our interrogatory answers we alleged in 1965 refusal to sell bulk power at wholesale by Ohio Edison Company to the City of Newton Falls.

Our original 1965 date was based upon a piece of correspondence obtained on discovery and this was the only information we had at the time we answered the interrogatories.

end 1

1 We found upon further investigation that, in fact,
2 the refusal was not in 1963, but prior to that.

3 In view of the Board's prior rulings, we thought
4 that we might make an offer of proof with respect to this
5 witness, Mr. George W. Raika, R-a-i-k-a, and with respect
6 to one Department of Justice Document bearing 1900001.

7 We would propose to have Mr. Raika testify and we would
8 submit the document.

9 CHAIRMAN RIGLER: Shall we identify Justice
10 Document 1900001 as Department Exhibit 314 for identification?

11 (The document referred to was
12 marked Exhibit DJ-314 for
13 identification.)

14 CHAIRMAN RIGLER: That would be 01 through what
15 number?

16 MR. CHARNO: I don't believe that document bears
17 any further numbers.

18 It is a 45-page report. Although some of the pages
19 are oversized and probably result in multiple pages -- 47
20 pages in the exhibit.

21 We would offer DJ-314 in the testimony of Mr. Raika
22 to indicate in 1964 the City of Newton Falls expected a better
23 than average growth potential in the future and that one of
24 the alternatives explored by the City in terms of bulk power
25 supply, was purchase of power from Ohio Edison Company, and

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1 Ohio Edison Company refused to supply this power, thereby
2 foreclosing this bulk power supply alternative.

3 Finally, we would offer the document for a
4 comparison of the rates of Ohio Edison and Newton Falls at
5 that time.

6 MR. STEVEN BERGER: Your Honor, Ohio Edison
7 would object to the introduction of these documents or to
8 the testimony of Mr. Paika on the ground that it relates
9 to a factual situation that would be according to the
10 Board's previous rulings remote in time from the factual
11 situations that the Board has determined it will view in
12 passing upon the issues which have been delineated for
13 resolution in this proceeding.

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Beyond that, let me just state that assuming that the Board were to reject those matters, I feel it incumbent upon me to state that we have, to the best of our ability, investigated this charge of the Department which came at the end of the discovery period, after it had been closed.

We have no knowledge whatsoever of any alleged refusal to sell at wholesale to the City of Newton Falls during this time frame or any other time frame.

We do not know who Mr. Raabe or anybody else spoke to at Ohio Edison. In making that statement it is not because I believe the Board doesn't have the ability to separate that which is properly in evidence and not properly in evidence, but because I believe it is incumbent on me to do so to the extent that any impression can be created that such was the case.

MR. SMITH: Who was the witness from Newton Falls?

MR. STEVEN BERGER: Mr. Krog.

MR. SMITH: When did he testify?

MR. STEVEN BERGER: What date?

MR. SMITH: Yes. Do you remember?

MR. STEVEN BERGER: I do not. I believe it was in or around January 7, Mr. Smith.

MR. RIESER: It was.

CHAIRMAN RIGLER: What would Mr. Kaika's testimony be?

MR. CHARNO: Nothing that was not in the offer of proof on the document. It is my understanding there is little that he can add to what is contained in the document.

CHAIRMAN RIGLER: The document doesn't -- strike that.

On page 8 of the document there is a statement that the normal supply for power in this manner would be the Ohio Edison Company. They have stated they are not interested in selling power.

Does Mr. Kaika have any independent knowledge of that statement?

MR. CHARNO: I'm not sure, but I will find out, if you can give me a moment. I don't believe he does, but I can check.

No, he doesn't.

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1 CHAIRMAN RIGLER: Thus far, except for good cause
2 shown, the Board has not gone to the time period prior to 1965
3 for evidence of the events that took place.

4 The only purpose we have had thus far in going
5 behind that date is to find out what the existing situation
6 was in 1965.

7 I gather there is no dispute that in 1965
8 Newton Falls was operating as an isolated system.

9 Whether there were refusals at some prior period,
10 is the type of argument that has not been permitted into
11 evidence as of this time.

12 Mr. Berger, there is no dispute on the part of
13 Ohio Edison that Newton Falls was operating as an
14 isolated system in 1965, is there?

15 MR. STEVEN BERGER: Not that I know of at this
16 time.

17 CHAIRMAN RIGLER: Then, consistent with our earlier
18 ruling, we will reject the offer of proof.

19 MR. CHARNO: For clarification of the record,
20 can we offer DJ-314 into evidence?

21 CHAIRMAN RIGLER: Yes, and it will be rejected
22 on the grounds just stated.

23 I might note that in view of Mr. Berger's
24 statement that Ohio Edison has been unable to find anyone
25 with knowledge of the events set forth in the record, and

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1 the fact that the Justice witness has no independent knowledge,
2 that would be a secondary ground for the at least a
3 reservation on our part before receiving QJ-314 into
4 evidence.

5 MR. CHARNO: At this time the Department would like
6 to move into evidence, Exhibits for Identification 289 through
7 299.

8 MR. RIESER: Duquesne Light, on behalf of itself,
9 has no objection to these documents.

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MR. REYNOLDS: Mr. Chairman, on the matter of documents which are directly relevant to settlement discussions in this case, and that would include DOJ Exhibits 272, 3, 4, 5, I have already noted for the record my objection to this material coming into evidence and certainly coming into evidence under the offer of proof that the Justice Department has suggested.

I think the documents that I have identified clearly relate to talks that were conducted while this case was pending in an effort to reach some settlement among the parties and the material that was circulated among Applicants to try to accomplish that effort, it seems to me, is an inappropriate basis for sustaining an offer of proof for collective or concerted action on behalf of the Applicants which would, as I understand the Department's offer of proof, go to support their general Section 1 allegations.

Mr. Charno reminds me that Department of Justice Document 263 is within the same category, but I believe that is a document which has been deferred by the Board, the introduction has been deferred by the Board at an earlier time.

CHAIRMAN RIGLER: Can someone point to the transcript page where we had the offer of proof?

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MR. REYNOLDS: 5146.

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1 CHAIRMAN RIGLER: We will reject from evidence,
2 Numbers 263, 272, 273, 274 and 275, without prejudice to
3 the Department's right to attempt to reintroduce them as
4 rebuttal documents at the conclusion of Applicants' case
5 and, again, without any prejudgment that they will be
6 acceptable at that time either.

7 MR. REYNOLDS: I next object to Document 277, which
8 the Department has sought to introduce under an offer of
9 proof that appears on pages 5156 and 5157 of the February 18th
10 transcript and, basically, that offer of proof suggests
11 that this document is coming in as proof concerning communi-
12 cation and concertive action and agreement at a time when it
13 was argued that, obviously, CEI was dealing with the City
14 of Cleveland.

15 Specifically as to this document, the Department
16 states that it is a document soliciting from the CAPCC
17 members and explanation of reason or exposition of reasons
18 why the City of Cleveland should be excluded from
19 participation when, if this is a matter solely of interest
20 to CEI and to the City of Cleveland, which one would think
21 a refusal by the City of Cleveland would be such a
22 solicitation, would be immaterial and unnecessary.

23 I pointed out at the time that my recollection
24 of this document, and I was going back and attempted to
25 refresh my recollection, and I believe my recollection is

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accurate, is that it was generated on the basis of a request initiated by the Department of Justice, for Applicants' views or positions with regard to the matter that is discussed in the attached memorandum and at least in part, the attached memorandum comprised a response by Applicants to a specific discovery request of the Department of Justice, at an earlier time in this proceeding.

I think that based on the offer of proof, it would be improper to admit this document into evidence, in order to establish what the Department seeks to have it establish.

MR. CHARNO: The Department would like to note several things for the record. That to the extent this exhibit and other exhibits which have not yet been identified were a response to the Department's inquiry, they would be a response for or to the question asking for an explanation of prior statements by the Applicants.

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The Applicants are on record as indicating that membership in CAPCO, CAPCO type pool is not appropriate for a municipal system, specifically the City of Cleveland, because of legal barriers which have absolutely nothing to do with the Applicants, and at one point -- and I'm uncertain on the timing -- the Department did ask for an exposition of the reasons underlying that position which had been taken a number of times by the Applicant.

We note further that CEF's fact brief, page 7, indicates that there are practical and legal reasons that prohibit an Ohio municipality from participating in a pool such as CAPCO.

CHAIRMAN RICLER: But isn't the burden on them to demonstrate that there are legal reasons rather than the burden on the Department to show the absence of any legal impediments?

MR. CHARNO: I think that is clearly true. I'm not sure that the issue is going to arise firmly until briefing.

CHAIRMAN RICLER: If it doesn't arise, then the Board would take the position as they find it, namely that there are no legal impediments. If Applicants contest that at some point along the line, the burden would be on them to establish the preponderance of the

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1 evidence that there are legal impediments.

2 At that point the Department might well attempt
3 to utilize some of these documents. Right now it
4 seems to me you are assuming a burden that isn't yours
5 to assume.

6 Moreover, the Applicants may never attempt to
7 introduce evidence to support that particular point.

8 MR. CHERNO: I'm afraid the first time we see this
9 will be after the record is closed, in briefing in the
10 proposed conclusions of law.

11 CHAIRMAN RIGLER: The Applicants will have to
12 make that in their affirmative case if they intend to
13 have the Board consider a point of Ohio law as a reason for
14 denying membership in CAPCO.

15 Do you disagree with that, Mr. Reynolds?

16 MR. REYNOLDS: I would say that I could make it
17 in my closing brief just as appropriately as -- I will
18 not -- I don't know at that point exactly the -- how to
19 approach the particular question; but in general terms,
20 if the Applicants are to take a position that as a matter
21 of law, be it Ohio law or federal statute or Ohio
22 constitution or federal constitution, something cannot --
23 the municipalities or somebody else is precluded, or are
24 precluded from certain activity, that legal argument
25 could be made in closing briefs without first submitting

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1 anything as a fact matter to the Board in the affirmative
2 case.

3 CHAIRMAN NIGLER: That puts a different light
4 on things because Exhibit 277 indicates that as Applicants
5 made their arguments with respect to Ohio law or drafted
6 an opinion that that opinion is shaped in some ways to
7 support of conclusion Applicants were going to attempt
8 to argue.

9 I think it would be highly relevant then to
10 our considerations.

11 Mr. Smith reminds me we might have a mixed
12 question of fact and law here also, which is the extent
13 to which Applicants were attempting to rely on provisions of
14 Ohio law as justification for their stand with respect to
15 membership benefits in CAPCO.

16 In view of what you just said about trying to
17 argue this on final briefs, I think that it would now
18 appear to be the better course of action to permit this
19 to come in at this time.

20 MR. REYNOLDS: Mr. Chairman, if I might, the
21 point that I'm making is that what the Department has
22 suggested, that this is proof of solicitation of views
23 of the Applicants, which solicitation would be immaterial
24 and unnecessary but for the fact that Applicants were
25 working together in some sort of common design which was

1 aimed at excluding the City from participation in CAPCO.

2 It seems to me if it is coming in under that
3 offer of proof it is inappropriate, because the document
4 is not one which was -- either document, the covering
5 letter or the attachment, is not one which suggests a
6 solicitation of views for the purpose that the Department
7 wishes to ascribe to it.

8 I make the point basically because the
9 solicitation was at the prompting of the Department of
10 Justice and it was by Mr. Chaznoff, my partner, which is
11 why I have direct knowledge of it, and therefore it
12 seems inappropriate to me to introduce this document to try
13 to show some effort to solicit views which may shape
14 an opinion of the Applicants that they didn't otherwise
15 have.

16 I understand Mr. Smith's comment to be a mixed
17 question of fact and law. I have no difficulty, subject
18 to what I hear, with considering this matter under a
19 revised offer of proof, but I think it is unfair to the
20 Applicant, and it is inappropriate for the Department to
21 proceed by using this document in order to prove or try
22 to prove as a fact matter that the solicitation here
23 was something that was being done without the Department
24 knowing about it, and a solicitation that would have been
25 immaterial and unnecessary, but for any reason other than

1 the fact that the Applicants were somehow engaged in some
2 anticompetitive conduct.

3 That is my objection to it.

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1 If there is a mixed question of fact or law in this
2 area, and it does become necessary to get into it on
3 Applicants' affirmative case, we can do that, but I think that
4 this document, if it is coming in on an unsponsored basis,
5 should come in under an adequate offer of proof.

6 CHAIRMAN RIGLER: Mr. Charno, we consider Mr. Reynolds
7 has a valid point with respect to the offer of proof which
8 you made.

9 On the other hand, we continue to be troubled by
10 the Applicants' answer with respect to their ability to
11 argue the applicability of the Ohio Constitution as to
12 membership in CAPCO, since this document suggests that
13 that opinion may be more argumentative than objective,
14 in some respects.

15 Do you want to revise your offer of proof?

16 MR. CHARNO: Yes, sir.

17 The Department would offer JS-277 for identification
18 to show the collective drafting of a legal opinion in
19 support of positions previously taken by certain of the
20 Applicants and the drafting of that opinion to support
21 a position taken and, finally, the reliance of Applicants
22 upon the Ohio Constitution for a basis for their refusal
23 to deal with the City of Cleveland.

24 MR. REYNOLDS: Let me go to the Applicants'
25 continuing objection down the list.

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1 MR. BUCHMANN: Before you go on, just to
2 clean up a typographical error, in DF-277, on page
3 of the attachment, there is a reference to the 1851
4 Constitution. Just in case anybody is reading this, they
5 should be aware that is the 1851 Constitution of Ohio, the
6 provision in question having been in for more than a
7 century.

8 CHAIRMAN RIGLER: Thank you.

9 MR. REYNOLDS: I don't have anything further on
10 277.

11 CHAIRMAN RIGLER: All right, the original offer
12 of proof is rejected.

13 The new offer of proof which concentrated on the
14 Applicants' reliance on the Ohio Constitution is acceptable,
15 and we will defer our ruling to treat all documents as a
16 group.

17 MR. REYNOLDS: On Document 268, there is no
18 continuing objection.

19 On 269, 270, 271 -- I'm sorry, on 269, the
20 continuing objection for all Applicants, but Duquesne
21 Light Company.

22 On 270 and 271, the continuing objection on
23 behalf of all Applicants, but the Cleveland Electrical
24 Illuminating Company.

25 CHAIRMAN RIGLER: The continuing objection

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1 on behalf of all Applicants, but the Cleveland Electrical
2 Illuminating Company.

3 CHAIRMAN RICHER: The continuing objection is
4 overruled, and we will admit into evidence, 268 through
5 271 at this time.

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6 (The documents heretofore marked
7 Exhibits DJ-268 through 271 for
8 identification, were received in
9 evidence.)

10 MR. BUCHMANN: If your Honor please, I don't
11 mean to be difficult on these things, but 270 is a duplicate
12 of DJ-191. 271 is a duplicate of DJ-192.

13 I would like to inquire as to why, since we are con-
14 fronted with this mound of paper as it is that we are making
15 this more difficult than it needs to be, unless there is
16 some significance in the second document and, if so, I
17 would like to know what it is.

18 We have had this before. DJ-188 is the same
19 as 106. DJ-100 is the same as 185.

20 Unless something is claimed for this multiplication,
21 I don't think we ought to do this.

22 MR. CHAMCO: The first two documents that Counsel
23 referred to were introduced to show the location in
24 Duquesne files of documents that were otherwise located
25 in Cleveland Electrical Illuminating Company's files.

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1 We had requested a stipulation with respect to
2 these documents --

3 CHAIRMAN RIGLER: What kind of stipulation?

4 MR. CHARNO: They came from the files of
5 Duquesne, and that an identical copy of 191, for
6 example, was obtained in the files.

7 We have been unable to secure such a stipulation.
8 If we can get, we will move to strike our own exhibit
9 to simplify the record.

10 I will make the continuing objection with
11 respect to Document 277 on behalf of all Applicants
12 other than the Toledo Edison Company.

13 CHAIRMAN RIGLER: 277 reflects on its face that
14 at least CEI is involved.

15 MR. REYNOLDS: All that it reflects on its
16 face is that Don Hauser of CEI made a request and that
17 Gerry Charnoff had some discussions with Mr. Les Henry
18 and as a result Mr. Les Henry prepared a draft and
19 has circulated that draft to certain parties.

20 CHAIRMAN RIGLER: And that those parties in
21 turn voted on that draft.

22 MR. REYNOLDS: I don't see anything on the face
23 of this document or the attachment to suggest that all of
24 the parties voted on this draft.

25 CHAIRMAN RIGLER: If we look at 114736, we will

1 see specifically that Mr. Hauser is voting on it and
2 replying to Mr. Henry.

