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NUCLEAR REGULATORY COMMISSION

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IN THE MATTER OF:

OHIO Edison Company and
Cleveland Electric Illuminating Co.
(Davis-Besse Nuclear Power
Stations, Units 1, 2 and 3)

Docket No.,
80-0-10
80-8311
80-8112

and

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

80-4102
80-1021

Place - Beaver Springs, Cleveland

Date - Monday, 22 July 1976

Pages 12,711-12,836

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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

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First Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland

Tuesday, 20 July 1976

The hearing in the above-entitled matter was convened,
pursuant to adjournment, at 11:00 a.m.

BEFORE:

- DOUGLAS RIGLER, Esq., Chairman
- JOHN FRYSIK, Member
- IVAN, Smith, Member

APPEARANCES:

(As heretofore noted.)

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C O N T E N T S

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>
Raymond Kudukis	12,739	12,745	12,769
Robert Hart	12,772	12,791	

E X H I B I T S

<u>NUMBER</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
DJ No. 639 - Mr. Charno's ltr of July 6, 1976	12,714	12,719
Applicants' Exhibit 213		12,720
Applicants' Exhibit 278 - Ltr dtd July 7, 76, from Hauser to Reynolds	12,720	
Applicants' Exhibit 279 - Undated draft Affidavit of Francis Gaul	12,720	
Applicants' Exhibit 280 - July 7, 77 Affidavit of Mr. Gaul	12,720	
Applicants' Exhibit 281 - July 2, 76 Affidavit of Judith Coll	12,720	
Applicants' Exhibit 282 - Transcript with Handwritten notes pertaining to Subcommittee mtg of the Cleveland City Council con- ferred on March 5, 1974	12,720	
City of Cleveland Exhibit 168 - tape	12,720	12,723
DJ No. 640 - Pages 172 thru 176 of Mr. Kudukis' deposition of May 13 Volume	12,746	

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P R O C E E D I N G S

CHAIRMAN RIGLER: Good morning, everyone.

We will re-open the record very briefly and for limited purposes this morning.

Since the record was closed, a few tail-end exhibits have been identified and the Board must rule upon their admission into evidence, in addition to which we will consider today the events of March '74, the Gaul hearings, and the position of the City of Cleveland, and we will also consider the Staff's attempt to put into the record certain testimony relating to the circumstances of the afternoon immediately after Mr. Milburn was deposed.

Our first item of business will be to identify the Department of Justice Exhibit 639 for the record, which is Mr. Charro's letter of July 6, 1976 requesting additional red-lining.

Is there objection to the receipt into evidence of DJ Exhibit 639, and the additional red-lining?

MR. REYNOLDS: Applicants don't have any objections, but we would, in light of that red-lining designated on the exhibit, note additional red-lining by Applicants of a very limited nature.

This would probably be the proper time to do it.

CHAIRMAN RIGLER: All right.

Would you care to do so on the record without a

1 written submittal?

2 MR. ZAHLER: With respect to Applicants Exhibit
3 261, Applicants would request that on page 1 of the
4 Hupenbecker testimony, that there be additional red-lining
5 on lines 44 to 51, and on page 2, lines 6 to 18.

6 That completes that particular answer.

7 CHAIRMAN RIGLER: Wait a minute. Page 1, lines
8 which?

9 MR. ZAHLER: 44 to 51. And page 2, lines 6 to
10 18.

11 In addition, since the testimony relates to a
12 particular exhibit in the filing, Applicants request Exhibit
13 8, statement P, pages 1 to 5, be red-lined.

14 CHAIRMAN RIGLER: 8-P?

15 MR. ZAHLER: Exhibit 8, statement P, pages
16 1 to 5.

17 MR. CHARNO: Is that the totality of the additional
18 red-lining?

19 Could we have a chance to examine that before
20 it is moved in -- pardon me, before the red-lining is
21 accepted by the Board?

22 CHAIRMAN RIGLER: Yes.

23 (The document referred to was
24 marked DJ Exhibit 639, for
25 identification.)

1 CHAIRMAN RIGLER: Item 2 is the identification
2 of Applicants Exhibits 278 through 282. Although we have a
3 letter request for identification, now that we have an
4 actual transcript, I think it may be useful to read them
5 into the record and identify them in the transcript.

