

NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING CO.

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

Docket Nos.
50-346A
50-550A
50-501A

and

CLEVELAND ELECTRIC ILLUMINATING
CO., et al.

(Perry Nuclear Power Plants, Units
1 & 2)

50-440A
50-441A

Place - Silver Spring, Maryland

Date - Friday, June 18, 1976

Pages 11,760-
11,965

THIS DOCUMENT CONTAINS
POOR QUALITY PAGES

6285

Telephone:
(Code 202) 547-6222

ACE - FEDERAL REPORTERS, INC.

Official Reporters

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

NATIONWIDE COVERAGE

8002 260 808

N

bw

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

-----X

In the Matter of	:	Docket Nos.
TOLEDO EDISON COMPANY and	:	50-346A
CLEVELAND ELECTRIC ILLUMINATING CO.	:	50-550A
	:	50-501A
(Davis-Besse Nuclear Power	:	
Stations, Units 1, 2 and 3)	:	
	:	
and	:	
	:	
CLEVELAND ELECTRIC ILLUMINATING	:	
CO., <u>et al.</u>	:	
	:	50-440A
(Perry Nuclear Power Plants, Units	:	50-441A
1 & 2)	:	
	:	
-----X		

First Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland
Friday, June 13, 1976

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

BEFORE:

- DOUGLAS RIGLER, Chairman
- JOHN FRYSLAK, Member
- IVAN SMITH, Member

APPEARANCES:

(As heretofore noted.)

C O N T E N T SWITNESSDIRECTCROSSREDIRECTRECROSS

VOIR

DIREExhibitsFor IdentificationIn Evidence

9	LJ-616 (Stipulation)	11,762	11,762
10	Applicants No. 191		11, 764
11	through 194 (CEI)		
12	Applicants No. 198		11,789
13	Applicants No. 199		11,790
14	Applicants No. 200 (CEI)		11,791
15	Applicants No. 201 (CEI)		11,792
16	Applicants No. 202 (CEI)		11,793
17	Applicants NO. 203 (CEI)		11,794
18	Applicants No. 204 (CEI)		11,797
19	Applicants Nos. 205 and 206 (CEI)		11,800
20	Applicants Nos. 207, 208,		
21	209 (CEI)		11,807
22	Applicants No. 210 (CEI)		11,807
23	Applicants No. 211 (CEI)		11,809
24	Applicants No. 212 (CEI)		11,811
25	Applicants No. 213 (Affidavit, Francis Saul)		11,816

bw

ch

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

3	<u>Exhibits</u>	<u>For Identification</u>	<u>In Evidence</u>
4	Applicants No. 214 (OE) (SEC Holding Company Act Release Number 4.)	11,816	11,816
6	Applicants No. 215 (OE) (letter from Shaker to Tilit, dated July 21, 1969)	11,816	11,816
8	Applicants No. 216 (OE) (Internal No. 114, ordinance, Village of Lowellville.)	11,817	11,818
10	Applicants No. 217 (OE) (Internal No. 112, SEC Form U-1 for Lowellville.)	11,818	11,819
13	Applicants No. 218 (OE) (Internal No. 111, SEC order authorizing acquisition of Lowellville.)	11,819	11,823
15	Applicants No. 219 (OE) (Internal No. 204, SEC Form U-1 for Hiram case.)	11,824	
18	Applicants No. 220 (OE) (Internal No. 62) SEC Findings, Hiram	11,833	11,833
19	Applicants No. 221 (OE) (Internal No. 145, Norwalk Form U-1	11,833	
21	Applicants NO. 222 (OE) (Internal No. 22, SEC notice of Proposed Acquisition of utilities from Norwalk.)	11,836	11,837

25

bw 1

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

2	<u>Exhibits</u>	<u>For Identification</u>	<u>In Evidence</u>
3	Applicants Exhibit 223(OE) (Internal No. 61. SEC Order authorizing acquisition of , of, electric system of Norwalk.)	11,837	11,838
4			
5			
6			
7			
8	Applicants No. 224 (Internal No. 131, letter from Gurant to Zimmerman.)	11,838	11,843
9			
10	Applicants No. 225 (OE) (Internal No. 152, letter from Krough to Gorant.)	11,844	11,844
11			
12			
13	Applicants No. 226 (OE) (Internal No. 19, handwritten notes of Mr. Codispoti.)	11,345	
14			
15	Applicants No. 227 (OE) (Internal No. 130; letter from Duncan to Kauper.)	11,853	
16			
17			
18	Applicants No. 228(OE) (Internal No. 184, FPC Order approving rate settlement, August 1973)	11,867	11,868
19			
20			
21	Applicants Exhibit No. 229 (OE) (Internal No. 124, a letter to the FPC from Frances McGovern.)	11,868	11,869
22			
23			
24	Applicants Exhibit 230(OE) (Internal No. 209, ltr. from Frances McGovern to Claire Carlin.)	11,969	11,870
25			

ch 1

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

2	<u>Exhibits</u>	<u>For Identification</u>	<u>In Evidence</u>
3	Applicants 231 (OE) (Internal Identification Number 155, letter from Frances McGovern to Kenneth Plumb, dated April 12, 1976)	11,870	11,874
4	Applicants 232 (OE) (Internal No. 171, letter from Beil to McEwen.)	11,875	11,876
5	Applicants 233 (OE) (Internal No. 172, letter from Beil to Tsehappat.)	11,877	11,877
6	Applicants 234 (OE) (Internal No. 179, letter from Dicke to Vexford)	11,877	11,877
7	Applicants 235 (OE) (Internal No. 192, memo from Dawson to Orrville.)	11,878	11,878
8	Applicants 236 (OE) (Internal No. 195, letter from McGovern to Zimmerman.)	11,879	11,879
9	Applicants 237 (OE) (Internal No. 196, letter from Keller to Firestone.)	11,879	11,880
10	Applicants 238 (OE) (Internal No. 205, notes of 1974 Orrville- Ohio Edison meeting.)	11,881	11,881
11	Applicants 239 (OE) (Internal No. 206, memo from Codispoti to Keller, February 8, 1974.)	11,882	11,882

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

2	<u>Exhibits</u>	<u>For Identification</u>	<u>In Evidence</u>
3	Applicants 240 (OE) (Internal No. 125, memo from Tschappat and Workman to Firestone and Woolridge)	11,882	11,883
4			
6	Applicants 241 (OE) (Internal No. 141, letter from Rosser to Bixler.)	11,884	11,884
7			
8			
9	Applicants 242 (OE) (Internal No. 146, letter from Bixler to Rosser.)	11,884	11,885
10			
11	Applicants 243 (OE) (Pennsylvania Power contract with New Wilmington.)	11,885	11,888
12			
13			
14	Applicants 244 (OE) (Pennsylvania Power contract with Zelienople.)	11,885	11,888
15			
16	Applicants 245 (OE) (Pennsylvania Power contract with Wampum)	11,885	11,888
17			
18	Applicants 246 (OE) (Pennsylvania Power contract with Elwood City.)	11,886	11,888
19			
20			
21	Applicants 247 (OE) (Pennsylvania Power contract with Grove City.)	11,887	11,888
22			
23	Applicants 248 (OE) (3-page letter with attachments, dated Dec. 19, 1967, from Turner to Dickey.)	11,894	
24			
25			

bw

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

	<u>Exhibits</u>	<u>For Identification</u>	<u>In Evidence</u>
2	Applicants 249 (TE)	11,912	11,912
3	(Memo from Hupenbecker		
4	to Harding, October		
	7, 1971.)		
5	Applicants 250 (TE)	11,912	11,913
6	(Letter from Engle to		
7	Davis, November 27,		
	1972.)		
8	Applicants 251 (TE)	11,914	11,914
9	(Letter from Wortman		
	to Keck, June 21,		
	1973.)		
10	Applicants 252 (TE)	11,914	11,914
11	(Letter from Keck to		
12	Wortman, July 23,		
	1973.)		
13	Applicants 253(TE)	11,916	11,917
14	(3-page letter dated		
15	Feb. 24, 1975,		
	from C.E. Campbell to Mr.		
	Roy Dorsey.)		
16	Applicants 254(TE)	11,918	11,918
17	(one-page memo dated		
18	April 17, 1975, from Cloer		
	to Johnson.)		
19	Applicants 255(TE)	11,918	11,923
20	(one-page memo with		
	two captions, dated June 11,		
	1975, from Bosch to Libbe.)		
21	Applicants 256 (TE)	11,927	11,928
22	(letter from Bosch to		
23	Hoffman, July 23,		
	1975.)		
24	Applicants 257 (TE)	11,927	11,928
25	(memo from Bosch to		
	Libbe, July 31,		
	1975.)		

ch

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25C O N T E N T S (cont'd)

<u>Exhibits</u>	<u>For Identification</u>	<u>In Evidence</u>
Applicants 258 (TE) (October 15, 1975 newspaper article)	11,928	
Applicants 259 (TE) (service agreement between Toledo Edison and Bradner, Ohio.)	11,930	11,931
Applicants 260 (TE) (service agreement between Toledo Edison and Haskins, Ohio.)	11,930	11,931
Applicants 261 (TE) (Multipage document, FPC Docket No. 76-132, supplemental data.)	11,931	
Applicants 262(DL) (Cert. of Public Convenience, PUC, Pa., dated May 3, 1967, with attached order.)	11,938	11,939
Applicants 263(DL) (Document Entitled United States of America Fed. Power Com., dated June 13, 1967.)	11,939	11,939
Applicants 264 (DL) (Title Decisions of PUC.)	11,940	11,941

DE:bwl

S1

P R O C E E D I N G S

MR. CHARNO: The Department would like to offer for identification as DJ-616, a stipulation entered by the parties.

We would like to move that into evidence and upon receipt into evidence of DJ-616, we would like to withdraw our request for a subpoena for John White of Ohio Edison.

CHAIRMAN RIGLER: Hearing no objection, we will receive Department Document Exhibit 616 into evidence at this time and pursuant to the request of the Department we will withdraw the subpoena addressed to John White.

(Whereupon the document referred to was marked Exhibit DJ-616 for identification and was received in evidence.)

MR. ZAFER: Mr. Chairman, I believe the first order of business is Applicants' pending motion to move into evidence Applicants Exhibit 191 (CEI) through Applicants Exhibit 212 (CEI).

CHAIRMAN RIGLER: Is there objection to that request?

MR. CHARNO: The Department has a number of objections. We can take them on a seriatim basis.

I think that would probably be the easiest way to proceed.

bw2

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

MR. LESSY: Staff has certain objections also.

MR. HJELMFELT: As does the City.

MR. CHARNO: We have not had an opportunity to coordinate the objections between the parties opposing the grant on the unconditioned application.

CHAIRMAN RIGLER: As to which numbers does the Department object?

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

LEIDRE #2
h 1

MR. CHARNO: The Department would object to 195, 196, 198, 199 through 202, 204 through 212.

CHAIRMAN RIGLER: All right.

What is the basis for the objections/

MR. CHARNO: Beginning with 195 --

CHAIRMAN RIGLER: Wait a minute.

Does anyone object to anything prior to 195?

MR. LESSY: One second, Mr. Chairman.

No. Staff does not object to 191, 192, 193 or 194.

MR. HJELMFELT: Neither does the city.

CHAIRMAN RIGLER: All right.

We will receive into evidence Applicants Exhibits 191 through 194.

(Whereupon, the documents previously marked for identification as Applicants Exhibits 191 through 194 were received into evidence.)

CHAIRMAN RIGLER: You may state your objection to 195.

MR. CHARNO: The Department would object to 195 as the deposition of a nonparty and would note Mr. Reynolds' prior objection, 5995 of the transcript, where he stated, "As to deposition testimony of individuals who do not fit

ch 2

1 within the category of a party, i.e., an officer, director
2 or managing agent, we do not think that the Board has the
3 authority to look to the deposition testimony of those
4 individuals, but that they must be called to testify. And
5 we would object to the use of any portions of those depositions
6 or the introduction of any portions of those depositions."

7 We would note that Applicants 195 is the deposition
8 of an individual at one time employed by the city of
9 Painesville. Painesville is not a party to this proceeding.

10 The depositions previously admitted by the Board
11 which were offered by the Department of Justice were
12 characterized by the Board as not being terribly controversial
13 in content. We would indicate that this document is extremely
14 controversial.

15 We believe that the Board's preference for allied
16 witnesses which has been expressed in the transcript should
17 be extended to this document, since we believe the demeanor
18 of this witness is very significant. We would note that the
19 Board did not modify its attitude toward the use of
20 depositions of individuals who are not affiliated with parties
21 at any time during the proceeding, and we don't believe that
22 it would be appropriate to modify it at this point.

end 2

qdiB 3

23 Finally, we would note that the staff attempted
24 to introduce the deposition of Mr. Pandy of Painesville as
25 the deposition of a nonparty, and this was opposed, and it

1 was necessary to call Mr. Pandy as a witness in this proceeding.
2 We would expect the opportunity to put in the depositions of
3 certain City employees and portions of Mr. Pandy's deposition
4 rather than calling him as a witness.

5 MR. HJELMFELT: The City joins in that objection.

6 MR. LESSY: With respect to the Staff, we join in
7 all of those reasons and have some additional reasons,
8 objecting to Applicants 195.

9 With respect to the Pandy matter, this was an item
10 on the agenda for the prehearing conference that took place
11 on the Friday before Thanksgiving weekend. The Board made
12 it clear at that time that the deposition would not be
13 considered and that the witness would have to be called, although
14 there was never a formal, on the record, as the hearing
15 started, attempt to put it in evidence.

16 I think a little history is going to be significant
17 here.

18 The Staff subpoenaed both Mr. Pandy and Mr. Milburn
19 approximately a year ago for depositions by subpoena in
20 Washington. Mr. Pandy did show up. Mr. Milburn did not, and
21 Mr. Pandy had carried with him a one-paragraph motion to
22 quash by Mr. Milburn.

23 Staff answered that, and the Board ordered that
24 Mr. Milburn be present for a deposition to involve; since
25 it was apparent to us at the time that Mr. Milburn was not

ch 4

1 going to come to Washington, the Staff agreed to go to his
2 law offices in Painesville to take his deposition at that time.

3 At that time, it was necessary to have a stipulation
4 among the counsel present to remove certain profane language
5 on behalf of the deponent during the course of the deposition.

6 MR. REYNOLDS: Excuse me.

7 Could I have that read back?

8 MR. LESSY: I will repeat it.

9 During the course of the deposition, it was
10 necessary for counsel to stipulate to remove certain profane
11 language mentioned by the deponent in response to answers
12 by counsel. In addition to that, it is important to note
13 that the deposition of Mr. Milburn was not signed.

14 Now, all of the depositions that have been received
15 in evidence have been signed, and the procedure that was
16 used was that the depositions were taken, the original was
17 sent to the deponent. The deponent had an opportunity to sign
18 the deposition and submit corrections. That did not occur
19 in Mr. Milburn's case.

20 And under Rule 30 subparagraph (e) of the new
21 federal rules, a deposition must be signed. There are three
22 exceptions: a stipulation; an illness so that he cannot sign
23 it; and refusal to sign.

24 Staff would rely principally on the case of
25 Bernstein versus Brenner at 51 Federal Rules Decision 9, which

ch 5

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

stands for the proposition that, well, two propositions: one, that only in exceptional circumstances can an unsigned depositions be used. I should mention this is the 1970 District Court for the District of Columbia addition. And secondly, the court must consider whether the reason for lack of signature is such that the deposition should be suppressed.

Now, after the deposition of Mr. Milburn -- and we have a witness available, if this is necessary, to go forward to it -- Mr. Reynolds and Mr. Hauser plowed into a car and headed back to Cleveland from Painesville, leaving Mr. Berger, Mr. Hart and myself at Mr. Milburn's law offices, at which point in time he was to produce certain documents from his files, which we got xerox copies of and then distributed to all the parties, pursuant to the agreement.

The xeroxing time took approximately five minutes, and it was very clear to me and to others by the very nature of the questions that Mr. Milburn was asking of counsel -- none of which we answered -- that he was having clear second thoughts about some of the matters that he had testified to, such that if that deposition were taken at 4 o'clock instead of at 9:30, it would have read entirely differently, in my view.

Now, we think that this is one of the reasons why Mr. Milburn refused to sign the deposition and that it

ch 6

1 remains in an unsigned state.

2 CHAIRMAN RIGLER: Well, I want to ask you about that,
3 pursuant to Commission's rule 2.740(e). It says that "the
4 deposition shall be submitted to the deponent for examination
5 and signature unless he is ill." I gather that exception
6 does not apply.

7 MR. LESSY: It may. He has had a lot of physical
8 problems and did have them then at that time.

9 CHAIRMAN RIGLER: All right.
10 Is that the state reason for his failure to
11 sign the deposition?

12 MR. LESSY: There is no reason, sir.

13 CHAIRMAN RIGLER: All right.
14 Then it continues, "cannot be found or refuses to
15 sign."

16 Has there been an express refusal to sign the
17 deposition?

18 MR. LESSY: My understanding of it is that the
19 deposition was sent to him by both the unofficial reporter,
20 which was Pincum, and the official, which was Ace, and he
21 never signed it and returned it. As to whether or not that
22 constitutes a refusal, it may indeed.

23 CHAIRMAN RIGLER: Has the deposition been certified
24 by the officer? Again I am referring you now to 2.740(e).

25 MR. REYNOLDS: That appears on page 102 of the

ch 7

1 document before the Board.

2 MR. SMITH: This notary public did not have
3 jurisdiction to administer oaths in that county.

4 MR. LESSY: No, it wasn't.

5 CHAIRMAN RIGLER: What is objection raised?

6 MR. LESSY: To the --

7 CHAIRMAN RIGLER: To the lack of notarial
8 authority within the jurisdiction?

9 MR. LESSY; No. But this -- he just certified,
10 Mr. Robinson is certifying that he transcribed what was said.
11 He is not certifying that this is a true and correct -- that,
12 this was --

13 CHAIRMAN RIGLER: Moreover, the rule requires that
14 the certification set forth the reasons for the failure to
15 sign.

16 MR. LESSY: Right.

17 CHAIRMAN RIGLER: And I don't see that in the
18 certificate.

19 Does that conclude the staff's objection?

20 MR. LESSY: No, sir. We would also rely on the
21 case of GEJ Corporation versus Uranium Air, Incorporated,
22 Circuit Court of Appeals, 9th Circuit, to the effect that if
23 a witness is available to testify, h's deposition cannot be
24 used.

25 We would also point out that the CEI, during the

ch 8₁

entire course of the negotiations, until his retirement with Painesville, was represented by Mr. Howley, vice president at that time and general counsel of CEI. And if CEI needs evidence with respect to Painesville, I am sure Mr. Howley would be available to them.

There has been no proof of -- well, in -- and the final point is that the effect of putting into evidence a deposition by a hostile party taken by a hostile nonparty, taken by a member of the staff of any other proceeding, I think if such things were put into evidence, in future cases I think parties would feel very reluctant to take the deposition of such a nonparty if it didn't know what kind of answers it was going to get and if it felt that they would be received in evidence. I think that is the reason why depositions of parties only are received into evidence.

I think, given the demeanor of the witness, the fact it was not signed, and the reasons Mr. Charno mentioned, we would oppose this, especially since other evidence is available through Mr. Howley, whose deposition was taken in this proceeding as a party.

end 3

21

22

23

24

25

S4
bwl

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

MR. ZAHLER: Mr. Chairman, I am absolutely at a loss to respond to some of the objections, because it seems to me that the reference to Mr. Reynolds objection is the objection that Applicants made and lost before this Board.

I don't understand how Mr. Charno can now refer to that to exclude this deposition. It is my understanding that the Federal Rules of Civil Procedure provide that if a Witness is outside of 100 miles of the jurisdiction of the Court his deposition can be used.

It is my understanding that that was one of the bases of the Board's ruling in this proceeding, and that is one of the bases that the Department urged upon the Board.

All Applicants are doing now is making use of the simular ruling that the Board extended to the Department.

The Applicants did not concede and contested that some of the depositions introduced by the Department were not parties, officers or directors or managing agents.

It doesn't seem to me that we ever resolved that issue.

CHAIRMAN RIGLER: That was in the case of former employees.

MR. ZAHLER: And in the case of existing employees

bw2

1 who were not serving in the form of an officer or director
2 of the company, or a managing agent.

3 MR. CHARNO: That would be argument rather than
4 something that was actually determined.

5 The Department is not of the opinion that it
6 offered the testimony of anyone who is not a managing
7 agent.

8 MR. ZAHLER: I would appreciate if I could finish
9 the argument.

10 Secondly, the characterization by Mr. Charno
11 that the depositions that came in previously were non-
12 controversial was again disputed by Applicants.

13 I can understand that it is legitimate.
14 But for the Department to now say that in their opinion
15 this is controversial because Applicants made the same
16 argumen' as to the previous depositions doesn't seem to
17 advance the issue to me at all.

18 Moreover, I point out that the deposition of
19 Mr. Milburn was taken pursuant to subpoena by the other
20 side.

21 That is, by the NRC Staff, and that the parts
22 red-lined here are examination by the other side.

23 There can be no way that the other side had full
24 opportunity to examine Mr. Milburn.

25 This is not the case where Applicants were taking

bw3 1 the deposition without a chance to cross-examine by the
2 other side.

3 I don't understand Mr. Lessy's statement that
4 Mr. Milburn is a hostile witness.

5 Presumably Mr. Milburn represented at the time
6 he was being questioned about the City of Painesville and
7 the fact that he gave the answers he gives and the fact that
8 Mr. Lessy is not happy with those answers, is not a basis
9 for saying that he is hostile to Staff or hostile to CEI.

10 We are talking about adversity in this proceeding.

11 Mr. Milburn was counsel for the City of
12 Painesville and I don't understand the statement that he
13 was a hostile nonparty to the NRC Staff.

14 As to the question of signature by Mr. Milburn
15 of the deposition and the formality of the notary, I would
16 point out that the notary was secured by the NRC Staff in
17 this proceeding.

18 If they are going to make an objection now, it
19 seems to me that that was waived.

20 I think that objection was not sustained by the
21 Board and it seems to me at this time it is a little late
22 in the game to be arguing that.

23 As to whether Mr. Milburn signed it, it is my
24 understanding that the rule is aimed for the protection
25 of the deponent and that chances are that it can't come in

bw4

1 against the deponent unless he hasn't signed it for any
2 number of reasons.

3 But where he hasn't signed it, it seems to me
4 Mr. Milburn waived any rights he may have to object to it.
5 But none of the parties to this proceeding can assert the
6 rights of Mr. Milburn in this proceeding.

7 Two final points, Mr. Chairman. As to whether
8 the use of the Pandy deposition was on the record or
9 not, I don't think that comes to the central issue which
10 is that it seems to the Applicants that the Board changed
11 its position that it expressed at the earlier prehearing
12 conference, upon looking at the deposition, and it is that
13 ruling that we should be operating under at this time.

14 Finally, there is no difference between the
15 Milburn Deposition in any form, character, nature, whatever
16 considerations, policy or otherwise, that the Board might
17 like to consider as against the depositions of Applicants
18 that came in against Applicants that the other side put in.

19 And it doesn't seem to me that any meaningful
20 distinction can be drawn between the two.

21 MR. LESSY: I would like to respond briefly.
22 With respect to the 100-mile rule, that is done in the NRC,
23 you go there with respect to NRC hearings.

24 In other words, if a witness is unable to testify,
25 unavailable because he is more than 100 miles away, and he

bw5

1 can't come to the place of the hearing then the NRC goes
2 there.

3 So that I think that the 100-mile rule is not
4 an exception to the use of depositions, never has been.

5 Secondly, we would rely on U.S. v. Rickenbacker,
6 12th Federal Rules decision, 485, that a party seeking
7 to use a deposition of a nonparty must establish that the
8 person is unable to attend the hearing and U.S. v. Rosanstein
9 at 303 Federal Sup. 210 for the proposition that, establishing
10 that a person is unable to attend a hearing must be done
11 by evidence.

12 And if it is a medical reason for it, by medical
13 certificate.

14 I think it is essential that if Mr. Milburn's
15 testimony is to be used, it is essential that his demeanor
16 also be evaluated and the deposition gives no basis for that.

17 MR. CHARNO: Could the Department also reply to
18 to the comments?

19 I did not mean to characterize the prior testimony
20 as uncontroversial. It was my understanding that
21 that was one of the bases of the Board's ruling, concerning
22 the deposition testimony that was allowed in.

23 The portions, the red-line portions of the
24 Applicants 195 are not confined to the direct
25 examination which was perhaps my misinterpretation of what

bw6

1 Mr. Zahler was saying, but go quite extensively into
2 the cross-examination. Of the depositions taken by the
3 Department and the Staff, all depositions were signed
4 except two.