3 MR. SUCHMANN: Is that an exhibit number?

4 CHAIRMAN RIGLER: That is included within 277,
5 I believe.

6 MR. CHARNO: I believe that that document was --
7 that and subsequent documents were not offered or
8 identified.

9 MR. REYNOLDS: That is the document I profess a
10 continuing objection to in a continuing manner, rather
11 than the one that is now before the Board.

12 CHAIRMAN RIGLER: Continue.

13 MR. REYNOLDS: On 278, 279, 280, 281, I
14 would make the continuing objection on behalf of all
15 Applicants other than the Duquesne Light Company.

16 On 282, there is no continuing objection
17 on behalf of any of the Applicants.

18 On 283, 284, I will make the continuing objec-
19 tion on behalf of all Applicants other than the
20 Duquesne Light Company.

21 285, no continuing objection.

22 I believe 286 and 287 have been withdrawn.

23 288, we will make the continuing objection
24 on behalf of all Applicants other than the Cleveland
25 Electric Illuminating Company.

1 289, the continuing objection on behalf
2 of all Applicants other than the Dugessene Light Company.

3 290 through 293, continuing objection on behalf
4 of all Applicants other than the Cleveland Electric
5 Illuminating Company.

6 We have conferred with the Department and done
7 some further internal investigation with respect to
8 Exhibit 294, which I had commented upon when it was marked
9 as an exhibit last week.

10 I can now state that 294 is a document that
11 came from the files of the Cleveland Electric Illuminating
12 Company.

13 We also are satisfied that it was prepared
14 by somebody at the Cleveland Electric Illuminating
15 Company, but at the present time we still don't
16 know who it was that prepared that document.

17 As to that document, the continuing
18 objection would be applicable to all of the Applicants
19 other than the Cleveland Electric Illuminating Company.

20 On 295 through 299, the continuing objection
21 on behalf of all Applicants other than the Cleveland
22 Electric Illuminating Company.

23 As to Department of Justice Exhibits 293, 4, 5,
24 6, 7 and 8, I would make a separate objection on behalf
25 of all of the Applicants to the admissibility into evidence

1 of this material which prelates the September 1, '65 out-
2 off point, and is remote in time and is not something
3 that is of legitimate concern of this Board with respect
4 to the issues and matters in controversy.

5 CHAIRMAN RIGLER: All right. The continuing
6 objection is overruled and the remoteness -- Mr.
7 Hjelmfelt?

8 MR. HJELMFELT: I wanted to speak to the remote-
9 ness question.

10 CHAIRMAN RIGLER: It is going to be overruled.

11 MR. HJELMFELT: Then I won't bother.

12 CHAIRMAN RIGLER: The remoteness objection is
13 overruled in this instance and Exhibits 277 through 285
14 will be received into evidence, and 288 through 299 will
15 be received in evidence.

16 (DJ Exhibits 277 thru 285,
17 and DJ Exhibits 288 thru 299,
18 previously marked for
19 identification, were received
20 in evidence.)

21 CHAIRMAN RIGLER: What are your plans now?

22 MR. CHARNO: We will call Mr. Hart.

23 CHAIRMAN RIGLER: We will take five minutes.

24 (Recess.)

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Whereupon,

ROBERT HART

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

MR. BUCHMANN: Mr. Chairman, may I go forward?

CHAIRMAN RIGLER: Yes.

CROSS-EXAMINATION (Contd)

BY MR. BUCHMANN:

Q If your Honor please, you will recall at the last session of cross-examination of Mr. Hart, we were introducing documents preparatory to the cross-examination. The last one was Applicants Exhibit 86 (CEI), which is a letter of October 21, 1975, from Mr. Hart to Mr. Hauser, on the subject of wheeling.

I now mark as Applicants Exhibit 84 (CEI), a letter of October 30, 1975, from Mr. Hauser to Mr. Hart, and ask you, Mr. Hart, if you, in fact, received that letter?

A I believe I did.

(The document referred to was marked Applicants Exhibit #4 (CEI) for identification.)

BY MR. BUCHMANN:

Q Mr. Hart, I recall the last time I asked you if you knew at any point in time how much money was owed by the City of Cleveland to the Illuminating Company.

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1 Does the next to the last paragraph of this letter
2 refresh your recollection, at least as to the status of
3 that account in October 1975?

4 A Not, it doesn't.

5 Q Is there any reason to disagree with the assertion
6 that the amount owed at that time was \$8 million?

7 A Yes, there is reason to disagree with that.

8 As you notice--I mean to say, as you know, the
9 whole total dollar amount, whatever it may be, there is a great
10 deal of that in dispute.

11 Q A large part of that has been resolved by the Court
12 of Appeals by the District of Columbia.

13 A That is inaccurate. That whole matter has now
14 been referred back to the FCC.

15 Q About how much of that \$8 million in October 1975,
16 would you say was in dispute?

17 A I couldn't give you any accurate information.
18 I would say practically all of it would be in dispute.

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arl 1 Q All of the monies owed by the City to the
2 Illuminating Company are in dispute?

3 A I didn't say all. I said practically all of it.

4 Q Practically.

5 I also notice that Mr. Hauser expresses that
6 he would be happy to sit down with you and representatives
7 of Buckeye Power and ask you to undertake to arrange such a
8 meeting. Have you done so since October 30, 1973?

9 A No, sir.

10 MR. BUCHMANN: Mr. Chairman, I would like marked
11 for identification as Applicant's Exhibit 95 (CEI) a letter
12 from Mr. Hart to Mr. Lansdale, dated November 25, 1975,
13 and attached draft proposal, firm power service.

14 (The document referred to
15 was marked Applicant's
16 Exhibit 95 (CEI), for
17 identification.)

18 BY MR. BUCHMANN:

19 Q Mr. Hart, you in fact served that letter, did
20 you not?

21 MR. MELVIN BERGER: Mr. Buchmann, perhaps
22 we can wait until we have had opportunity to look at this?

23 MR. BUCHMANN: Sure. I'm sorry.

24 THE WITNESS: Yes, I did.

25

1 BY MR. BUCHMANN:

2 Q Did you in fact prepare the firm power schedule?

3 A It states in the attachment 2 that I did, but
4 I'm sure there are portions of it I did, but there are
5 lots of it I didn't.

6 Q Surely you had input from the City's consultants?

7 A The major portion of this would have been prepared
8 by Bill Mayben.

9 Q And I gather that letter was delivered to Mr.
10 Lansdale at a meeting; is that correct?

11 A I'm trying to think. I did deliver one letter
12 to him at a meeting. This could possibly be it.

13 Q I think this is the one. The next letter will
14 show.

15 A Okay, I will take your word for it, then.

16 MR. MELVIN BERGER: Excuse me. May I inquire as
17 to the source of the handwritten notes on the margin of
18 the -- on the first page?

19 MR. BUCHMANN: Based on many years experience,
20 that is Mr. Lansdale's handwriting, and I don't -- or
21 the handwriting. I'm glad you caught that.

22 I have marked as Applicant's Exhibit 95 (CEI)
23 a letter of December 3, 1975 from Mr. Lansdale to Mr.
24 Davis.
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1 (The document referred to
2 was marked Applicant's
3 Exhibit 96 (CEI), for
4 identification.)

5 BY MR. BUCHMANN:

6 Q Did you see a copy of this letter, Mr. Hart?

7 A Yes, I did, sir.

8 Q And I note that Mr. Lansdale -- and I'm
9 paraphrasing -- reiterates a commitment of the
10 Illuminating Company to agree to wheel for the City of
11 Cleveland provided only that the wheeling was from a market
12 equally open to CEI.

13 Do you remember that commitment?

14 A I'm sorry, I can't find it in here, but if you
15 state it --

16 Q It is a third of the way down the second page,
17 Mr. Hart.

18 A Are you asking me -- what is the question?

19 Q Do you remember that representation being made?

20 A Do I remember the representation being made?

21 Q Yes.

22 A At the meeting?

23 Q Yes.

24 A I don't recall it.

25 Q In any event, keeping in mind your prior

1 testimony here, the statement made by Mr. Lonsdale
2 in the exhibit which is marked Applicant's Exhibit 96,
3 do you finally understand that the Illuminating Company
4 was willing to wheel, for example, Buckeye power for you?

5 A No.

6 MR. BUCHMANN: Mr. Chairman, I have marked as
7 Applicant's Exhibit 97 (CEI) a letter from Mr. Rudolph
8 to Mr. Davis of the City of Cleveland, dated December 29,
9 1975.

10 (The document referred to
11 was marked Applicant's
12 Exhibit 97 (CEI), for
13 identification.)

14 BY MR. BUCHMANN:

15 Q Did you receive a copy of that letter, Mr. Hart?

16 A I believe I did. It says on there I did, and
17 I believe in fact I did.

18 Q Attached to that, Mr. Hart, are the transmis-
19 sion service -- a draft transmission service schedule
20 and a draft firm power schedule; am I correct?

21 A That's correct.

22 Q Put in terms we've been using here, the
23 transmission service schedule covers wheeling, does it not?
24 It is the same thing?

25 A If your question is, is it the same thing, I

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1 think we do use the terms synonymously.

2 Q Mr. Hart, I think you testified the last time
3 you were that the City responded to the Illuminating
4 Company with respect to these two schedules on February
5 6, 1976. That is a fact, is it not?

6 A That's right.

7 Q And the parties are still in negotiation on
8 those two schedules, are they not?

9 A That's right.

10 Q Mr. Hart, you made reference the other day
11 to a 69 kV service rendered the City by the Illuminating
12 Company. Do you recall that?

13 A We made reference to it, that's right.

14 Q Now, in fact, that service was provided in
15 accordance with the Federal Power Commission Order of
16 March 1972; is that correct?

17 A No, I don't believe so, because in the order,
18 as we interpreted it, it was a synchronous connection.

19 Q Was the service, the 69, whether it was synchronous
20 or nonsynchronous, whatever it was, it was provided for in a
21 March 1972 order of the FPC?

22 A If you put that stipulation in there, whether it
23 was synchronous or nonsynchronous.

24 Q Am I correct?

25 A That is true.

1 Q The Federal Power Commission made provision
2 in March 1972 for some service at 69 kV; is that right?

3 A That's right. That is^{is} accurate.

4 Q The service could not be rendered unless
5 certain construction was undertaken?

6 A That is my understanding.

7 Q There was some construction to be undertaken
8 by the Illuminating Company and some construction to be
9 undertaken by the City of Cleveland; is that correct?

10 A Yes, that's correct.

end 11

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1 Q And the work to be done by the Illuminating Company
2 was to be paid for by the City of Cleveland, was it not?

3 A That is correct, sir.

4 Q Now do you recall when the City Council enacted
5 any ordinance to provide for any construction by the
6 City of its portion of that work?

7 A I don't remember, specifically. The exact date,
8 I believe is in one of the exhibits we went through.

9 Q Would you agree with me it took them about three
10 months to getting around to do that?

11 A If you will assert the fact, I will go along with
12 you. It is easy enough to check, I think.

13 MR. BUCHMANN: I have marked as Applicants Exhibit
14 98(CEI), a letter of George S. Peck, P-e-c-k, to
15 Mr. David Davidson of the Illuminating Company, dated
16 December 5, 1973.

17 (The document referred to was
18 marked Applicants Exhibit
19 98(CEI) for identification.)

20 BY MR. BUCHMANN:

21 Q You have seen that letter before, have you
22 not, Mr. Hart?

23 A No, sir.

24 Q You have not?

25 A No, sir.

1 Q Who is Mr. Pofok?

2 A At that time he was engineer for the division
3 of light and power. NOW he is engineer for the utility's
4 engineering division.

5 Q I notice that among other persons he sends
6 copies of his letter to the chief of Bureau of Power of the
7 Federal Power Commission, or at least so it shows on this.
8 Would it be the custom of engineers of the City of Cleveland
9 to write to the FPC without clearing it through your office
10 at this point in time?

11 A the only reason I'm stopping here is because
12 you are asking, is it the custom.

13 Q Was it the custom?

14 A I don't think one letter makes it the custom.
15 May I state, I don't hink it is unusual that he would be
16 doing this.

17 Q Is Mr. Pofok familiar with the various
18 connections between the Illuminating Company and the City
19 of Cleveland?

20 A I would have to let him speak to that. I really,
21 as I indicate to you, this is the first time I have seen
22 tis letter.

23 Q I notice Mr. Pofok says that the Division
24 sorry. That an ordinance was passed in October 1972
25 for the work to be done by the City of

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1 Cleveland. Does that seem an appropriate date to you?

2 A I indicated to you earlier, sir, I don't know the
3 answer, but it is in some of the prior exhibits.

4 I am referring -- may I continue?

5 Q I asked you if that date sounded right to you.

6 A My best answer is, I don't know.

7 Q Do you know whether Mr. Pofok is correct in
8 stating that the City let the contract for its work in
9 March 1973?

10 A That I don't know, sir.

11 Q Wouldn't the contract have had to go through the
12 legal department?

13 A The contract as finally approved would have gone
14 through the legal department; that is correct, sir.

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arl 1 A But that doesn't mean it went through me.

2 Q Did it go through you?

3 A I don't believe it did, sir.

4 Q Who would it have gone through?

5 A We have different people at different times
6 that are assigned the task of approving contracts.

7 Q And when a contract to do work for the 69 kV
8 interconnection which had been litigated and was still
9 under litigation with the Federal Power Commission went
10 through, you didn't have anything to do with it?

11 A Let's put it this way: I don't remember it.

12 Q Who would have done it in March 1973, would you
13 know?

14 A That I couldn't tell you. That changes.

15 What we generally do is when we get a new person
16 in the office, which changes from time to time, and that
17 new person would then approve contracts.

18 Q Do you have before you a copy of the Department
19 of Justice Exhibit 130?

20 A Can you give me a better identification?

21 Q Mr. Kadukis to Mr. Howley of January 18, 1974.

22 A Apparently I don't have that, sir. I have
23 January 15, but I don't believe -- I have just got the
24 documents you introduced the last time I was here.

25 Q Do you have a copy of that exhibit before you

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1 now?

2 A Yes.

3 Q This you did get a copy of, did you not?

4 A Yes, I did, sir.

5 Q And this is a letter by Mr. Kadukis in
6 which he recites some of the history of the 69 KV intercon-
7 nection; correct?

8 A Yes, sir.

9 Q And do you have any reason to disagree with,
10 for example, the dates and such like that Mr. Kadukis puts
11 in that letter?

12 A No, sir.

13 Q And this shows that the City did not enact an
14 ordinance to do its share of the 69 KV work until October
15 9, 1972, correct?

16 MR. MELVIN BEIGER: Objection. I think the
17 document would speak for itself on that point.

18 MR. BUCHMANN: This witness testified we delayed
19 this interconnection, if Your Honor please. Here I have
20 him six months down the line before the City gets around
21 to passing the ordinance in order to do its share.

22 I think I'm entitled to cross-examine on that.

23 CHAIRMAN RIGLER: Let me hear the pending
24 question.

25

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

3 CHAIRMAN RIGLER: Overruled.

4 BY MR. BUCHMANN:

5 Q I am correct on that, am I not, Mr. Hart?

6 A I would have to say I don't know the answer
7 to that, and may I explain?

8 Q No.

9 Mr. Hart, Mr. Kudukis' letter with which you said
10 a minute or two ago you did not disagree as far as dates
11 went, shows on its face, did it not, that the City did
12 not even award a contract for its share of the 69 KV
13 interconnection for more than a year after the Federal
14 Power Commission order, does it not?

15 A No.

16 MR. MELVIN BERGER: Objection. I think the
17 document speaks for itself. The language is there.
18 We can all read it. Why does Mr. Hart have to interpret
19 what it says?

20 CHAIRMAN RIGLER: This time I agree with you,
21 Mr. Berger. I will sustain that.

22 BY MR. BUCHMANN:

23 Q I notice Mr. Kudukis -- did you help draft
24 this letter?

25 A Yes, sir.

1 Q I notice Mr. Kudukis tells us that a purchase
2 order from the City of Cleveland is like a certified
3 check. My recollection is that you used the same phrase
4 last week.

5 Is that indeed your phrase in this letter?

6 A Yes, it is, sir.

7 Q What is your understanding of a certified
8 check, Mr. Hart?

9 A A certified check is one wherein there are
10 funds that stand behind the check, and the funds remain
11 behind the check until the check is cashed.

12 Q Well, is it a check that has to be paid?

13 A The check may be outstanding indefinitely, I
14 suppose.

15 Q Now you testified last time that a purchase
16 order was issued to the Illuminating Company for the work
17 it was to do for the account of the City on the 69 kV
18 interconnection. Do you recall that testimony?