6 Exhibit 278 is the July 7, 1976 letter from
7 Mr. Hauser to Mr. Reynolds.

8 Exhibit 279 is an undated draft affidavit of
9 Francis Gaul.

10 Exhibit 280 is a July 7, 1976 affidavit of Mr.
11 Gaul.

12 Exhibit 281 is a July 2, 1976 affidavit of
13 Judith Coll.

14 Exhibit 282 is a transcript with handwritten
15 notes pertaining to the Subcommittee of the Cleveland City
16 Council conferring on March 5, 1974.

17 In addition, we will mark as Applicants 283 a
18 tape cassette of the proceedings before the Subcommittee of
19 the Cleveland City Council on March 5, 1974.

20 MR. REYNOLDS: Can we go off the record for a minute?

21 (Discussion off the record.)

22 CHAIRMAN RIGLER: Applicants Exhibit 283 as
23 originally submitted and referred to in the affidavit of
24 Mr. Gall has a mechanical defect. There is a reversal in
25 the tape. At the Board's request, another cassette was

1 provided and I understand that all of the parties consent
2 to use the new recording which is the one we will be
3 hearing this morning in place of the one actually referred
4 to in the Gaul affidavit.

5 Since receipt of Applicant's Exhibit 278
6 through 282, we have had objection by the Department of
7 Justice and City of Cleveland to receipt of them into
8 evidence.

9 MR. LESSY: Staff would join both objections also.

10 CHAIRMAN RIGLER: We have considered the content
11 of those objections. We are going to deny the objections
12 of the City, the Department, and now the Staff.

13 It was not necessary to rule on the issue of
14 timeliness of notification by CEI that it intended to
15 controvert the good faith of the City in seeking ownership
16 in the CAPCO units because the Board considers that the
17 question of Cleveland's past and present desire to participate
18 should be a matter of record in these proceedings.

19 Since the Board believes that this information
20 is necessary to complete the record, collateral questions
21 of document listings in accordance with the procedures
22 applicable to these proceedings are obviated.

23 What we propose to do is to play the tape so that
24 all of us can hear the reported version of what went on at
25 that March 5 council meeting.

1 Then we are going to ask that Mr. Kudukis be
2 called to the stand and the Board wishes the parties or
3 the Board independently will put to him questions relating
4 to the posture of the City of Cleveland in 1974 with respect
5 to ownership or participation in the CAPCO units in its
6 present posture.

7 Mr. Hjelmfelt?

8 MR. HJELMFELT: The City was finally able to
9 locate the original tape which is taped -- it is a three-
10 inch wide tape and taped on a large spool. It is recorded
11 on a permanent installation called a Soundscriber.

12 We can't replay it here. The tape records
13 about 10 hours. This particular spool was used over about
14 a four-month period before it was used up.

15 We have made a cassette recording off of it
16 which differs in some respects from the one that the
17 Applicants have provided for the Board, namely in that it
18 picks up a little sooner and runs a little longer, and
19 also there are portions in the tape provided by the Applicants
20 which have breaks where the machine was shut off and
21 started again.

22 Those do not appear on this tape and a few
23 additional words are picked up.

24 The City would tender that tape to the Board also.

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1 CHAIRMAN RIGLER: What would be most productive?
2 To hear the City's cassette version of the City's transcript
3 of the long tape or to hear the CEI short tape which
4 breaks?

5 MR. BUCHMANN: Wouldn't it make more sense to listen
6 to Mr. Hjelmfelt's tape?

7 We have a transcript of the CEI tape. We can follow
8 along. If that produces any wild disparities, then we
9 can do something about it.

10 Otherwise, I would prefer to hear the longer
11 tape.

12 CHAIRMAN RIGLER: I might note I have had an
13 opportunity to listen to the CEI tape, and there were several
14 places where the transcript of his call did not agree with
15 the exact language of the recording.

16 There did seem to be a problem with the break.
17 So, I think the suggestion we listen to the City's version
18 makes sense.

19 MR. HJELMFELT: Also I understood Mr. Reynolds'
20 motion to admit exhibits included Exhibits 213. I'm not
21 certain whether the Board had ruled on that.