5 And all depositions which were signed
6 were then submitted to the Commission in accordance with
7 the rules.

8 It is my understanding that in the case of
9 Mr. Howley's deposition, since he didn't sign his, and
10 in Mr. Milburn's deposition, since he didn't sign his, that
11 those were not submitted to the Commission and are not on file
12 with the Commission.

13 MR. REYNOLDS: Mr. Chairman, I am only standing
14 because I was present when Mr. Milburn's, at the time of
15 Mr. Milburn's deposition.

16 Mr. Zahler was not.

17 Just to explain this matter about signing,
18 Mr. Milburn was not represented by counsel.

19 CHAIRMAN RIGLER: He is a lawyer, is he not?

20 MR. REYNOLDS: He is a lawyer. I think though
21 that the better part of wisdom is even if you are a lawyer,
22 you get into a situation such as that, that you obtain
23 counsel.

24 CHAIRMAN RIGLER: Who filed the motion to quash
25 the subpoena on his behalf?

1
2 MR. LESSY: Mr. Charles Cannon, an attorney
3 in Painesville, Ohio.

4 CHAIRMAN RIGLER: So that prior to the deposition,
5 Mr. Milburn had consulted with counsel with respect to
6 his testimony?

7 MR. REYNOLDS: I would be sure he did.

8 All I wanted to state is that with respect to the
9 matter of signing it had come up in all of the depositions
10 raised by, I believe myself, as a matter of fact, as to
11 whether the Witness did or did not desire to sign.

12 That was not a matter that came up in Mr. Milburn's
13 deposition.

14 Pe'ally, I am indicating only that I don't
15 think it was addressed at any time, and it was not focused
16 upon by any of the counsel or by Mr. Milburn at that time.

17 CHAIRMAN RIGLER: All right.

18 This has been an enlightening argument.

19 While many of the points that Mr. Zahler makes
20 seem persuasive, the Board is going to sustain the
21 objection.

22 The principal reason is that the Board
23 independently through some of the documents submitted also
24 had concluded that Mr. Milburn is the type of witness who
25 should be called live, wherein observing his demeanor
and his response would be important to this Board's

bw8 1 consideration.

2 And for that reason, primarily, we are going
3 to refuse to receive Mr. Milburn's testimony through
4 the medium of the deposition.

5 MR. REYNOLDS: This is going to change the
6 scheduling some then.

7 I will have to get in touch with with
8 Mr. Milburn and I would like to make an application for
9 subpoena for this witness, and I am not sure when I can
10 schedule it.

11 But I will get on the phone today and make
12 every arrangement to bring him in.

13 MR. LESSY: We would endeavor to cooperate in that.

14 CHAIRMAN RIGLER: Off the record.

15 (Discussion off the record.)

ES4 16

17

18

19

20

21

22

23

24

25

DE5
ch 1

1 CHAIRMAN RIGLER: Okay.

2 Let's go back on the record.

3 What is the objection to Applicants Exhibit 196?

4 MR. CHARNO: Applicants Exhibit 196 has been offered
5 for the truth of the contents, and we would object to that
6 document as hearsay upon which the Department has had no
7 opportunity for cross-examination, especially since Applicants
8 just indicated that they are going to call Mr. Milburn as
9 a witness in this proceeding.

10 MR. LESSY: I would join in that objection and
11 add to that on behalf of the staff that this letter seeks to
12 comment upon statements made in the Davis-Besse 2 and 3
13 advice letter, which advice letter was offered by the staff
14 in this proceeding, and objection to it was sustained by the
15 Board.

16 Now, in addition to that, it is clear from
17 Applicants document 197 that this letter by Mr. Milburn to the
18 Nuclear Regulatory Commission was written at the request of
19 Mr. Howley of CEI.

20 Now, Applicants 197 sets forth what the request
21 was in part. But the second paragraph of Applicants 197
22 says, as we discussed the other day, it indicates that there
23 was a phone conversation or implies that there was a phone
24 conversation between Mr. Howley and Mr. Milburn in which Mr.
25 Milburn was requested to write this letter.

ch 21

2 The substance of that conversation we have no
3 knowledge of. Based on that --

4 CHAIRMAN RIGLER: That would not necessarily
5 prevent the letter from coming in. However, since the offer
6 of proof was for the truth of the matter contained therein,
7 I think we need go no further.

8 MR. ZAHLER: Staff Exhibit 137, which is a letter
9 from Mr. Milburn, was admitted in this proceeding during the
10 examination of Mr. Pandy, and I believe it is for the truth
11 of the matter. If staff would like to charge that, that is
12 okay.

13 Similarly, a letter to Mr. Charno, Exhibit 138,
14 was also admitted in this proceeding. Both of those
15 were at the request of adverse parties to Applicants in this
16 proceeding.

17 The question that Mr. Lessy raised as to the
18 substance of the telephone call was one of the matters discussed
19 in Mr. Milburn's deposition, and Mr. Lessy had full chance
20 to examine him on that. The staff is not in the dark as
21 to that.

22 CHAIRMAN RIGLER: I am not concerned about the
23 fact that the letter was written in response to a phone call.
24 That can be developed later. That wouldn't necessarily
25 affect the contents of the letter. But because the letter
purports to represent the truth of the matter contained

ch 3

1 therein, we are going to reject it on that basis.

2 MR. ZAHLER: Then I would like to modify the offer of
3 proof of Applicants. The offer would be to show that Mr.
4 Milburn did write a letter to the NRC staff, merely for the
5 fact that it was written, and that this is relevant in light
6 of the fact that Mr. Milburn's previous correspondence with the
7 staff and the Department of Justice has been introduced as
8 Exhibits in this proceeding, Staff Exhibits 137 and 138.

9 I take it that Exhibits 137 and 138 are not for the
10 proof of the matters contained therein.

11 MR. CHARNO: Those were not unsponsored exhibits.

12 MR. ZAHLER: Mr. Milburn wasn't here to sponsor
13 them

14 I am confused. If the other side is arguing that
15 this can't come in for the truth of the matter but asserts
16 that their letters do come in for the truth of the matter,
17 then I think they are playing double standards.

18 CHAIRMAN RIGLER: That is not the pending question
19 right now. The question is whether there is objection to
20 receipt of the letter for the purposes just stated by Mr.
21 Sahler, namely, the fact that such a letter was written.

22 MR. LESSY: I would object, pending the
23 disposition of whether or not Mr. Milburn is going to come
24 here as a witness. If he is coming here as a witness and this
25 can be a sponsored exhibit, that is one thing.

ch 4 1

2 If this is going to be an unsponsored exhibit, I
3 would object on the grounds that, notwithstanding the fact
4 of the truth of the matter asserted therein, it is not being
5 claimed now that we were not permitted over Applicants'
6 objections to offer the Davis-Besse advice letter as new
7 evidence, even as a letter that was sent and received by the
8 Department of Justice, and because that objection was
9 sustained, this letter, which seeks to comment on that
10 advice letter, should also be sustained.

end5

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

S6
bwl

1 MR. ZAHLER: Just to make one comment.

2 The reason the advice letter did not come in was
3 because the Board ruled that it was already a matter of
4 record in this proceeding.

5 I don't understand Mr. Lessy's objection to that
6 extent.

7 MR. CHARNO: The Department does not object
8 to 196.

9 MR. REYNOLDS: Mr. Chairman, you had sustained
10 the objection to 196, if it came in as to the
11 truth of the matter asserted.

12 CHAIRMAN RIGLER: Now we are going to admit
13 196 for the reasons just restated by Mr. Zahler.

14 MR. LESSY: Could I ask a clarifying question then
15 with respect to the advice letters, if they have already
16 been considered by the Board, can they be cited in proposed
17 findings as letters that were sent and received?

18 CHAIRMAN RIGLER: Certainly.

19 MR. LESSY: Okay.

20 CHAIRMAN RIGLER: Was there objection to 197
21 by any party other than the Department?

22 MR. CHARNO: The Department did not object to
23 197.

24 MR. LESSY: Staff objects to it as hearsay,
25 to 197.

1 CHAIRMAN RIGLER: All right.

2 We are going to reject 197.

3 What is the objection to 198?

4 MR. CHARNO: There are several objections.

5 First, that it does not meet the offer of
6 proof as stated.

7 CHAIRMAN RIGLER: Which was what?

8 MR. CHARNO: The document was offered at transcript
9 page 11,739 to show that the load transfer service was
10 the first part of a three-phase program leading to
11 a permanent interconnection, to show that the City was
12 desirous of a load transfer service and three-phase program
13 leading to a permanent interconnection and, in fact, the City
14 proposed such a plan to CEI, which was latter accepted by
15 CEI.

16 The Department does not believe that
17 Applicants 198 shows that the City proposed a three-phase
18 program.

19 In fact the record in this proceeding shows
20 that the program originated prior to the time of this
21 letter and while it shows that the Department -- pardon
22 me, while Applicants 198 shows that the City desired
23 a permanent interconnection, we don't believe that it
24 shows that the City desired the three-phase program in
25 order to secure that interconnection.

bw3

1 We would object to the remaining offer, that
2 the load transfer was part of a three-phase program leading
3 to a permanent interconnection as irrelevant.

4 We would object to the entire exhibit as hearsay
5 upon which the Department has had no opportunity for cross-
6 examination.

7 MR. GOLDBERG: Staff joins in those objections.

8 MR. HJELMFELT: The City would join in the objection
9 on the grounds that the document does not meet the offer.

10 MR. ZAHNER: If I could start from the bottom
11 of those objections.

12 It seems we are going to hear a hearsay objection
13 every time.

14 It seems to me that now the other side is again
15 trying to apply a double standard. This document was
16 received by Applicants during discovery from the City.
17 It is a City document. The City is a party to this
18 proceeding.

19 I don't understand how this is any different
20 than any of the other unsponsored documents that came in
21 against Applicants.

22 It seems to me that hearsay objections are
23 frivolous, as to whether it meets the offer of proof.
24 That is just quibbling, really.

25 The inferences that the Department may want to draw
is different. I direct the Board to paragraph one

1 of the letter where it states that this letter will serve
2 as the City's suggestions for implementation of a
3 temporary tie-in between the Light Plant and CEI.

4 On page 2, where it states that the City wishes
5 to memorialize its understanding with CEI, that this
6 temporary tie-in arrangement is but the first of a three-phase
7 project between CEI on the City, when when completed will
8 provide a permanent tie-in.

9 I believe on the face of the document, it indicates
10 that the City was desirous of obtaining these forms
11 of services.

12 CHAIRMAN RIGLER: That gets into a semantic
13 quibble as to what is meant by desirous.

14 It is plain that the document contemplates
15 that type of service.

16 Desirous might also have the meaning that
17 one initiates or has a strong wish to obtain this
18 service and that might be the basis of the objection.

19 MR. ZAHLER: If I understand the purpose of
20 the offer, it is to indicate what we are offering it for,
21 and the broadest types of findings that we might draw
22 from it.

23 This is what CEI believe they would
24 draw from the document.

25 As I understand the Board's ruling on
previous offers, as long as the face of the document comports

bw5 1 with that in a general sense, it is acceptable.

2 The Department is open to quibble with
3 that offer of proof.

4 I don't understand that the Board has
5 previously rejected offers, because the other side
6 may be denying the offer of proof.

7 The question is whether the document on its
8 face supports in some general manner or is probative
9 of the offer of proof.

10 I do believe this is probative of the offers
11 I gave.

12 CHAIRMAN RIGLER: I agree with you.

ES6

13

14

15

16

17

18

19

20

21

22

23

24

25

DE 7
ch 1

1 MR. HJELMFELT: This document certainly doesn't
2 show that the city proposed, and that is what he says in his
3 offer, that the city proposed such a plan to CEI, which was
4 later accepted by CEI. In fact, the very language quoted
5 suggests that it is a memorializing of an understanding of
6 CEI. It doesn't say anything about proposing.

7 CHAIRMAN RIGLER: It may support the inference
8 that he is asking us to draw from it. The objections are
9 overruled. We will receive 198.

10 (Whereupon, the document
11 previously marked for identifi-
12 cation as Applicants Exhibit
13 198 was received in evidence.)

14 MR. CHARNO: The Department would enter the same
15 objections to Applicants 199 which had the same offer of
16 proof.

17 MR. LESSY: Staff joins in that objection.

18 MR. HJELMFELT: City joins.

19 MR. ZAHLER: This document should be viewed in
20 context with the other documents. It is a series of corre-
21 spondence between the City and CEI. It is expressing its
22 understanding of what was going on with the negotiations
23 between the City and CEI.

24 CHAIRMAN RIGLER: The objections are overruled.
25 We will receive 199.

ch 2

1

(Whereupon, the document previously marked for identification as Applicants Exhibit 199 was received in evidence.)

2

3

4

5

MR. CHARNO: The Department would object to Applicants 200 as not meeting the offer, as well as a hearsay objection.

8

9

10

11

12

13

14

15

16

The offer in that case, at transcript page 11,740, was that the document would show further study of negotiations between CEI and the City regarding permanent interconnections, that the outages between May and September of 1970 were due to a lack of communication and confusion on the part of MELP and further negligence on the part of MELP's employees, that MELP's equipment was in poor condition, as was its fuel supply, and in such bad shape that many times the fire actually went out by itself. The offer ending on 11,741.

17

18

We think that the document itself shows that there were not the sole factors responsible for outages.

19

20

21

And, finally, we would object that these contributing factors outlined in the Applicants' offer are irrelevant to the issues in this proceeding.

22

23

24

CHAIRMAN RIGLER: Mr. Zahler, were you suggesting that these were the sole factors, or that they were contributing factors to the outages?

25

MR. ZAHLER: These are the factors that are

ch 3

1 highlighted by Mr. Bergmanman's memo to Mr. Geasto.

2 CHAIRMAN RIGLER: You are not responding.

3 I say, are you saying that these are the sole
4 reasons or these are some of the reasons?

5 MR. ZAHLER: That's certainly not the sole
6 reason.

7 CHAIRMAN RIGLER: The objections are overruled.

8 We are going to receive Applicants 200 at this time.

9 (Whereupon, the document pre-
10 viously marked for identifica-
11 tion as Applicants Exhibit 200
12 (CEI) was received in evidence.)

13 MR. CHARNO: On the basis of Applicants' offer of
14 proof for Applicants 201, which was that the document would
15 complete documentation concerning FPC investigation; and
16 jurisdiction and show that the FPC allowed the City
17 to amend its complaint to include antitrust allegations and
18 that such objection on the part of the FPC was necessary and
19 appropriate and a proper exercise of the Commission
20 responsibilities under the Federal Power Act, the Department
21 would object to the document as irrelevant, since the collateral
22 estoppel issue has been determined with respect to this pro-
23 ceeding, and the fact that the FPC can or did consider antitrust
24 issues would seem to be completely irrelevant to the matters
25 in controversy before the Board.

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

MR. HJELMFELT: The City joins in this objection.

MR. GOLDBERG: Staff joins.

CHAIRMAN RIGLER: The objections are overruled.

We will receive 201.

(Whereupon, the document previously marked for identification as Applicants Exhibit 201 (CEI) was received in evidence.

MR. CHARNO: The Department would make the same objection with respect to Applicants 202.

MR. GOLDBERG: The staff would join in that objection and add that it does not conform to the offering in that it doesn't show that the FPC ordered open switch operation of the 69Kv service.

MR. HJELMFELT: The City joins in the objection.

end 7

S8
bwl

1 MR. CHARNO: The Department would accept the
2 modification of the Staff in its objection.

3
4 CHAIRMAN RIGLER: The objections are overruled.
5 We will receive 202.

6 (Whereupon, the document previously
7 marked as Applicants Exhibit 202
8 (CEI) was received in evidence.)

9 MR. CHARNO: I don't believe we objected to 203.

10 CHAIRMAN RIGLER: Hearing no objection, we will
11 receive 203 into evidence at this time.

12 (Whereupon, the document previously
13 marked as Applicants Exhibit 203
14 (CEI) for identification, was
15 received in evidence.)

16 MR. CHARNO: The Department would object to
17 Applicants 204 on the grounds of relevance.

18 MR. HJELMFELT: The City would object on grounds
19 of relevance and not that the ordinance is not
20 yet enacted into law.

21 MR. SMITH: Is this a publication required
22 by law to, — one of the steps before an ordinance may be
23 enacted?

24 MR. HJELMFELT: I believe it probably is. I
25 believe what this represents is a first reading on introduction.

bw2

1 CHAIRMAN RIGLER: Mr. Zahler, do you have a response
2 on that?

3 MR. ZAHLER: It seems to me that this document is
4 probative of the fact that the City of Cleveland has taken
5 preparatory action for the acquisition of CEI's facilities
6 within and without the City of Cleveland, and that it is
7 a follow-up of Applicants Exhibit 203, which is the
8 resolution introduced by the president, George Forbes.

9 CHAIRMAN RIGLER: Now, tell me how that relates
10 to the issues in controversy and the allegations being made
11 here.

12 MR. ZAHLER: Just for example, one of the claims
13 is that CEI has been studying for a long time the acquisition
14 of the MELP system. Part of CEI's defense is
15 that this has been an ongoing struggle between the two
16 bodies, that on numerous occasions the City people have
17 proposed acquisition of CEI, that in response to those
18 requests CEI has found it necessary to study the question
19 of MELP's viability in the City, the acquisition of the
20 City, and I think this is a further example of the ongoing
21 relationship between the two.

22 Both of them are involved in making statements
23 that they are going to acquire the other, and that this has
24 been true throughout the entire period
25 under consideration in this proceeding.

bw3

1 CHAIRMAN RIGLER: Now, tell me what you mean by
2 within and without the City?

3 MR. ZAHLER: That language is added because the
4 ordinance talks about the setting up of an authority
5 that would have jurisdiction within and without of the City.

6 CHAIRMAN RIGLER: Does the City have authority
7 to acquire facilities outside of its jurisdiction?

8 MR. ZAHLER: I believe that is the case.
9 I have been so informed.

10 MR. SMITH: One of the things that I see in
11 these documents is that there is a possibility that the
12 condemnation power of the City of Cleveland over CEI
13 could serve as a restraint upon CEI of the abuse of market
14 power.

15 And no one has addressed that possibility.
16 Do you think that that would be germane to the issues
17 in controversy, Mr. Zahler?

18 MR. ZAHLER: I do, Mr. Smith. I believe it
19 is regulation in this industry and constraints on these
20 entities at all levels, at the federal, at the
21 state, at the municipal level. I believe the fact that
22 the City can, it is the exercise of franchise competition,
23 to take away your power in the City.

24 MR. SMITH: One of the objections made by the
25 City Council was that they were concerned about excess
profits earned by CEI. And those are steps that the City

bw4

1
2 has taken on its own initiative, in its own power
3 and authority to counteract that.

4 I think that I would view these documents
5 as pertaining to that issue.

6 MR. REYNOLDS: Mr. Smith, or Mr. Rigler, I am
7 only rising because I believe the question came up in the
8 hearing as to the ability of the municipality to acquire
9 facilities outside its jurisdiction.

10 I have filed with the Board a letter which cites
11 the Ohio provisions that deal directly, I believe, with that
12 matter and do indicate that the municipality under the
13 Ohio Consitution does have the ability to acquire facilities
14 outside, as well as those facilities inside.

15 But there is some limitation on the outside
16 which I think relates to the facilities that will be
17 used inside too.

18 CHAIRMAN RIGLER: We have a copy of
19 your letter, and I do recall it.

20 I do not recall having seen a response from
21 any of the other parties.

22 I am not sure whether there was controversy
23 with respect to your presentation.

24 All right. The objections are overruled.
25 And we will receive Applicants 204.

(Whereupon, the document
previously marked Applicants
Exhibit No. 204 (CEI) for
identification, was received
in evidence.)

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

bw4

bw5

ES8

DE 9 1
ch 1

2 MR. GOLDBERG: Yesterday when 204 was identified,
3 I requested a copy. Since the staff does not have one, I
4 would again request a copy of 204.

5 MR. ZAHLER: I'm sorry. I thought it had been
6 provided. We will provide that.

7 MR. GOLDBERG: Thank you.

8 CHAIRMAN RIGLER: your objection to 205 through
9 212 the same objection Mr. Charno? I notice that you grouped
10 them together.

11 MR. CHARNO: No. I am afraid not.

12 205 and 206 would be similar. They are both
13 reports of the City planning commission. We would object on
14 the basis of relevancy and hearsay.

15 Here the cross-examination we think would be
16 appropriate, and would go to two points: the fact that the
17 city planning commission, according to depositions taken by
18 the Applicants, is a body that has only investigative power and
19 no executive or administrative power whatsoever, unlike a
20 number of planning commissions that have some authority;
21 secondly, the extent of -- which has been taken under
22 this 1972 report which as of the May 1, 1975 deposition,
23 absolutely no action has been taken under it.

24 The record doesn't reflect that and will not
25 reflect that without an opportunity for cross examination,
with respect to Applicants 205 and 206.

ch 2

1

CHAIRMAN RIGLER: Is there controversy with respect to that?

2

3

MR. ZAHLER: I believe the most recent exhibits and the newspaper advertisements indicate that the city is in the process of taking action.

4

5

6

MR. CHARNO: I don't believe it has anything to do with this report.

7

8

MR. ZAHLER: I don't know where Mr. Charno severs the link here. I know the city contemplates the action.

9

10

The document is probative as to the official reports of the city. The city council members are all listed here, as to what action the city was contemplating.

11

12

13

It further goes to the point that Mr. Smith was making, that the municipalities do have this power and, even without using it, can be a significant power within the territories.

14

15

16

17

MR. CHARNO: This commission has no authority to do anything but make suggestions. It is not the people who are listed inside the front cover who are the members of the commission.

18

19

20

21

CHAIRMAN RIGLER: Right. But it seems to me that still your objections only go to the weight.

22

23

MR. SMITH: Let me add along that line -- and I'm raising it to let you know early, or at least timely, that these are concerns. I certainly hope you address yourself to

24

25

ch 3

1 this. If you don't, you know where my thinking is going.

2 But in addition to constraints upon the power of
3 the City, of CEI within the City, you can also consider the
4 possibility that the City of Cleveland has enhanced or is
5 in the process of enhancing its capacity to be a potential
6 entrant into the market outside the city. That is my remark.
7 You can proceed.

8 MR. GOLDBERG: I would like to also add, on
9 205, that, strictly speaking, the document does not conform
10 to the offer and that it does not show that the City studied the
11 acquisition of CEI but only certain facilities of CEI.

12 CHAIRMAN RIGLER: Mr. Hjelmfelt, I wasn't clear as
13 to whether you had joined in any of the objections to these
14 documents.

15 MR. HJELMFELT: No.

16 CHAIRMAN RIGLER: The objections are overruled,
17 and we will receive 205 and 206 into evidence.

18 (Whereupon, the documents pre-
19 viously marked for identifi-
20 cation as Applicants Exhibits
21 205 and 206 (CEI) were received
22 in evidence.)

23 MR. CHARNO: Mr. Chairman, we would like to request
24 that page 18 of the appendix, part 3, of Applicants 205 be red-
25 lined.

S10

bwl 1

2 MR. GOLDBERG: Mr. Chairman, with respect to
3 206, we didn't have an opportunity to address that. I thought
4 we were still on 205.

5 I would object in that on page V-3 reference
6 is made to another report, and I would object to
7 this document coming in without that other report.

8 CHAIRMAN RIGLER: Is this project number
9 51026?

10 MR. GOLDBERG: Yes.

11 CHAIRMAN RIGLER: We are not going to reject
12 it on that basis.

13 If you find that the other report has some
14 probative value the Staff wishes us to consider, we
15 would certainly permit you to introduce the other.

16 But look it over first. You may determine
17 that it is not necessary.

18 Mr. Charno, your redlining was page 18 of
19 appendix --

20 MR. CHARNO: Just a moment. I am sorry.
21 Specifically footnotes B and C of page 18 of the appendix
22 to Section C. or Part III

23 CHAIRMAN RIGLER: Is it III or C?

24 MR. CHARNO: Section III, Roman Number III,
25 I am sorry.

CHAIRMAN RIGLER: Okay.

bw2 1

MR. SMITH: Is that 206?

2

MR. CHARNO: 205.

3

4

5

6

7

8

9

10

11

12

13

14

?

15

16

17

18

19

20

21

22

23

24

25

The Department would object to Applicants 207 as hearsay with no opportunity for cross-examination and note that it was compiled from secondary sources, such as legal briefs and unnamed other materials and that it is impossible from the document itself to determine the nature and extent of CEI's influence on the document.