19 A Yes, sir.

20 Q And I conclude from these letters that that
21 purchase order was issued on August 6, 1972.

22 You testified --

23 MR. MELVIN BERGER: Which letters are you
24 referring to?

25 MR. BUCHMANN: The one in front of him.

1 MR. MELVIN BERGER: Letter, and not letters.

2 MR. BUCHMANN: The letter of Mr. Pofok
3 says the same thing.

4 BY MR. BUCHMANN:

5 Q You testified the last time you were here
6 with reference to the purchase order that any time you
7 present this to the City of Cleveland, we will then pay
8 you. Do you recall that testimony at page 4730?

9 A I believe I did.

10 Q Do you adhere to that testimony?

11 A That's correct. In the parlance we use, that is
12 true.

13 Q Is the parlance you use different from that used
14 by anyone else in this respect?

15 A Well, I don't know. If you will go on --

16 Q Are you suggesting to me that if a representative
17 of the Illuminating Company had come in the next day,
18 August 9, 1972, and presented that purchase order, it would
19 have received \$62,000?

20 A What he would have to do also is to show that
21 he has done something.

22 Q Yes, he would have to show that to whom?

23 A You would have to show -- well, first of all, if
24 I may start in the process of what really happens here --

25 Q Please answer my question.

1 Who would you have to show you had done some-
2 thing?

3 A To an engineer in the Division of Light and
4 Power.

5 Q All you had to show was that you had done
6 something or you had done what was specified in the
7 purchase order?

8 A That you had conformed to the purchase order.

9 Q If the engineer agreed, what would he then do?

10 A He would then take that and probably present it
11 to his superior.

12 Q And what would his superior then do?

13 A He would present it to his superior.

14 Q How many rungs do we go up the ladder?

15 A At this point you start to go laterally.

16 Q Then what happens?

17 A And then once you have gone laterally one step,
18 then you go up the ladder one more step.

19 Q Where did you go laterally to?

20 A You go to the Division of Fiscal Control.

21 Q What does the Bureau of Fiscal Control have to do
22 with it?

23 A They would give their approval to it.

24 Q Then it goes up a step there?

25 A That's correct, sir.

1 Q Then where does it go to? To somebody who has
2 the cash box?

3 A Then it goes to the Commissioner of Accounts, and
4 the Commissioner of Purchases.

5 Q And what do they do?

6 A They then give their approval also.

7 Q And when we have the approval of those two
8 commissioners, where do we go next?

9 A Then there is a warrant issued.

10 Q A warrant is issued?

11 A Yes, sir.

12 Q A warrant is in effect a check?

13 A That's correct.

14 Q This is what you liken to the practice of
15 cashing a certified check?

16 A That's right. There are funds that stand behind
17 it at all times.

18 CHAIRMAN RIGLER: Suppose there is a dispute
19 between the party performing the work and the engineering
20 department of the City with respect to the nature of the
21 work being completed?

22 MR. BUCHMANN: You certainly anticipated my
23 next question, Mr. Rigler.

24 CHAIRMAN RIGLER: Then I will let you ask it.

25 MR. BUCHMANN: No, no. That is virtually what I

1 was going to say.

2 CHAIRMAN RIGLER: Can you respond to that
3 question?

4 THE WITNESS: As it is with any type of a
5 situation, should there happen to be a dispute, then the
6 whole process could be stopped.

7 MR. BUCHMANN: I have marked for identification
8 as Applicant's Exhibit 99 (CEI) a document dated August 8,
9 1972 which can be identified as Order No. 104-69267 of the
10 City of Cleveland.

11 (The document referred to
12 was marked Applicant's
13 Exhibit 99 (CEI), for
14 identification.)

15 BY MR. BUCHMANN:

16 Q Mr. Hart, this is the purchase order we have
17 been talking about, isn't it?

18 A I will take your word for it that it is. I
19 don't know for a fact that it is, but I will take your
20 word for it.

21 Q I direct your attention to the Department of
22 Justice Exhibit 180, which is the letter of Mr. Kudukis
23 dated January 18, 1974, in the next to the last line on
24 the first page it says:

25 "On August 8, 1972, the City issued Purchase

1 Order No. 104-69267."

2 Is there any question that Applicant's Exhibit
3 99 is that document that tracks with Mr. Kudukis' letter?

4 A Okay, I will say I will take your word for it.
5 I didn't see that there.

6 Q Is there any doubt that this is the right
7 document, before I go into it? You said you helped draft
8 Mr. Kudukis' letter.

9 A I will agree with your statements there, sir.
10 If you tell me this is the purchase order, I will take
11 your word for it.

12 CHAIRMAN RIGLER: He is not telling you, he is
13 asking you to look at another document and answer the
14 question based on that.

15 THE WITNESS: Okay, sir.

16 CHAIRMAN RIGLER: You are not being asked to
17 agree with anyone else's assertion. You are being asked
18 to give us your independent answer.

19 THE WITNESS: The problem I have with this,
20 sir, is that I'm not sure that I have seen this before.

21 BY MR. EUCHMANN:

22 Q Leaving aside the fact that the witness
23 has testified that he received DJ 180, which describes
24 this, and on its face says a copy of it is attached, and
25 the fact he said he drafted it, I'm asking you, do you have

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1 any doubt that Applicant's Exhibit 99 is the purchase
2 order in question?

3 A Do I have doubt? No, I don't think I have any
4 doubt.

5 Q Then I see you said in answer to the Chairman's
6 question if there was a disagreement when the purchase
7 order was strated through the payment process -- well,
8 you said there could be disagreement.

9 A Yes. However, in this case, there was no dis-
10 agreement.

11 Q Now the fact of the matter is that the person
12 at the City who is presented with a purchase order, for
13 example, for a hundred widgets has to at least be sure that
14 a hundred have been delivered, isn't that correct, before
15 he approves the purchase order?

16 A That's correct, sir.

17 Q I notice that this particular purchase order
18 provides for labor and material as required on CBI
19 Plant for 69 kV emergency temporary electrical interconnec-
20 tion.

21 Would you say that such a description might
22 leave quite a bit of room for interpretation between
23 engineers?

24 A Not in this particular case, I don't, sir.

25 Q As required doesn't seem broad to you?

1 A No, sir, because here we are under an order of
2 the FPC and there was very little room to disagree.

3 CHAIRMAN RICKER: Wait a minute, Mr. Hart.
4 You told us earlier with respect to FPC orders relating to
5 \$8 million that there was substantial ground for dis-
6 agreement and the fact that there was an FPC order didn't
7 allow you to immediately narrow all points of difference.

8 THE WITNESS: Sir, if I may submit -- here
9 they are asking for something physically to be done. The
10 other was an account owed or owable. This they are actually
11 saying join up here, put these two bolts together.

12 As far as I was concerned, there was really no
13 reason to disagree here.

14 BY MR. BUCHMANN:

15 Q Mr. Hart, this involved the construction of a
16 69 kV line for a little bit more than a mile, did it not?

17 A I'm not trying to be evasive, but I just don't
18 know.

19 Q Are you suggesting that the 69 kV interconnection
20 between the City of Cleveland and the Illuminating Company
21 was comparable to putting two bolts together?

22 A No, no.

23 Q And in view of the relationships between the
24 Illuminating Company and the City of Cleveland on or about
25 August 1972, would you, if you were the recipient of

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this purchase order, be confident that you would receive that \$62,000 promptly?

A Any time I have a purchase order of the City of Cleveland, I would be very confident, yes, sir.

Q Going back, Mr. Hart, for a moment to Department of Justice Exhibit 130 --

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MR. SMITH: Excuse me.

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Even if there had been a dispute about the work order, and going back to your earlier testimony, would the funds that were encumbered to pay this, remain encumbered?

THE WITNESS: Yes, sir. The funds stay there no matter what happens.

MR. SMITH: Until any dispute is worked out?

THE WITNESS: The funds stay there until the \$62,000 is actually paid, whether there is a dispute or not a dispute.

CHAIRMAN RIGLER: Supposing the engineer concludes that the work wasn't done, or that although the purchase order is for 100 widgets, only 50 widgets were in the box?

THE WITNESS: Then you have encumbered funds that stay encumbered.

CHAIRMAN RIGLER: Until what?

THE WITNESS: Until you can go to --- well, those funds, as long as there is an outstanding purchase order, are supposed to stay encumbered, until they would present this back, and we would come to an agreement that only, say, 60,000 was here.

If they presented less than 100 widgets.

CHAIRMAN RIGLER: Is there a provision for cancelling a purchase order?

THE WITNESS: In the charter of the City of

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1 Cleveland, there is no provision for cancelling a purchase
2 order.

3 Section 195 of the Charter says these funds
4 will remain appropriated until expended, until this thing
5 has been expended, it says there.

6 CHAIRMAN RIGLER: Suppose the work is never
7 performed?

8 THE WITNESS: This is one of your --

9 CHAIRMAN RIGLER: Suppose the project is
10 abandoned?

11 THE WITNESS: These funds in theory stay encumbered,
12 then, sir.

13 MR. BUCHMANN: There is provision for
14 decertification, is there not?

15 THE WITNESS: Not in the City Charter.

16 BY MR. BUCHMANN:

17 Q Are you saying the city of Cleveland has never
18 decertified any funds?

19 A Not according to the City Charter.

20 Q I don't care what they did it according to.
21 Are you saying they never decertified funds?

22 A There is a provision of an ordinance which is
23 questionable.

24 Q Which would permit decertification, would it not?

25 A Which would permit decertification.

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1 What ordinance?

2 Q From time to time during the progress on this --
3 Mr. Hart, to clear up the record on DJ-120, the January 13,
4 1974, letter of Mr. Kudukis, do you have any reason to
5 disagree with any of the facts asserted in that letter?

6 A No, I don't. As the facts are laid out there,
7 I have no reason to disagree with it.

8 Q Now, Mr. Hart, from time to time, the Federal
9 Power Commission staff investigated the progress of the
10 69 kv interconnection, did it not?

11 A I believe they did.

12 Q Pardon?

13 A I believe they did, sir.

14 MR. BUCHMANN: I have had marked for identification
15 Exhibit 100(CEI,) an undated letter from Mr. Woods of
16 the Federal Power Commission staff to Mr. Both, with
17 an attached memorandum dated May 8, 1972, being a progress
18 report on the interconnection which we have been discussing.

19 (The document referred to
20 was marked Applicants Exhibit
21 100(CEI) for identification.

22 CHAIRMAN RICLER: This is 100?

23 Q MR. BUCHMANN: Yes, sir. The cover letter
24 may be dated June 27, 1972.

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BY MR. BUCHMANN:

1
2 Q Mr. Hart, have you seen this report before?

3 A No, sir.

4 Q You have not. Were you aware that reports of
5 this kind were being rendered in connection with the 69 kv
6 interconnection?

7 A No, sir.

8 Q Who would have received copies of this?

9 A It states in the last page, I see here Mr. W. D.
10 Hinchee.

11 Since this was before my time, it would have gone
12 to him.

13 Q Is this before your time at the City law
14 department?

15 A That is correct, sir.

16 MR. BUCHMANN: I have had marked for identification
17 as Applicants 101(CEI) a letter from Mr. Woods to
18 Mr. Rowley dated September 6, 1972, and an attached report
19 on the 69 kv emergency interconnection, dated August 28,
20 1972.

21 (The document referred to
22 was marked Applicants
23 Exhibit 101(CEI) for
24 identification.)
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1 BY MR. BUCHMANN:

2 Q Does the same situation obtain here? Did you
3 see that before?

4 A No, sir, I have not seen this before.

5 Q I presume you were unaware of these records?

6 A That is correct, sir.

7 Q When if ever, Mr. Hart, was the 69 kv
8 interconnection finally put into service?

9 A I would say probably around July of 1974. I
10 could be wrong on that. That is the best of my thinking.

11 Q Now, Mr. Hart, do you know approximately what
12 amounts the Illuminating Company claimed was due and owing
13 to it from the City of Cleveland in August 1972, or
14 thereabouts?

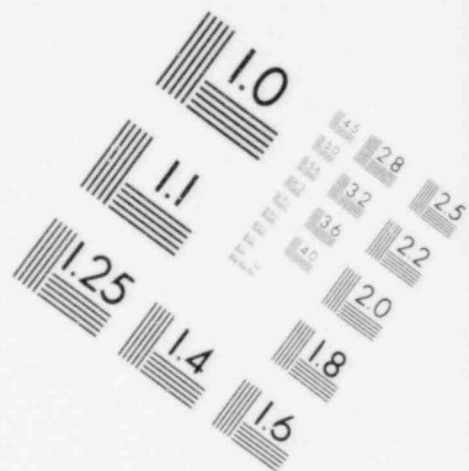
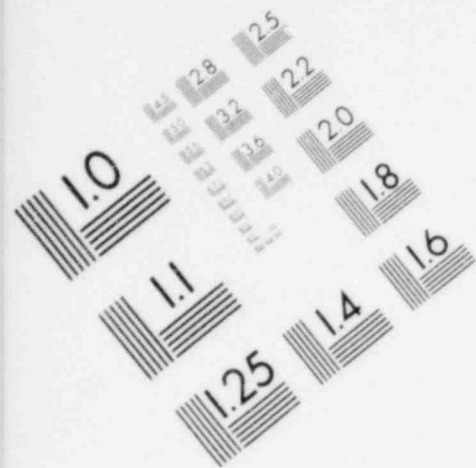
15 A No, sir. I mentioned that was before my time.

16 Q Have you made any effort to look at the historical
17 basis for those claims?

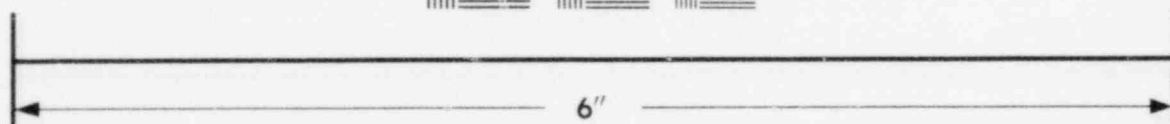
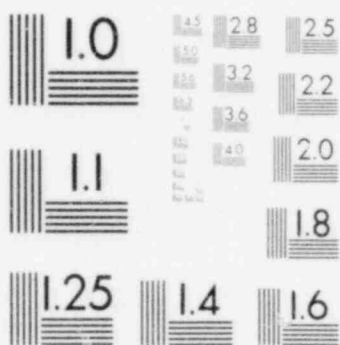
18 A This whole matter came up in dispute in the
19 case that is pending -- the two cases that are pending in
20 the Common Pleas Court in Cleveland.

21 And whatever was presented in evidence at that
22 time I would have reason to review.

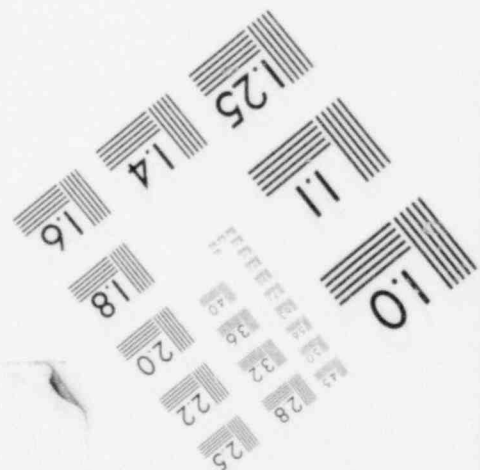
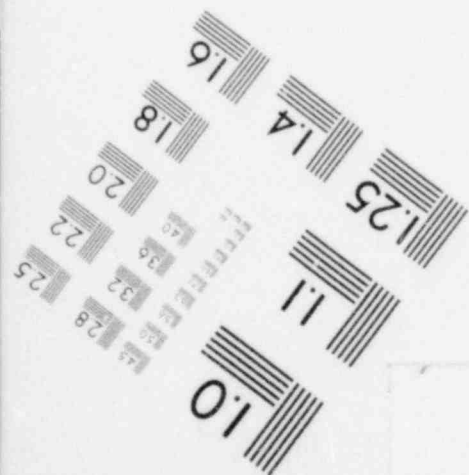
23 Q Mr. Hart, at that point, the service being
24 rendered by the Illuminating Company to the City was the
25 load transfer service, was it not? We are talking about

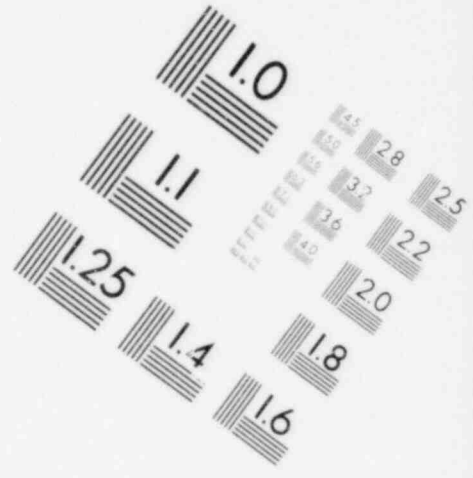
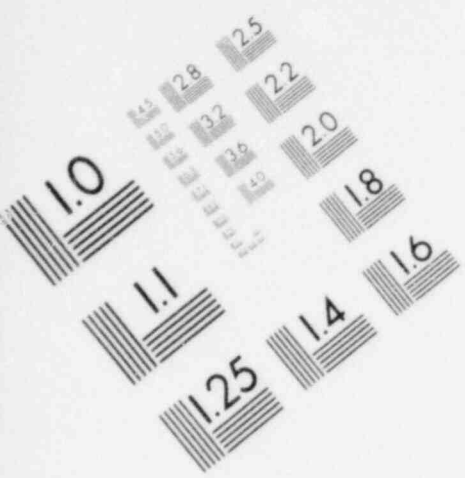