22 CHAIRMAN RIGLER: We have not ruled on 213. 213
23 was the original affidavit that had been rejected.

24 MR. HJELMFELT: Yes.

25 CHAIRMAN RIGLER: That ruling will stand.

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MR. HJELMFELT: That ruling stands?

CHAIRMAN RIGLER: That is correct.

The original affidavit was rejected.

MR. CHARNO: Mr. Chairman, for clarification of the record, I don't believe the Board has ruled on 639.

CHAIRMAN RIGLER: That is correct.

MR. CHARNO: We have no objection to the additional red-lining proposed by Applicants.

CHAIRMAN RIGLER: That being the case, we received into evidence the Departments Exhibit 639, and we will receive the Applicants' request for additional red-lining.

(Whereupon, the document previously marked Exhibit DJ-639 for identification, was received in evidence.)

CHAIRMAN RIGLER: We grant that request of Applicants.

MR. REYNOLDS: Mr. Chairman, before moving on, I would like to, if I could, renew my motion with respect to Applicants 213 and ask that the Board accept it for the fact that an affidavit was prepared. In order to complete the record, since we have introduced drafts of that affidavit, I think to make it clear what the drafts relate to, I would like 213 to come in for at least the fact

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that the affidavit was at least prepared, even if the Board rejects the Exhibit on the basis of the truth of the matters contained therein.

CHAIRMAN RIGLER: Hearing no objection, the Board will receive it for that limited purpose.

XX

(Whereupon, the document previously marked Applicants Exhibit 213 for identification, was received in evidence.)

XX

(Whereupon, Applicants Exhibits 278 through 282 were marked for identification and were received in evidence.)

CHAIRMAN RIGLER: Do we want to identify the City tape as Applicants 284 or do we want to give it a City number?

MR. REYNOLDS: I think we ought to give it a City number.

CHAIRMAN RIGLER: 168.

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(Whereupon, the material referred to was marked City of Cleveland Exhibit No. 168 for identification.)

MR. ZAHLER: In Applicants' Exhibit 277, which is the additional red-lining of Applicants with reference to

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1 Department of Justice Document 300, the red-lining was
2 listed for page 14 and that should be page 4, not page 14.
3 The section number listed there is still correct.

4 CHAIRMAN RIGLER: Well, now -- Mr. Reynolds?

5 MR. REYNOLDS: While we were off the record,
6 the Chairman requested a status report, I believe, on
7 Exhibit 248, which is the Turner letter. I have been
8 in touch with the firm of Simpson, Thatcher and Bartlett
9 and have requested that they provide me with the documentation
10 that is relevant to that correspondence. I have been advised
11 by two lawyers in that firm that they have undertaken
12 a file search of their New York office and also the files
13 at the Brooklyn Warehouse and have not been able to locate
14 any of that documentation.

15 I have asked the firm to go further and to
16 ask Ohio Power Company whether it has any of the documentation
17 that is referred to in the letter, and at the present time
18 they are undertaking a search of the files of Ohio Power
19 Company and also -- which includes the central filing
20 system in Canton -- Ohio Power, and I expect they will report
21 back to me. I had thought today, but shortly on the results
22 of that file search. At the moment, we have not been able to
23 come up with copies of any of that material. There are no
24 documents of that nature in the Toledo Edison files. None in
25 the Ohio Edison files. We are still trying to find if the

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1 documentation is in the files of the Ohio Power Company.

2 I will obtain a letter from Counsel that I
3 have been in communication with, when they have completed
4 the search of the Ohio Power files and communicate to the
5 Board the results of that file search.

6 CHAIRMAN RIGLER: All right.

7 Mr. Charno, refresh my recollection: Had the
8 Department ascertained postiviely that it no longer had
9 its materials relating to this, or was it merely unable
10 to locate them with their being a possibility that they were
11 off in dead storage somplace?

12 MR. CHARNO: We had ascertained we no longer
13 had complete files.

14 We had the vast majority of materials relating
15 to it, which we supplied to the Applicants, but we are missing
16 certain, what we believe to be, significant submissions.