I think that both of those factors would be significant in view of the Applicants' offer that this is being placed in the record to prove that a purchase of power from CEI by MELP is the best alternative for MELP.

CHAIRMAN RIGLER: That was the recommendation of Cresap, McCormack and Padgett. They are independent management consultants.

MR. CHARNO: They purport to be a management consultant based upon the second page of the document, and they list their sources on page I-II of the document, and it is that listing of sources which are not tied to any specific parts of the report and make it impossible to determine the source of much information or the validity of that information that form the basis for my objection.

MR. HJELMFELT: I would join in the objection and note that what you have got here is a management

b73

1 consulting firm purporting to make power supply expansion
2 studies, which are something that engineering consultants
3 spend considerable amounts of time doing.

4 CHAIRMAN RIGLER: Who made the determination
5 to hire a management consultant firm to engage in this type
6 of study?

7 MR. HJELMFELT: The City Council retained these
8 people, I don't know what the scope, what they had in mind
9 that the management consultants would do in the
10 engineering field.

11 CHAIRMAN RIGLER: We don't even know that their
12 well-studied conclusion is the right conclusion.

13 But, nonetheless, it is the conclusion they
14 made.

15 MR. GOLDBERG: I would join in those objections
16 and add that I don't think this conforms to the offer of
17 at all with respect to showing that MELP's best alternative
18 is the purchase of power from CEI.

19 CHAIRMAN RIGLER: If you are saying that may not
20 be its best alternative, I suppose the document would
21 not indicate that, but surely that is the conclusion.

22 MR. GOLDBERG: I would disagree with that also.

23 CHAIRMAN RIGLER: We will overrule the objection.

24 MR. ZAHLER: I would like to have red-lined on
25 page I-II, the portion that lists the sources

bw4 1

relied on by Cresap, McCormack and Padgett.

2

If the Department would like an offer as to that,

3

I believe it shows that the study was based on personal

4

interviews, in part, with MELP people and other

5

studies, and there is reason to give some weight to the

6

conclusion drawn by this report.

ES10

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

DE 11
ch 1 1

MR. GOLDBERG: What page was that?

MR. ZAHLER: Roman numeral I-2, the section under "Approach."

MR. GOLDBERG: Thank you.

MR. SMITH: Currently this study is also predicated upon legal briefs. Were they referred to later in the study?

MR. ZAHLER: There's discussion later on about ongoing litigation that MELP is involved in. I don't remember whether it's -- it specifically states those. It does spell out what it assumes is and is not available and draws some conclusions.

In light of this proceeding, in light of that, I am not sure that those conclusions are accurate any more. But take it for what they are. I think it does spell out the assumptions in the context of the report.

MR. HJELMFELT: I would ask that we add red-lining on page III-11, Roman III, page 11, the last paragraph on that page.

MR. CHARNO: Slow down.

MR. ZAHLER: Mr. Hjelmfelt, that is Roman numeral III, page 11?

MR. HJELMFELT: Yes. It comes after the first title page for part 4.

MR. ZAHLER: The last paragraph?

MR. HJELMFELT: Yes.

ch 2

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

MR. ZAHLER: Okay.

MR. HJELMFELT: And on the following page, which should be the first page of part 4, the first paragraph under the subheading "accomplishing the recommended strategy."

MR. ZAHLER: I believe that that entire page is red-lined.

MR. HJELMFELT: Okay.

MR. ZAHLER: Just so that it is clear.

CHAIRMAN RIGLER: Off the record.

(Discussion off the record.)

MR. CHARNO: The Department would object to Applicants 208 and 209 as being irrelevant on the basis of the offer, which is the same for both documents, and that the denial of cross examination of this hearsay is prejudicial, in that both exhibits purport to be reports of some attorneys, based upon an unspecified mixture of primary and secondary sources, most of which are not identified.

MR. GOLDBERG: Staff joins in those objections.

MR. CHARNO: To the extent that those attorneys are reporting on engineering matters, cross examination might be helpful as to their sources.

MR. ZAHLER: I would point out again that these people were retained by the City. This is an ongoing report that the city council has done on a regular basis. I don't believe there is any basis for hearsay objection.

ch 3

1 CHAIRMAN RIGLER: Does the City join in that
2 objection?

3 MR. HJELMFELT: The City does not.

4 MR. RIGLER: All right.

5 We will overrule the objections and receive into
6 evidence Applicants 208 and 209. I am not sure whether
7 we received 207 on the record. If not, that should also be
8 received.

9 (Whereupon, the documents pre-
10 viously marked for identifica-
11 tion as Applicants Exhibits
12 207, 208 and 209 (CEI) were
13 received in evidence.)

14 MR. CHARNO: The Department has no objection to
15 Applicants 210.

16 CHAIRMAN RIGLER: Hearing no other objection, we
17 will admit 210

18 (Whereupon, the document pre-
19 viously marked for identifica-
20 tion as Applicants Exhibit 210
21 (CEI) was received in evidence.)

22 MR. CHARNO: We would object to Applicants 211
23 on the grounds of relevance, in that it is a study which is
24 based upon admittedly false assumptions and that it is hearsay
25 with no opportunity for cross-examination.

ch 4

1 For example, on page 4, the assumption is stated
2 that MELP need not purchase from CEI because it could have
3 taken all its equipment down and refurbished it if it employed
4 certain financial programs, when the record here is clear
5 that prior to May 1975, at the time the interconnection was
6 completed, they were not in a position to take out the
7 great part of their generation.

8 So not only are these admittedly false assumptions,
9 but they are based upon further errors and without an
10 opportunity to examine --

11 CHAIRMAN RIGLER: Yes. But the record in this case
12 hasn't been closed. We have drawn no final conclusions.

13 MR. CHARNO: That's true. I am simply saying that
14 this is an assumption which they acknowledge to be false,
15 but they say there is a basis for it.

16 This is being offered for the truth of the
17 statements made therein. Therefore, we would have a problem
18 with the hearsay nature of this and with the relevance of it.

19 MR. HJELMFELT: The City joins in the objection.

20 MR. GOLDBERG: Staff joins in the objection.

21 MR. ZAHLER: I am not sure of his reference as
22 to the fact that it is clear on this record. There has been
23 testimony in this record that the service was available
24 and that it could have been done.

25 Furthermore, Mr. Charno points out, through Mr.

ch 5

1 Charno's objection, I think you understand that there really
2 isn't any basis.

3 This report lists the assumptions it makes. The
4 Board is in a position to evaluate those assumptions and
5 draw their conclusions.

6 If Mr. Charno would like further examination on
7 this point, that is open to him.

8 The objections he is making are no different than
9 the objections Applicants made on the first day of this
10 proceeding as to the use of unsponsored documents. I don't
11 think the character of this report differs from the character
12 of any of the other reports that came in previously.

13 MR. CHARNO: I would take issue with this, in
14 that these reports were not generated by the Department of
15 Justice. The documents that came in previously came out of
16 the files of the Applicants and were prepared either for the
17 Applicants or by the Applicants. I think it is a significant
18 distinction.

19 CHAIRMAN RIGLER: The objections are overruled.

20 (Whereupon, the document, pre-
21 viously marked for identifica-
22 tion as Applicants Exhibit 211
23 (CEI), was received in evidence.)

24 MR. HJELMFELT: Applicant's 211, I would ask that
25 on page 4, the paragraph under "conclusion" be redlined. I

ch 6

1 would ask that page 6 be redlined in its entirety. I would
2 ask that page 28, 29, 30 and 31 be redlined.

3 MR. ZAHLER: Could I get those last pages again,
4 please?

5 MR. HJELMFELT: 28, 29, 30, 31.

6 MR. ZAHLER: The last two pages are graphs?

7 MR. HJELMFELT: They are tables.

8 MR. GOLDBERG: Just for clarification, Mr. Hjelmfelt,
9 the first pages you mentioned, page 4 and page 6, those are
10 the pages of the cover letter and not of the attachment?

11 MR. HJELMFELT: That is correct. Thank you.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

endl1

S12
bwl

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

CHAIRMAN RIGLER: 212?

MR. CHARNO: The Department would object to 212 on the basis of the offer.

It was being offered to show that the Federal Power Commission resorted to court litigation as being irrelevant.

MR. GOLDBERG: Staff joins in that objection.

MR. HJELMFELT: City joins in that objection.

CHAIRMAN RIGLER: The objection is overruled.

And we will admit 212 at this time.

(Whereupon, the document previously marked Applicants Exhibit 212 (CEI) for identification, was received in evidence.)

CHAIRMAN RIGLER: Is this a good time for our morning break?

MR. CHARNO: Certainly.

CHAIRMAN RIGLER: Off the record.

(Discussion off the record.)

MR. REYNOLDS: I would like to mark as Applicants Exhibit 213 an affidavit of Francis E. Gaul, G-a-u-l, which was just recently filed in the civil proceeding in the United States District Court.

MR. CHARNO: The Department would like to note that this was distributed for the first time after the

bw2

1 close of business last night, and that we have had no
2 opportunity to do anything with it and would request
3 that the 24-hour rule be adhered to until we can
4 have some opportunity to find out some information about
5 the document and the contents of the document.

6 CHAIRMAN RIGLER: That seems reasonable.

7 We will take it up the next time.

8 MR. REYNOLDS: All right. Find.

9 That is why I did that now.

10 In that case, in direct response to your
11 question, we can move to the OHIO Edison documents.

12 (Recess.)

ES12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
S13
bwl 2 MR. PERI: Mr. Chairman, yesterday we had
3 a brief meeting with representatives of the Department
4 of Justice at which we were asked for certain offers of
5 proof and we were able to run through the documents at
6 one time.

7 I think I can do this straight through.

8 MR. CHARNO: Would it be appropriate to just go
9 through and identify the documents in order, and we will
10 make our requests as we go through them?

11 MR. PERI: Fine.

12 I have notes that would indicate where an offer
13 was asked for, and I suppose I will just read it into the
14 record at that time.

15 And also on those occasions when we were asked
16 whether the document was being admitted for the truth of
17 the matter.

18 We would like to offer for identification
19 document for the Ohio Edison and Pennsylvania Power,
20 Document, this would be identified as Applicants 214.
21 That is an SEC Holding Company Act release number
22 5289.

23 MR. SMITH: I wonder if you could indulge me here.
24 Sometimes by the time you are done identifying the document
25 I have forgotten the Exhibit number. So could you begin
with perhaps a simplified identification of the document?

bw2 1 MR. PERI: Yes, sir. I find that helpful
bw2 2 myself.

3 There is one minor problem with that
4 document which I would like to mention, page 13 is missing,
5 and we have been able to determine that at this time, at
6 least, there is quite a common practice in following, in
7 filing such a paper for that to be intentionally left
8 blank and our records do indicate that in this case additional
9 room was left after the findings and opinions of the
10 Commission for additional material which was never
11 included, and the records indicate that page 13 was
12 intentionally left blank by the Commission.

13 MR. CHARNO: Could we have an offer on Applicants
14 214.

15 MR. PERI: Yes.

16 The offer was that, we would offer this document
17 to show that the arrangement by which Ohio Edison owns
18 Pennsylvania Power stock was approved by the Commission
19 and to show that the SEC specifically recognized that
20 the Ohio Edison and Pennsylvania Power systems had
21 for many years operated and continued at the date of this
22 order to operate as a single integrated system.

23 CHAIRMAN RIGLER: How are we going to handle
24 objections?

25 Are we going to take them as the offer is made

1 or wait until they are all in?

bw3

2 MR.CHARNO: At the Board's convenience.

3 CHAIRMAN RIGLER: What is the preference of
4 the parties?

5 MR. LESSY: I would prefer to do it one by
6 one.

7 CHAIRMAN RIGLER: Is there objection to 214?

8 MR. CHARNO: The department would object to 214
9 on the basis of the offer.

10 We believe the document is irrelevant.

11 MR. LESSY: Staff would join in that and indicate
12 that the document is too remote in time as to be,
13 as to be relevant also.

14 MR. PERI: If I may respond, we have been very
15 selective in the red-lining of this document. We have offered
16 it for an extremely narrow purpose.

17 We are trying to indicate that the relationship
18 of the Ohio Edison and Pennsylvania Power Companies which
19 we think is central to our point of view has been recognized
20 for quite a long time by the administrative government
21 agency and it is offered only for that point.

22 We have often gone, or several times have
23 gone beyond the September 1965 cut-off date.

24 CHAIRMAN RIGLER: All right. The objection is
25 overruled.

bw4

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

(Whereupon, the document referred to was marked Applicants Exhibit No. 213 for identification)

(Whereupon, the document referred to was marked Applicants Exhibit 214(OE) for identification and was received in evidence.)

MR. PERI: The next document is internal number 107. It is a letter from Shaker to Tilit, dated July 21, 1969. It will be identified as Applicants 215.

(Whereupon, the document referred to was marked Applicants Exhibit No. 215(OE) for identification.)

No offer was asked for in our conference yesterday.

We are going to do each one, one at a time. And I would move that into evidence.

CHAIRMAN RIGLER: Hearing no objection we will receive Applicants 215.

(Whereupon, the document previously marked for identification as Applicants Exhibit No. 215(OE) was received in evidence.)

MR. PERI: Internal Number 114, an ordinance of the Village of Lowellville, I would move 216 into

bw5

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

of the Village of Lowellville, I would move 216 into evidence.

(The document referred to was marked Applicants Exhibit 216 (OE) for identification.)

MR. CHARNO: Could we inquire whether Applicants 216 is offered for the truth of the statements contained therein or merely for the fact that an ordinance was passed?

MR. PERI: It is offered for the truth of the matters asserted.

MR. CHARNO: The Department would object to Applicants 216 on the absence of ability to cross-examine, specifically with respect to the statement contained at the beginning of Section 1 on the first page and above that in the second whereas clause concerning the need for the facilities by the municipality.

If Applicants, if Ohio Edison is offering this document to establish that those facilities are no longer needed in any context, except that they are going to be purchased and services going to be supplied by another supplier.

MR. PERI: It seems to me that that is a perfectly consistent reading with the document and the offer. I might choose to read it another way, but no longer needed as declared by the board of trustees. That is the truth of the matter.

CHAIRMAN RIGLER: The objection is overruled. We will admit 216.

(Whereupon, the document previously marked for identification as Applicants Exhibit 216 (OE) was received in evidence.)

MR. PERI; The next document in your books is internal number 112, which will be identified as document 217. It is SEC Form U- or Lowellville.

(Whereupon, the document referred to was marked Applicants Exhibit 217 (OE) for identification.)

MR. PERI: I would move that into evidence.

We were requested to indicate that -- whether this was offered for the truth of the matter, and it is.

I move that into evidence as 217.

MR. CHARNO: The Department would make a similar objection with respect to the identical language contained in Exhibit B of Applicants 217.

ch 2

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

MR. LESSY: Staff would join in that objection.

MR. PERI: Is there a response to that, sir/
Exhibit B is a sale agreement. That might
help your determination.

CHAIRMAN RIGLER: The objections are overruled.
We will receive 7.

(Whereupon, the document pre-
viously marked for identifica-
tion as Applicants Exhibit 217
(OE) was received in evidence.)

MR. PERI: The next document is number 111, the SEC
order authorizing the proposed acquisition of the Village of
Lowellville, and it would be identified as Applicants No. 218.

(Whereupon, the document referred
to was marked as Applicants
Exhibit 218 (OE) for
identification.)

MR. PERI: And I would move that into evidence.

MR. CHARNO: The Department would object on the
basis of relevance.

The approval of this acquisition or disapproval of
this acquisitions by the Securities and Exchange Commission
is not relevant to any matter in controversy in this proceeding.

MR. PERI: I must say, Mr. Charno, I am prepared
for many objections, and that is one I never anticipated. I

ch 3

1 think it is highly relevant, and I really don't think a
2 response is necessary.

3 if it is, your Honor, I will continue.

4 CHAIRMAN RIGLER: You had better make one.

5 MR. PERI: May I have a moment?

6 CHAIRMAN RIGLER: All right.

7 MR. PERI: I first would like to make a very
8 preliminary comment, and that is, in the case of each of these
9 acquisitions, we have tried to be selective in the documents
10 we have given the Board, a full understanding of the procedures
11 which must be followed. I just meant that as a preliminary
12 matter.

13 CHAIRMAN RIGLER: We know that the SEC must
14 approve it. The objection is that the SEC approval is non-
15 probative with respect to any of your allegations.

16 MR. PERI: I believe it is, particularly because
17 in this case the only reason that the Ohio Edison Company
18 must seek approval from the SEC is that it is a registered
19 holding company under the act. The Holding Company Act deals
20 specifically with antitrust matters, and the SEC need for
21 approval is predicated precisely on the investigation of
22 and the ability of persons to come forward with charges of
23 anticompetitive conduct or anticompetitive effect which might
24 result from this.

25 One of the specific allegations deals with the

ch 4

1 acquisition of this system, and I think it is highly
2 relevant that a governmental agency has been petitioned to
3 approve and has approved this acquisition.

4 CHAIRMAN RIGLER: Go ahead.

5 MR. PERI: They have approved such an acquisition
6 with a study of the possible anticompetitive effect of the
7 acquisition of the assets of this municipality by the Ohio
8 Edison Company.

9 CHAIRMAN RIGLER: Did the SEC consider that
10 acquisition standing alone or in conjunction with other
11 acquisitions made by Ohio Edison?

12 MR. PERI: My understanding is that its
13 consideration takes into account other acquisitions of Ohio
14 Edison, not only recently but for some time in the past,
15 because it includes all of the assets then in the possession
16 of the Ohio Edison Company, and the ramifications this would
17 have in the area.

18 I think a more complete response to that is
19 contained in the Applicants' prehearing brief and about a
20 two-page section in our motion to dismiss specific charges.

21 MR. CHARNO: We would concur that this argument
22 being advanced by Ohio Edison is the identical argument
23 made in their motion to dismiss at pages 15 and 16, where
24 they set forth the language at 15 USC Section 797. And the
25 motion to dismiss on this basis was denied by the Board.

ch 5

1 CHAIRMAN RIGLER: Was there opposition to the Lowell-
2 ville acquisition?

3 MR. PERI: There was not. There was no official
4 intervention.

5 CHAIRMAN RIGLER: Does Applicants Exhibit 216
6 indicate the extent to which the SEC considered the antitrust
7 aspects of this request for acquisition?

8 MR. PERI: My understanding would be that, in
9 the second-to-last paragraph, that one on page 2 where the
10 Commission recites that the applicable standard of the act
11 and the rules promulgated thereunder are satisfied and no
12 adverse findings are necessary. The Commission deems it in the
13 public interest that that application be granted.

14 MR. LESSY: I am not sure that's true in the
15 absence of intervention in 1965, Mr. Peri, that there is any
16 finding or investigation by the Commission.

17 MR. PERI: I think Mr. Lessy's objections on that
18 point might go to the weight rather than the admissibility
19 of this document.

20 CHAIRMAN RIGLER: Are you contending that we are
21 collaterally stopped to the extent that these acquisitions
22 have been approved by the SEC pursuant to the provisions of
23 the Holding Company Act?

24 MR. PERI: May I have a moment?

25 MR. LESSY: Staff is joining in this objection,

ch 6

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

if that is not already reflected in the record.

MR. PERI: Your Honor, I am not making that contention, and Ohio Edison and Pennsylvania Power have not made that contention in this proceeding. However, I think it is vital for the Board, in its consideration of these matters, to have before it evidence that the acquisition was approved by the SEC and of the types of things that were considered and what the SEC's conclusions were, having examined them, being much closer in time and with a much -- a large number of documents, the U-1 et cetera, put before it.

In this order -- and I don't have any other particular way to get that in -- there was a hearing as a possibility for intervenors with any difficulties with this acquisition, and no one took advantage of that opportunity. And I think that is very significant and is part of the truth of the matter of this document.

CHAIRMAN RIGLER: The objects are overruled. We will receive Applicants 218.

(Whereupon, the document previously marked for identification as Applicants Exhibit 218 (OE) was received in evidence.)

MR. PERI: The next three documents will not be introduced. That is internal numbers 64, 119 and 118. They may be removed. Those deal with the acquisition of East

nd 14

ch 7

1 Palestine. In view of the Board's order of two days ago, we
2 feel that would be repetitive and unnecessary.

3 CHAIRMAN RIGLER: Off the record.

4 (Discussion off the record.)

5 MR. PERI: Internal number 204, I would identify
6 it as Applicant's 219. It is the SEC Form U-1 in the Hiram
7 case.

8 (Whereupon, the document referred
9 to was marked as Applicant's 219
10 (OE) for identification.)

11 MR. PERI: The Department asked us whether we were
12 including this for the truth of the matters asserted therein
13 and we responded in the affirmative. And I move this into
14 evidence.

15 MR. CHARNO: The Department would object to the
16 acceptance into evidence for the truth of the matters contained
17 therein of the application made by Ohio Edison to the
18 Commission in that it contains self-serving statements upon
19 which there is no opportunity to cross examine.

20 MR. PERI: If I may respond?

21 Your Honor, this was filed by the company over the
22 signature of the president, Bruce Mansfield, and it was filed
23 under oath. We believe that all statements contained therein
24 are true.

25 MR. LESSY: Staff would object on the same grounds,

ch 8

1 that complaints in other proceedings were not received into
2 evidence. This presents one side of this matter, and I feel
3 that there is substantial room to doubt or to not examine on
4 the contents of it.

5 CHAIRMAN RIGLER: What are the portions of this
6 exhibit upon which you would have cross-examined or in which
7 controversy would exist?

8 MR. CHARNO: The extent to which integration of this
9 utility into the company system would result in improvements
10 in its service.

11 CHAIRMAN RIGLER: Where is that?

12 MR. CHARNO: On page 2 of the application or declara-
13 tion, as it is captioned.

14 MR. LESSY: The third paragraph, page 2.

15 CHAIRMAN RIGLER: A little more specific.

16 MR. CHARNO: It is the third paragraph, as Mr.
17 Lessy just stated, the first sentence thereof.

18 MR. PERI: Your Honor, if I may respond?

19 CHAIRMAN RIGLER: Wait a minute.

20 MR. SMITH: Are those the standards that the SEC
21 applied in approving that acquisition?

22 MR. PERI: I beg your pardon?

23 Was that addressed to me?

24 MR. SMITH: Yes.

25 Was the acquisition designed to improve the

ch 9

1 operation of the company while improving the service received
2 in the village?

3 MR. PERI: That is a part of the standard of the
4 holding company and is one of the items that the Commission
5 inquired into.

6 MR. SMITH: That's the antitrust aspect of it?

7 MR. PERI: No. But it's a portion of the
8 responsibility of the SEC in looking into this.

9 MR. LESSY: I would like to see a citation for that.

10 MR. SMITH: This raises -- this raises -- see,
11 that's part of the problem. We don't know very well what the
12 SEC uses to come up with its conclusions.

13 MR. PERI: It has been briefed extensively. Although
14 I don't have it at my fingertips, I could certainly make it
15 available to you.

16 CHAIRMAN RIGLER: That is just part of the problem.
17 The second half of the problem is whether the SEC investigation
18 was pro forma due in part to the absence of intervenors.

19 MR. PERI: In this case, there was intervention,
20 and we will get to that with the order which is the following
21 document.

22 CHAIRMAN RIGLER: All right.

23 MR. PERI: The company and the president of the
24 company were required to file this document, to put
25 into it a large amount of information which, as I indicated

ch 10

1 to you before, we think puts in one place more forthrightly
2 than any place else what Ohio Edison was trying to accomplish
3 and did accomplish.

4 CHAIRMAN RIGLER: When you say the truth of the
5 matters contained therein and referring specifically to the
6 statement that has been challenged by the Department and the
7 Staff that represents at best Mr. Mansfield's view?

8 MR. PERI: Yes. That's right.

9 CHAIRMAN RIGLER: He has signed this under oath?

10 MR. PERI: Yes. That's right.

11 It is his view that it should make it possible to
12 improve the efficiency.

13 CHAIRMAN RIGLER: And Mr. Mansfield was deposed
14 in these proceedings?

15 MR. PERI: Yes, sir.

16 CHAIRMAN RIGLER: We have received portions of
17 Mr. Mansfield's deposition?

18 MR. PERI: Yes, sir. And there will be additional
19 redlining of that this afternoon, as I understand it.

20 MR. SMITH: Would the SEC make its decision based
21 upon other facts, too, not alleged in the application?

22 MR. PERI: Yes, sir. They will also publish a
23 notice of the proposed acquisition, which they attempt to have
24 reached all parties that would be interested, and there is a
25 publication in the Federal Register. There is publication.

ch 11

1
2 I am afraid I can't represent that it is in the Register although
3 I think that would be the logical place.