**IMAGE EVALUATION
TEST TARGET (MT-3)**

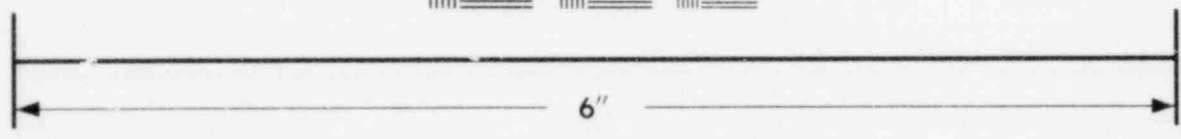
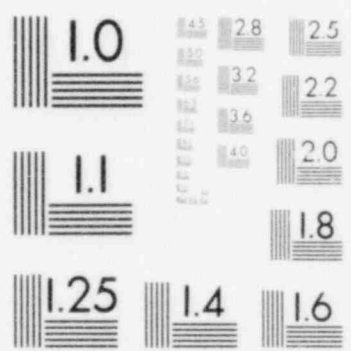


MICROCOPY RESOLUTION TEST CHART

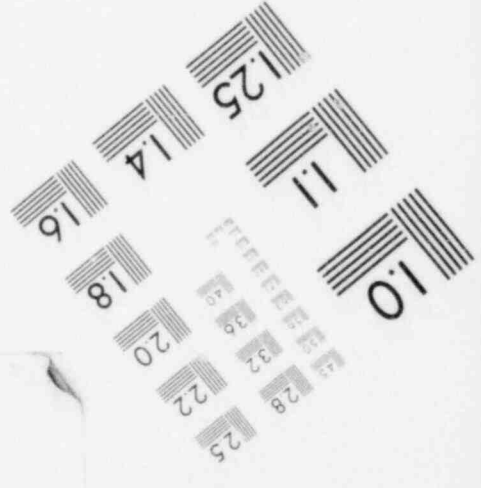
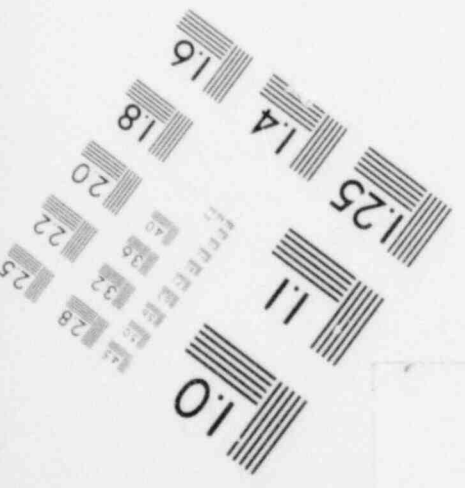




**IMAGE EVALUATION
TEST TARGET (MT-3)**



MICROCOPY RESOLUTION TEST CHART



1 before the 69 kv interconnection.

2 A In August or September of 1972, I believe you
3 are accurate, sir.

4 Q And would it be fair to say that the balance
5 owing to the Illuminating Company at about that time ranged
6 from \$300- to \$600,000 a month or constantly?

7 A If I may, sir, as of when we talked about this,
8 as of May 30, 1972, which was the cut-off point of what I
9 call CEI Case Number 1 in the Common Pleas Court in
10 Cleveland, the amount under dispute there was around
11 \$547,000.

12 Q And then after May 30, you continued to run up
13 bills under another schedule, did you not, under an FPC
14 order?

15 A We would have continued to receive service.

16 Q And you would have continued not to pay for it;
17 isn't that correct?

18 A No, sir, I don't believe that is accurate.

19 Q Would you deny that in August of 1972, the
20 approximate balance owing the Illuminating Company for
21 service rendered subsequent to May 30, 1972, was up around
22 \$350,000?

23 A You want -- you want to repeat that?

24 Q Would you deny that for service subsequent to
25 May 30, 1972, by August 1973, the Illuminating Company

bw7

1 claimed a balance from the City in the approximate amount
2 of \$350,000?

3 A I would not deny that the Illuminating Company
4 claimed a balance of that much.

5 Q That is why I put the words in there.

6 Mr. Hart, you told us last time that before you
7 and Mr. Whiting drafted a letter to the Illuminating Company
8 asking for membership in CAPCO, that you had mentioned or
9 discussed the matter with the Mayor and that after you wrote
10 the letter you told him you had sent the letter.

11 Do I roughly paraphrase your testimony?

12 A I believe you do, sir.

13 Q The City of Cleveland has a council in addition
14 to the mayor, does it not?

15 A That is correct.

16 Q The Council has 33 members?

17 A That is correct.

18 Q The mayor of the City of Cleveland presumably
19 is Republican, is he not?

20 A That is correct.

21 Q The Council consists of 31 democrats and two
22 republicans?

23 A That is correct.

24 MR. MELVIN BERGER: What is the relevancy of
25 this?

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1 MR. BUCHMANN: I think it is obvious in things
2 that involve this much money, that the Council of the
3 City of Cleveland gets involved.

4 I am going to ask who on the Council he talked
5 to.

6 MR. SMITH: Are you waiving Neerx-Pennington?

7 MR. BUCHMANN: No, sir.

8 CHAIRMAN RICLER: If you are going to ask about
9 the City's representation to that Council in the sense of the
10 executive branch approaching the legislative branch of the
11 City of Cleveland, that is what you are going to be doing.

12 MR. BUCHMANN: These preliminary questions are
13 simply to indicate to the panel that in the circumstances
14 of the City of Cleveland, one cannot assume that because
15 the Administration wishes something, it will pass through
16 the political process.

17 I'm simply trying to find out if before these
18 demands were made to enter into relationships that would
19 cost hundreds of millions of dollars, if request or any
20 information was given to the City Council about it.

21 I don't see where that waives Neerx-Pennington
22 at all.

23 MR. MELVIN BERGER: I think if this is allowed,
24 we should be allowed to inquire into CEI approaching any
25 of the City Councilmen.

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CHAIRMAN RIGLER: That certainly would bear on the chances of success of any such program.

If you are going to ask about the City's lobbying of the Council to achieve their objectives, then it seems to me it raises the question of CBI approach to thwart those objectives.

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MR. BUCHMANN: You misunderstand. A, I'm

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not concerned with whether they lobbied

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City Council. I'm only trying to find out whether that branch

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of city government was consulted.

5

Two, I don't know how we can get into lobbying

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The City Council is the City just as much as the Mayor is.

7

CHAIRMAN RIGLER: Is there not an executive

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branch, legislative branch relationship?

9

MR. BUCHMANN: Sure, but the Mayor is no more

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the City than the City Council is.

11

MR. SMITH: You are simply trying to show

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that it is a cumbersome procedure.

13

MR. BUCHMANN: I'm trying to show that the

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request to join CAPCO was frivolous. They never went to

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the people in power in the City to find out if they were

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interested in it.

17

CHAIRMAN RIGLER: You just now conceded that the

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Mayor is as much a part of the City as the Councilman.

19

It is the Mayor's office through the legal department that

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was trying to explore membership in CAPCO.

21

MR. BUCHMANN: It is the City Council that would

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have to appropriate the money. I would like to see if in

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all these years they have been fiddling around on this,

24

they ever mentioned it to anybody over there.

25

MR. HOELMFELT: This isn't my witness, but I

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1 certainly think the City is involved in this topic of con-
2 versation with respect to the possible Noerr-Pennington
3 waiver.

4 I suggest particularly in view of Mr. Buchmann's
5 statements that unless the City went to City Council and
6 City Council had considered it, these discussions were
7 frivolous and if that is going to be the line they are
8 taking, then I think that CEI approaches which attempt
9 to influence the City Council as opposed to entry into
10 CAPCO becomes relevant.

11 We haven't had discovery on that, but I think
12 that opens the door to discovery and our cross-examination
13 and possibly bringing in witnesses on these issues.

14 MR. BUCHMANN: Is there a suggestion here
15 that the executive branch of government has a First Amend-
16 ment right which is applicable in this thing?

17 All I'm asking, and this goes nothing to what
18 they did -- as far as we know, they didn't consult them,
19 and that would be the answer I would like to get.

20 CHAIRMAN RIGLER: But the reason you are
21 pursuing this line is to find out what the reaction of
22 the City Council would be to a proposal that the City
23 make the financial commitments necessary to obtain member-
24 ship in the CAPCO pool; is that correct?

25 MR. BUCHMANN: That is part of it. Not

ar3

1 precisely.

2 CHAIRMAN RIGLER: Let's stay with that part of
3 it.

4 It seems to me inescapably it opens the door
5 to the question of what other factors were brought to
6 bear on the City Council and how effective they would have
7 been in influencing its decision.

8 MR. BUCHMANN: I must respectfully disagree
9 to Your Honor on that. Is that your ruling? Are you sus-
10 taining the objection to this on that ground?

11 I guess there isn't an objection.

12 CHAIRMAN RIGLER: Well, there is an objection,
13 as I understand it, based on the fact that we have
14 indicated that we would not let parties adverse to
15 Applicants explore CEI's conversations and contacts with
16 the legislative branch.

17 We may overrule the objection, but if we do
18 that, that may open the door, as we see it, as a result
19 of Applicant's doing, and permit either discovery or
20 inquiry into this same area by the other parties.

21 It is not going to be a one-way street.

22 MR. BUCHMANN: Is that your ruling?

23 You used the word "may." If that is your
24 ruling, I may have to except it.

25 CHAIRMAN RIGLER: The objection is overruled.

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1 MR. BUCHMANN: Do I understand from Your
2 Honor's ruling that if I pursue this line of inquiry,
3 it is the ruling of the Board that we have waived the
4 Noerr-Pennington consideration?

5 CHAIRMAN RIGLER: That would come up in specific
6 circumstances, and I suppose at your peril we will not announce
7 advance rulings. We have given you a preliminary considera-
8 tion that would come into play.

9 (Recess.)

10 MR. BUCHMANN: If Your Honor please, with all
11 respect, I don't wish to reargue when your panel has
12 already ruled, but it seems to me, and I thought it had been
13 developed in earlier cross-examination, at least to my
14 satisfaction and not necessarily to anybody else's, that
15 there were serious questions raised as to the bona fides of
16 some of these requests for various kinds of service and
17 participation made by the City of Cleveland to the
18 Illuminating Company and relied upon by the Justice
19 Department in their direct case.

20 It is extremely difficult, indeed impossible,
21 I represent to you, for me to make any meaningful decision
22 as to how to proceed with cross-examination without a
23 ruling from the Board as to whether this line of
24 inquiry which I suggest is simply intended to show, and of
25 course I don't know what the answers of the witness are

ar5

1 going to be -- but intended to show that there was, there
2 really never was bona fide requests from the City.

3 I find it impossible to decide how to go
4 forward on that as to whether that ruling is going to be a
5 waiver to the Noerr-Pennington defense applicable to our
6 dealings with the City Council.

7 CHAIRMAN RIGLER: Let me interrupt.

8 The Board explored its thoughts with respect
9 to Noerr-Pennington on the record.

10 MR. BUCHMANN: I was here during that. I'm
11 fully aware of the Board's position.

12 CHAIRMAN RIGLER: Apparently not, because you
13 indicated we had held that Noerr-Pennington applies.

14 We indicated we had reservations about its
15 applicability in a licensing proceeding generally, but
16 we sustained Noerr-Pennington objections up to a point.

17 We did with respect to Justice Exhibit 276,
18 the letter to Senator Pastore. Nonetheless, I think you
19 overstated the case.

20 We have not made a ruling that Noerr-Pennington
21 is applicable to licensing proceedings, fully
22 applicable.

23 MR. BUCHMANN: I thought Your Honor's remarks a
24 few minutes ago had gone farther than that. It was to that
25 I had reference.

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1 In any event, let's assume there is a dispute
2 as to the applicability of the doctrine. Assuming we may
3 be able to persuade you it is applicable, I do not wish to
4 be confronted with a finding that it is applicable, but
5 you have waived it.

6 CHAIRMAN RIGLER: We have given you substantial
7 guidance with respect to what our ruling would be. We
8 will not make anticipatory rulings.

9 MR. BUCHMANN: May I have the record reflect
10 an exception to the Panel's refusal to give me a ruling
11 at this time?

12 CHAIRMAN RIGLER: Certainly.

13 MR. SMITH: My memory of the transcript was
14 that the Chairman was trying to inquire of you what problems
15 might arise if you would proceed, and you persisted in
16 getting a firm ruling from the Chairman.

17 You effectively foreclosed any further
18 discussion. Now you are unhappy with that result.

19 MR. BUCHMANN: I really don't understand what
20 you mean, Mr. Smith.

21 MR. SMITH: Then we will rely upon the transcript.

22 MR. BUCHMANN: In view of that, if Your Honor
23 please, I will proceed to another area.

24 BY MR. BUCHMANN:

25 Q Mr. Hart, you will remember some testimony the

1 last time you were here on the subject of whether or not
2 in one of its offers to sell power to the City of Cleveland,
3 the Illuminating Company was attempting to exercise
4 control over the prices which the Municipal Plant would
5 charge its customers.

6 I paraphrased it, but do you remember that
7 subject?

8 A Yes, sir.

9 Q I believe you testified that the Illuminating
10 Company would dictate the cost to the Municipal Light
11 Plant. Do you recall that?

12 A I believe I do. Yes, sir, I do recall it.

13 Q Now the -- I wish you would hypothesize a
14 situation for me where the City of Cleveland got its power
15 in part from the Illuminating Company, and in part from
16 its own generation.

17 That is not an unreasonable hypothesis, is it?

18 A No, sir.

19 Q The cost to the City of Cleveland of power
20 purchased from the Illuminating Company would be regulated
21 by the Federal Power Commission, would it not?

22 A If we were -- as we are receiving it at the
23 present time, it is under schedule -- I forget what the
24 number of the schedule is.

25 Q It is an FPC schedule?

1 A It is an FPC schedule, that's correct, sir.

2 Q The cost to the Municipal Light Plant of
3 the power which it generates is something more or less
4 within its own control, is it not?

5 A Your statement was more or less, and that is
6 true, yes, sir.

7 Q Coal prices may go up and you can't control them,
8 but in any event, you chose what things to run and how much
9 you want to run them, and things of that sort, do you not?

10 A Yes, sir.

11 Q The Illuminating Company can't dictate those
12 costs, can it?

13 A No, sir.

14 Q Now if I recall, and I'm not attempting to
15 quote, that offer asked that the City agree not to sell
16 electricity at below cost. Am I roughly correct?

17 A That's correct, sir.

18 Q And the correspondence already in evidence
19 shows that you -- and by you, I mean the City -- objected
20 to that proviso; correct?

21 A That's correct, sir.

22 Q If that request had been in the form of asking
23 that the City fix its electric rates so as to provide
24 sufficient revenues to pay all of its expenses of opera-
25 tion and maintenance, all other obligations and indebtedness

ar9

1 payable by the Municipal Light Plant and debt service
2 charges, would you have found that a more acceptable
3 limitation?

4 MR. MELVIN BERGER: Could I have the question
5 repeated, please?

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

8 THE WITNESS: Sir, you are asking me to get into
9 a question of what is cost and most of the discussion on
10 that day, December 13, 1973, I believe it was, was conducted
11 by Mr. Goldberg, who is very familiar with the practice
12 and policies of the FPC as to what cost was.

13 I personally didn't understand it all.

14 BY MR. BUCHMANN:

15 Q Here today would you agree with me if you had
16 consented to fixed rates so that you paid all expenses
17 of operation and maintenance, debt service and all other
18 obligations payable by Municipal Light, you would have
19 in effect agreed not to sell below cost?

20 A I will have to say I don't know the answer to
21 that, sir.

22 Q What item of cost, as you understand it,
23 would you find that I have left out?

24 A Sir, I do not understand the technical meaning
25 of the word "cost."

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1 Q Do you understand the common, ordinary meaning
2 of the word "cost"?

3 A I do not understand it as it is meant there,
4 nor do I understand it as it is meant here.

5 Q In fact, the City has already agreed to fix
6 rates which would provide all expenses of operation and
7 maintenance and debt service charges and all other obliga-
8 tions payable by the utility, has it not?

9 A I'm sorry, sir. Would you repeat that? You say
10 have they agreed to?

11 MR. BUCHMANN: Could you read it back?

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

14 CHAIRMAN RIGLER: Fix rates with whom?

15 MR. BUCHMANN: Fix rates for its electric
16 services which it charges its customers. I asked has the
17 City agreed to fix rates within that limitation.

18 CHAIRMAN RIGLER: Agreed with whom?

19 MR. BUCHMANN: The trustee under its 1943
20 bond indenture.

21 THE WITNESS: I think that provision is in there,
22 which raises the question you are getting to here, which is
23 who would determine what the costs are.

24 MR. BUCHMANN: If the Chairman please, I'm
25 marking as Applicant's Exhibit 102 (CEI) a copy of the

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preliminary official statement for \$9.8 million City of
Cleveland temporary mortgage revenue bonds.

(The document referred to
was marked Applicant's
Exhibit 102 (CEI), for
identification.)

BY MR. BUCHMANN:

Q Mr. Hart, do you have a copy?

A Yes, sir. I was just handed one.

Q This is the document we discussed the last time
you were here, is it not, which we call the prospectus?

A That's correct.

Q This is the one that has your name on the cover?

A That's correct.

Q I direct your attention to page 15.

MR. MELVIN BERGER: Mr. Buchmann --

MR. BUCHMANN: The pencilled marks are in large
measure mine, and Mr. Hauser's, and are to be ignored.

MR. MELVIN BERGER: There are written notations
in the margin. I assume the same is true with respect to
those.

MR. BUCHMANN: Yes, sir.

If they are troublesome to anybody, I will try
to substitute a clean copy.

MR. MELVIN BERGER: There is no need for a clean

1 copy. I just wanted to know the source of the marks.

2 BY MR. BUCHMANN:

3 Q Mr. Hart, directing your attention to the
4 third paragraph on page 15, that describes the covenant
5 to which I have just referred, does it not?

6 A I believe it is. The statement that you have
7 made, I believe, is in the indenture. If this is part
8 of the indenture, that would be a true statement.

9 Q That indenture covenant is still in effect, is
10 it not?

11 A The indenture covenant is still in effect, yes,
12 sir.

13 CHAIRMAN RIGLER: Is that paragraph supposed to be
14 red-lined?

15 MR. BUCHMANN: Yes, sir.

16 CHAIRMAN RIGLER: It isn't. Is this document
17 red-lined?

18 MR. BUCHMANN: No, sir, not yet. We just had it
19 duplicated because the ones I was going to use had problems
20 with it.

21 CHAIRMAN RIGLER: I would appreciate it if you
22 would red-line the Board's documents and other parties
23 as well during the noon recess.

24 MR. BUCHMANN: Yes, sir.

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BY MR. BUCHMANN:

Q Mr. Hart, again referring to that covenant in the indenture and the indenture, do you correctly understand that you cannot distinguish between that covenant and the request that you not sell electricity at less than cost?

A I can distinguish it, sir.

Q Go ahead and tell me how it is different?

A What is different is, as you know -- I didn't mean to say that. There has been a suit in the Federal District Court on just the issue you are raising there, and the City was successful and the trustee has not deemed it -- seen fit to indicate to us that there is a breach here.

Q I'm not suggesting, Mr. Hart, that there is a breach. All I'm trying to suggest to you is -- all I'm trying to ask you is why you should find it on behalf of the City to be distressing to be asked not to sell electricity below cost when you already are subject to this covenant.

That is the only thing I'm asking.

MR. HJELMFELT: I object in that there is no showing that the provisions of the covenant are in any way the same as the suggestion that electricity not be sold for less than cost.

MR. BUCHMANN: That is what I'm trying to ask him.

CHAIRMAN RIGLER: Actually I would like a little

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1 more elaboration on the witness' answer with respect to
2 what the issues were and what was decided in the suit
3 with respect to the covenant referred to here on page 15,
4 Exhibit 102.

5 THE WITNESS: If I may, sir, there is a suit
6 brought in the Federal District Court. It was a class action
7 by one James Nolan on behalf of all consumers of power
8 from Cleveland Electric Illuminating Company who contended
9 that because he lived in the City of Cleveland and because
10 he was receiving power from CEI on the one hand, and was pay-
11 ing taxes to the City of Cleveland on the other hand, that he
12 was in effect subsidizing the Cleveland Municipal Light
13 System, and that the City of Cleveland was in effect
14 selling electricity below cost because it was being
15 subsidized by him as a taxpayer.

16 I moved to dismiss the action on various grounds,
17 basically of which the entire suit was politically
18 motivated and the Court agreed with me.

19 CHAIRMAN RIGLER: Well, we will ignore any
20 evidence with respect to the motivation of the suit for
21 the moment. I'm concentrating on the question of the
22 allegations with respect to sales below cost. That is
23 the only relevant consideration at this moment.

24 MR. REYNOLDS: Mr. Chairman, could I move to
25 strike that last portion of his answer which did relate

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to his understanding of the motivation?

CHAIRMAN RIGLER: It will be struck.

But I want you to continue your answer with respect to the allegations in the suit relating to sales below cost.

end 15

S16

1 THE WITNESS: This was basically what he was
2 saying. It has been a year or a year and a half since that
3 case was dismissed.

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4 That is basically what the suit was about.
5 We were selling electricity below cost, and he, as a
6 taxpayer, was subsidizing us.

7 CHAIRMAN RIGLER: Did I understand that the City
8 of Cleveland took the position that they were not making
9 sales below cost?

10 THE WITNESS: That is correct, sir.

11 CHAIRMAN RIGLER: Was any finding one way or another
12 made with respect to that contention?

13 THE WITNESS: No, sir. Remember this is a
14 class action and there are certain requirements that have to
15 be met.

16 This was part of the reason that the case was
17 dismissed.

18 CHAIRMAN RIGLER: Was this particular covenant
19 set forth in the complaint in that action?

20 THE WITNESS: I do not remember this specific
21 covenant as set forth right there. However, this whole
22 prospectus was, as I remember, either attached to or was
23 subject to review by the court, because that was one of the
24 reasons that the bonds did not sell, was because that
25 suit was pending or was filed immediately thereafter, when the

1 sale was going to take place.

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2 MR. BUCHMANN: I move to strike that.

3 CHAIRMAN RIGLER: We will strike that portion of
4 the answer relating to any reasons why the bonds did not
5 sell.

6 MR. BUCHMANN: Are you finished?

7 CHAIRMAN RIGLER: Yes.

8 MR. BUCHMANN: Can I have an answer to my question
9 which was still pending?

10 BY MR. BUCHMANN:

11 Q Mr. Hart, why, in view of the existence of this
12 covenant as stated or paraphrased on page 15 of Exhibit 120,
13 why, in view of the existence of that covenant, were you
14 troubled by a request that you not sell at retail service
15 below cost?

16 A You have me at a disadvantage, bec ause you
17 are asking me what cost is and I really don't know
18 what cost is.

19 Q Did I understand you to just testify that in this
20 litigation brought by Mr. Noland, the City took the position
21 it was not selling below cost?

22 A That is correct, sir.

23 Q What do you mean by "cost" in that answer?

24 A That if we were selling below cost, that the bond
25 trustee would have indicated that there was a default, and

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1 my conversations with the bond trustee had indicated
2 he did not think we were in default.

3 Q So far as you are concerned, cost is, whether
4 or not you are selling below cost is to be determined by
5 the bond trustee?

6 A Yes, sir.

7 Q Is he as expert in cost matters as is
8 Mr. Goldberg?

9 A I don't know, sir. I have had many discussions
10 with him about this, though.

11 Q Who is the bond trustee?

12 A The bond trustee is the Union Commerce Bank,
13 and I have talked with their outside counsel.

14 Q Who did you talk to at the Union Commerce Bank?

15 A When I spoke, I was speaking specifically through
16 their outside counsel.

17 Q Mr. Hart, just one or two other questions; you
18 recall the correspondence that you had with Mr. Copper of
19 Indiana and Michigan?

20 A That is correct, sir.

21 Q I'm looking at DJ-178, which is your
22 letter to Mr. Copper of October 19, 1975, and then Mr. Copper
23 wrote you back on October 31 under the numbers DJ-183.
24 You call the general tenor of those letters?

25 A Yes, sir.

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1 Q I notice Mr. Copper says if you have further
2 questions or require additional information, do not hesitate
3 to call or write.

4 Did you ever call or write him again?

5 A No, sir.

6 Q We discussed the power from PASNY the last time
7 you were here.

8 A Yes, sir.

9 Q The question as to the appropriate parties to
10 receive the 30 megawatts of power from PASNY is an issue
11 still pending before the Federal Power Commission; is it
12 not?

13 A That issue is before the Federal Power Commission,
14 yes.

15 Q And there are other people besides Ohio entities
16 trying to get that power?

17 A That is correct, sir.

18 MR. BUCHMANN: Could I have a moment to confer,
19 Mr. Rigler?

20 CHAIRMAN RIGLER: Yes.

21 MR. BUCHMANN: Your Honor, I have nothing further,
22 and I move the introduction of Applicants Exhibits 94 through
23 102.

24 MR. MELVIN BERGER: Mr. Chairman, we would object
25 to the admission of 94 through 97 on the ground that these

1 go to settlement negotiations.

2 We would object to admission of 98, 100 and 101 as
3 being unsponsored exhibits and with regard to 100 and 101,
4 we would object that they are being introduced as unsponsored
5 exhibits, since it appears they should have been introduced
6 through Mr. Hinchae.

7 He is listed as being a participant in the meetings
8 noted on the last page of each of those two documents and,
9 if they had been introduced at that time, it would have given
10 us opportunity to allow Mr. Hinchae to comment on these
11 documents.

12 In addition, if they are being offered on
13 unsponsored basis, we would request offers of proof for
14 97, 98, 100 and 101.

15 MR. BUCHMANN: Do I understand there is no
16 objection to 94 and 95?

17 CHAIRMAN RIGLER: There objections to 94 and 95.
18 They are subject to objection in that they related
19 to settlements.

20 MR. BUCHMANN: 94, 95, 96, 97 do not relate
21 to settlement, if your Honor please. 94 is a letter from
22 Mr. Hart to Mr. Hauser, traces through the whole business
23 of letters we have gone into before, dealing with Buckeye.

24 95 is from Mr. Hart and relates to firm power.
25 I was nothing to do with settlement negotiations between the

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1 City of Cleveland and the Illuminating Company.

2 Same is true of 96, which relates principally to, as

3 I understood it, wheeling which we have had two and a

4 half years worth of letters on wheeling which that summarizes.

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arl 1 97 transmits a wheel schedule and firm power
2 schedule. These things are under negotiation, but
3 they are not part of a settlement between us or anyone else
4 and the City of Cleveland.

5 I don't know where the Department of Justice
6 gets the idea they are.

7 MR. MELVIN BERGER: Upon Mr. Buchmann's
8 representation, we will withdraw our objection to those
9 four exhibits.

10 CHAIRMAN RIGLER: All right, we will receive into
11 evidence at this time Applicant's Exhibits 94 through 97.

12 (Applicant's Exhibits 94
13 thru 97 (CEI), previously
14 marked for identification,
15 were received in evidence.)

16 MR. BUCHMANN: I have lost track to the
17 objections, if Your Honor please.

18 CHAIRMAN RIGLER: We have received Applicant's
19 94 through 97.

20 We will receive into evidence Applicant's
21 Exhibit 99.

22 (Applicant's Exhibit 99
23 (CEI), previously marked
24 for identification, was
25 received in evidence.)

1 MR. BUCHMANN: Was there objection to 98?

2 CHAIRMAN RIGLER: I have a notation there was.

3 MR. BUCHMANN: I didn't catch what the objec-
4 tion was. It is a letter from the City of Cleveland to
5 us. You may recall the testimony of Mr. Hart on --

6 CHAIRMAN RIGLER: Save your comments for a
7 minute.

8 We will admit at this time Applicant's Exhibit
9 No. 102.

10 (Applicant's Exhibit 102
11 (CEI), previously marked
12 for identification, was
13 received in evidence.)

14 CHAIRMAN RIGLER: Now it is appropriate for
15 Applicants to address the objections with respect to 98,
16 100 and 101, which as I understand it is that they are
17 unsponsored exhibits and beyond the area of knowledge of
18 this particular witness.

19 MR. HJELMFELT: I would like to join in the
20 objections to Exhibit 101 and 102 for the reasons stated
21 by Mr. Berger.

22 MR. BUCHMANN: 98 is not beyond the period of
23 knowledge of this witness. It is December 5, 1973 letter.
24 You will recall this witness introduced the subject of
25 delays in making a 69 kV interconnection. This is a letter

1 which this witness, I agree, testified he did not see.
2 But from the chief electrical engineer of the City to
3 the manager of City Planning and Engineering Department,
4 describing what the City has yet to do. It is a self-
5 authenticating document. It is relevant to that cross-
6 examination.

7 CHAIRMAN RIGLER: Is there any question as to the
8 authenticity of this document raised by the Department?

9 MR. MELVIN BERGER: No, I don't believe so.

10 CHAIRMAN RIGLER: And there was no objection on
11 behalf of City on this so at this time we will overrule
12 the objection. We will receive 98 into evidence

13 (Applicant's Exhibit 98
14 (CEI), previously marked
15 for identification, was
16 received in evidence.)

17 CHAIRMAN RIGLER: Mr. Hjelmfelt, I believe you
18 misspoke when you joined in the Department's objection.
19 You said 101 and 102. That objection applied to 100, 102.

20 MR. HJELMFELT: That's correct. And if I stated
21 102 and 101, that was a misstatement.

22 CHAIRMAN RIGLER: Do you want to address 100 and
23 102?

24 MR. BUCHMANN: 100 and 102 are the same subject
25 matter. Again they are official productions of the Bureau

1 of Power of the Federal Power Commission resulting
2 from conferences as they reveal on their face with both of
3 the parties with respect to the 69 kV interconnection.

4 And I submit to Your Honor when we are charged
5 with delaying that connection, and when you put together
6 these official reports of the federal government with the
7 letters from the chief engineer, and then from the director
8 of utilities of the City of Cleveland, over a year and a
9 half later, it shows where the delays can be placed.

10 I suggest to Your Honor that these documents are
11 self-authenticating, relevant at this point in time, and
12 admissible. I don't think they are relevant to anyone
13 else's testimony.

14 CHAIRMAN RIGLER: I believe the Department
15 requested an offer of proof.

16 MR. BUCHMANN: I'm sorry. I object to being
17 asked to make an offer of proof on cross-examination. I
18 can't make a proffer on cross-examination.

19 CHAIRMAN RIGLER: But these are really
20 unsponsored exhibits.

21 Have it your way, and in that case, the objection
22 will be sustained.

23 MR. BUCHMANN: I don't see how I could proffer
24 what -- I offer these documents as showing that the
25 charges that the Illuminating Company delayed the

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1 construction of the 69 kV interconnection are erroneous
2 and that the Federal Power Commission, acting under its
3 authority under the Federal Power Act, and pursuant to the
4 statutes -- pursuant to the order which ordered that
5 interconnection, made investigation, made reports of the
6 progress of that interconnection, and that those
7 documents, coupled with 100, 101, and Mr. Fudakis' letter
8 which is a Department of Justice exhibit, demonstrate that
9 the witness' charges are false and these are self-authenticating
10 documents and admissible in that fashion.

11 MR. MELVIN BERGER: With regard to Mr.
12 Buchmann's comment about self-authentication of the
13 documents, I might call the Board's attention to the
14 Department of Agriculture documents which were at that time
15 under seal, and Applicants at that time insisted we bring
16 in Mr. Darling to testify about them.

17 CHAIRMAN RIGLER: You are indicating to us
18 that Applicants have taken an inconsistent position with
19 respect to documents drawn from government files?

20 MR. MELVIN BERGER: Yes, I believe they have,
21 although we do not contest the authenticity of those
22 documents.

23 MR. BUCHMANN: I was here when that argument
24 was made on the Department of Agriculture matter. While I
25 didn't make it, I see a considerable distinction between

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1 these expressed official reports of what is happening
2 by the Federal Power Commission, and a series of reports
3 by people who wander around Northwestern Ohio and report
4 back the chit-chat and gossip they pick up.

5 MR. HJELMFELT: I am not going to comment on that
6 remark, but I think the offer of proof indicated that
7 these were findings of the Commission or reports of the
8 Commission, and I think there is a distinction between
9 the Commission acting and a report of the Staff of the
10 Commission.