4 That publication was sufficient to have intervenors
5 from the town of Hiram intervene and contest this acquisition.

6 CHAIRMAN RIGLER: Well, as I understand your
7 position, it is that this Board and this agency are not
8 collaterally estopped from considering the acquisition of
9 the Hiram system and its antitrust consequences under
10 the standards of the AEC Act. But the fact that the company
11 ran this up the flag pole, so to speak, at a different
12 agency having at least some antitrust jurisdiction and the
13 fact that the company took its chances in a public forum of
14 defending that acquisition is something we may want to take
15 into consideration for whatever weight is appropriate.

16 MR. PERI: Yes, sir. And I think a part of
17 that would be to consider the information that was presented
18 at that time.

19 MR. CHARNO: You queried concerning Mr. Mansfield's
20 depositions, and we would like to note at this time that Mr.
21 Mansfield's testimony before the Securities and Exchange
22 Commission in the context of this proceeding was excluded
23 upon objection by the Applicants.

24 CHAIRMAN RIGLER: That's one of the things that
25 is troubling me.

MR. LESSY: Further, Exhibit F to this exhibit

ch 12

1 includes an opinion by counsel that the company has legally
2 acquired these assets. This is Exhibit F and follows the
3 maps at the end.

4 If that is being offered for the truth of the
5 matter being contained in that opinion by counsel, I would
6 object strenuously.

7 MR. PERI: This is Mr. White's opinion of what
8 happened. And what -- that all state laws are applicable,
9 that the company will legally acquire the assets. I mean no
10 more than that.

11 MR. LESSY: Mr. Peri, under form 1, opinions by
12 counsel, it can be in-house counsel or counsel obtained
13 from the outside, and the opinion by counsel goes far beyond
14 state laws.

15 CHAIRMAN RIGLER: The opinion of counsel doesn't
16 necessarily make it so. But as far as the truth of the matter
17 contained therein, it's uncontestable that
18 Mr. White rendered that opinion.

19 MR. LESSY: Yes.

20 MR. REYNOLDS: It is my recollection that Mr.
21 Mansfield's deposition before the SEC, in testimony before the
22 SEC, that that did not come in. At least one of the reasons
23 being that he was deposed in this proceeding.

24 There was opportunity to cross examine him on that
25 testimony in this proceeding, and there was no -- the other

ch 13

1 parties did not avail themselves of that opportunity. His
2 deposition in this proceeding did come in. But I think that
3 that was a problem that we had with respect to the earlier
4 deposition.

5 My own view on this particular document is that
6 it is clearly a public record with exception to the hearsay
7 rule, being admitted. And I think we would not have
8 a problem with it.

9 CHAIRMAN RIGLER: I would have less problem with it
10 were it not for the fact that the document in question
11 represents Mr. Mansfield's sworn statement to the SEC, and
12 then he was challenged with respect to the contents of that
13 statement in a deposition process related to the SEC proceeding.
14 Not deposition process; in the hearing itself, I suppose.

15 That makes it more difficult, in my opinion, for
16 us to accept the exhibit as offered for the truth of the
17 matters contained therein.

18 MR. REYNOLDS: I guess I have to ask Mr. Charno
19 if it is his recollection that the deposition before the
20 SEC, the deposition testimony did challenge or address what
21 the Board Chairman has indicated. I don't have a clear
22 recollection.

23 I can get the transcript. It is in my office.
24 If he does, it might be helpful to us to indicate what his
25 recollection is.

end 15

S16 1
bwl

CHAIRMAN RIGLER: Let's do that

2 over the lunch hour.

3 I am going to defer ruling on this.

4 I may be mistaken. But I seem to recall some questions
5 addressed to Ohio Edison which were answered by Mr. Mansfield
6 which related to the acquisition policy of the company.

7 MR. SMITH: Was his testimony before the Senate?

8 CHAIRMAN RIGLER: I think before we rule,
9 we would be interested in seeing the transcript.

10 MR. REYNOLDS: The transcript reference. There
11 was no discussion in the deposition, excerpts of which
12 have been introduced here with regard to this matter.

13 MR. LESSY: I think the public document argument
14 goes to the SEC opinion or the ruling.

15 But making that with respect to a pleading
16 by one party to a proceeding, I am not sure that that is
17 correct.

18 MR. PERI: It is not a pleading. It is
19 an application.

20 MR. LESSY: It is an application, right?

21 MR. REYNOLDS: With respect to subparagraph
22 8(b).

23 MR. LESSY: Yes.

24 8(b) is reports of agencies. The administrative
25 proceeding number, the finding of the SEC is a public record.

bv 2

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

CHAIRMAN RIGLER: We will defer ruling on this until after lunch.

MR. PERI: The next document would be Interstate Numberr 62, the SEC findings, opinion and order, granting the application to acquire Hiram.

I would ask that it be identified as Applicants 220.

And I would note that the Department of Justice did request an offer and the offer was given as follows, we offer this to show that Ohio Edison was required to get approval of the SEC for the purchase of the electrical system of Hiram, that intervention was sought and obtained, that a hearing was held, an approval was given for the acquisition notwithstanding such intervention not the objections raised by the intervenors.

MR. CHARNO: The Department would make a similar relevancy objection.

MR. LESSY: The Staff would join in that objection.

MR. PERI: Mr. Chairman, I could, if you wish, repeat the arguments that were made.

CHAIRMAN RIGLER: That is not necessary. The objections to 220 will be overruled and we will receive it into evidences.

1 (Whereupon, the document referred
2 to was marked Applicants Exhibit
3 No. 220 for identification and was
4 received in evidence.)

5 MR. PERI: The next document, internal number
6 145, a Norwalk form U-1. I would ask that that
7 be designated as Applicants 221.

8 (Whereupon, the document referred
9 to was marked Applicants Exhibit
10 221(OE) for identification.)

11 We were asked by the Department of Justice
12 whether this was offered for the truth of the matter.
13 We responded in the affirmative.

14 In addition, I might add one other problem.
15 There is an indication on page, it is about the seventh
16 page, item six, exhibits and financial statements, the
17 second from the last, you will see that unlike the other
18 U-1s we put before the Board today, there is an extensive
19 list of exhibits. We have included Exhibit B, the
20 sale agreement.

21 However, we felt that to include all of the
22 others, including the numerous inventories would not
23 be beneficial to the Board or any of the parties.

24 I have made available to Ms. Urban the full
25 packet of exhibits in the G series.

bw4

1 I don't believe she has yet had time to review
2 those.

3 But to overcome any possible objection about the
4 incompleteness of the document, I assure you that this was
5 done only so that we would not have an extremely thick
6 packet that we would not find anything to red-line in.

7 And I would move that into evidence at this
8 time.

9 MR. CHARNO: Would it be possible to defer ruling
10 on this document long enough for the Department to examine
11 the entire document?

12 CHAIRMAN RIGLER: Yes.

13 MR. LESSY: I object on the basis of hearsay
14 and relevancy, specifically I ask that the Board look at
15 page 5, Section 4, Regulatory Approval in which this
16 filing by Ohio Edison declares that no state commission or
17 no federal commission other than the SEC has jurisdiction
18 over this matter.

19 Over the proposed transaction.

20 CHAIRMAN RIGLER: To what extent does
21 do you disagree with that?

22 MR. LESSY: Well, the extent that that could be
23 used as a base for any form of collateral estoppel
24 argument or any form of --

25 MR. CHARNO: What was your citation again, Mr. Lessy?

bw5

MR. LESSY: Page five, Section four.

CHAIRMAN RIGLER: Mr. Peri, you are not contending your collateral estoppel argument to apply on this either, are you?

MR. PERI: We have never made that argument.

Your Honor, I would note two things, if I might. One, this deals with jurisdiction under, over the accounting of the company with respect to the proposed transaction.

And as to the ability to approve the accounting with regard to the proposed transaction since consummated, I really don't believe there is any problem.

There is just no collateral estoppel argument.

MR. LESSY: If it deals with accounting, how is it relevant to the issues in this proceeding?

CHAIRMAN RIGLER: ALL RIGHT.

We will defer decision on this until the Department has had an opportunity to examine the entire document.

Next?

MR. PERI: Yes, sir.

The next would be internal document number 62. The SEC notice of proposed acquisition of utility assets from NORwalk.

CHAIRMAN RIGLER: You want that marked as 222?

bw6

MR. PERI: Yes, sir.

(Whereupon, the document referred to was marked Applicants Exhibit 222(OE) for identification.)

MR. PERI: Certain of the people following in the books on this side of the reporter may find that there are two letters attached, that is a clerical error. I believe the Department of Justice has been informed of this.

If you have letters of October 28 and 29 attached, that is a mistake. That was not the case in the original document.

I would also note that at least one and probably both of those are already in evidence.

They should be discarded.

I would move Applicants 222 into evidence.

ES16

Lwl 1
S17

MR. CHARNO: No objection by the Department.

MR. SMITH: You are referring to the letters
to Zimmerman?

MR. PERI: No, sir. They have been removed from
your copy.

CHAIRMAN RIGLER: Hearing no objection we will
receive 222 into evidence.

(Whereupon, the document heretofore
marked Applicants Exhibit 222(OE)
for identification, was received
in evidence.)

MR. PERI: Next internal document number
61. This is the SEC order authorizing the proposed
acquisition of the electric system of Norwalk.

And I would like that identified as Applicants
223.

(Whereupon the document referred
to was marked Applicants Exhibit
223(OE) for identification.)

And I would move that document into evidence
at this time.

MR. CHARNO: The Department would object
on the basis of relevancy.

MR. LESSY: As would the Staff.

MR. PERI: My response would be as it has

bw2 1 been on both of the orders that we have discussed.

2 CHAIRMAN RIGLER: The objections are overruled.

3 We will admit Exhibit 223.

4 (Whereupon, the document heretofore
5 marked Applicants Exhibit 223(OE)
6 for identification was
7 received in evidence.)

8 I am not sure I mentioned that as the exhibit
9 number on this. Is that the correct number?

10 MR. PERI: Yes. 223.

11 Internal identification number 151, a letter
12 from Gorant to Zimmerman.

13 I would ask that that be identified as 224.

14 (Whereupon, the document
15 referred to was marked Applicants
16 Exhibit 224(OE) for
17 identification.)

18 MR. PERI: The Department has requested an
19 offer on this document. And I shall read, we offer this
20 document to show that a primary concern of Mr. Zimmerman
21 and Mr. Gorant at this point in time was how best to
22 serve Norwalk with electricity, from a technical point of
23 view, after Norwalk made a unilateral decision to discontinue
24 the use of its generating facilities.

25 Further, we offer this to show that a primary area

bw3 1

of concern to a division manager contemplating the needs
of a wholesale customer was expecting to serve in the near
future was the electrical capability of the lines in the
area in which service was to be provided.

4

5

And the earliest possible date at which the
facilities would be available to serve the full needs of
the customer.

6

7

8

Further, that there are electrical limitations
on the ability to serve customers which are taken into account
by the company in deciding what they are able to do in terms
of service to a particular customer.

10

11

12

I am sorry, the offer is probably longer than
the document itself.

13

14

And I would move 224 into evidence.

15

16

17

MR. CHARNO: The Department would object to
Applicants 224 on the grounds that the document does not
meet the terms of the offer.

18

19

20

21

Before going into the specifics, we would
note that the Department on numerous occasions did amend
its offers which were considered too broad, contrary
to the Applicants assertions this morning.

22

23

24

25

We don't believe that this shows a primary
concern by any Ohio Edison personnel.

We don't believe that the documents indicates
a unilateral decision to discontinue generation, simply

bw4

1 that it is under contemplation that generation might be
2 discontinued.

3 I think rather that the document speaks of an
4 interest, rather than a primary concern or that it
5 would be of interest to Mr. Gorant to determine certain
6 things.

7 Certainly, the document falls far short of the
8 degree of emphasis in the offer.

9 MR. LESSY: I would agree.

10 As to the electrical characteristics of the
11 line, this shows that the capabilities of the line are
12 subject to fluctuation and change.

13 CHAIRMAN RIGLER: I forget what Mr. Peri
14 said on that.

15 MR. LESSY: Would you repeat it?

16 MR. PERI: I think this is the portion of
17 the offer that we would offer this to show a primary concern
18 of the division manager contemplating the needs of a wholesale
19 customer he was expecting to serve in the very near future
20 was the electrical capability of the lines in the area
21 in which service was to be provided.

22 Was that the part, Mr. Lessy?

23 MR. CHARNO: The Department would further note
24 that the electrical limitations with respect to the City of
25 Norwalk, if any, are not demonstrated by this

bw5

1 and we would question the relevance, in that context.

2 MR. LESSY: Mr. Peri has located the
3 language.

4 MR. PERI: I think it is the same language
5 that Mr. Charno is concerned about right now.

6 Further, that there are electrical limitations on
7 the ability to serve customers which are taken into account
8 by the company in deciding whether they are able to
9 extend service to a particular customer.

10 CHAIRMAN RIGLER: All right.

11 The objections would be sustained.

12 We will sustain objection to that part of
13 the offer relating to the primary area concern and we
14 would sustain objection to that part of the offer relating
15 to a unilateral decision on behalf of NORwalk to
16 discontinue its own service.

17 We would not be persuaded by the attack
18 on the offer as to the limitation of the ability to
19 serve customers being taken into account by the
20 company as one factor.

21 So that we will sustain the objection and
22 reject the document, unless you choose to modify it
23 in accordance with our remarks.

24 MR. PERI: I would like to modify it.

25 We would offer this document to show that one

1 concern of Mr. Zimmerman and Mr. Gorant at this time
bw6 2 was how best to serve Norwalk with electricity.
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DE 18
ch 1

1 CHAIRMAN RIGLER: That modification is accepted.

2 MR. PERI: From a technical point of view, after
3 Norwalk indicated its consideration of possible discontinuance
4 of the use of its generating facility.

5 MR. LESSY: It shows from my reading the concern of
6 Mr. Gorant, not a concern of Mr. Zimmerman.

7 CHAIRMAN RIGLER: That gets back to our earlier
8 discussion about whether the offer has to be sufficient on its
9 face or whether it can be argued as to whether the offer has
10 been fully established.

11 With that, the objections are overruled, and we
12 will receive 224.

13 (Whereupon, the document pre-
14 viously marked for identifica-
15 tion as Applicants Exhibit 224
16 (OE) was received in evidence.)

17 MR. PERI: The next document, Internal 152, a
18 letter from Crough to Gorant.

19 MR. CHARNO: Could the Department have an offer?

20 MR. PERI: I am not sure -- the designation on
21 that is Applicants 225. The offer would be that we offer
22 this for the factual background it provides of the Norwalk
23 situation, for the recognition by Service Director Krough
24 that the limitations in the Norwalk wholesale contract
25 correspond with the amount of energy that could be taken with

ch 2

1 the then-existing facilities of Norwalk, and that new
2 facilities, as well as a new contract, would be necessary
3 for Norwalk to take an increase in the amount of service.

4 We also offer it to show the request by Municipal
5 Service Director Krough of a contract with a ten-year term.

6 MR. CHARNO: The Department would object to
7 Applicants 225 as not meeting the offer of proof, and we do
8 not believe that it demonstrates a request by Mr. Krough for
9 a ten-year contract term, as stated in the offer of
10 proof.

11 MR. LESSY: We join in that objection.

12 I think the Staff exhibits of Ohio Edison whole-
13 sale contracts at this time indicate that the ten-year term
14 was the only term available and that that is why Mr. Krough
15 probably said, assuming that a satisfactory ten-year contract
16 would be entered into, and we would join in that objection.

17 MR. SMITH: You said new ten-year contract?

18 MR. LESSY: Yes, sir.

19 CHAIRMAN RIGLER: The objections are overruled.

20 We will receive 225 into evidence.

21 (Whereupon, the document referred
22 to was marked for identification
23 as Applicants Exhibit 225(OE)
24 and received in evidence.)

25 MR. PEPI: Internal identification number 19,

ch 3

1 which are handwritten notes. It is not apparent from the docu-
2 ment, but I would note now that these are Bruno Codispoti,
3 an Ohio Edison employee.

4 CHAIRMAN RIGLER: Off the record.

5 (Discussion off the record.)

6 MR. PERI: We would like that identified as 226,
7 Applicants 226. And I would like to move that into evidence.

8 (Whereupon, the document referred
9 to was marked as Applicants
10 Exhibit 226 (OE) for identifi-
11 cation.)

12 MR. CHARNO: The Department has no objection.

13 MR. LESSY: Staff has an objection.

14 The first is that if it is moved into evidence
15 pursuant to a business record, there is no testimony of a
16 custodian or other qualified witness. If it is being moved
17 into evidence pursuant to a recollection, we would rely on
18 the Federal Rule of Evidence 8035, to the extent that a
19 memorandum of record may be read into evidence but may not
20 itself be received as an exhibit unless offered by an
21 adverse party.

22 I don't know what theory Mr. Peri is relying on,
23 but it is hearsay. These are just notes. We have no
24 opportunity to examine them, Mr. Codispoti, as to
25 whether he took notes. And I think on that basis it is hearsay.

1 and I know of no exception.

ch 4

2 MR. PERI: I believe the rules have been set down in
3 this proceeding for the admission of these documents. I think
4 this is proper document.

5 It is our representation, as we have verified it
6 with Mr. Codispoti, that these were his notes.

7 CHAIRMAN RIGLER: These are his contemporaneous
8 notes?

9 MR. PERI: Yes.

10 And the next exhibit is a memo he wrote the
11 next day, if I recall correctly.

12 No. I'm sorry. I have that confused with another
13 situation. That is later on.

14 CHAIRMAN RIGLER: Exhibit 226 is a three-page docu-
15 ment. Is that correct?

16 MR. PERI: Yes. The first page is an attendance
17 list already in evidence, and that, as I understand it, was
18 not prepared by Mr. Codispoti but by each of the signators.

19 MR. LESSY: If this is past recollection recorded,
20 it is not admissible under the federal rules, Rule 8035,
21 unless the witness has no present recollection of what
22 transpired.

23 Moreover, I would note that at that meeting,
24 there were approximately ten Ohio Edison people present.
25 To pick one of these out and to say that, for the truth of the

end 18
begin 19

ch 5

1 matters stated therein, these notes accurately reflect what
2 occurred at the meeting, I don't think is appropriate under
3 the hearsay rules. And if there is no custodian for business
4 records nor is there any absence of present recollection, and
5 in addition to that, the federal rules do not permit it
6 being received into evidence unless it is offered by an
7 adverse party.

8 MR. PERI: Rule 803, hearsay exception; there
9 it states, "The availability of the declarant immaterial;"
10 number one, after the words, "The following are not excluded
11 by the hearsay rule, even though the declarant is available
12 as a witness, present sense impression; a statement
13 describing an event or condition."

14 I would submit that the last two pages of this
15 Exhibit are the present recollections of Mr. Codispoti and
16 that the attendance sheet is included because it was a
17 part of the document.

18 MR. LESSY: It is my understanding of the present
19 sense impression that it requires testimony that that, in
20 fact, was and that he has to be here to testify to that o
21 so his recollection can be tested as to possible incorrections
22 with respect to the minutes.

23 A best evidence objection; the best evidence would
24 require Mr. Codispoti to testify as to what his present
25 recollection is and whether or not it is based on these notes.

ch 6

1

MR. PERI: I have two comments, if I may, your

2

Honor.

3

CHAIRMAN RIGLER: Just a minute.

4

MR. PERI: It is not clear to me whether you are waiting on me or not. If you are, I have just one comment.

6

I feel that Mr. Lessy's comments about the best evidence ulre are a misunderstanding and that a reading of the rules of evidence, Rule 1001 through 1004, would indicate that that is the case.

10

MR. LESSY: The point is that there is nobody to cross examine. When there are ten Ohio Edison witnesses who were at that meeting and to put in the handwritten notes of one, I think, is clearly hearsay, without an exception upon which to base it. Presumably Mr. Codispoti is available.

15

CHAIRMAN RIGLER: Okay.

16

With some reluctance we are going to sustaine the ojbctions. The reluctance arises from the fact that we have heard other witnesses during the proceedings who were present at this meeting. To require Mr. Codispoti to come in gets fairly close to unwarranted repetition, to make him come in to testify with respect to notes of a meeting where others have already testified about what was discussed.

23

24

25

Nonetheless, the balance, I think, goes against admission of this particular document, due primarily to the importance of the subject matter which arose at the meeting.

ch 7

1 So 226 will be rejected.

2 MR. REYNOLDS: Mr. Chairman, if I may, our witness
3 list is growing. It looks now like we will have to schedule
4 for Mr. Codispoti to come in, and we will do so, and alert
5 the parties as soon as we can arrange a schedule.

6 I would like to comment just very briefly that it
7 was my understanding all along that the whole procedure of
8 unsponsored documents left open the possibility that
9 documents would come in and that there would not be an
10 ability to cross examine unless the other party was the one
11 that would call the witness in putting on its case.

12 We had dropped in our lap a large number of
13 unsponsored documents over the objection that it deprived the
14 Applicants of the ability to cross-examine, and the response
15 was, if you want to cross examine, you can bring these
16 people in. I would submit that that argument is no different
17 here, that if the other parties want to cross-examine, there
18 is no difficulty at all making Mr. Codispoti available
19 to them on their rebuttal case to cross examine. They have
20 that opportunity.

21 What we were trying to do is to expedite these
22 proceedings, to put in the documents in the same manner that
23 they were put in against us.

24 Now we are in a situation where the schedule is
25 going to have to be extended because, to the extent we are not

ch 8

1 putting these in on an unsponsored basis, especially in
2 this situation where we have some testimony about this
3 meeting, and we have here a document that is a present sense
4 impression contemporaneously, then it does open up the
5 necessity to call additional witnesses, and the Applicants
6 will have to do that.

7 We will try to schedule it within some reasonable
8 time. But it looks like the direct case of the Applicants
9 is not going to be closed as quickly as we had hoped.

10 MR. CHARNO: Mr. Chairman, if I may reply.

11 CHAIRMAN RIGLER: Wait a minute.

12 What appears in Exhibit 226 that hasn't already
13 been the subject of testimony?

14 MR. REYNOLDS: There is controversy in the record
15 as to matters in this meeting.

16 CHAIRMAN RIGLER: Right.

17 Is this going to resolve that controversy?

18 The controversy arises with respect to whether
19 certain subjects were discussed. Some people recall items
20 being discussed at this meeting, and others have no
21 recollection of it. The absence of these points in the
22 Codispoti notes would not be dispositive.

23 MR. REYNOLDS: If we have additional testimony
24 that confirms the understanding or recollections of certain
25 people and we have a contemporaneous document that sustains

end 19

begin 20

ch 9

1 that, it seems to me that it is importance evidence that we
2 would like to have in the record.

3 In addition, there is also quite a bit of discussion
4 about the letter of intent. That is a matter that was to follow
5 on after the meeting, and how that was raised, and how that
6 particular matter was left, I think that these notes address
7 that particular subject.

8 CHAIRMAN RIGLER: I think you are just emphasizing
9 the one basis for the Board's ruling, which is, where you have
10 a matter that has been the subject of such controversy,
11 this would be a good occasion to have a live witness, notwith-
12 standing the use of documents on less controversial points.

13 MR. REYNOLDS: I guess my question is, the burden is
14 on Applicants, when they are putting in their unsponsored
15 documents, to bring in a witness. Then it flips over, and the
16 burden is on Applicants to produce the witnesses, which
17 means that the Board has a ruling or two rulings which, in
18 sum and substance, put the burden on the Applicants to
19 produce the witness with respect to all unsponsored documents.

20 I don't differ with the Board's analysis that it
21 may be appropriate to bring in witnesses for cross examination
22 purposes. And that is obviously the followup that comes
23 from proceeding with a procedure of unsponsored documents.

24 And, really, all that the unsponsored document
25 procedure does is it shifts the burden as to who is going

ch 10

1 to bring the particular witness in, and if he is going to be
2 brought in.

3 And now what I am suggesting is that the rulings at
4 this stage which are rejecting unsponsored documents on the
5 ground that we don't have an opportunity to cross examine are
6 requiring the Applicants to bring these witnesses in,
7 whereas when we were going through the exercise before,
8 when we made this particular argument to the Board, the
9 response consistently was, bring the witness in in your case
10 and cross examine him if you want.

11 CHAIRMAN RIGLER: I am not sure that I agree with
12 what you say. But the record will speak for itself. So
13 let's move ahead.

14 MR. LESSY: I would just hope that since we have Mr.
15 Cheeseman and Mr. Mayben on rebuttal on this subject, that
16 Mr. Codispoti be brought in before that time.

17 MR. REYNOLDS: If we can do it, we will. I am
18 not sure what his schedule is.

19 MR. LESSY: I am also going to apply to the
20 Board for a subpoena for all Ohio Edison personnel who attended
21 that meeting.

22 MR. REYNOLDS: That has already been produced.

23 MR. LESSY: Then you wouldn't have a problem making
24 them available to us if our file is incomplete at this time.

25 MR. REYNOLDS: I object now of going through another

ch 11

1 round of discovery. We have answered the requests. We
2 have made them available. I now question that we need to go
3 back through it again.

4 CHAIRMAN RIGLER: Let's move ahead.

5 MR. LESSY: This particular meeting, if we don't have
6 the copies of the notes of the individuals or all of them, and
7 since they have been produced, there would be no problem in
8 giving us the ones we need, would there?

9 CHAIRMAN RIGLER: I don't know. But if they
10 were produced according to the proper discovery request, we
11 are not going to make them conduct another file search to
12 satisfy you.

13 MR. LESSY; If they were not, we would be entitled
14 to them.

15 CHAIRMAN RIGLER: You are arguing with the Board,
16 Mr. Lessy.

17 Let's move ahead.

18 MR. PERI: The next document is internal idnet
19 identification number 130. It is a letter from Duncan to
20 Kauper, dated December of 1972. I would like it identified
21 as Applicants 227.

22 (Whereupon, the document referred
23 to was marked as Applicants 227
24 (OE) for identification.)

25 MR. CHARNO: Is Applicants 227 offered for the

ch 12

1 truth of the contents or as evidence that the letter was sent
2 and received?

3 MR. PERI: It is offered for the truth, Mr.
4 Charno; in addition I would note that we were asked for an
5 offer, and I will read that.

6 "We offer this to show that counsel for WCOE
7 believes that all complaints of the WCOE members against
8 Ohio Edison would be remedied if Ohio Edison
9 proceeded in good faith in carrying out a settlement
10 agreement and so advised the Department of Justice at this
11 time."

12 CHAIRMAN RIGLER: Say that again.

13 What would be resolved?

14 MR. PERI: It would be remedied. The complaints of
15 the WCOE members against Ohio Edison at this time.

16 Further, we would offer this as a manifestation
17 of what WCOE contemplated that the -- the joint study to
18 include -- I am sorry.

19 And more particularly as is evidenced by M.r
20 Mr. Duncan's statement on page 3 of the letter that, therefore,
21 in view of this impending new "partnership" arrangement
22 between Ohio Edison and the cities, the cities do not expect
23 to oppose the granting of a construction license to Ohio Edison
24 for construction of the Beaver Valley power plant Unit 2
25 as long as Ohio Edison honors the terms of the pending

ch 13

1 settlement agreement.

2 CHAIRMAN RIGLER: That is irrelevant to this
3 proceeding, I would think.

4 MR. PERI: May I continue with the offer?

5 CHAIRMAN RIGLER: Sure.

6 MR. PERI: And further, to demonstrate that the
7 settlement agreement, as it appears in draft form attached to
8 this agreement, did not change in any significant respect
9 from that which was later signed by WCOE and Ohio Edison.

10 MR. SMITH: Did we make findings that some 21
11 Ohio Edison wholesale customers for many years considered
12 themselves subjected to seriously anticompetitive practices
13 of Ohio Edison and that until very recently they have been
14 unable to unburden themselves of the effect of those
15 practices?

16 MR. PERI: Your Honor, the problem we have with
17 this document -- I am sorry to take the time of the Board, but
18 in response to Mr. Smith's question, I think that such a
19 finding would have to rest on the entire record if it is
20 substantiated.

21 I think this document does no more than indicate that
22 at this time Mr. Duncan believed that to be the case.

23 CHAIRMAN RIGLER: But then you are asking us
24 to take the document, part of the statements, but not for the
25 truth of others.

ch 14

1 MR. PERI: It is for the truth of Mr. Duncan's
2 belief at that time.

3 CHAIRMAN RIGLER: And for the truth of his
4 belief with respect to the other matters encompassed in your
5 offer of proof?

6 MR. PERI: Yes, to the extent that there are
7 beliefs expressed there.

8 CHAIRMAN RIGLER: To the extent that there are
9 beliefs, they are nonprobative. To the extent that
10 they are supposed to reflect a fact, how can you say this
11 fact is acceptable but that one is untrue?

12 It makes it very difficult to pick your way
13 through the letter like that.

14 MR. SMITH: Could we afford different weight to
15 one belief than to another in the same letter?

16 MR. PERI: I think we may well, where one appears
17 to be against interest or perhaps is an admission.

end 20

18

19

20

21

22

23

24

25

S21
bwl 1

MR. CHARNO: I would object to that
strongly.

I was waiting to request some red-lining which was
the portion that was pointed out, and my
objections are going down the same line, if, indeed, this
is being offered for the fact that he had beliefs on both
subjections, the resolution of antitrust claims, as well
as the existence of antitrust claims, then we have no
objection.

If they are going to be accorded unequal weight
in the offer, then we have substantial problems and would
object to it on that basis.

MR. PERI: May I just make one --

MR. CHARNO: This is not an admission by a
party to this proceeding.

That is the difference between these documents and
prior selective utilization.

MR. PERI: First of all, there is, it really is
more important than a housekeeping matter and I am sorry
that I did not do this first on this document.

Originally, the document was red-lined in
one fashion. In lockint it over we felt that we were falling
very much into the trap that we feel that the parties
opposed to Applicants did with red-lining, which was to red-
line so selectively as to give the wrong impression of the
total document.

bw2 1

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

So the entire document and letter should be red-lined. I believe that is the case in the Board's copies and has been indicated to certain of the other parties and if there is any confusion on that that is solely my fault, and I am sorry.

The attached August 11 letter of Mr. Stout is not red-lined. It is a very familiar document to the Board. The settlement that is attached is red-lined in its entirety, except for the numbers on about the fifth page there.

Everyone should be consistent on this part.

And exhibit C, the last page is red-lined. The Board's copies are already red-lined in the proper fashion.

MR. LESSY: Staff would object to the documents as, in light of the offer of proof, as not supporting the offer of proof offered for it.

CHAIRMAN RIGLER: Let me tell you some of the difficulties I have which are numerous.

We have already discussed the problem of accepting one belief and rejecting another.

I think the offer is deficient where you say that all complaints would be remedied, I believe was your phrase.

I don't read that anywhere in the letter.

bw3

1 I do see a reference to a new accord which would
2 obviate any complaints.

3 I think there is a substantial difference
4 between obviating complaints because one signs off on an
5 agreement and remedying all complaints.

6 Secondly, even the remark as to
7 obviating complaints was made in context of the Beaver
8 Valley Station which is not an issue before this Board.

9 And thirdly, we have the further problem that we
10 have WCOE, a number of witnesses who have testified
11 as to their concerns in this proceeding.

12 MR. PERI: The witnesses, the witness was
13 Mr. Lyman. And Mr. Duncan who is an attorney, who handles
14 this sort of matter, he may have had a different
15 recollection.

16 MR. LESSY: But Mr. Duncan no longer represents
17 WCOE in this matter.

18 MR. PERI: I was not aware of that.

19 I think the representation of the legal people
20 and the engineering people to WCOE is of some real
21 relevance.

22 CHAIRMAN RIGLER: How do you respond to my point
23 that the letter discusses an accord which might obviate
24 certain complaints only with respect to issues raised
25 by the Beaver Valley application?

Si.

bw4

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

MR PERI: In two ways. First of all I had some difficulty with understanding how a complaint is obviated.

That is the language he chose, and I attempted to case that into something that would be more understandable to me.

Perhaps I was too broad in that, and I would certainly be amenable to changing the offer on that particular point.

However, I think, I mean to go no further with this than to indicate that whatever issues there are in controversy between WCOE and Ohio Edison, whatever difficulties there have been in the past, that at this point in time, late December 1973, just before the settlement agreement of February,, pardon me, late December 1972, immediately before January and February of '73, when the settlement agreement was signed, that Mr. Duncan had reached a point where he felt the complaint of the cities would be obviated, the settlement agreement was signed, the exhibit C that he specifically refers to was signed in exactly that form, the attached settlement agreement has as nearly as I can tell, only a single very minor correction, the difference between six and seven percent, although the entire agreement is retyped by the time it is signed in February of 1973.

bw5

1 And I think this is highly relevant to the
2 relationship that existed at this time immediately
3 prior to these proceedings, the relationship that existed
4 between WCOE as represented by its counsel and Ohio Edison
5 I am afraid we will have to take some of the bad with the
6 good.

7 I cannot verify Mr. Duncan's statements as
8 to their facts. I can only say that that is what he believed
9 at the time.

10 CHAIRMAN RIGLER: How about his statement that this is not
11 his final position and an indication that there would be
12 some further contact with the Attorney General?

13 MR. PERI: I would be delighted if it Justice
14 has any record of that contact. It is my understanding
15 that they do not.

16 CHAIRMAN RIGLER: That is my question.

17 It seems to me that even this response is
18 hedged on the contingency that --

19 MR. PERI: It seems to me that that just
20 strengthens the document and indicates that that may continue
21 to be the position of these people at least as long as
22 they are represented by Duncan.

23 If they found no need to amend this response,
24 I think that is very important.

25 MR. LESSY: But they did. There was an outline of

bw6

1 the settlement agreement of the scope of the new power
2 supply study which Mr. Duncan sent to Mr. White.

3 He listed all these things. How can you say that
4 this is a manifestation of what they contemplated when we
5 have a letter to Mr. White specifically outlining what he
6 wanted studied subsequent to this letter.

7 MR. PERI: That seems to me to be completely
8 envisioned by this, that is, dealings between the parties.

9 We are talking about dealings between WCOE
10 raising its complaints with the department.

11 MR. LESSY: How can you offer this as
12 what they contemplated as a joint study?

13 MR. PERI: At that time.

14 MR. CHARNO: With respect to future comments
15 by WCOE on the Beaver Valley Power Station Unit 2,
16 the firm of Duncan, Allan and Mitchell was informed
17 that the Department was required to submit advice to
18 the Commission and was informed when we had submitted
19 that advice and that further comments on Beaver Valley
20 too would be superfluous after the day upon which,
21 in fact, after a week before the Department submitted
22 such advice.

23 MR. PERI: Excuse me. If that is a representation
24 that the subsequent plants under consideration here are
25 not important to WCOE, I certainly would appreciate

bw71

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

that stipulation, And if not I would appreciate
knowledge of what other comments came to the Department
with regard to those other proposed plants.

L

ES21

S22
bwl

1 MR. CHARNO: And you have complete knowledge?

2 MR. PERI: There were none further.

3 MR. CHARNO: You had complete discovery on
4 this?

5 CHAIRMAN RIGLER: It should be evidence that
6 the Board has some reservations with respect to the
7 probative VALUE of the document.

8 Nonetheless, we are going to overrule the
9 objections.

10 MR. REYNOLDS: Mr. Rigler, I am on my feet
11 in hopes I can get a quick comment in before the ruling.

12 CHAIRMAN RIGLER: We have ruled.

13 I don't know that it is necessary.

14 MR. REYNOLDS: It is necessary to the extent
15 that the Board has expressed reservations as to the probative
16 value of the document.

17 I would simply like to state that from an
18 evidentiary standpoint under the rules of evidence, I think
19 that a document could come in to show what Mr. Duncan,
20 the author of the document, truly believed at that time to
21 the extent that the document contained
22 omissions by Mr. Duncan and would be entitled, it
23 seems to me, to more probative weight than to the extent
24 that the document contains self-serving statements
25 by Mr. Duncan, so that the Board could very clearly as an

bw2 1

evidentiary matter apply different weight to different statements in a document of this sort.

2

3

And I think that there was a discussion of that.

4

5

MR. SMITH: There is a little bit of difference here. It is not so much that Mr. Duncan says that he believes there are serious anticompetitive problems. But Mr. Duncan says that his clients believe it. And that is just not a matter of opinion. I assume that Mr. Duncan was privy to his clients' beliefs.

6

7

8

9

10

11

MR. REYNOLDS: Yes.

12

And --

13

MR. SMITH: To me it is of some significance that between municipalities all agree and report to their attorney that there were serious anticompetitive practices, whether it is true or not.

14

15

16

17

The problem here is that I agree with you that you could have a large document and some statements would be against interest and some would be, and then you would give them weight.

18

19

20

21

But here he is reporting the position of twenty individual people, and their beliefs which he has every basis to know.

22

23

24

He is not expressing his opinion as to the anticompetitive facts, but he is communicating what their

25

1 impression had been.

bw3

2 MR. REYNOLDS: I am not quarreling with you,
3 Mr. Smith. I think that to the extent that there is
4 a statement like that in the letter I am not saying it is
5 entitled to no weight. I guess my only response to you
6 is that I would weight that statement against the kind of
7 evidence that has been presented in this hearing and, as to
8 what those municipalities consider to be anticompetitive
9 effects or what Mr. Duncan considers to be, if he were
10 brought in here, which he hasn't been.

11 To the extent that there is some finding
12 to be derived from this document, I think that it would
13 have to be in the context of the total evidentiary
14 record to the extent that those municipalities that Mr. Duncan
15 at that time believed, though were subject to
16 anticompetitive practices, if you will, did or did not
17 come forward here to give evidence to this Board.

18 And I am not suggesting that that is in terms
19 of the different weight that can be accorded, that that
20 kind of statement is entitled to no weight.

21 I appreciate what you are saying.

22 CHAIRMAN RIGLER: Okay. We understand.

23 MR. PERI: I have a very brief comment.

24 I would read that a little differently than you do,
25 Mr. Smith. It does not appear to me certain that

1 Mr. Duncan is talking in terms of all 20 wholesale
bw4 2 customers.

3 I think that can be read that some plural
4 number, two, three, four felt that way.

5 But the document is there, the language is
6 there.

7 That is for the Board.

8 CHAIRMAN RIGLER: I think we are beginning to
9 belabor some of these points more than we need to.

10 MR. P' RI: Yes, sir.

11 Internal number 184 which is a FPC order
12 approving the rate settlement, August 1973.

13 We would ask that that be identified as
14 Applicants 228. And we are asked by the Department of
15 Justice whether this was offered for the truth of the
16 matter.

17 We responded in the affirmative and I would
18 move this document into evidence.

19 (Whereupon, the document referred
20 to was marked Applicants
21 Exhibit 228 (OE) for identification.)

22 MR. CHARNO: We would object to the document
23 on grounds of relevancy to the extent that it is offered
24 to draw any inference concerning FPC approval. Otherwise
25 it seems to me it is redundant upon evidence already of

bw5 1 record. And we would object to it for that reason.

2 CHAIRMAN RIGLER: The objection is overruled.
3 We will receive 228 into evidence.

4 (Whereupon, the document
5 previously marked Applicants
6 Exhibit 228 (OE) for
7 identification, was received
8 in evidence.)

9 MR. PERI: The next document is internal
10 identification number 124, a letter to the Federal
11 Power Commission from Frances McGovern.

12 We would like it identified as Applicants
13 229.

14 (Whereupon, the document
15 referred to was marked
16 Applicants Exhibit 229 for
17 identification.)

18 The Department of Justice has inquired as to
19 whether this is offered for the truth of the matter and we
20 have answered in the affirmative.

21 I would move that document into evidence.

22 MR. LESSY: I have one question. Is the
23 attachment to this document the contract, the current
24 contract between Newton Falls and Ohio Edison?

25 MR. PERI: That is not the current contract.

bw6

1 That was an attachment with this letter and
2 the next two documents I hope will make that clear.

3 MR. LESSY: Staff has no objection.

4 CHAIRMAN RIGLER: Hearing no objection,
5 we will receive Applicants 229 into evidence.

6 (Whereupon, the document previously
7 marked Applicants Exhibit 229
8 (OE) for identification, was
9 received in evidence.)

10 MR. PERI: I would like to identify
11 internal identification number 209, a letter from Frances
12 McGovern to Claire Carlin as Applicants Exhibit 230.

13 (Whereupon, the document referred
14 to was marked Applicants
15 Exhibit 230 (OE) for
16 identification.)

17 MR. PERI: And we move that into evidence
18 at this time.

19 MR. LESSY: We have no objection.

20 We would like to note the date of the letter
21 vis-a-vis Mr. Craig's testimony here.

22 CHAIRMAN RIGLER: Hearing no objection, we
23 will receive Applicants 230 into evidence.

24

25

bw7

1 (Whereupon, the document
2 previously marked Applicants
3 Exhibit 230(OE) for
4 identification, was received
5 in evidence.)

6 MR. PERI: Internal identification number
7 155, a letter from Frances McGovern to Kenneth Plumb, dated
8 April 12, 1976.

9 We ask that that be identified as Applicants
10 241.

11 (Whereupon, the document
12 referred to was marked
13 Applicants Exhibit 231(OE)
14 for identification.)

15 MR. PERI: Two problems occur. The Department
16 of Justice has asked if this is offered for the truth
17 of the matter asserted therein.

18 It is.

19 Secondly, the Department raised with us
20 the fact that it is apparent that a contract was appended
21 hereto. And I am afraid at this time all we can make
22 available is the significant change in the contract.

23 The contract has been mailed from Akron, but
24 has not arrived. We had telecopied Section 2, which is
25 indicated in the filing, if not in the previous letter

1 from Frances McGovern, that there were some changes in
2 Section 2.

3 I have that as corrected and I will pass out
4 copies of that at this time.

5 With the understanding that the complete
6 contract will be appended to the official exhibit when it
7 is received.

8 MR. LESSY: Mr. Chairman, we have obtained the
9 current contract dated March 29, 1976, between Newton
10 Falls and Ohio Edison, which was the contract which
11 will be appended to the April 12, 1976 letter and have
12 red-lined it and would make it available to Mr. Peri for
13 including in the exhibit, and you can red-line anything
14 additional, if you want.

15 MR. PERI: I will Xerox it and make it available
16 after lunch.

17 If there are no objections to that, perhaps
18 we could move that into evidence.

19 MR. LESSY: Staff has no objections to 155 and
20 the attachment.

21 MR. CHARNO: Could we examine the attachment?

22 MR. PERI: Fine.

23 CHAIRMAN RIGLER: All right.

24 Let's go off the record.

25 (Discussion off the record.)

bw9

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

ES22

(Whereupon, at 1:10 p.m., the hearing was
recassed, to be reconvened at 1:50 p.m., this same
day.)

AFTERNOON SESSION

(1:55 p.m.)

1
2
3 CHAIRMAN RIGLER: Shall we resume?

4 MR. PERI: I am sorry to say we don't yet have
5 the xerox copies of the contract that was attached to 0155.
6 They will be here in a moment. Perhaps we can move to the next
7 document.

8 CHAIRMAN RIGLER: In the meantime, Mr. Smith has a
9 matter he wants to bring up.

10 MR. SMITH: Mr. Hjelmfelt, the Board has been
11 contemplating the fact that this record is about to close
12 and the issue of the disqualification of SS and D is
13 still unresolved. When the motion to disqualify was
14 filed, it was alleged that participation of the law firm
15 could result in prejudice and reversible error.

16 The Board would like to hear from the city on its
17 view as to what extent the record indicates error and
18 prejudice, if any, as a result of the
19 firm's participation and what, if any, relief at this point
20 would you seek to remedy that error and prejudice?

21 We don't want your answer now, but at your
22 convenience sometime prior to the time we close the record.

23 MR. HJELMFELT: Fine. We will provide a response.

24 MR. REYNOLDS: Can we go off the record for two
25 seconds?

ch 2

1 CHAIRMAN RIGLER: All right.

2 (Discussion off the record.)

3 MR. SMITH: I wonder if there is any connection
4 with the fact that at about the time we lose our three-hole
5 punch, you began having a three-hole punch available to you?

6 That's off the record.

7 (Laughter.)

8 MR. PERI: The attachment to Exhibit 231,
9 which is the contract as amended, has been distributed.

10 MR. LESSY: It is dated March 29, 1976. Is that
11 correct?

12 MR. PERI: That's correct.

13 CHAIRMAN RIGLER: It will be admitted into
14 evidence.

15 (Whereupon, the document pre-
16 viously marked for identification
17 as Applicants Exhibit 231 (CB)
18 was received in evidence.)

19 MR. LESSY: The redlining on this exhibit now
20 reflects the interest of both the Staff and the Applicants.

21 MR. PERI: Mr. Zahler reminds me that this now
22 brings the document to seven pages instead of two pages.
23 And I think in fairness, we should redline both of those
24 first two pages. It is really a page and a half, as I
25 recall.

ch 3

1 Moving then to document 171 as the internal
2 number, the letter from Beil to Mr. McEwen, "we would ask
3 that that be identified as Applicants 232.

4 (Whereupon, the document referral
5 to was marked as Applicants
6 Exhibit 232 (CE) for
7 identification.)

8 MR. PERI: The Department requested an offer, and
9 the offer is as follows. This document is offered to show
10 the willingness of Ohio Edison to aid Newton Falls in the
11 work necessary to bring about an interconnection and to
12 demonstrate the type of information requested by Ohio Edison
13 to implement an interconnection and specifically as part of
14 that information to show that the information requested in
15 item 6(f) of the attachment concerning load characteristics
16 was to be provided by the municipality.

17 MR. LESSY: 6(f)?

18 MR. PERI: 6(f), I believe -- I beg your pardon.
19 I misspoke. It is K(6). It is on page 5, the two
20 items right above the bottom.

21 And I would like to move that document into
22 evidence.

23 MR. CHARNO: The Department would object to
24 Applicants 232 on the grounds that it falls short of the
25 offer.

ch 4

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

The document, we do not believe evidences or mentions interconnection or what is required for interconnection, as stated in the offer. It does indicate a willingness by Ohio Edison to assist Newton Falls in the design of a substation,

And then as to the necessity of the information requested, it is certainly information requested by OE, but we are not sure it is necessary in this case or whether it is necessary for the design of an interconnection. We believe the document does not reach those points.

MR. PERI: I would like to refer to Mr. Zahler's discussion this morning about what an offer attempts to do. And I believe, particularly in conjunction with other evidence we already have, Mr. Craig's testimony, there is little question that this document is exactly what it purports to be.

CHAIRMAN RIGLER: The objection is overruled. We will admit 232.

(Whereupon, the document previously marked for identification as Applicants Exhibit 232 (OE) was received in evidence.)

MR. PERI: There is -- the next document is in some books with an internal identification number of 172. If you have a book with that exhibits which is the January 22,

1 1975 letter to Mr. Tschappat from Mr. Beil, that is to be
ch 5 2 discarded. Just take it from the book.

3 The next document is internal identification
4 number 175 from Beil to Bixler, and we would ask that that
5 be identified as Applicants 234, and we request that it be
6 accepted into evidence. I am sorry; 233.

7 CHAIRMAN RIGLER: Hearing no objection, we will
8 admit Applicants 233 into evidence.

9 (Whereupon, the document referred
10 to was marked as Applicants
11 Exhibit 233 (OE) for identifi-
12 cation and was received in
13 evidence.)

14 MR. PERI: Internal identification number 179,
15 a letter from Dicke to Vexford et al. We ask that that be
16 identified as Applicants 234, and I would move that into
17 evidence.

18 CHAIRMAN RIGLER: Hearing no objection, we will
19 receive 234 into evidence.

20 (Whereupon, the document referred
21 to was marked as Applicants
22 Exhibit 234 (OE) for identifi-
23 cation and was received in
24 evidence.)

25 MR. CHARNO: The Department would request that the

1 paragraph on page 4 of Applicants 234 be redlined.

2 MR. PERI: All right.

3 The next document is internal number 192. It is a
4 memo from Dawson to Orrville file, and we would ask that that
5 be identified as Applicants 235.

6 (Whereupon, the document referred
7 to was marked as Applicants
8 235 (OE) for identification.)

9 MR. PERI: The Department has asked for an offer on
10 this documents. It is offered simply as an accurate record
11 of the matters discussed at the 1974 meeting between Orrville
12 and Ohio Edison.

13 MR. CHARNO: Are you suggesting that that reflects
14 all matters discussed at that meeting, or simply that
15 the matters discussed are accurately reflected?

16 MR. PERI: That the matters discussed herein are
17 accurately reflected.

18 CHAIRMAN RIGLER: Hearing no objection, we will
19 receive Applicants 235 into evidence.

20 (Whereupon, the document pre-
21 viously marked for identifica-
22 tion as Applicants Exhibit 235
23 (OE) was received in evidence.)

24 MR. PERI: Internal number 195, a letter from
25 McGovern to Zimmerman. We would ask that that be identified

end 23

24

1 as Applicants 236, and we would move that into evidence.