11 I would want to quibble with that portion of the
12 proffer.

13 MR. BUCHMANN: They are reports by the Staff.
14 I didn't claim they were orders of the Federal Power
15 Commission. They are reports by the Staff forwarded out
16 to the various parties. They show on the face --

17 CHAIRMAN RIGLER: I think Mr. Hjelmfelt's
18 objection went further than orders of the Federal Power
19 Commission.

20 MR. BUCHMANN: He is correct on that.

21 CHAIRMAN RIGLER: I think an offer of proof
22 clearly is called for in that these exhibits were not
23 related to any direct testimony of the witness. If you
24 are trying to bring them in as unsponsored exhibits at this
25 time subject to the offer of proof that was made, that

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1 offer would have to be amended in that you said they established
2 certain facts.

3 You might offer them as probative of certain
4 facts.

5 MR. BUCHMANN: I get Your Honor's distinction.
6 I offer them to establish --

7 CHAIRMAN RICLER: Or to assist in establishing or
8 to support your argument with respect to the party
9 responsible for the delay in completing the G-V inter-
10 connection.

11 MR. BUCHMANN: That was the intention of my
12 offer.

13 CHAIRMAN RICLER: Subject to that amended offer,
14 we will receive into evidence Applicant's No. 102 and 100.

15 (Applicant's Exhibits 100 and
16 102 (CEI), previously marked
17 for identification, were
18 received in evidence.)

19 MR. HJELMFELT: In view of the admission of
20 Applicant's Exhibit 100, on page 2 of the attachment,
21 the City would ask that the fourth paragraph, beginning
22 on April 24, 1972, be red-lined.

23 CHAIRMAN RICLER: Which one was that?

24 MR. HJELMFELT: Exhibit 100, page 2, the
25 attachment, the paragraph beginning with the words "on

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1 April 24, 1972," the fourth paragraph.

2 With respect to ---

3 MR. BUCHMANN: Did you red-line the whole
4 paragraph?

5 MR. HJELMFELT: Yes, sir.

6 With respect to Applicant's Exhibit 101, again
7 on page 2 of the attachment, I would ask that the first
8 full paragraph be red-lined.

9 CHAIRMAN RIGLER: What is the one that begins
10 "since March 8"?

11 MR. HJELMFELT: No, it begins "the City of
12 Cleveland City Council passed Ordinance No. 976-72."

13 CHAIRMAN RIGLER: Very well.

14 Is there any redirect?

15 MR. MELVIN BERGER: Yes, there is some redirect.

16 CHAIRMAN RIGLER: We Suchmann, we are going to
17 return all of the exhibits to you over the lunch hour
18 for appropriate red-lining for documents longer
19 than three pages. You must make that known in advance
20 to the parties discussing redirect or recross.

21 I think this is a good time to break for lunch.
22 Shall we come back at a quarter of 1:00 by the wall clock?
23 Quarter of 2:00, rather.

24 (Whereupon, at 12:50 p.m., the hearing was
25 recessed, to reconvene at 1:45 p.m., this same day.)

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AFTERNOON SESSION

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(2:00 p.m.)

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Whereupon,

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ROBERT HART

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resumed the stand as a witness on behalf of the

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Department of Justice and, having been previously

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duly sworn, was examined and testified further as follows:

8

REDIRECT EXAMINATION

9

BY MR. MELVIN BERGER:

10

Q Mr. Hart, I would like to direct your attention to Applicant's Exhibit 99, which is the --

11

12

A Could you tell me which piece of paper that is?

13

Q August 8, 1972 purchase order. Do you have that in front of you?

14

15

A Yes, sir.

16

Q Mr. Hart, with regard to this order, was there a dispute with respect to any items at the time this order was tendered for payment?

17

18

A No, sir.

19

Q How long after this order was issued was it tendered for payment?

20

21

A It was over 16 months, or whatever you have that it was first presented to the City of Cleveland for payment and at that time it was immediately paid.

22

23

24

Q Mr. Hart, I believe you testified earlier today

25

1 that you had helped Mr. Kufukis draft a letter which
2 was identified as DJ 160, which is the January 18, 1974
3 letter addressed to Mr. Howley?

4 A Yes, sir.

5 Q I know that that letter states that this
6 purchase order is an attachment. I believe you stated
7 earlier today that you had not seen that purchase order;
8 is that correct?

9 A That's correct, sir.

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1 Q If you helped draft this letter of Mr. Kudukis,
2 how come you had not seen the purchase order?

3 A Because when I helped draft this, it was done
4 over the telephone. Since this is dated prior to the time
5 I became active in this area, I and Director Kudukis had
6 talked over the telephone and any preparation I did was over
7 the telephone and I had merely called downstairs to a
8 different division of the City of Cleveland, i.e., to the
9 Commissioner of Accounts to verify that there was in fact a
10 purchase order that had been issued back at the time, and
11 that it was in this dollar amount that is issued there.

12 So, for the actual typing, actual sitting down,
13 putting the word on paper, I did not actually do that.

14 This particular purchase order, a copy of thereof
15 was not sent to me, but was sent directly from the
16 Commissioner of Accounts to the Director of Public Utilities
17 or his staff, which is in an entirely different building than
18 my own.

19 Q I believe Mr. Buchmann asked you a question or two
20 this morning with respect to the two letters between yourself

21
22 A Yes, sir.

23 Q I believe you testified that you did not write or
24 call Mr. Copper following the receipt of his letter; is that
25 correct.

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1 A That is correct, sir.

2 Q Why did you not call or write him?

3 A Because I had stated my position as what had gone
4 on at that meeting in that letter I wrote to him. He
5 stated his position in the letter he wrote back to me.
6 It appeared to me that his letter confirmed mine, that they
7 were still hinging any wheeling they would do upon the
8 wheeling by CEI, so my letter was still standing and there
9 was no reason just to write back to him to affirm what I
10 had already stated.

11 Q I believe this morning you also mentioned that Mr. ---
12 Mr. Buchmann brought up the question of availability of the
13 30 megawatts of PASNYpower for the City of Cleveland and
14 that that matter was still pending before the FPC.

15 Do you know if an initial decision on this
16 question has been reached in the FPC?

17 A Yes, I do know.

18 Q What was the initial decision?

19 A The initial decision by the Administrative Law
20 Law Judge in the FPC allocated the power to
21 Allegheny Co-op, contingent upon CEI wheeling the power
22 to the City of Cleveland.

23 Q How would this decision allocating this power
24 to Allegheny have an effect on Cleveland getting the power?

25 A You remember that the power authority of the

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1 State of New York agreed to allocate the power to Allagheny
2 initially and that was done with the contingency that when
3 it became available and, i.e., that Cleveland could receive
4 the power, i.e., again that CEI would wheel the power, then
5 the power would come directly to the City of Cleveland,
6 so what the administrative law judge did was to merely
7 confirm what the Power Authority of the State of New York
8 had already ordered.

9 Q Do you know if this decision has been appealed?

10 A Yes, it has, sir.

11 Q Has any decision been reached on appeal?

12 A No, sir.

13 Q I would like you to take a look at Applicants
14 Exhibit 200. I'm sorry, 102, which is the preliminary official
15 statement, dated May 10, 1974.

16 Now, I would like to direct your attention to the
17 first page, if I may, for a moment.

18 Mr. Buchmann had asked you some questions with
19 respect to this prospectus which is referred to as
20 a "preliminary official statement."

21 What is meant by the term "preliminary"?

22 A What is meant there is that what is written up
23 the side of the page in the original, on the printed copies,
24 that is in bright red, which is the way this particular
25 document gets the name of a "red herring."

Anybody who would pick this up is immediately

1 forewarned that this is a preliminary meeting, that it
2 is not a final document.

3 After the words "preliminary statement" it
4 states out in big capital red letters, red on the original,
5 subject to being corrected and changed, and that is the reason
6 a preliminary or red herring is issued.

7 It is subject to being changed as matter
8 come to light that should be changed.

9 Q Did any such matters come to light after
10 May 10, 1974, which is the date of this preliminary
11 prospectus?

12 A Yes, they did.

13 Q Are you stating there are certain errors in
14 this?

15 A There are certain errors in this document;
16 that is correct, sir.

17 As I look back on it now, as of May 10, it
18 was the best and most accurate we could do, but
19 since that time I am stating for the record there are
20 inaccuracies in here.

21 Q I would like you now to turn to page 15 of
22 Applicants 102 and direct your attention to the third
23 paragraph which Mr. Buchmann read this morning.

24 Under the third paragraph, who would determine
25 whether the requirements stated in that paragraph were

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complied with by the City of Cleveland?

A The bond trustee.

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1 Q To your knowledge, Mr. Hart, is the bond
2 trustee a competitor or is he controlled by a competitor
3 of the Municipal Light Plant?

4 A No, he is not.

5 Q Mr. Hart, does this third paragraph give the
6 trustee control over any of the City's individual rates
7 or only over the total revenue collectively received under
8 all rates?

9 MR. BUCHMANN: I think I object to that.

10 CHAIRMAN RIGLER: Basis?

11 MR. BUCHMANN: In the first place, it requires a
12 legal conclusion. The paragraph itself is a description
13 of what is in the indenture, and not the indenture
14 language. That is one.

15 The second problem is who has ever suggested
16 that anybody wanted control over specific rates.

17 CHAIRMAN RIGLER: Overruled.

18 MR. MELVIN BERGER: Can we have the question
19 reread?

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

22 THE WITNESS: It is only over the total
23 revenue received for all rates.

24 BY MR. MELVIN BERGER:

25 Q Mr. Hart, I would like to direct your attention

1 to the December 13, 1973 letter from Mr. Rowley, which
2 is DJ 188.

3 A Yes, sir.

4 Q Mr. Hart, under the proposal contained in this
5 letter, what is your understanding as to who would have
6 made the determination as to whether Cleveland was selling
7 electric power below cost?

8 A CEI.

9 Q Is it your understanding that this December 13
10 proposal would give CEI the ability to challenge the City's
11 retail electric rates or merely the City's overall revenue
12 generated by the Municipal Light Plant?

13 A No. We interpret it as meaning that they could
14 challenge any specific rate.

15 Q I believe earlier today you stated that the 69
16 KV interconnection was put into service in July of 1974; is
17 that correct?

18 A That's correct, sir.

19 Q Do you know if it had been operated prior to that
20 time?

21 A It had been operated on occasion prior to that
22 time.

23 Q Mr. Buchmann had asked you a number of questions
24 with respect to Buckeye Power. If you would, I would like
25 to have you look at DJ 177, which is the July 9, 1975

1 letter from Robert Hart to Carl Rudolph with two attach-
2 ments.

3 A I'm sorry, what is the date of that again?

4 Q July 9, 1975.

5 A Okay, sir.

6 Q I would like to have you look particularly at
7 the second attachment, which is the April 15, 1975
8 letter.

9 A Okay, sir.

10 Q I direct your attention to the fourth paragraph
11 on the first page and note that the paragraph opens with
12 the statement that "Buckeye is precluded from selling power
13 directly to nonmembers."

14 I believe you testified that Cleveland is not a
15 member of Buckeye; is that correct?

16 A That's correct, sir.

17 Q Well, if Cleveland is not a member of Buckeye
18 and Buckeye was precluded from selling power directly to
19 nonmembers, wouldn't that prevent Cleveland from obtaining
20 Buckeye power?

21 A No, sir.

22 Q Why not?

23 A Because as is stated in that fourth paragraph
24 there, you in fact enter into an agreement with one of the --
25 one or more of the cooperatives. You don't actually

1 enter into an agreement with Buckeye, Inc. Buckeye, Inc.
2 is only a negotiating arm to set everything up and wield
3 a bit of influence with the cooperatives. As is stated
4 in the fourth paragraph there are in fact, for instance,
5 the Butler Rural Electric Cooperative has entered into an
6 agreement with the City of Lebanon.

7 Buckeye Rural Electric Cooperative, which is
8 one of the 28 that make up Buckeye, Inc.

9 Butler or one of the other 27 would enter
10 into agreement with the City of Cleveland to supply
11 electricity.

12 Q I would like to refer you, if I may, to
13 Applicant's Exhibit 34, which is an October 14, 1975
14 letter from Mr. Hauser to you.

15 I note in the second paragraph of that letter
16 that Mr. Hauser specifically mentions a willingness to
17 provide transmission services for the City of Cleveland
18 with respect to electric energy it may wish to purchase, and
19 it goes on to give examples of Ohio Power, Ohio Edison, or
20 PENELEC.

21 I would like to ask you, Mr. Hart, is there
22 any difference with respect to the power that would be
23 available to the City of Cleveland, let's say, from
24 PASNY with regard to the power that would be available
25 to the City of Cleveland from Ohio Edison, Ohio Power, or

1 PENELEC?

2 A Yes.

3 MR. BUCHMANN: Could I inquire as to the meaning
4 of the word "difference"? Electricity is electricity.
5 I don't know what he means by that. I object.

6 MR. MELVIN BERGER: I'm afraid I can't respond
7 to that without suggesting the answer to the witness. Mr.
8 Hart has answered yes.

9 CHAIRMAN RIGLER: You better rephrase.

10 MR. MELVIN BERGER: My next question would be
11 what is the difference.

12 CHAIRMAN RIGLER: Rephrase the question.

13 BY MR. MELVIN BERGER:

14 Q Mr. Hart, would power that would be available
15 for the City of Cleveland from PASNY be -- be available
16 to the City of Cleveland from PASNY be different, be the
17 same as power that would be available --

18 CHAIRMAN RIGLER: You can ask if it would
19 be available on the same terms as power from other sources.

20 BY MR. MELVIN BERGER:

21 Q Mr. Hart, wouldn't power that would be available
22 to the City of Cleveland from PASNY be available -- strike
23 that.

24 Mr. Hart, would power that would be available
25 to the City of Cleveland from Ohio Edison, Ohio Power or

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1 PENELEC, be available to the City on the same terms as,
2 let's say, power from PASNY?

3 A No, it wouldn't.

4 Q What would be the difference?

5 A The difference would be that you would be
6 paying -- you would pay substantially more for power
7 available from any of these three sources than you would
8 from, say, PASNY. At one time the power from PASNY was
9 available at a cost of 2.6 mills at the bus bar in Niagara.

10 The power from any one of these three sources
11 would be available at substantially greater prices. The
12 fact being that one is hydro power and these other three
13 sources would be fossil energy type power.

14 Q I would like to refer you now for a moment to
15 Applicant's Exhibit 75, which is the July 22, 1975 letter
16 from Karl Rudolph to Mayor Pozk.

17 A Okay, sir.

18 Q In the second paragraph of this letter, it is
19 stated:

20 "This company is willing to provide transmission
21 services to the City of Cleveland," et cetera.

22 And then certain conditions are listed.

23 Mr. Hart, at the time this letter was written,
24 had the City of Cleveland filed any action against CEI?

25 MR. REYNOLDS: I will object to that.

1 CHAIRMAN RIGLER: Basis?

2 MR. REYNOLDS: Well, I don't understand what
3 "any action" means. I guess the record is already fairly
4 clear that there are a number of actions that were pending
5 between the City and CEI. It doesn't have any frame of
6 reference and I don't see the relevance of the question.

7 CHAIRMAN RIGLER: Rephrase it.

8 BY MR. MELVIN BERGER:

9 Q Mr. Hart, at the time this letter was written,
10 had the City filed any action in the U.S. District Court
11 involving CEI?

12 A Yes, it had, sir. It filed an action July 1 of
13 1975, an antitrust action, private antitrust action in
14 the District Court in Cleveland.

15 Q I believe this morning -- strike that.

16 I would now like to direct your attention to
17 DJ 182, which is the April 13, 1973 letter from Herbert
18 Whiting to Karl Rudolph --

19 A Okay, sir.

20 Q Mr. Buchmann had asked you some questions with
21 respect to ownership participation referred to in this
22 letter.

23 I would like to ask you if in writing this
24 letter you intended to present to Mr. Rudolph more than one
25 alternative for participation in nuclear units?

1 A Yes, that is true. There are actually three
2 ideas that are presented in that paragraph.

3 One is energy participation.

4 One is AMP-G.

5 Another is for unit power.

6 Q Why was more than one method included in this
7 letter?

8 A Because we wanted to offer alternatives in case
9 there was some objection to any one of the three.

10 If there was a legal objection to any one of the
11 three, then we wanted to make sure there were alternatives.

12 Q Mr. Hart, I believe in some of your earlier
13 testimony you stated that you have always been under the
14 impression that the City's participation in nuclear units
15 would be from CEI's share of those units; is that correct?

16 A They indicated -- in other words, we made a
17 request for participation. They indicated back to us that
18 if we were going to have a share, it would come out of their
19 share.

20 Q Did you request that this arrangement be one that
21 was offered to you?

22 A No, sir. We didn't care where the share came
23 from.

24 Q Who suggested this arrangement?

25 A Whoever the original correspondence was -- it

1 was from CEI. I imagine it was from Mr. Lee Rowley.