2 CHAIRMAN RIGLER: That includes the contract
3 attached?

4 MR. PERI: Yes, it does, which is merely that
5 for standby service to Orrville; it has been discussed
6 previously.

7 CHAIRMAN RIGLER: Hearing no objection, we will
8 receive Applicants 236 into evidence.

9 (Whereupon, the document referred
10 to was marked as Applicants
11 Exhibit 236 (OE) for identifi-
12 cation and received in
13 evidence.)

14 MR. PERI: Internal identification number 196, a
15 letter from Keller to Firestone, with some marginal
16 notations. We would ask that that be identified as Applicants
17 237.

18 (Whereupon, the document referred
19 to was marked as Applicants
20 Exhibit 237 (OE) for
21 identification.)

22 MR. PERI: The Department has inquired whether
23 this is offered for the truth, and we have responded that
24 it is.

25 MR. CHARNO: Are the marginal notations, the

ch 8

1 handwriting being offered?

2 MR. PERI: Yes.

3 MR. CHARNO: Do you have a typed-up copy of that?

4 MR. PERI: No, I don't. I can easily provide it.

5 I also believe that the bottom portion by and large can
6 be read. I have a copy that is the same xerox level as
7 yours.

8 MR. CHARNO: I think we have problems with the bottom
9 on both pages.

10 MR. PERI: Perhaps the better procedure, then,
11 since -- would be for me to type it up and provide it to you.

12 MR. CHARNO: Thank you.

13 CHAIRMAN RIGLER: Do we know who wrote the hand-
14 written notations?

15 MR. PERI: Yes. Mr. Firestone.

16 CHAIRMAN RIGLER: All right.

17 We will receive 237 into evidence, and we will
18 be expecting an additional typed page of the handwritten
19 notes.

20 MR. PERI: Thank you, Mr. Chairman.

21 (Whereupon, the document pre-
22 viously marked for identifica-
23 tion as Applicants Exhibit 237
24 (OE) was received in evidence.)

25 MR. PERI: For internal identification number 205,

ch 9

1 which are notes of the Orrville-Ohio Edison meeting of
2 1974, as reported by Bruno Codispoti. We ask that that be
3 identified as Applicants 238.

4 Again, I would indicate according to Mr. Codispoti,
5 the cover page, which is an attendance list, was not prepared
6 by him but was received by him at that date and appended to
7 his notes. That is the way we received the document.

8 CHAIRMAN RIGLER: Was that moved?

9 MR. PERI: And I would like to move that into
10 evidence.

11 CHAIRMAN RIGLER: Hearing no objection, we will
12 receive Applicants 238 into evidence.

13 (Whereupon, the document referred
14 to was marked as Applicants
15 Exhibit 238 (OE) for identifi-
16 cation and was received in
17 evidence.)

18 MR. PERI: For identification, Ohio Edison-Penn
19 Power number 206 is the internal number, a memo from Codispoti
20 to Keller, dated February 3, 1974. We would ask that that
21 be identified as Applicants 239, and I would move that into
22 evidence at this time.

23 CHAIRMAN RIGLER: Hearing no objection, we will
24 receive Applicants 239 into evidence.

25

1
ch 10

2

3

4

5

(Whereupon, the document referred to was marked as Applicants Exhibit 239 (CE) for identification and was received in evidence.)

6

MR. PERI: Number 125, this is a memo from Tschappat and Workman to Firestone and Woolridge. I would ask that that be identified as Applicants No. 240.

7

8

9

10

11

12

(Whereupon, the document referred to was marked as Applicants Exhibit 240 (CE) for identification.)

13

14

15

16

MR. PERI: The Department has requested a response to the question, whether we offer this for the truth, and we do. And on that basis, I would like to move it into evidence at this time.

17

18

MR. CHARNO: The Department would object to this document on the basis of relevance.

19

20

21

22

23

MR. PERI: Your Honor, if I may respond; one of the specific allegations in the September 5 filings deals with the suggestion that Ohio Edison refused to buy Norwalk's generating facilities, and this is a nearly contemporaneous account of the condition of those facilities.

24

25

MR. CHARNO: Mr. Chairman, I think some further explanation is necessary at this point.

ch 11

1

2 At one point, Ohio Edison declined to purchase
3 certain of Norwalk's facilities. That was January 1970.

3

4

MR. PERI: That's correct.

4

5

6 MR. CHARNO: And this occurs, of course, after
7 that. Subsequently, in 1971, they declined to purchase any
8 of the facilities and, unless counsel could direct me to some
9 portion of this memorandum that would enlighten me on the
10 relevance, I can't seem to make that association.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

MR. PERI: I am afraid I don't have -- let me put
it another way. Let me begin again.

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

52

This is an evaluation of the Norwalk generating
station, all generating facilities at Norwalk, done by
the representatives who went directly to the scene and
examined these units. It is in the period between the two
situations Mr. Charno referred to, and I think it is the
only record we have available of the factual situations sur-
rounding the condition of the generating station at that
time, which I think is highly relevant.

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

CHAIRMAN RIGLER: The objection is overruled.
We will receive the document into evidence.

20

21

22

23

24

25

26

27

28

29

30

31

32

33

(Whereupon, the document pre-
viously marked for identifica-
tion as Applicants Exhibit 240
(OE) was received in evidence.)

34

35

MR. PERI: Number 141, a letter from Mayor Rosser

ch 12

1 to Bixler. We would ask that that be identified as
2 Applicants 241, and I would move that into evidence at this
3 time.

4 CHAIRMAN RIGLER: Hearing no objection, we will
5 receive 241 into evidence.

6 (Whereupon, the document referred
7 to was marked as Applicants
8 Exhibit 241 (OE) for identifi-
9 cation and was received in
10 evidence.)

11 MR. PERI: Applicants internal number 146, a letter
12 from Bixler to Rosser. We would ask that that be identified
13 as Applicants 242.

14 (Whereupon, the document referred
15 to was marked as Applicants
16 Exhibit 242 (OE) for identifi-
17 cation.)

18 MR. PERI: The Department asked whether this was
19 offered for the truth of the matters asserted therein, and
20 we responded that it was. And I would offer this into
21 evidence on that basis.

22 MR. CHARNO: The Department would object to
23 Applicants 242 on the basis of hearsay. It is clearly what I
24 could characterize as a sales pitch and presents things from
25 a business point of view, in the light most favorable to the

1 person making the statements. I don't think it should go
2 in for the truth of the contents without examination.

3 MR. PERI: I would suggest that Mr. Charno's
4 comments go to the weight that might be attached to the
5 exhibit.

6 CHAIRMAN RIGLER: I agree.

7 The objection is overruled. We will receive it.

8 (Whereupon, the document pre-
9 viously marked for identifica-
10 tion as Applicants Exhibit 242
11 (OE) was received in evidence.)

12 MR. PERI: There is a final set of documents
13 that I believe is probably best considered all at once,
14 because they are largely similar. There are five contracts,
15 proposed contracts by the Pennsylvania Power Company. Three
16 of them, those mailed on May 25 to the boroughs of New
17 Wilmington, Zelienople and Wampum, and I would like to
18 identify these with the following numbers:

19 The New Wilmington letter with attached contract
20 be identified as 243; Zelienople as 244, and Wampum,
21 Applicants 245.

22 (Whereupon, the documents
23 referred to were marked as
24 Applicants Exhibits 243, 244 and
25 245 (OE) for identification.)

ch 14

1 MR. SMITH: What? What is the one that followed
2 New Wilmington?

3 MR. PERI: New Wilmington is 243. Selisnople
4 is 244, and Wampum is 245.

5 Each of these three is identical in all respects,
6 except for the signature blocks and the addressee.

7 CHAIRMAN RIGLER: Who is the author of the cover
8 letter?

9 MR. PERI: I am not familiar with the -- oh. That
10 is Mr. Dunlevy.

11 I would like to identify the next two and cite the
12 minor differences.

13 For identification, the letter and attached
14 contract to the borough of Elwood City; we could identify
15 that as Applicants 246.

16 (Whereupon, the document referred
17 to was marked as Applicants
18 Exhibit 246 (OE) for
19 identification.)

20 MR. PERI: Again, the signature block and
21 addressee are different. In addition, there is a slight
22 difference in the first two paragraphs with regard to the
23 dates; a difference of one month in each case.

24 MR. CHARNO: When you are speaking of the
25 differences, Mr. Peri, are these differences only in the first

ch 1

page and all subsequent pages are identical in each case?

MR. PERI: Yes, except for the signature blocks at the end of the contract. The contract itself in each case, all five cases, as I understand it, is identical. The very same xeroxes were used, except for the signature blocks in each case.

Finally, for identification, the letter to the borough of Grove City. I would like this identified as Applicants 246 -- 247, I'm sorry.

(Whereupon, the document referred to was marked as Applicants Exhibit 247 (OE) for identification.)

MR. PERI: And here again, the contract is identical except for the signature blocks. However, there is a somewhat more extensive letter with an explanation. It is a bit more detailed than in the other four cases.

And I think, because of the large degree of similarity, I might just move all five of those into evidence at one time, and I would like to do that at this time.

CHAIRMAN RIGLER: Hearing no objection, we will receive Applicants Exhibits 243 through 247 into evidence at this time.

(Whereupon, the documents
previously marked for identifi-
cation as Applicants Exhibits
243 through 247 (OE) were
received in evidence.)

1
ch 16 2

3
4
end 24 5

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

S25 1
bwl

MR. PERI: Mr. Chairman, that would complete our documents for today.

MR. REYNOLDS: I would like to renew the motion on Applicants Exhibit 219.

MR. CHARNO: The Department would renew its objection at this time.

And indicate that over the lunch break we had an opportunity to review Exhibit DJ-460 and DJ-479, and we found that the acquisition policy of Ohio Edison was referred to in Mr. Mansfield's testimony before the Securities and Exchange Commission in the Hiram proceeding on pages 22, 44 and 62.

The rates charged by Ohio Edison was referred to at page 53.

I am sorry. I believe I misspoke. The acquisition policy was 26, 44 and 62.

The rates was 53 and discussion of economies of scale at page 51.

I believe all of these are encompassed in Applicants 29, specifically in the application.

Certainly, the economies of scale and the rates to be charged would be in the third paragraph of page 3, as well as the reason for acquiring municipal systems.

MR. PERI: I would like to ask Mr. Charno, after that analysis of the record, whether there was any

1 specific mention of other reference to the statements
bw2 2 in the U-1 or the U-1 itself, if he is aware.

3 MR. CHARNO: If Counsel is asking whether
4 there was a cross-examination on the U-1, I am not aware of
5 any. That is to say, cross-examination on the specific
6 words of the U-1.

7 Certainly, Mr. Mansfield testifying on behalf
8 of the company as to the same things that are contained in
9 the U-1 under oath, I am not sure that it is a distinction
10 of merit.

11 MR. REYNOLDS: I reviewed the testimony that
12 you had reference to over the lunch period.

13 I would simply point out as I understood how we
14 got into this, the Board's question, it was in connection
15 with a question that was asked of the Department as to
16 whether it had reason to believe that the statements by
17 Mr. Mansfield in the Application were contradicted or
18 in any way undermined by his testimony.

19 I would submit from my review of the
20 testimony it is abundantly clear, both with specific
21 reference to the pages that Mr. Charno mentioned and as
22 to the rest of the testimony that it neither undermined, it
23 neither addresses or undermines any of the statements set
24 forth in the Application. And I would again point out
25 that there was opportunity at the time of the depositions

1 in this case, had the Department thought it desirable
2 to do so, to cross-examine Mr. Mansfield about the
3 statements in his application or any portion of his
4 testimony at the SEC proceeding, and they did not do so.

5 But there is nothing in this testimony, in DF-460
6 that was not allowed into evidence, that would impact at all
7 on the credibility of Mr. Mansfield's statements in the
8 Application made under oath.

9 MR. CHARNO: I think it explains the statements
10 made under oath and certainly a policy of the company
11 in favor of acquiring municipal systems in order to
12 bring about benefits of integration as set forth in the
13 testimony is --

14 CHAIRMAN RIGLER: But didn't you have a chance
15 to examine Mr. Mansfield on that policy?

16 MR. CHARNO: The Department did not have the
17 opportunity upon deposition to examine Mr. Mansfield as to
18 anything.

19 CHAIRMAN RIGLER: Wasn't that one of the subjects
20 you had in mind when you began the deposition?

21 MR. CHARNO: I don't believe it was, sir.

22 I am not sure.

23 CHAIRMAN RIGLER: The acquisition policy of Ohio
24 Edison?

25 MR. CHARNO: I am not sure of the scope of his

bw4 1 deposition at this time. I can ascertain that an get back
2 to you.

3 CHAIRMAN RIGLER: Although I notice that most of
4 this exhibit has been red-lined, the only controversial
5 area that has been pointed out to the Board is the
6 reference on page 2 to the possibility of improving the
7 efficiency of the company's operations, and improving
8 the service received by Hiram.

9 MR. CHARNO: I think also page 3 which is a
10 discussion in the second full paragraph of the rates to
11 be charged is further explained.

12 MR. REYNOLDS: Where is that? I am sorry.

13 MR. CHARNO: I am sorry. That is the wrong
14 exhibit.

15 Never mind.

16 CHAIRMAN RIGLER: We are going to overrule the
17 objection and admit the document.

18 (Whereupon, the document
19 previously marked Applicant
20 Exhibit 219 (OE) for
21 identification, was received
22 in evidence.)

23 CHAIRMAN RIGLER: What is the status of 221?

24 MR. REYNOLDS: That is deferred until further
25 information is furnished.

bw5

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

MR. PERI: This was the item we discussed earlier, the U-1 had more exhibits originally attached to it. The Staff will review it. When they have, we will have a complete document and move it into evidence at that time.

CHAIRMAN RIGLER: Okay.

Who is next?

ES25

S26 1
bwl 2

MR. REYNOLDS: Toledo Edison, if we could,
because we have planes we have to catch.

MR. KLEE: Mr. Chairman, Toledo Edison
Company would like to introduce a series of documents
based upon prior proceedings.

We will take them individually, one at a time.

CHAIRMAN RIGLER: All right.

MR. KLEE: The first document we would like
to mark for identification as Applicants -- take that
back.

I won't describe the document. The first document is
a three-page letter with attachments, dated December 19,
1967 from Donald F. Turner to Richard M. Dickey.

I would like to have this document marked
for identification as Applicants Exhibit 248(TE).

(Whereupon, the document referred
to was marked Applicants
Exhibits Exhibit 248
(TE) for identification.)

MR. KLEE: And the Department has requested
an offer of proof which is as follows--

MR. GOLDBERG: Excuse me. If you held up
until I locate that document.

MR. KLEE: Certainly.

(Brief pause.)

bw2 1

MR. GOLDBERG: All right.

2

MR. KLEE: Okay.

3

4

5

6

7

8

The offer is as follows: We are offering this document to show that the Buckeye Agreements were entered into by the parties with the clear understanding shared by the Department of Justice and the parties that the terms and conditions of the Buckeye agreements were not inconsistent with the antitrust laws.

9

10

11

12

13

14

15

And further to show that insofar as the Buckeye agreements contain a provision restricting sales to municipalities the language of those provisions is a product of an arrangement solicited and approved by the Department, excuse me, solicited and approved by the Department of Justice to conform such restrictions to Section 4905.261 of the Revised Code of Ohio.

16

17

At this time, Mr. Chairman, we would like to offer this document into evidence.

18

19

MR. CHARNO: Is this document red-lined or to be red-lined?

20

21

22

MR. KLEE: Yes. It is.

23

24

MR. CHARNO: Not as far as I can tell. It is not red-lined.

25

MR. GOLDBERG: Staff's is not red-lined either.

MR. KLEE: Okay.

CHAIRMAN RIGLER: My copy looks as if the whole

bw3

1 thing is red-lined.

2 MR. KLEE: The red-lining consists of all but the
3 last two pages, the last attachment.

4 MR. CHARNO: The Department would object to
5 Applicants 248 as not meeting the offer, as being
6 irrelevant in view of the reservation contained both in
7 the letter and in the unred-lined portion at the end of the
8 document and, indeed, in 28 CFR Section 50.6.

9 Finally, in the alternative, should this
10 document be admitted, we would move under Rule 106 that the
11 writings and representations in the context of which this
12 document was made and without which it would be
13 impossible to interpret this document be placed in the
14 record by Toledo Edison, and this would show the extent
15 and degree to which the parties who requested this and
16 according to again 28 CFR Section 50.6, those are the only
17 parties who may rely upon it, fulfilled their affirmative
18 obligation, which is again in the unred-lined portion of the
19 document to disclose all material facts and circumstances.

20 It is the position of the Department that such a
21 disclosure did not take place.

22 For example, we were unaware of any information
23 being submitted to the Department in writing or in oral
24 representation concerning territorial agreements between
25 different parties here into the agreement and to the other --

bwd 1 CHAIRMAN RIGLER: Would disclosure of such
2 agreements have had an impact on the advice rendered by
3 the Department?

4 MR. CHARNO: I think it clearly would,
5 Mr. Chairman.

6 If you are indicating to the Department that
7 you may or may not be limiting competition in a certain
8 fashion and the representation is made by Mr. Dickey and
9 repeated in the letter are somewhat unclear as to whether
10 there would be a limitation to competition, if those were
11 made with knowledge of agreements clearly violative of
12 the antitrust law which further limit competition, as that
13 this would be the total elimination of competition
14 for a certain class of customers, I think it would have
15 a very substantial effect upon whether such an agreement
16 would be considered to be valid or viable under the
17 antitrust laws.

18 MR. SMITH: Doesn't the Assistant Attorney
19 General state the facts upon which the advisory letter is
20 predicated or does he just assume all of the facts
21 presented are in support of the question?

22 It was my understanding that the advisory
23 letter_{was} good only to the extent of the facts on which
24 it is predicated within the letter.

25 MR. CHARNO: I think that the business review

bw51

procedure indicates that if there has been any failure to
make representations or any incorrect representations that
the advice rendered as a result is not binding
upon the Department.

Maybe I can find that.

MR. SMITH: That is not exactly my point.

My point is, isn't the advice good as it relates
to the facts stated in the advice?

I think the letter contains the answer to my
question.

MR. CHARNO: I would direct your attention to
the last page of the letter which is a direct reservation
of the right to take any necessary action in the future.

MR. SMITH: My point was narrower than that
and the letter answers it.

CHAIRMAN RIGLER: There is no question, but that
the offer fails in the terms in which it was expressed.

We would permit an amendment.

Stating merely that Toledo Edison, that
this letter represents the Department's response.

If we would permit that amendment we would
also give the Department an opportunity to respond.

MR. CHARNO: WE have attempted to
secure those materials. We don't have complete files.
That is why I made a motion under Rule 106 which requires

bw6

1 the party introducing the document to complete the
2 record.

3 MR. KLEE: Could I have a moment to confer
4 and then I will respond?

5 CHAIRMAN RIGLER: Sure.

6 MR. HJELMFELT: Did I understand the Chairman
7 to say that an offer which stated that Toledo Edison had
8 requested a clear answer would be accepted?

9 The letter indicates that the request was on
10 behalf of Ohio Power Company.

11 CHAIRMAN RIGLER: You are correct, Mr. Hjelmfelt.
12 I misspoke.

13 MR. REYNOLDS: I missed that. I am sorry.

14 CHAIRMAN RIGLER: Mr. Hjelmfelt reminded me that I
15 misspoke, I said the request for clearance was submitted
16 on behalf of Toledo Edison and it was submitted on behalf
17 of Ohio Power.

18 MR. REYNOLDS: Mr. Chairman, is the second part
19 of the offer, is that a problem? I mean that is based
20 on what is stated in the letter which goes to the
21 fact that the restrictive provision, if that is what it
22 is to be called, was as a result of an
23 amendment solicited and approved by the Department of
24 Justice to conform to the restrictions in the Ohio Code,
25 which is what I believe the letter itself states.

bw7

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

As I understand your amendment, it would go to the first part of the offer.

ES26

S27

bwl

1 MR. CHARNO: I don't believe that is what
2 the letter states at all.

3 CHAIRMAN RIGLER: Yes.

4 It certainly doesn't indicate that the amendment
5 was solicited by the Department of Justice.

6 It indicates that they raised a problem and later
7 there was an amendment proposed by the Ohio Power Company.

8 MR. REYNOLDS: Right. It was at the request
9 of the Department of Justice that the provision be amended
10 and in response to that an amendment was proposed by the
11 Ohio Power Company.

12 That is exactly what I am suggesting.

13 The letter indicates that as originally submitted
14 the provision that is now in question was not agreeable
15 as far as the Department of Justice is concerned.

16 And they asked that it be amended.

17 Yes, Ohio Power proposed an amendment.

18 CHAIRMAN RIGLER: I think that is clear from
19 the letter.

20 MR. CHARNO: Is that to be considered an amendment
21 to the offer?

22 MR. REYNOLDS: Yes. That would be part of the
23 offer.

24 CHAIRMAN RIGLER: Does your offer still
25 indicate that it was the Department of Justice which

bw2

requested or proposed the amendment?

MR. REYNOLDS: Not proposed, no.

That it requested that the provision be amended and that the Ohio Power Company propose an amendment.

CHAIRMAN RIGLER: Where does the request by the Department of Justice appear in the letter?

MR. KLEE: I think it is inferred.

MR. REYNOLDS: I think it is a permissible reading of the last paragraph on page 2, carrying over to page 3.

CHAIRMAN RIGLER: Well --

MR. REYNOLDS: If you want to read that, otherwise I guess we could argue about that.

But we would submit that there is certainly a permissible reading of this language that the Department of Justice was not satisfied with the definitions as originally submitted and proposed or requested that they be amended, and Ohio Power proposed an amendment.

CHAIRMAN RIGLER: How about --

MR. REYNOLDS: Which is in fact what did occur, I will represent to the Board.

But I don't know that that is relevant to your question.

MR. SMITH: Are you representing that the

bw3

1 Department of Justice asked them to amend or simply
2 advised that they would withhold their advice unless
3 it was amended?

bw3

4 MR. REYNOLDS: I believe the Department of Justice
5 in fact asked them to amend.

6 MR. CHARNO: If you mean by amend to delete, I
7 think that is a correct statement.

8 MR. REYNOLDS: NO.

9 I don't believe it was even delete.

10 MR. CHARNO: I think we definitely need a
11 response on our rule 106 motion.

12 MR. REYNOLDS: I guess what I am suggesting is
13 that as the letter is written here, as I wasn't trying
14 to address it in terms of my own familiarity with the
15 background, that a permissible reading is certainly as
16 I have suggested, and we would offer the letter to
17 substantiate that reading to the extent that additional
18 documentation comes in going one way or the other, that
19 obviously would bear on whether my reading is correct or not
20 correct.

21 CHAIRMAN RIGLER: How do you gain your
22 familiarity?

23 MR. REYNOLDS: Through conversations with our
24 clients, using Ohio Power.

25 CHAIRMAN RIGLER: Well, I am going to withhold

bw4

1 admitting it, in any event, pending receipt of the backup
2 documents, the documents which were submitted in connection
3 with the request.

4 MR. REYNOLDS: Okay. I guess we have a problem
5 in that I don't believe Toledo Edison has a complete set
6 of documents, backup documents.

7 I think that probably the company that would be
8 most likely to have that would be the Ohio Power Company.

9 MR. KLEE: If I can address that, I am not at all
10 positive that we do.

11 I was able, we have possession of this exhibit.
12 We attempted to introduce it as it is now.

13 Without the attachment. We will attempt
14 to locate the remaining documents.

15 But in any event we will try to obtain
16 them.

17 CHAIRMAN RIGLER: Discuss it with the Department
18 ~~because the~~ Department may not require for its purposes that
19 all of the documents submitted be attached to the MRC
20 exhibit here.

21 MR. CHARNO: Could we ask that the last two pages
22 be red-lined at this time, before I forget about it?

23 CHAIRMAN RIGLER: All right.

24 MR. REYNOLDS: Could I ask that the Department
25 let us know what documents they do have. I believe all the

bw5 1 documents we are talking about would be in the
2 possession of the Department.

3 They indicate that part of their file is deficient,
4 I believe.

5 MR. CHARNO: It is deficient, but I don't
6 know exactly what is missing.

7 MR. REYNOLDS: Let me know what you have and
8 we will provide you with what you need.

9 CHAIRMAN RIGLER: This is all contingent
10 upon your modification of your original offer, Mr. Klee.

11 MR. KLEE: Yes, Mr. Chairman.

12 Now I would like to offer an amended offer
13 of proof.

14 We offer this document to show that Ohio Power has
15 made a request for a business advice letter from the
16 Department of Justice concerning the Buckeye agreements to
17 which the Toledo Edison Company is a party and this
18 letter represents the complete response of the Department
19 of Justice thereto.