2 Q Mr. Buchmann also asked you some questions
3 with respect to CEI's request for the right of first
4 refusal.

5 That is capacity not needed by Cleveland
6 which is contained again in the December 13 letter.
7 Again, it is DJ 188.

8 I believe with respect to this, your prior
9 testimony was to the effect that you read this -- this
10 right of first refusal as allowing CEI to determine the
11 price at which they would purchase the power of this excess
12 capacity from Cleveland; is that correct?

13 A That's correct, sir.

14 Q How do you reach that conclusion?

15 A If we have to go before the FPC every time,
16 we would be constantly embroiled in rate cases which is
17 kind of the case, or the way it is right now. From that
18 standpoint, I concluded that it would be the cost -- not
19 the cost -- but the price would really be up to them, because
20 our only alternative would be to go to the FPC, and we
21 would be constantly litigating in that forum.

22 If I may add in that question about the
23 first option, you could agree to everything they say right
24 here, and you still would not be able to wheel power.

25 MR. REYNOLDS: I object, and move that the

1 latter portion of the testimony be struck as non-
2 responsive.

3 CHAIRMAN RIGLER: You were adding that with
4 respect to the first option where?

5 THE WITNESS: It was the first option, yes, sir.

6 CHAIRMAN RIGLER: Mr. Berger?

7 MR. MELVIN BERGER: I think we were going to go
8 into this in a subsequent question. If you like, we will
9 go into it now.

10 CHAIRMAN RIGLER: We will permit it.

11 MR. REYNOLDS: Are you overruling the motion to
12 strike?

13 CHAIRMAN RIGLER: We are overruling the motion.
14 It was nonresponsive, but let's not quibble. The
15 Department says they are going into this area, so let's move
16 along.

17 BY MR. MELVIN BERGER:

18 Q If we were to assume that the City were to
19 have accepted all of the conditions in this December 15
20 letter, and that it turned out that the City had excess
21 capacity in one of the nuclear plants, and that CEI was
22 offered the power first, had the right of first refusal
23 and refused to take that power, would the City have been
24 able to sell that power to another wholesale customer?

25 MR. BUCHMANN: I'm sorry, but could I have that

1 one read back?

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

4 MR. BUCHMANN: I object, if Your Honor please.
5 That is purely speculative. As to how we can offer them a
6 first refusal without the option of letting them get
7 it through and get it to somebody else.

8 CHAIRMAN RIGLER: I'm a little confused myself.

9 MR. MELVIN BERGER: Maybe we can track this through
10 another way. I will withdraw that question.

11 BY MR. MELVIN BERGER:

12 Q Mr. Hart, at the time this letter was given
13 to you at the December 13 meeting, had CEI taken a
14 position on the willingness to wheel power for the
15 City of Cleveland?

16 A It had taken a position, yes.

17 Q What position was that?

18 A That they would not wheel power.

19 MR. BUCHMANN: The question was to the City of
20 Cleveland.

21 MR. MELVIN BERGER: Can I have that question
22 repeated, the last two questions?

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

1 CHAIRMAN RIGLER: Mr. Buchmann, is it your point that
2 the refusals to wheel were refusals to wheel power from an
3 outside source to the City for its own use?

4 MR. BUCHMANN: Sure.

5 CHAIRMAN RIGLER: And that no request had been made
6 to wheel power on behalf of the City to some customer of
7 the City elsewhere?

8 MR. BUCHMANN: Absolutely, sir. We have been
9 putting in a lot of pieces of paper here, and you haven't
10 seen one request to wheel out yet.

11 BY MR. MELVIN BERGER:

12 Q Mr. Hart, if the City had excess power in one
13 of the nuclear units, could it have sold it to a wholesale
14 customer of its choice?

15 A When I use the word "wheel," and I assume that
16 is the way we are using it, we are talking about wheeling in
17 and out.

18 There has never been an indication that we could
19 wheel out.

20 Now, it has been in every proposal that has been
21 made in recent months to CEI, that in and out has been in-
22 cluded in there, but that December 13 letter, of course,
23 provides no means to get it out, and that was the reason in
24 the prior letters of Mr. Howley you will find he puts the
25 two requirements in there, that the City will be able

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1 to get only generation on the nuclear power plants that
2 is their contract capacity or the requirements of the
3 City of Cleveland.

4 I interpret that to mean that whichever is
5 lower of the two, that that is the amount the City of
6 Cleveland will receive.

7 In effect, although you can wheel into the City
8 there, if you take those words literally, because you can only
9 have the total requirements of the City, there is a contingency
10 put on there saying you cannot wheel out.

11 MR. BUCHMANN: I move to strike the question, if
12 your Honor please, as if the City had excess capacity in
13 the nuclear unit, could it have sold to a wholesale
14 customer of its choice, the answer to which can be yes or
15 no.

16 I object.

17 CHAIRMAN RIGLER: Sustained.

18 MR. MELVIN BERGER: Could we have the
19 question reread?

20 (The reporter read the pending question.)

21 CHAIRMAN RIGLER: Your objection was to the
22 question or answer?

23 MR. BUCHMANN: To the answer. It was a motion
24 to strike, yes, sir.

25 CHAIRMAN RIGLER: All right. You can try again

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1 the same question and see if you can get a response,
2 Mr. Berger.

3 THE WITNESS: May I save some time here?

4 (The reporter read the record as requested.)

5 CHAIRMAN RIGLER: You can answer that
6 yes or no, and Mr. Berger can ask you why, and you can
7 give a reason, if you have one.

8 THE WITNESS: The answer is no.

9 BY MR. MELVIN BERGER:

10 Q Why not?

11 A Because per that letter of December 13 and
12 the earlier letter of Lee Howley, we were precluded from
13 wheeling out of the City of Cleveland.

14 MR. BUCHMANN: Your Honor, I object to that as
15 nonresponsive. Part of the offer is to sell them
16 capacity from Beaver Valley, which isn't in the City of
17 Cleveland and which doesn't require the lines of Cleveland
18 Electric Illuminating Company to get it anywhere.

19 CHAIRMAN RIGLER: That goes to the weight of the
20 question. I hope you inquire as to where in the
21 December 13 letter or the other letter to which Mr. Hart
22 referred, he finds language supporting his conclusion.

23 MR. STEVEN BERGER: Mr. Chairman, I can't
24 hear you.

25 (The reporter read the record as requested.)

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BY MR. MELVIN BERGER:

Q Mr. Hart, if I may ask, wherein the December 13 letter or in the other letters, did you find language to support that conclusion.

MR. REYNOLDS: Mr. Chairman, I'm not going to object to the question, but if we are referring to other letters --

CHAIRMAN RIGLER: I think the Witness can do that in his answer. If he wants to refer to another letter, he can designate that at that time.

THE WITNESS: What I'm referring to, sir, is in the December 13 letter, that paragraph, the same paragraph that we have been discussing, that has the right of first refusal.

CHAIRMAN RIGLER: Last paragraph on page 1.

THE WITNESS: I'm sorry, yes, sir, the last paragraph on the page 1, where it states would have the right of first refusal to purchase any power from the City's participation not required by the City for its own use or the use by retail customers of the City. What my thinking was, assume CBI said we do not want to purchase this power from you, you have excess capacity, but we do not want to purchase this power from you. At that point we would have nothing to do with it, we would have to eat the power, because there would be nothing we could do with it, because there would be no means to wheel

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1 It out of the City, and when I'm talking about out of the
2 City, this is a simplistic way of my thinking of what
3 happens to the power coming of a nuclear generator, would
4 come to the City and the City might have an excess capacity,
5 and then what would it do with it.

6 I think we all know from an engineering standpoint
7 that that is not what happens to the power. The power
8 would come off the nuclear generator and it would go in
9 some theorias per a straight line of wherever it was going
10 to be going.

11 CHAIRMAN RIGLER: I understand that part of the
12 answers. To save time I'm going to ask you where CEI
13 gave an indication that they would not transmit power from
14 the bus bar of the nuclear plant in that straight line to
15 some source designated by the City as the ultimate
16 customer.

17 THE WITNESS: In the conversations in support of
18 the meeting of December 13 or thereabouts, plus this
19 correspondence here, sir.

20 CHAIRMAN RIGLER: Which correspondence, other
21 than December 13th letter, do you have in mind?

22 THE WITNESS: What I'm referring to also, sir, is
23 the letter of February 7, 1974, from Mr. Howley to Mr. Ruben
24 Goldberg. And do you want me to continue?

25 CHAIRMAN RIGLER: Just to make the record clear,

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1 you are referring to the second paragraph in the
2 document designated DJ Exhibit 1917

3 THE WITNESS: Whatever the number is.

4 MR. MELVIN BERGER: Yes, that is the DJ Exhibit
5 number.

6 THE WITNESS: What I'm referring to specifically
7 there is the line, the third line up in that second paragraph,
8 third and fourth lines up, it states not to exceed the
9 capacity specified therein and not to exceed the direct
10 requirements of the City which, I believe, is the same thing as
11 saying you can't wheel it out.

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CHAIRMAN RIGLER: All right.

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BY MR. MELVIN BERGER:

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Q Mr. Hart, I would now like you to look at

4

Applicant's Exhibit No. 70, which is a November 19, 1974 letter from Reuben Goldberg to Donald Hanser.

5

MR. REYNOLDS: Excuse me, Mr. Chairman.

6

Am I correct now in assuming that that is the

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total correspondence that the witness was relying on in response to the question by the Department and the Board as to the basis for his conclusion that there was no

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9

wheeling now?

10

He addressed correspondence, and I asked to have it identified, and you said he could identify it in his answer.

11

12

CHAIRMAN RIGLER: I think it is safe to assume if he didn't identify it that it wouldn't be considered.

13

14

MR. REYNOLDS: That is why I had asked the question.

15

16

THE WITNESS: If there is additional documentation you would like, I could go ahead.

17

18

MR. REYNOLDS: That is what bothers me about it.

19

20

BY MR. MELVIN BERGER:

21

Q Is there additional documentation you relied upon?

22

A Now you are in the area of firm -- strike firm.

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1 You are into the transmission schedules that we
2 have submitted to CEI most recently which have provided for
3 wheeling to and from the City of Cleveland, and if I'm
4 not mistaken, the transmission schedules that come back
5 to us from CEI only say to the City.

6 Q Mr. Hart, if I may refer to Applicant's 70,
7 November 19, 1974 letter, Mr. Buchmann had shown you
8 the line of correspondence dating back earlier into
9 your 1974, and he particularly referred to February 27,
10 1974 letter from Lee Howley to the City which forwarded a
11 copy of a draft participation agreement.

12 Following Applicant's -- the sending of
13 Applicant's 70 by Mr. Goldberg, did the City send CEI
14 another draft of a participation agreement?

15 A I believe I did, yes, sir.

16 MR. MELVIN BERGER: I would like to have
17 marked for identification as DJ 315 a letter from Reuben
18 Goldberg to Donald Hauser, dated December 13, 1974, which
19 bears Department of Justice internal identification number
20 012994.

21 (The document referred to was
22 marked DJ Exhibit 315, for
23 identification.)

24 THE WITNESS: Yes, sir.
25

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1 BY MR. MELVIN BERGER:

2 Q Mr. Hart, have you seen this document before?

3 A Yes, I have, sir.

4 Q Was this document forwarded to CEI with the
5 agreement that you just mentioned in your prior testimony?

6 A Yes, sir. I believe all of them were forwarded.
7 In other words, there would have been a participation
8 agreement, operating agreement, and a facilities agree-
9 ment.

10 Q Mr. Hart, do you recall if these three
11 agreements were fairly lengthy documents?

12 A All of them were fairly lengthy documents,
13 very complex, lengthy documents, yes, sir.

14 Q Who prepared these documents for the City?

15 A Probably the original draft would have been
16 prepared by Bill Mayben. It would have been reviewed by
17 outside counsel. I would have merely glanced at them,
18 and then they would have been forwarded to CEI as here by
19 Mr. Reuben Goldberg.

20 Q Between February 27, 1974, which is the date
21 Mr. Howley forwarded a draft participation agreement to
22 the City and December 13, 1974, which is the date that
23 Mr. Goldberg forwarded three draft agreements, including a
24 participation agreement to CEI, was there any discussion
25 between CEI and the City with respect to the participation

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1 agreement.

2 MR. BUCHMANN: I object to that, Your Honor.
3 The record shows that this was all handled by Mr.
4 Goldberg's office and this witness testified on cross-
5 examination the last time that he was not familiar with
6 what went on.

7 MR. MELVIN BERGER: I believe Mr. Hart had
8 testified that he attended certain meetings in this period
9 of time and the intent of my question is to determine
10 whether participation agreements were discussed.

11 MR. BUCHMANN: I would like counsel to cite any
12 record reference to a meeting in the period of time of
13 2/27/74 on.

14 You may recall that I put in Exhibits 64 in April
15 of 1974, 65 in August of 1974, as Mr. Goldberg's reply,
16 Exhibit 66. Letters 67 and 68, all of which we were asking
17 to have meetings and there weren't any meetings, and that is
18 the point. There were no meetings. Unless counsel can
19 show me a record, I object. Not on the participation
20 agreement.

21 MR. MELVIN BERGER: I believe that at transcript
22 page 4906 and again at 4912, Mr. Hart has referred to meetings
23 which took place after February 27, 1974, and from the
24 context of the documents that were discussed, at those trans-
25 cript locations, it would have been prior to December 1974.

1 MR. BUCHMANN: That is precisely not. That
2 was my cross-examination where this witness has said there
3 may have been meetings, but he didn't remember where they
4 were or when they were.

5 I put those documents in to demonstrate, and I
6 believe I persuaded him, that the meeting had not been
7 held. I think that is the fair reading of that transcript.

8 CHAIRMAN RIGLER: All right. Then I will permit
9 the question.

10 THE WITNESS: I'm sorry?

11 CHAIRMAN RIGLER: You may answer.

12 THE WITNESS: The question is --

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

15 THE WITNESS: Yes, there was.

16 BY MR. MELVIN BERGER:

17 Q Were these discussions associated with discus-
18 sions which were going back and forth between the City
19 and CEI?

20 A There were a whole series of agreements which
21 were under discussion at that time. In this December 13
22 letter, December 13, 1974 referred to a participation
23 agreement, operating agreement and a facilities agreement.

24 The operating agreement and the facilities
25 agreement are a necessary step if you are going to enter

1 into a participation agreement, because at that time we
2 did not have the 138 kV interconnection, and the
3 operating agreement and the facilities agreement were to
4 facilitate that interconnection and they were only one
5 or two steps in the path leading toward the participation
6 agreement which would be the end result of all of this.

7 As I indicated earlier, we did enter into an
8 agreement on the operating and facilities agreement on
9 April 17, 1975. So there was a whole series of meetings
10 finally that were culminated on that date dealing with
11 one step toward this whole process of entering into a
12 participation agreement.

13 MR. BUCHMANN: I object unless the witness
14 can relate it to a meeting from 2/23 to 3/13 of '74,
15 the time period he was asked about.

16 CHAIRMAN RIGLER: He has given his answer
17 and you will be permitted to go into that on recross.

18 BY MR. MELVIN BERGER:

19 Q Mr. Hart, I believe in response to some
20 cross-examination by the Staff regarding the December 13
21 meeting, and in particular regarding any comments that
22 Mr. Howley may have made to you when he handed you DJ 186,
23 which is an undated letter from John M. Arthur to the
24 City of Cleveland, attention Honorable Ralph Perk, do you
25 have that letter in front of you?

1 A Yes, sir, I have that in front of me, sir.

2 MR. BUCHMANN: Mr. Chairman, I don't believe I
3 inquired into that in cross at all.

4 I'm sorry, the Staff did. I withdraw that.

5 BY MR. MELVIN BERGER:

6 Q I believe your testimony was that upon being
7 handed this letter by Mr. Howley, he stated that you may
8 not have received this yet, and that he then testified he
9 had no additional comments concerning the purpose as to
10 why he was distributing this letter.

11 Do you recall that testimony?

12 A Yes, sir.

13 Q If I may, I would like to try to refresh your
14 recollection on that point.

15 MR. BUCHMANN: Is the Department of Justice
16 going to cross-examine its own witness now?

17 CHAIRMAN RIGLER: I think for the purpose stated,
18 it is perfectly proper examination.

19 MR. BUCHMANN: He hasn't testified he couldn't
20 recall anything yet. He hasn't stated that he couldn't
21 remember anything. He stated flatly what his recollection
22 was.

23 end 22
24
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1 CHAIRMAN RIGLER: The Department is entitled to
2 refresh that recollection. We are interested in the truth.

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3 MR. BUCHMANN: I understand. So on I, sir.

4 CHAIRMAN RIGLER: All right.

5 If there is something that strikes a discord
6 and is not in his previous testimony, that
7 is at variance with the facts, we would rather have the
8 actual facts established, rather than leave the record in
9 an incomplete or incorrect state.