20 And, further, to show that insofar
21 the Buckeye Agreements contain a provision restricting
22 sales to municipalities, the language of those provisions
23 is approved, of an amendment approved by the Department
24 of Justice to conform such restrictions to Section 4904.261
25 of the Ohio Revised Code.

1 MR. CHARNO: Can I have that offer back, please?

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

4 MR. CHARNO: I still have trouble with the new
5 offer, that it was approved in order to conform it.

6 CHAIRMAN RIGLER: I think the offer is acceptable,
7 except for the use of the word "approved."

8 The Department didn't approve anything. They
9 indicated that they had no present intention to commence
10 an action, if an agreement were signed.

11 Is that a correct interpretation of the procedures
12 in effect at that time?

13 MR. CHARNO: IN effect at that time and
14 at this time. That is the extent to which under the Code
15 of Federal Regulations the Department can assure
16 anyone of anything.

17 Any further advice would be unauthorized and
18 contrary to law.

19 CHAIRMAN RIGLER: Mr. Klee, you may say that the
20 clearance letter showed an awareness as to the terms of the
21 amendment. But that is about as far as you could
22 go.

23 MR. KLEE: Mr. Chairman, if I may, I will
24 start with the second part and see if this is acceptable.

25 And further to show that insofar as the Buckeye

bw7

1 agreements contain a provision restricting sales to
2 municipalities, the language of those provisions is a product
3 of an amendment conforming such restrictions to Section
4 4905.261 of the Ohio Revised Code, and with respect
5 to which the Department of Justice saw no need at that time
6 to institute proceedings.

7 MR. CHARNO: If you put purportedly in front of
8 conforming, I wouldn't have any objection to that.

9 MR. REYNOLDS: That is legal argument.
10 I think as an offer of proof it seems to me that
11 the document certainly does lend itself to a reading which
12 arguably is stated in the offer.

13 If the Department wants to contest that
14 on legal argument before this Board, we certainly can
15 deal with that at that time.

16 I think the Board can evaluate it at that time.

17 CHAIRMAN RIGLER: You are not saying that
18 the Department agreed that the amendments conform to the
19 Ohio Code, are you?

20 MR. KLEE: Mr. Chairman, I believe the
21 offer of proof is silent on that.

22 It does not indicate that. It is silent on that.

23 CHAIRMAN RIGLER: Well, my problem is that as
24 I heard it the last time, it suggested that the Department
25 agreed that the amendment conformed to the Ohio Code.

bw8

1

MR. REYNOLDS: I believe the offer is
2 silent on that.

2

3

I would suggest this letter is no more
4 an indication that the Department agreed than that it
5 agreed with respect to the Ohio Code.

4

5

6

And --

7

CHAIRMAN RIGLER: Reread the offer.

8

9

MR. REYNOLDS: I think it would be a problem
to have an offer which is silent on that point.

10

11

12

13

14

Further, to show that insofar as the Buckeye
agreements contain a provisions restricting sales to
municipalities, the language of that provision is the
product of a amendment conforming such restrictions to
Section 4905.261 of the Revised Code of Ohio.

15

16

17

CHAIRMAN RIGLER: There is the problem.
You are inserting that it is a finding of
fact that these amendments conform to the Code.

18

19

MR. REYNOLDS: Not that the Department agreed
to it, though.

20

21

I am asserting that, and that is my offer
of proof.

22

23

24

25

And the question as to whether the Department
agreed or disagreed with me, the offer is silent on that.
But I think I am entitled on the basis of this document
to make that assertion, and I am making that assertion in

bw9

1 this proceeding.

2 I guess that we will come out in terms of
3 how Ohio law is interpreted and we will have to argue that to
4 the board.

5 CHAIRMAN RIGLER: You certainly may argue that
6 to the Board. The problem is that this document doesn't
7 prove or disprove.

8 MR. REYNOLDS: Pardon me?

9 CHAIRMAN RIGLER: This document does not
10 prove or disprove that proposition.

ES27

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

De 28¹
ch 1

MR. REYNOLDS: Indeed, the agreement itself is clear on its face that the amendment conforms the provision to the Ohio Code. The dispute, if you will, in this case is what the Ohio Code provides. But in terms of the amendment and the provision in the document, I don't think there is any contest nor any basis for arguing with respect to this document that the amendment does conform the provision to section 4905.261 of the revised code.

CHAIRMAN RIGLER: In the opinion of the Ohio Power Company?

MR. REYNOLDS: I think it is in the opinion of everybody.

CHAIRMAN RIGLER: What is what we cannot accept.

MR. REYNOLDS: But the language of the amendment and the language of the contract references, incorporates by reference the Ohio Code.

CHAIRMAN RIGLER: That may be, but that doesn't emerge from this document on its face, does it?

MR. REYNOLDS: Well, I guess --

CHAIRMAN RIGLER: I don't know that we have a disagreement.

MR. REYNOLDS: The contract provisions makes specific reference, and that is the only part of it, to the Ohio Code provision. And the amendment does, in fact, based on what is in this record, conform to that Ohio Code

1 provision.

ch 2

2 CHAIRMAN RIGLER: We are not going to spend more
3 time on it.

4 The offer is acceptable, except that it must be
5 understood that it is the representation of Ohio Power that
6 the amendment conforms to the Ohio Code. If you accept
7 that, then the offer is acceptable to the Board.

8 MR. REYNOLDS: Well, I don't have any choice.

9 CHAIRMAN RIGLER: All right.

10 However, we will defer actual receipt until the
11 Department is satisfied with respect to the supplementary
12 materials.

13 MR. KLEE: The next document will be much easier.
14 We are discarding -- you have already discarded the Board's
15 copy. But for the other parties, we are discarding the two-
16 page memorandum from Charlie Jack to the file dated
17 February 2, 1970.

18 The next document we would like to identify is a
19 one-page memorandum dated October 7, 1971, from W. E.
20 Hupenbecker to S. Harding. We would like to have this
21 document marked for identification as Applicants Exhibit
22 249 (TE). We would move the document into evidence at this
23 time.

24 CHAIRMAN RIGLER: Hearing no objection, we will
25 receive 249 into evidence.

ch 3

1 (Whereupon, the document referred
2 to was marked as Applicants
3 Exhibit 249 (TE) for identifi-
4 cation and was received in
5 evidence.)

6 MR. KLEE: The next document we would like to
7 identify is a one-page letter dated November 27, 1972, from
8 John C. Engle to John K. Davis. And again, we have not
9 been requested to make an offer, and so we would like to move
10 this into evidence at this time.

11 MR. GOLDBERG: Excuse me --

12 MR. KLEE: Excuse me.

13 I would like this document to be marked for
14 identification as Applicants Exhibit 250 (TE).

15 (Whereupon, the document referred
16 to was marked as Applicants
17 Exhibit 250 (TE) for identifi-
18 cation.)

19 MR. GOLDBERG: Excuse me.

20 My documents are not in the order in which you are
21 proceeding, so I need some time to find this.

22 MR. KLEE: At this time, we would like to move
23 the document previously marked for identification as Applicants
24 Exhibit 250 into evidence.

25 CHAIRMAN RIGLER: Hearing no objection, it is

1 admitted.

ch 4

2 (Whereupon, the document pre-
3 viously marked for identifica-
4 tion as Applicants Exhibit 250
5 (TE) was received in evidence.)

6 MR. KLEE: The next document is a three-page
7 document dated April 25, 1973 and bearing the caption on
8 the front page, "Information to accompany application for new
9 delivery point by Buckeye member."

10 It is our understanding that this -- that this is an
11 attachment to a document already in evidence as NRC 128, and
12 the Toledo Edison Company would merely like to replace the
13 existing attachment with a more clearly legible copy and
14 request that the three pages be redlined. It is an attachment
15 to NRC 128.

16 CHAIRMAN RIGLER: Are you moving it into
17 evidence?

18 MR. KLEE: It is already in evidence, Mr.
19 Chairman.

20 CHAIRMAN RIGLER: I see.

21 MR. KLEE: The next document is a one-page letter
22 dated June 21, 1973, from Mr. F. Brian Wortman to Mr.
23 Marvin Keck. We would like this document marked for
24 identification as Applicants Exhibit No. 251 (TE), and we
25 would like to move at this time this document into evidence.

1
ch 5

2 CHAIRMAN RIGLER: Hearing no objection, we will
3 receive 251 into evidence.

4 (Whereupon, the document referred
5 to was marked as Applicants
6 Exhibit 251 (TE) for identifica-
7 tion and was received in
8 evidence.)

9 MR. KLEE: The next document --

10 MR. GOLDBERG: Excuse me.

11 Wasn't that 252?

12 MR. KLEE: No; 251.

13 MR. GOLDBERG: I'm sorry.

14 MR. KLEE: The next document is a one-page letter
15 dated July 23, 1973. The initials on the bottom are from
16 Marvin W. Keck. It was sent to Mr. F. Brian Wortman. We
17 would like to this document marked as Applicants Exhibit No. 252
18 (TE). We would like this document moved into evidence at
19 this time.

20 CHAIRMAN RIGLER: Hearing no objection, we will
21 admit it.

22 (Whereupon, the document referred
23 to was marked as Applicants
24 Exhibit 252 (TE) for identifi-
25 cation and was received in
evidence.)

S29

bwl 1

MR. KLEE: The next document is a three-page letter dated February 24, 1975, from C.E. Campbell to Mr. Roy Dorsey.

The department has requested an offer of proof which has been amended since yesterday to read as follows: Toledo Edison would offer this document not for the truth of the matter asserted therein, but to demonstrate that Napoleon was advised by Mr. Campbell of his understanding as to the Toledo Edison Company's genuine interest in jointly constructing, operating or owning large-scale generating units with municipal systems, such as Napoleon locating within its general area.

At this time we would like to move this document into evidence.

MR. CHARNO: The Department will object to Applicants 1253 on the grounds that, one, it doesn't meet the positive portion of the offer of proof set forth by Toledo Edison and, two, they are again trying to pick and choose between accepting the probity of certain parts of a document and rejecting the remainder. This not being an admission, admission against interest or anything resembling that, I don't think they are in a position to do that.

I take exception to their offer of proof as to the genuine interest in jointly constructing.

1 (Whereupon, the document referred
2 to was marked Applicants
3 Exhibit 253'(TG) for
4 identification.)

5 I presume they are referring to the second full
6 paragraph on page 2 which says this, "There is reason
7 to believe that the Toledo Edison Company would give
8 various considerations to some form of joint venture
9 with Napoleon and/or other communities.

10 That makes no reference to the sources of the
11 statement. We have no idea whether Toledo Edison had such
12 an interest, whether it had been communicated to
13 Mr. Campbell, whether Mr. Campbell was speculating
14 completely.

15 He certainly -- it wouldn't be unlikely in a
16 communication of the nature of Applicants 253.

17 CHAIRMAN RIGLER: The objection of the scope
18 of the document is overruled. What was that about
19 picking and choosing?

20 MR. CHARNO: They are not offering it for the
21 truth of the matters asserted therein.

22 However, they are offering it for the truth
23 of apparently the second full paragraph on page 2, in that
24 they have not only accepted that, but gone beyond that.
25

bw3

1 CHAIRMAN RIGLER: Was there another portion
2 you felt should be red-lined or taken into consideration
3 by the Board?

4 MR. CHARNO: Well, the entire document presumably
5 being less than three pages.

6 CHAIRMAN RIGLER: You are saying that there are
7 materials in here as to which they have picked and chosen
8 and I am asking, what is it you want us to look at that
9 would undercut whatever they want us to look at.

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

11 CHAIRMAN RIGLER: All right.

12 MR. CHARNO: This letter appears to be a
13 solicitation, unsolicited by the City of Napoleon containing
14 a voluntary comment, which is in accord with the
15 writer's interests concerning Toledo;s inclinations
16 for which no basis is stated.

17 So we would again object on the basis of h e a r
18 hearsay.

19 CHAIRMAN RIGLER: The objections are overruled.
20 We will receive 253.

21 (Whereupon, the document
22 previously marked Applicants
23 Exhibit 253 (TE)
24 identification, was received
25 in evidence.

lw4 1 MR. KLEE: The next document is a one-page
2 memorandum dated April 17, 1975, from John B. Cloer to
3 W. A. Johnson.

4 We would request that this document be
5 moved into evidence at this time.

6 (Whereupon, the
7 document referred to was
8 marked Applicants Exhibit
9 254(TE) for identification.)

10 CHAIRMAN RIGLER: Hearing no objection, we
11 will receive 254 into evidence.

12 (Whereupon, the document
13 previously marked Applicants
14 Exhibit 254(TE) for
15 identification, was received
16 in evidence.)

17 MR. KLEE: The next document is a one-page
18 memorandum with two captions dated June 11, 1975,
19 from Tony Bosch to John Libbe.

20 We request that this document be marked
21 for identification as Applicants Exhibit
22 Number 255.

23 (Whereupon, the document
24 referred to was marked
25 Applicants Exhibit 255 (TE)
for Identification.)

bw5 1

2 MR. KLEE: And the Department has requested
3 an offer on this document, and it is as follows: Toledo
4 Edison would offer this document to show that
5 there are ongoing negotiations between Toledo Edison
6 and Southeastern Michigan Cooperative, for Toledo Edison
7 to provide direct wholesale service to the Michigan
8 portion of the Southeastern Michigan Cooperative system
9 and, in fact Toledo Edison will be providing such service
10 in the near future.

11 Toledo Edison would also offer this document
12 to show that its willingness to negotiate and sell
13 wholesale power directly to the Michigan portion of the
14 Southeastern Michigan Cooperatives inconsistent with
15 the allegations of the Department of Justice that there
16 is a territorial agreement between the Consumers Power
17 and the Toledo Edison Company.

18 CHAIRMAN RIGLER: Mr. Klee, let me ask you
19 if a delivery point has been established as contemplated
20 by this June 11, 1975, memorandum?

21 MR. KLEE: The physical delivery point itself
22 has not been constructed.

23 The commitment, however, has been made, as
24 I understand it.

25 CHAIRMAN RIGLER: The what?

MR. KLEE: Well, the physical delivery point

1 has not been constructed. There is a definite commitment
2 to go ahead.

3 And --

4 CHAIRMAN RIGLER: Is there a written agreement
5 between the Southeastern Michigan REC and Toledo Edison?

6 MR. REYNOLDS: Mr. Chairman, I think the problem
7 is that you are catching us at a time when I am not
8 sure whether it has, in fact been signed yet.

9 There is an agreement. My understanding is
10 that it has been negotiated, but for one or two minor
11 points that are not large controversies, and it is
12 neither signed or is about to be signed.

13 We would certainly be prepared to furnish
14 that copy to the Board as soon as it is executed.

15 I am not confident now enough to say that it has
16 in fact been fully executed.

17 But I think they are just about ready to
18 execute it.

19 MR. CHARNO: Has this been offered?

20 MR. KLEE: The Toledo Edison Company would
21 like to offer this document into evidence at this time.

22 MR. CHARNO: Mr. Chairman, we would object
23 to this, and the following two documents which happen
24 to be an identical offer of proof.

25 And our objection goes in large part to the

bw7 1

subject matter of your question.

2

We would object to the portion of the offer that states, and in fact, Toledo Edison will be providing such service in the near future, which is not indicated by this document, the next document or the document following that.

3

4

5

6

7

We would also object to that portion of the offer as, and sell wholesale power directly to the Michigan portion of the Southeastern Michigan Cooperative, et cetera.

8

9

10

11

We recognize that there are ongoing negotiations. We believe that this document and the following two documents demonstrate the existence of those negotiations.

12

13

14

15

Our latest information is that there is no agreement and on that basis, we would resist allowing the inference to be stated as part of an offer of proof that such an agreement will be concluded or has been concluded depending upon which portion of the offer you look at.

16

17

18

19

20

21

MR. REYNOLDS: Is it your representation that your information is that there is some reason to believe it will not be concluded in the near future?

22

23

24

MR. CHARNO: I am saying that our information does not indicate that such an agreement has been

25

bw8

1 concluded, and I would resist an offer of proof
2 that states that it has.

3 MR. REYNOLDS: I don't believe the offer
4 stated that.

5 MR. CHARNO: These documents do not indicate --

6 CHAIRMAN RIGLER: We are not going to take
7 the part of the offer that says that something is going to
8 happen in the immediate future.

9 MR. CHARNO: I think further that as to the
10 second part of the offer, it may show these 1975 negotiations
11 may show Toledo Edison willingness to negotiate.

12 But until a contract of sale, the first of
13 its kind, is signed, that hasn't been demonstrated by
14 these documents, and they don't begin to touch it.

15 Are

16 CHAIRMAN RIGLER: The limitations on the offer
17 proposed by the Department acceptable to
18 Toledo Edison?

19 MR. KLEE: I am not sure I understand the
20 last limitation. If I could have that back again, maybe
21 I could comment on it.

22 MR. CHARNO: We have no problem with the fact that
23 this document is offered to show Toledo
24 Edison's willingness to negotiate.

25 Until a sale agreement is concluded, I don't think

bw9

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

we have a demonstration by these documents or by anything that there is a willingness to sell wholesale power directly into the Michigan portion of the Southeast Michigan Cooperative.

ES29

de 30

ch.1 1

2 CHAIRMAN RIGLER: How about that part of the offer
3 that says that these documents negate the allegation? There
4 was some impediment to territorial sales.

5 MR. CHARNO: I don't believe that a document
6 which demonstrates a willingness to negotiate necessarily
7 negates a territorial agreement. I think its argument --

8 CHAIRMAN RIGLER: Why would they negotiate if they
9 didn't intend to sell in that territory?

10 MR. CHARNO: I think negotiations have taken place
11 where there was no intent to enter into an agreement at the
12 other end.

13 CHAIRMAN RIGLER: But this is an internal company
14 document, isn't it?

15 MR. CHARNO: It is an internal company document
16 after this proceeding was instituted, and these claims were
17 well known.

18 CHAIRMAN RIGLER: Nonetheless, it is an internal
19 company document, and --

20 MR. CHARNO: I believe --

21 CHAIRMAN RIGLER: These people are saying to each
22 other that the request will receive favorable action. They
23 are not saying it to some outsider.

24 MR. CHARNO: The issue of whether or not this agree-
25 ment, the territorial agreement, existed and the effect upon,
current effect upon Southeastern Michigan had already been the

ch 2

1 subject of deposition of Toledo Edison employees as of the
2 date of this memorandum.

3 CHAIRMAN RIGLER: The offer seemed to indicate that
4 where had never been such an agreement, and a June 1965 negotiation
5 may not be relevant to whether there was such an agreement in
6 the past.

7 MR. CHARNO: Well, that is certainly a sub-aspect
8 of whether that portion of the offer going to the reputation
9 has any validity. Certainly, it has no validity prior to
10 the date of the document.

11 CHAIRMAN RIGLER: Do you want to make all three
12 and then we will make a ruling with respect to all three of
13 them?

14 MR. KLEE: Could I respond to the last comments?

15 CHAIRMAN RIGLER: Yes.

16 MR. KLEE: The offer is silent. It doesn't
17 state any specific time-frame on its face.

18 CHAIRMAN RIGLER: That was my problem, Mr. Klee.

19 MR. REYNOLDS: If we solved that problem by modi-
20 fying the offer to indicate that as of the date of these
21 memorandums, they are being offered to show that there is not
22 in existence a territorial agreement between Consumers and
23 Toledo Edison that would preclude Toledo Edison from
24 negotiating with the Southeastern Michigan Coop for the
25 purpose of establishing a delivery point, would that

1 satisfy the problem?

ch 3

2 CHAIRMAN RIGLER: I would take that offer, yes.

3 MR. REYNOLDS: I don't think we have any
4 problem with that. I would, however, with respect to the
5 Department's other comment, I would respond similar to the way
6 that you responded, Mr. Chairman, on a different point. That
7 is, why would we be negotiating with Southeastern Michigan if
8 there was not a willingness to sell them wholesale power?

9 MR. CHARNO: There are a number of things being
10 negotiated in addition to the sale of wholesale power.

11 CHAIRMAN RIGLER: Is the modification stated by
12 Mr. Reynolds acceptable?

13 MR. KLEE: Yes, sir.

14 MR. CHARNO: Could we have that back, read by
15 the reporter, please?

16 (The Reporter read the record as requested.)

17 MR. CHARNO: We will still object.

18 CHAIRMAN RIGLER: Your objection is overruled.

19 MR. GOLDBERG: Could I ask counsel to provide the
20 staff with a more legible copy of the first page of this
21 exhibit?

22 MR. KLEE: We would be glad to provide you with a
23 more legible copy.

24 I will now mark the other two documents and move
25 them in at one time.

1 The next document is a one-page letter bearing the
ch 4 2 date July 23, 1975, from Tony Bosch to Mr. Carl J. Hoffman,
3 which we would like to have marked for identification as
4 Applicants Exhibit No. 256 (TE).

5 (Whereupon, the document referred
6 to was marked as Applicants
7 Exhibit 256 (TE) for identi-
8 fication.)

9 MR. KLEE: The next document is a one-page
10 memorandum with two attachments dated July 31, 1975, from
11 Tony Bosch, Jr., to John Libbe. And we would like to have
12 it marked for identification as Applicants Exhibit No. 257
13 (TE), and we would like to move all three of these documents
14 into evidence at this time.

15 (Whereupon, the document referred
16 to was marked as Applicants
17 Exhibit 257 (TE) for
18 identification.)

19 MR. CHARNO: All three of these come in with the
20 same offer of proof, and we would object that they don't
21 meet the offer.

22 CHAIRMAN RIGLER: The objection is overruled,
23 and we will receive all three documents, 255, 256 and
24 257 into evidence.
25

1
ch 5

2 (Whereupon, the documents pre-
3 viously marked for identifica-
4 tion as Applicants Exhibits
5 255, 256 and 257 (TE) were
6 received in evidence.)

7 MR. KLEE: The next document is a one-page
8 document which is a clipping from a newspaper bearing the date
9 October 15, 1975, and captioned, "Napoleon's electric system
10 enjoying financial help." We would like this document to
11 be marked for identification as Applicants Exhibit No. 258
12 (TE).

13 (Whereupon, the document referred
14 to was marked as Applicants
15 Exhibit 258 (TE) for
16 identification.)

17 MR. KLEP: The offer --

18 MR. CHARNO: Didn't we -- we didn't request an
19 offer. We simply asked if it was being offered for the truth
20 of the contents.

21 MR. KLEE: I will read our response.

22 Toledo Edison is offering this document not for
23 the truth of the matters asserted therein but to demonstrate
24 that the City of Napoleon was under no misapprehension as to
25 any so-called price squeeze for its inability to offer
retail service below the rates of Toledo Edison and, in fact,

1 Napoleon represented that it could undersell Toledo Edison
ch 6 2 at the residential, commercial and industrial levels.

3 We would move that this document be admitted into
and 30 4 evidence.

begin 31⁵ 5 MR. CHARNO: I don't think that the conclusions
6 contained in the offer of proof can be reached without
7 assuming the truth of the statements contained in the
8 article. Therefore, I would object to the newspaper article
9 as hearsay.

10 MR. GOLDBERG: I would join in that objection
11 and note that this does not support the offer insofar as
12 showing knowledge on the part of the City of Napoleon.

13 MR. HJELMFELT: I join in the objection on the
14 basis that if it is not for the truth of the matter, all it
15 shows is that there was a newspaper article published, and I
16 don't see any relevance to that.

17 CHAIRMAN RIGLER: The objections are sustained.

18 MR. KLEE: I would like to address the next two
19 documents together. They relate to the same subject matter
20 and an offer has been requested with respect to both, which is
21 identical.

22 The first document consists of four pages and is
23 a copy of the service agreement between the Village of
24 Bradner, Ohio and the Toledo Edison Company entered into on
25 the 20th day of April, 1976. We request that this document

ch 7

1 be marked for identification as Applicants Exhibit No. 259
2 (TE).

3 (Whereupon, the document referred
4 to was marked as Applicants
5 Exhibit 259 (TE) for
6 identification.)

7 MR. KLEE: Mr. Chairman, are your copies redlined?

8 CHAIRMAN RIGLER: Yes.

9 MR. KLEE: the entire document is redlined, for
10 the other parties.

11 MR. CHARNO: Okay.

12 MR. KLEE: The next document is -- consists of four
13 pages and is the service agreement between the Village of
14 Haskins, Ohio and the Toledo Edison Company, dated March
15 4, 1976.

16 (Whereupon, the document referred
17 to was marked as Applicants
18 Exhibit 260 (TE) for
19 identification.)

20 MR. KLEE: The offer for these is as follows.
21 Toledo Edison would offer these agreements to show the
22 present terms and conditions under which service is provided
23 to the City of Brander and Haskins, Ohio.

24 At this time, the Toledo Edison Company would
25 move these documents into evidence.

MR. CHARNO: We have no objection.

MR. KLEE: All -- both of these documents in
entirety are redlined.

CHAIRMAN RIGLER: Hearing no objection, we will
259 and 260 into evidence.

(Whereupon, the documents pre-
viously marked for identifica-
tion as Applicants Exhibits
259 and 260 (TE) were received
in evidence.)

MR. KLEE: The next document is a multipage document
with the caption, "FPC Docket No. 76-132, a Toledo Edison
supplemental data for 12 months ending September 30,

We would request that this document be marked
for identification as Applicants Exhibit No. 261 (TE).

(Whereupon, the document referred
to was marked as Applicants
Exhibit 261 (TE) for
identification.)

MR. KLEE: An offer of proof was requested, and
it follows. Toledo Edison would offer this document
in which it states that the FPC requires Toledo Edison to file a
service study, that Toledo Edison has so filed a
study and that such a study provides information upon which

ch 9

1 the FPC sets the rates Toledo Edison charges its wholesale
2 customers.

3 At this time, we would move that this document
4 be entered into evidence.

5 MR. CHARNO: Could we have an indication of the
6 redlining on this document?

7 MR. REYNOLDS: We gave it to you.

8 MR. KLEE: Is there any problem with your copy?

9 CHAIRMAN RIGLER: Ours are redlined.

10 Is the Department going to object?

11 MR. CHARNO: Yes, sir.

12 MR. GOLDBERG: Where is the redlining?

13 MR. REYNOLDS: The first six pages.

14 MR. CHARNO: Hold it just a second.

15 There seems to be a little disagreement.

16 MR. REYNOLDS: None whatsoever.

17 CHAIRMAN RIGLER: Off the record.

18 (Discussion off the record.)

19 MR. CHARNO: The Department would object to
20 Applicants 261 as not meeting the offer, specifically that
21 portion of the offer that was -- and that such a study
22 provides the information upon which the FPC sets the rates.
23 Toledo Edison charges its wholesale customers.

24 We don't believe that this document indicates
25 anything resembling that portion in the offer. We further

ch 10

1 don't believe that it indicates the requirements of the
2 Federal Power Commission except through the representations
3 of the -- if at all -- except through the representations of
4 the Toledo Edison employees.

5 We would not dispute that there is such a
6 requirement if there is, but we don't believe it comes from
7 this document. Certainly, the document does appear to
8 represent what Toledo Edison has characterized as the cost of
9 service study. I would believe that, based on those
10 comments, the document is irrelevant.

11 MR. HJELMFELT: I would object on the basis that
12 the filing presented is not the cost of service study upon which
13 the FPC files rates. It is just backup material and not
14 the future rate period for which the rates are set.

15 CHAIRMAN RIGLER: Not what?

16 MR. HJELMFELT: Not the future cost period of
17 estimated costs upon which rates are approved or determined.

18 Also, as a part of this big document from which
19 this smaller excerpt was handed out, there is attached the
20 testimony of Mr. Hupenbecker, which indicates on page 2
21 that the rates that are filed are not based upon cost
22 but based upon a negotiated settlement.

23

24

25

S32 1
bwl 2

MR. KLEE: Mr. Chairman, I think that the offer, the document clearly conforms insofar as the offer merely states that this is the information upon which the Toledo Edison rates are set, and I don't think that the objections voiced by the opposing parties are --

CHAIRMAN RIGLER: Wouldn't it be correct to say that this is the information submitted by Toledo Edison in connection with its pending rate request?

MR. KLEE: That is what I thought the offer was.

CHAIRMAN RIGLER: In those terms, is it acceptable?

MR. CHARNO: It is.

MR. HJELMFELT: It is a portion of it.

But my understanding in looking at this rate filing, it is not the entire rate filing that is required. It is merely the backup material, actual cost data of a period prior to the time when the new rates would go into effect and that the new rates are not based upon this data.

This is merely a test against data which is an estimate of a future test year which is the actual test year that is used.

MR. REYNOLDS: What do you think is missing? That might clarify your objection. There is data as to the past test year, and the future test year. It is the

1 information that was supplied in connection with the
bw2 2 rate that is proposed.

3 MR. HJELMFELT: Well, I didn't understand, I don't
4 understand this to be both the future and the past test
5 years.

6 MR. REYNOLDS: It does contain data as to both.

7 MR. HJELMFELT: Is there a representation
8 that this is the entire material that was filed with the
9 FPC?

10 MR. CHARNO: On page 3 the document states, this
11 present filing is being made solely to correct the
12 deficiencies in the data submitted as part of the company's
13 filing of September 17, 1975.

14 It doesn't cancel any item, except to the extent
15 specifically noted above.

16 So it would appear that it is not the
17 complete filing made.

18 CHAIRMAN RIGLER: All right. We are going to
19 move along. We are going to withhold ruling on the
20 admissibility of this until the Applicants have a chance
21 to advise us as to whether there is additional material.

22 On the other hand, if there is
23 additional material, I would hope that we would not have to
24 put immaterial or irrelevant portions into our record, and
25 we could confine any additions to this exhibit to

bw3

1 red-lined portions that are worthy of our consideration.

2 Why don't we take our break?

3 MR. REYNOLDS: Could I ask one question?

4 This is submitted, and we have red-lined
5 nothing but the introductory portion.

6 I guess the objection goes to whether the
7 listing, if you will, in the cover letter is complete.
8 And if we find out it is not, an amendment to that listing
9 would be what everybody has in mind.

10 I am afraid that these things are ongoing and there
11 are amendments.

12 We could have come in with a cartload of material
13 but I don't know that we want to open a rate case.

14 CHAIRMAN RIGLER: Consult with Mr. Hjelmfelt and
15 find out what it is he would be interested in saying.

16 MR. REYNOLDS: That might be helpful.

17 All right.

18 CHAIRMAN RIGLER: Okay.

19 Why don't we come back at --

20 MR. KLEE: That is all of our documents.

21 CHAIRMAN RIGLER: All right.

22 Why don't we come back at 4 o'clock?

23 (Recess.)

ES32

24

25

S33
bwl

1 MR. RIESER: The first document I would like
2 to mark for identification is a document with the
3 heading Pennsylvania Public Utility Commission entitled
4 Certificate of Public Convenience dated May 3, 1967,
5 with an attached order by the Pennsylvania Public Utility
6 Commission.

7 I would ask that this document be identified
8 as Applicants Exhibit 262 and move its admission.

9 (The document referred to was
10 marked Applicant's Exhibit
11 262 for identification.)

12 MR. CHARNO: Is this being offered for the
13 truth of the contents?

14 MR. RIESER: Yes.

15 MR. CHARNO: Unless Duquesne Light is arguing
16 some kind of exclusive jurisdiction or collateral
17 estoppel, we would challenge this document on the basis
18 of relevance.

19 MR. RIESER: If the Board please, I think
20 we have heard this argument before earlier this morning.

21 CHAIRMAN RIGLER: Yes.

22 Not with respect to the PUC. However we
23 are going to admit it.

24 MR. RIESER: You said you overruled the objection?

25 CHAIRMAN RIGLER: It is admitted, yes.

1 (Whereupon, the document previously
bw2 2 marked Applicants Exhibit 262 (DL)
3 for identification, was received
4 in evidence.)

5 MR. RIESER: The second exhibit is a document
6 entitled the United States of America Federal Power
7 Commission, dated, or issued, June 3, June 13, 1967.
8 I would request that this exhibit be marked for identification
9 as Applicants Exhibit 263 (DL) and move its admission.

10 (Whereupon, the document referred
11 to was marked Applicants Exhibit
12 263 (DL) for identification.)

13 CHAIRMAN RIGLER: Hearing no objection, we will
14 admit Applicants 263.

15 (Whereupon, the document previously
16 marked Applicants Exhibit 263 (DL)
17 for identification, was received
18 in evidence.)

19 MR. RIESER: The third document is a document, ^{at} the
20 top of which there is the title decisions of the Public
21 Utility Commission and on the lower left-hand portion of
22 which it is stated, Pennsylvania Public Utility Commission,
23 Allegheny Center Associates, Allegheny Center Associates
24 versus Duquesne Light Company.

25 I will inform you that although this copy itself

1 does not indicate it, it comes from Volume 42 of the
2 Pennsylvania Public Utility Commission concerning
3 Rule 13, and I would move its admission at this time.

4 (Whereupon, the document referred
5 to was marked Applicants Exhibit 264
6 (DL) for identification.)

7 MR. CHARNO: The Department would --

8 MR. RIESER: Excuse me.

9 I forgot to give it a number.

10 I would ask that this be marked for identification
11 as Applicants Exhibit 264(DL).

12 Mr. charno; Is this document being offered
13 for the truth of the contents?

14 MR. RIESER: Yes, it is.

15 MR. CHARNO: I would object on the grounds that
16 this is wholly irrelevant with respect to the factual
17 contents, all of which have been red-lined.

18 It doesn't deal with any municipal system
19 relative to Duquesne Light.

20 To the extent that it applies a legal application or
21 construction of Rule 13, it certainly is briefable.

22 I don't think it belongs as an exhibit in this
23 proceeding.

24 CHAIRMAN RIGLER: You are saying we could take
25 judicial notice of it?

DW4

1 MR. CHARNO: I think it could be argued in brief,
2 yes.

3 MR. RIESER: I had submitted this copy for
4 the convenience of the Board. I felt that I could either
5 ask the Board to take judicial notice or have the Board
6 give me a decision on it.

7 CHAIRMAN RIGLER: I agree.

8 We will receive it.

9 (Whereupon, the document
10 previously marked Applicants
11 Exhibit 264 (DL) for
12 identification was received
13 in evidence.)

14 MR. RIESER: That was all for
15 Duquesne Light.

16 CHAIRMAN RIGLER: So that concludes the new
17 exhibits to be introduced today?

ES33

18
19
20
21
22
23
24
25

ch 1
DE34

1 MR. REYNOLDS: I think it does, yes, sir.

2 MR. ZAHLER: Yes, with the exception of the
3 additions to the deposition testimony which has already been
4 admitted into evidence. At the time that deposition was moved
5 into evidence, Applicants, pursuant to Rule 106 and, I believe,
6 the Federal Rule of Civil Procedure 32, asked to reserve their
7 right to introduce other portions of the depositions that came
8 in.

9 Applicants propose to do that at this time. The
10 first thing I would like to do is, the Department of Justice
11 Exhibit 585, which is a list of the pages the Department
12 attached to that deposition testimony -- the Applicants
13 prepared an addendum which lists applicants' additions and
14 additional redlining.

15 And I would request that this eleven-page
16 document be appended to the Department of Justice Exhibit 585.

17 MR. CHARNO: Mr. Chairman, I think we are going to
18 have some small problems with respect to depositions. The
19 rules, as I understand them, Rule 106 requires
20 providing the context necessary in which to understand the
21 document.

22 Rule 32(a)(4), which I presume is the basis for
23 counsel's statements, provides "if only part of a deposition
24 is offered in evidence by a party, an adverse party may
25 require him to introduce any other part which ought, in

ch 2

1 fairness, to be considered with the part introduced, and
2 any party may introduce any other parts."

3 We feel that the deposition material that we have
4 been supplied and we have examined falls into both
5 categories. With respect to any material put forward by the
6 Applicants which has any relationship whatsoever to the parts
7 of the deposition originally in evidence, the Department
8 has no objection to attaching those to the Department's
9 exhibits.

10 On the other hand, with respect to wholly new
11 material which has no relationship, is not part of the
12 context of the material we placed in evidence, we would like
13 to see that material separately identified as the Applicants'
14 exhibits, and we would also like to see this addendum list
15 separately identified so it would be possible to determine
16 at some point who is putting in what.

17 MR. ZAHLER: If I could respond to that, just on
18 a policy level, it is not clear to me exactly what purpose
19 would be served by that. If we follow Mr. Charno's suggestion,
20 the result is that we are going to have depositions of the
21 same person appearing in two different parts of the testimony.

22 It seems to me it is making complications that are
23 unnecessary in this proceeding. The transcript indicates
24 who is putting it in, as if that makes a difference. I am
25 not clear, but the transcript does clearly indicate who is

ch 3
and 34 1

putting what part in.

begin 35 2

MR. CHARNO: I think the rule makes the provision in order to maintain a coherent record and to be able to determine who put in what, who sponsored what material --

CHAIRMAN RIGLER: Well, that may serve a beneficial purpose, but I think Mr. Zahler is saying that we would still be able to make that determination without having the deposition spread out all over the record.

MR. CHARNO: I think it's more difficult to make that determination when they are all lumped together as to who is sponsoring the testimony.

CHAIRMAN RIGLER: I think it is going to be evident, just by the fact that these will be appended behind the pages the Department has put in already. I think that --

MR. CHARNO: I think that will be confusing, Mr. Chairman, to the extent that these are amendments of pages already in the record. You will have two sets of conflicting redlining appended to each other. One will be less extensive than the other.

CHAIRMAN RIGLER: The Board is going to adopt the procedure suggested by the Applicants on this. It would be more convenient to us, and I don't think it would be unworkable for the other parties.

MR. ZAHLER: So it is clear on the record, I just

ch 4

1 want to make sure everybody understands this. As to the
2 addendum for Applicants, they include new pages of the
3 deposition that we are redlining for the first time. They
4 also include pages that have been previously redlined.

5 In that case, Applicants took the page that was
6 redlined by the Department, added additional redlining, and
7 we xeroxed it. And I think the easiest way for the
8 parties to handle this is, if at all possible, to go through
9 with what Applicants have handed up to the Board and
10 interweave that into the exhibits that are already in
11 evidence. It can be attached as one document.

12 CHAIRMAN RIGLER: The Board will handle it in its
13 own way, and that explanation is helpful.

14 MR. ZAHLER: The one exception --

15 MR. PERI: I would like to just highlight some of
16 our problems.

17 We chose a different method. I think it is con-
18 sistent, and it deals with one redline and two redlines and
19 does indicate -- is responsive to some of the concerns Mr.
20 Charno mentioned. And we just found this to be an easier
21 procedure for us to follow.

22 We have taken the exhibit, indicated what we chose
23 to redline, and it is also a part of the Exhibit Mr. Zahler
24 talked about where we have also laid out what that is,
25 and I think that will be an easy method to follow.

ch 5

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

CHAIRMAN RIGLER: All right.

So now we have an addendum to 585, which should be noncontroversial.

That brings us to the addendums to the depositions themselves. Are we at the point where we receive any objections on the content of that material?

MR. ZAHLER: I think so. The other parties have had these for a while.

Mr. Chairman, I am not clear how you would like us to proceed. Do you want me to read through the numbers or do you want the parties to make objections?

CHAIRMAN RIGLER: The numbers -- well, the exhibits which are the depositions are reflected in the addendum to 585. So it seems to me we can proceed directly to the other parties objecting to addendums to particular exhibits.

MR. CHARNO: Well, initially, we would like to reserve the right to add additional redlining to totally new portions which we can either identify or not identify at this time on the record.

CHAIRMAN RIGLER: We are not going to deny you that right. We are treating it as rebuttal. I think any additional redlining would have to be responsive to the subject matter already raised.

end 35

S36
bwl

1 MR. SMITH: Am I missing your designations,
2 beginning with 557 and going through 568?

3 I have the first -- the first supplement sheet
4 I have begins with 570.

5 MR. ZAHLER: I think so. There should
6 be a cover sheet that says DJ Exhibit 585 on it and
7 has 558 through 568 there.

8 CHAIRMAN RIGLER: My problem then is, and
9 Mr. Smith may have the same one, I have a supplement
10 to 557, labeled "Rudolph."

11 MR. ZAHLER: That's because the Xeroxing
12 didn't come out clearly.

13 That is 558.

14 MR. SMITH: Okay.

15 MR. REYNOLDS: Off the record.

16 (Discussion off the record.)

17 CHAIRMAN RIGLER: In other words, any
18 additional red-lining should narrow the scope of these
19 proceedings and we will treat it as other rebuttal
20 testimony?

21 MR. REYNOLDS: Yes.

22 CHAIRMAN RIGLER: But you certainly have leave
23 to red-line pertinent portions for purposes of rebuttal.

24 MR. CHARNO: The Department turning to page
25 2 under DJ-570, the Dempler deposition, would object to

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

pages 142, line 17 through 143, line 5 and move to strike that material as being a nonresponsive answer which preceded an attempt to secure a responsive answer wherein the Witness was directed not to answer by Counsel.

MR. RIESER: Mr. Chairman, I would respond that Mr. Dempler's answer on those pages is perfectly responsive.

He was outlining that he felt on behalf of Duquesne that Duquesne's rights under the agreement were better than what it felt it could obtain from other sources.

And that was trying to do what it could with CAPCO rather than go outside.

I note on the transcript that I believe he thought the answer was responsive.

In fact, I feel it was an attempt by Mr. Brand to intimidate the Witness.

I might also note that the reason I included that was that I had red-lined the portion beginning at the bottom of page 144 and that the question stated, "Mr. Dempler, you indicated in your last answer that" -- and I felt that I couldn't really red-line that portion of the transcript without red-lining the preceding portion to let the reader know what it was that Mr. Dempler had said earlier.

bw3 1

I hate to interrupt the Board again, but

2

I might add that I did red-line the material, because you

3

could't understand what the Department had red-lined without

4

reading it in the context of the testimony.

5

CHAIRMAN RIGLER: All right.

6

The motion to strike as to that portion

7

of the testimony commencing on 142, line 17, and ending

8

on 143 with line 5, is granted.

9

The rest of the motion to strike is denied.

10

MR. CHARNO: That was the entire motion to strike.

11

Or did we mishear you?

12

CHAIRMAN RIGLER: I thought you included the portion

13

on 142 and 143 in your motion.

14

I was granting it as to that and denying it

15

as to the remainder of the material.

ES36 16

17

18

19

20

21

22

23

24

25

ch
DE 37 1
ch 1

2 MR. CHARNO: Your ruling was directly responsive
3 to my motion. I didn't include anything further than that, or
4 didn't intend to, if I did.

5 If we can go to the Firestone deposition, DJ-575,
6 the Department believes that none of this material should
7 be admitted and that Mr. Firestone has testified before us on
8 two occasions. The page 14 reference, 66 and 57 are
9 material not related to his deposition testimony.

10 MR. PERI: Excuse me.

11 What was the page reference?

12 MR. CHARNO: 1466 and 67.

13 The material appearing at pages 55, 56, 91 and 92,
14 which could, in a broad definition of context be felt to be
15 relating at least to material that he covered on deposition
16 that was placed in evidence by the Department was not -- was
17 all the subject of his testimony before the Board, and we
18 feel that that is impermissible double-dipping into the
19 record to get the same thing from a witness on two occasions.

20 This was previously the subject for discussion at
21 transcript 6198, and I think it was in part the basis for the
22 Board's ruling as pointed out by Mr. Reynolds this morning
23 with respect to the Mansfield testimony before the Securities
24 and Exchange Commission.

25 CHAIRMAN RIGLER: I have a little trouble with
that. I may be with you up to a point, but, plainly, it is

ch 2

1 the same parties who were examining Mr. Firestone during
2 this proceeding and during the deposition. So I don't see the
3 analogy to the SEC proceeding.

4 You are on better ground when you tell us that it
5 would constitute double-dipping,

6 MR. REYNOLDS: Mr. Chairman, I am impressed at the
7 influence that Dr. Pace had on the parties at this
8 proceeding. But I would submit, and I asked Mr. Zahler to
9 give me the transcript, but it is my recollection that this
10 point was specifically raised by me at the time we had the
11 discussion on the introduction of deposition testimony.

12 And my recollection is that we specifically indicated
13 that to the extent deposition testimony is introduced from the
14 other side, if a witness is brought in, that would not fore-
15 close the right of the Applicants to also introduce information
16 with respect to that same deposition.

17 MR. CHARNO: The Board indicated that they would
18 reserve judgment with respect to the cumulative effect of such
19 a submission.

20 MR. REYNOLDS: 6198 of the transcript with respect
21 to that point, you indicated that if it was useful and
22 appropriate, we would probably tend to let it in. If it is
23 repetitious, if it consists of going over the same material
24 two or three times, we might discourage it as repetitious
25 and cumulative.

ch 3

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

CHAIRMAN RIGLER: This is why I know you are going to do so well in the shorter time period on the findings and conclusions, because you are beautifully organized on that transcript.

MR. REYNOLDS: He gave us the reference, and I do have an index.

(Laughter.)

end 11

S38
bwl

1 MR. REYNOLDS: Mr. Charno, is way ahead of
2 me.

3 CHAIRMAN RIGLER: Okay. It is clear to me
4 that we are going to have to look this over.

5 We can't rule right this minute on the
6 number of pages and make a determination as to whether
7 it is repetitious.

8 Maybe it would be helpful to find out how
9 sensitive the rest of the Department's objections are
10 going to be and get a sounding from the Staff and the
11 City.

12 MR. REYNOLDS: Did Mr. Charno say it was
13 repetitious?

14 CHAIRMAN RIGLER: I thought he did.

15 Mr. Reynolds, are you responding to Mr. Charno's
16 point that we had live, direct testimony on the identical
17 issues which were covered in the deposition? Or is it
18 your contention that these are slightly different?

19 MR. REYNOLDS: I think if we have live
20 testimony and deposition testimony on the identical issue
21 and the testimony itself is not identical that it may
22 be that the testimony of both should be admissible.

23 I think that where you run into the caveat,
24 if you will, of the Chairman's is where you have duplicative
25 testimony that was live and that was submitted in

1 deposition context.

bw2

2 And there, I think, that the "double-dipping"
3 analogy may be pertinent.

4 But I don't see that because you have live
5 testimony on an issue that that would foreclose additional
6 deposition testimony on that same issues,
7 especially in those circumstances where the Department
8 has introduced deposition testimony and what is
9 being put in is to clarify and put in context that which
10 the Department has put in already and red-lined in the
11 deposition.

12 That is what I was addressing.

13 MR. PERI: If I could briefly reply to that.
14 We don't have a case here where the Department of Justice
15 has highlighted 20 or 60 pages. As I understand it, they
16 are talking about four pages.

17 In each case the red-lining continues directly
18 on to something else that the Department red-lined.

19 These were questions either of Mr. Brand or
20 of parties opposed to the license, in any case.

21 And I think in each case they are somewhat
22 more illustrious, and I think they are not
23 cumulative nor repetitious.

ES38 24

25

DE 39
ch 1 1

CHAIRMAN RIGLER: Okay.

2 How about the status report? We are not going to
3 rule on it right now.

4 MR. CHARNO: Are we off the record?

5 CHAIRMAN RIGLER: You can do it off the record.

6 (Discussion off the record.)

7 CHAIRMAN RIGLER: Well, we are going to break here
8 for the day.

9 Can you tell us in advance any other portions we
10 should read?

11 If it is down to 20 minutes, maybe that is not
12 necessary. If there is some major obstacle that is going
13 to require Board review, I would like to know about it. If
14 it is going to be small, page by page objections, it is not
15 worth it.

16 MR. CHARNO: Almost entirely small, page by page
17 objections.

18 MR. REYNOLDS: Mr. Chairman, before we break,
19 I would like to find out what the status report is on
20 witnesses next week. I really do have to coordinate with
21 a number of people.

22 So far I have been alerted as to just one witness
23 on the 23rd, and I don't know whether anybody else is coming
24 in or not next week, and I really have to know in order to
25 alert other counsel. They have to get prepared and so on.

ch 2

1 MR. CHARNO: We can tell you definitely that Mr.
2 Meister is not coming in next week.

3 CHAIRMAN RIGLER: You have one witness scheduled
4 for next Wednesday?

5 MR. CHARNO: We have one definitely.

6 CHAIRMAN RIGLER: One is not coming. One may
7 come, and that leaves one more.

8 MR. REYNOLDS: Is Mr. Meister off the books?

9 MR. CHARNO: Yes.

10 CHAIRMAN RIGLER: So we have White and Meister
11 off?

12 MR. REYNOLDS: We have Mr. Tribble and Mr. Miller.

13 CHAIRMAN RIGLER: Off the record.

14 (Discussion off the record.)

15 CHAIRMAN RIGLER: Okay.

16 We will see you at 10:0'clock next Wednesday.

17 (Whereupon, at 4:45 p.m., the hearing was
18 adjourned to reconvene Wednesday, June 23, 1976, at 10 a.m.)
19
20
21
22
23
24
25