10 MR. MELVIN BERGER: I would like to turn to
11 Exhibit 291 of the Department of Justice and to page 00014340.
12 This would be the fourth paragraph on that particular page.

13 I would like you to read that paragraph.

14 THE WITNESS: "L. C. Howley opened the meeting
15 by referring to the December 10, 1973, letter of
16 Duquesne Light Company, addressed to Ralph Park, Mayor.
17 L. C. Howley said this letter reflected the fact that
18 the CAPCO companies for the reasons stated in that letter,
19 that it didn't make sense for MELP to be a member of CAPCO,
20 noting particularly the restrictions on municipalities by
21 statute, charter and ordinance."

22 CHAIRMAN RIGLER: What page is that?

23 MR. MELVIN BERGER: 00014340.

24 BY MR. MELVIN BERGER:

25 Q Mr. Hart, does that refresh your recollection

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1 as to whether or not Mr. Howley made that statement at that
2 meeting on behalf of CAPCO companies?

3 MR. BUCHMANN: I object to the phrase "on behalf."
4 It doesn't say "on behalf of."

5 CHAIRMAN RIGLER: Rephrase it.

6 BY MR. MELVIN BERGER:

7 Q Mr. Hart, I would like to ask you if this
8 refreshes your recollection as to whether or not Mr. Howley
9 made that statement at that December 13 meeting?

10 CHAIRMAN RIGLER: Which statement, now?
11 You mean the second sentence?

12 BY MR. MELVIN BERGER:

13 Q Yes, the second sentences of the fourth paragraph.

14 A If the second sentence there --

15 Q Maybe I should read the sentence.

16 MR. BUCHMANN: He just read it.

17 BY MR. MELVIN BERGER:

18 Q The sentence reads as follows: "L.C. Howley
19 said that this letter reflected the fact that the CAPCO
20 companies for the reasons stated in that letter, that it didn't
21 make sense for MELP to be a member of CAPCO, noting
22 particularly the restrictions on municipalities by
23 statute, charter and ordinance."

24 A And your question is, do I remember that
25 statement? The answer is no, I'm afraid I do not remember

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1 that statement. I have heard him make a statement on
2 different occasions, but not at that particular meeting.

3 Q Can you testify that he did not make that
4 statement?

5 A No, sir, I can't.

6 MR. MELVIN BERGER: I don't believe we have any
7 further questions.

8 MR. LESSY: Staff has no recess.

9 MR. HJELMFELT: City has no questions.

10 MR. SUCHMANN: Can I have a moment?

11 Is it an appropriate time for a five minute
12 recess?

13 CHAIRMAN RIGLER: It is.

14 (Recess.)
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RE-CROSS-EXAMINATION

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2 BY MR. BUCEMANN:

3 Q Mr. Hart, you discussed on redirect the fact
4 that the question of the entitlement to the PASNY power
5 which we have been discussing was presently on appeal.

6 The fact is that it is on appeal from a decision
7 of the Administrative Law Judge to the Federal Power
8 Commission itself, and that is where it stands now, is
9 it not?

10 A That's correct, sir.

11 Q Without being overly precise about identification,
12 there are Vermont interests who are trying to get that
13 power?

14 A That is correct.

15 Q In addition to Allegheny?

16 A That's correct, sir.

17 Q Indeed, the Commission Staff, that is the
18 Federal Power Commission Staff itself recommended that
19 the power go to Vermont, did it not?

20 A I believe they recommended the power go to Vermont
21 contingent on it being able to be received by the City of
22 Cleveland.

23 Q In any event, those are matters of record,
24 are they not?

25 A That's correct.

1 Q One other question:

2 In discussing the request of the Illuminating
3 Company for the right of first refusal for any excess
4 power that the City might have in CEI's share of these
5 various nuclear plants, you used the expression "if we
6 must go to the FPC every time."

7 I gather you mean every time you want to sell
8 power to the Illuminating Company, you gather you would
9 have to go to the FPC if there was a rate dispute?

10 A If there was a rate dispute, the only recourse
11 we would have would be to contest it before the FPC.

12 Q You are discussing sales of power by the City
13 Municipal System to the Illuminating Company?

14 A That's correct.

15 Q Is it your understanding that the FPC regulates
16 that rate?

17 A I think I testified that I thought it did. I
18 could be in error there, but that is my opinion.

19 Q You might be in error there?

20 A Yes, sir. But that is my opinion, sir.

21 MR. BUCHMANN: Thank you very much.

22 CHAIRMAN RIGLER: Does that conclude your recross?

23 MR. BUCHMANN: Yes, sir.

24 CHAIRMAN RIGLER: Mr. Reynolds, do you have
25 anything?

1 MR. REYNOLDS: I have nothing, sir.

2 MR. SMITH: What is the basis for your thought
3 that the City of Cleveland would have to go to FPC for
4 approval of rates that would be involved in the first
5 refusal clause?

6 THE WITNESS: Sir, my only basis for thinking
7 that is when there is a wholesale sale of electricity, I
8 immediately think it has to have the approval of the FPC.

9 If CEI were to sell to the City of Cleveland,
10 it takes FPC approval. If you turn the thing around,
11 I assume that to be true also.

12 CHAIRMAN RIGLER: Any other questions?

13 MR. MELVIN BERGER: None from the Department.

14 CHAIRMAN RIGLER: All right. Thank you.

15 (Witness excused.)

16 MR. REYNOLDS: I would like to make a motion
17 with respect to the testimony of this witness under
18 Rule 105 similar to the one that has been made previously
19 with respect to other testimony.

20 CHAIRMAN RIGLER: All right, and we will
21 reserve that decision.

22 MR. BUCHMANN: Your Honor, that leaves only
23 one matter. I would like to take care of it while Mr.
24 Hart is still in the jurisdiction, if that is all right.

25 CHAIRMAN RIGLER: Fine.

MR. BUCHMANN: At page 4680 to 31 of the

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1 transcript, you ruled --

2 MR. SMITH: What date is that?

3 MR. BUCHMANN: February 10, sir.

4 CHAIRMAN RIGLER: Is that the only date in issue?

5 MR. BUCHMANN: Yes, sir.

6 CHAIRMAN RIGLER: All right.

7 MR. BUCHMANN: 4660 to 81, you ruled if, or at
8 least expressed a view if we could get a look at the transcript,
9 a motion to strike which I had previously made would be
10 granted, at least in part, and it was up to us to
11 designate what we thought was applicable.

12 To put it in context, you may recall, that was
13 some time ago, there was a series of questions about who
14 had drafted bond ordinances and why the City had
15 changed lawyers, if at all, and it was said it would be
16 connected up, and we had a long series of questions.

17 As I read this, I believe the motion to strike
18 should reach to -- and I don't know if this is a motion
19 or simply an argument -- from page 4667, line 23, most of
20 the next page is colloquy; but it goes down to line 18,
21 inclusive.

22 Then should pick up on page 4669, line 13, which
23 were expressions of reasons why this change was made,
24 through page 4671, line 22, and then finally page 46--

25 CHAIRMAN RIGLER: Wait a minute. That includes

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1 all of 4670 and 71 through line 22?

2 MR. BUCHMANN: Yes, sir.

3 Then page 4672, beginning on line 1 through
4 the next page, 4673, ending with line 25.

5 CHAIRMAN REGLER: Mr. Berger?

6 MR. MELVIN BERGER: I would like to respond
7 to this motion.

8 The Department believes that the
9 competitive positions of CBI and Cleveland Muni are
10 an issue in this case, especially with respect to
11 reliability and rates.

12 We already introduced some evidence on these
13 issues, and we will be introducing some additional
end 24 14 evidence.

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It is our position that the bond issue in question goes directly to MELP's ability to finance improvements and that this ability to finance improvements, directly impacts on the competitive position of MELP.

Any acts or circumstances which make it more difficult for MELP to finance these improvements, therefore, impacts on the competitive position and, therefore, we think that the problems which MELP had with regard to this bond issue, which were stated by Mr. Hart in his testimony are relevant to this proceeding.

MR. BUCHMANN: I am not going to take a position on the relevance of this in the abstract. This testimony, however, as you can see on page --where it began on 4567, the question was and, indeed, it is your question, Mr. Chairman, what difference does it make who drafted the bond ordinance, and the answer by Mr. Berger is, I believe I would connect this up in the next couple of questions, and you said, okay, in effect.

The testimony that is given, even if it is relevant, as adduced as part of a case in chief was not adduced in that way. It is presented as part of the connecting up to show why the drafter of the bond ordinance was somehow pertinent. That being stricken, the whole thing should go. If they want to put on testimony like that, they should put it on through a qualified witness

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1 directly and not over the back like this.

2 MR. HJELMFELT: My recollection was at the time
3 the Board had problems with testimony going to the
4 identity of who drafted the ordinance with respect to
5 relevance, but the testimony as to the effect of any
6 amendments or marketability of the bonds, as a result of
7 what happened at the Committee, was a different subject
8 entirely and was not connected with that limited problem of
9 what the relevance of the individual who actually drafted
10 the ordinance was.

11 CHAIRMAN RIGLER: Yes, I believe that states
12 it properly. If we refer to 4630 and 81, we indicated
13 tentatively that questions with respect to why the city
14 did not draft the ordinance, and the answers to those questions
15 were subject to the motion to strike, and we indicated
16 our intent to grant that motion.

17 However, we went ahead to say the subsequent
18 testimony with respect to the provisions of the bond ordinance
19 which were commented upon by investment counsel in New York,
20 tentatively were to be permitted to remain on the record.

21 MR. BUCHMANN: I'm aware of that, your Honor.
22 I'm trying to persuade you to change that tentative
23 conclusion. As you read this, it is plan that the
24 material was here offered on the express representation by
25 Counsel that this was to connect up the questions which I think

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1 we are all agreed should go out and that being so, they
2 should go out too.

3 It is not my representation that these were in there
4 for that purpose. It is Counsel's representation.

5 MR. HJELMFELT: That day the representation was
6 that the next couple of questions would connect it up
7 and not that the rest of the questions were for that purpose.

8 It is, among other things that is what they would
9 do.

10 CHAIRMAN RIGLER: Mr. Berger?

11 MR. MELVIN BERGER: If the testimony -- It seems if
12 the testimony is relevant and probative of the issue in
13 controversy, and the reasons for asking the questions --

14 MR. REYNOLDS: I can't hear a word he is
15 saying.

16 MR. MELVIN BERGER: It would appear if the
17 testimony is relevant and is probative of the issue
18 in controversy, then the reasons for asking the particular
19 questions would not be material.

20 MR. BUCHMANN: I don't agree with that, when the
21 expressed reason is a particular purpose and deprives me of
22 opportunity to object on other grounds.

23 CHAIRMAN RIGLER: All right. I think we are ready
24 to rule.

25 On page -- we would overrule the motion to

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1 strike with respect to the lines on page 4667.

2 Coming over to 4668, we would sustain the
3 objection posed on lines one and two of this page and
4 thus would strike the answer appearing on lines 17 and 18.

5 The motion to strike will be denied as to the
6 designated lines on 4669.

7 The motion will be denied as it relates to page 4670.

8 It will be denied as it relates to the lines
9 designated on 4671.

10 MR. BUCKMANN: I didn't hear, your Honor, what
11 that denied.

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1 CHAIRMAN RIGLER: Yes. It will be denied
2 with respect to page 4672.

3 It is denied as to page 4673.

4 We would have sustained the objection to the
5 questions posed on line 11 of 4673.

6 However, if we come to 4673, we see the
7 Department withdrew that line of questioning. There was
8 no motion to strike pending.

9 I believe that covers it.

10 MR. CHARNO: Mr. Chairman, pursuant to the
11 Board's instructions, we conferred at some length with
12 the City of Cleveland and over the weekend, and we were
13 able to take something over two feet of depositions, if
14 you combine the City's and ours, and reduce them a pile
15 of excerpts for 25 witnesses that is about five inches
16 high.

17 We have passed out the first of these, and
18 would offer it subsequently for identification and into
19 evidence.

20 CHAIRMAN RIGLER: Have you discussed
21 this with counsel for the Applicants?

22 MR. CHARNO: No, we have not.

23 CHAIRMAN RIGLER: I understand the Applicants
24 have a general objection going to the use of deposition
25 testimony. Bypassing that general objection and deferring

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1 ruling on it, I want Applicants to consider whether in
2 the event that we decided to accept some deposition
3 testimony, what their reaction or response would be to the
4 line proposal of the Department of Justice with respect
5 to the reduced volume of materials to be offered.

6 I want to defer this consideration at this
7 time. The Board has done further reflecting over the
8 weekend on this, and one of the problems we had with the
9 Department's original proposal is that a great deal of the
10 material seemed anticipatory and it seemed to us the better
11 course might be to wait and see if the Applicants introduced
12 evidence which required rebuttal in the opinion of the
13 Department.

14 However, we could see areas where it might be
15 useful to have the testimony in immediately and directly.
16 Areas such as whether or not there were any discussions
17 among CAPCO members with respect to some of the requests
18 for membership in CAPCO or participation which has been
19 the subject of some of the documentary evidence which is
20 already of record.

21 We thought in those instances there might be
22 an advantage in receiving deposition testimony.

23 With those further thoughts of the Board, I think
24 we will require the parties to confer during the evening
25 and see if they can agree with respect to the scope of

1 any deposition testimony to be used.

2 If not, we will reserve our consideration of the
3 offer of deposition testimony.

4 MR. CHARNO: It is the Department's understanding
5 that the Applicants are preparing a brief at this time
6 and have asked us not to make any submission until they
7 have had a chance to file a brief which we are willing to
8 do, presuming it is filed in the immediate future.

9 CHAIRMAN RIGLER: Off the record.

10 (Discussion off the record.)

11 MR. HJELMFELT: I would just like to add to what
12 Mr. Charno said that the City does have three additional
13 depositions which the Department did not intend to
14 utilize any portions of at this time that the City may,
15 when the time comes for it to present its own case,
16 present portions of these other three depositions.

17 Other than that, I have sat down with Mr. Charno
18 and gone through and consolidated our presentation on the
19 other depositions.

20 MR. REYNOLDS: Let me state for the record that
21 what Mr. Charno is referring to in the way of a brief is a
22 response to the memorandum that the Department has submitted
23 to the Board, regarding the matter of using deposition
24 testimony in this proceeding, and we will --

25 CHAIRMAN RIGLER: Do you take the position, or

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1 do you intend to take the position that as a matter of
2 law, we may not use depositions or merely that in the
3 exercise of our discretion we should not use depositions?

4 MR. REYNOLDS: It is the latter.

5 Basically our position is that it is an unwork-
6 able situation that will extend, rather than shorten, the
7 hearing by a considerable amount.

8 I don't know that I understand a notion
9 of a five-inch pile rather than a one-foot pile. When we
10 get into this kind of exercise, there has got to be red-
11 lining by all parties.

12 The one deposition which I have seen which
13 I got at noon I leafed through, and virtually every page
14 had a red-line mark on it, although not every page
15 was totally red-lined.

16 It is hard for me to get a grasp on what five
17 inches of excerpted material means.

18 CHAIRMAN RIGLER: We have one before us now which
19 has only one or two lines red-lined on many pages, and
20 that would reduce the volume of testimony.

21 MR. REYNOLDS: Depending on the volume that
22 the Applicants wish a red line.

23 CHAIRMAN RIGLER: That's right.

24 I think, Mr. Charno, you should designate the five
25 entire inches of deposition pages you wish to use so the

1 Applicants can red-line those.

2 MR. REYNOLDS: I cannot make that determina-
3 tion tonight because I have other commitments. I have other
4 files that have to be made in this proceeding that I
5 am working on, including the one I mentioned.

6 MR. HJELMFELT: I would just like to make
7 the Board aware that the City of Cleveland would
8 probably not be represented here on Wednesday or
9 Thursday, but the City has no objection to the trial
10 proceeding in its absence.

11 MR. GOLDBERG: If we have decided to take
12 tomorrow off for hearing, the Staff has no objection to
13 taking tomorrow off in lieu of Friday.

14 However, if we can proceed on Friday, we would
15 prefer to.

16 CHAIRMAN RIGLER: You may have to discuss that
17 with Mr. Rieser.

18 MR. REYNOLDS: We can't do that. I have
19 other commitments out of town.

20 CHAIRMAN RIGLER: I think we would have more
21 trouble with Mr. Rieser than anyone else. We have
22 indicated good cause has been shown for taking Friday off.

23 MR. RIESER: My bride will be happy to hear
24 love conquers all in some cases.

25 CHAIRMAN RIGLER: You can tell her you won a

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big motion before the Board, over the opposition of the Staff, the motion was granted.

(Laughter.)

We will resume at 9:30 on Wednesday.

(Whereupon, at 4:00 p.m., the hearing was adjourned, to reconvene at 9:30 a.m., Wednesday, February 25, 1976.)