17 CHAIRMAN RIGLER: Are they gone forever, or are
18 they located in a dead storage warehouse?

19 MR. CHARNO: Gone forever.

20 CHAIRMAN RIGLER: I suppose we are ready to
21 proceed to listening to what is now designated as the
22 City's Exhibit 168. The tape of the Gaul Subcommittee
23 proceedings of the Cleveland City Council of March 5, 1974.

24 (Whereupon, the tape was played and listed co
25 by the parties and the Board.)

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K:bwl

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1 CHAIRMAN RIGLER: Did you want to move the City's
2 Exhibit 168 into evidence, Mr. Hjelmfelt?

3 MR. HJELMFELT: I will move 168.

4 CHAIRMAN RIGLER: We will receive Applicants
5 278 through 283, and we will receive City's Exhibit 168
6 at this time.

7 (Whereupon, the material
8 previously marked City of
9 Cleveland Exhibit No. 168
10 for identification, was
11 received in evidence.)

12 MR. BUCHMANN: Whether we can get agreement
13 on the record as to its relationship of the transcript
14 made by Miss Coll, which is Exhibit 281 -- without trying
15 to be controversial about this, I went through that very
16 carefully and subject to the short addition at the end, in
17 which Mr. Kudukis offered to talk about this with Mr. Gaul
18 in the next meeting, and a number of omissions of the
19 phrase "you know," and a few other what I would regard as
20 minor matters, I would suggest that Miss Coll's transcript
21 certainly represents the substance of the tape and, if
22 there is any disagreement -- that may clear it up on the
23 record, but if there is any disagreement, I would like to hear
24 it.

25 MR. HJELMFELT: I would agree with Mr. Buchmann's

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1 statements that Miss Coll's transcript, while not an accurate
2 verbatim transcript of either of the two tapes, catches
3 the substance.

4 References to the tapes themselves are obviously
5 the best evidence.

6 MR. BUCHMANN: I understand that. I think in
7 the key parts, it is verbatim, but we will debate that
8 later on.

9 MR. REYNOLDS: I would like to suggest that
10 perhaps what we could do is picking up at the place where
11 Miss Coll's affidavit picks up, because there is a garbled
12 portion at the front end of the tape, have the tape transcribed
13 into the record as part of the record of today's hearing.

14 That way we will have an accurate transcription
15 of it.

16 CHAIRMAN RIGLER: Who will do it?

17 MR. REYNOLDS: The reporter said she can do that.
18 If we can do it that way, it would be the neatest way to
19 handle the matter.

20 MR. HJELMFELT: Where there is a reference to
21 Mr. Carr, you may stop.

22 CHAIRMAN RIGLER: We will ask the reporter then
23 to use Miss Coll's tape as a guideline and to make an accurate
24 transcription of the City Exhibit 168. Although, the Coll
25 transcript appears correct, sometimes a difference in

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1 inflection might alter the meaning. Mr. Smith thought
2 he detected one such instance which he wanted to discuss
3 with the parties.

4 MR. SMITH: Top of page 2, where Mr. Kudukis
5 responds to Mr. Gaul, the transcript has it being
6 "Yes, Mr. Chairman," which suggests that it is in agreement
7 with everything Mr. Gaul said.

8 I don't hear it that way. I hear it, "Yes,"
9 acknowledging that he had been called upon and then begins
10 a new sentence. Mr. Chairman, may I read -- I think
11 the difference could be important. Not very important, but
12 it could have some significance.

13 Transcribe
14 Tape

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1 MR. GAUL: Since George is here, it might be an
2 appropriate time to discuss. As I recall on Monday, Director,
3 we talked about, you know, getting into Finance Committee
4 hearings and the importance of squeezing every \$100,000, as
5 opposed to millions, and that the City is in a crunch.

6 And then we talked about the capabilities of
7 being able to become a partner-member in plants that would
8 require X millions, anywhere from \$20 million to \$100 and some
9 million. And I think at that time I read your retort, or
10 understood your retort, to be that you were interested in
11 not ownership, but rather kind of a reserve or standby
12 power or power allocation you could tap on a given notice.
13 Is that it?

14 MR. KUDUKIS: Yes.

15 Mr. Chairman, may I just read, you know, two
16 paragraphs. It won't take long, and I think it will clarify
17 that, because it's not the total issue. Okay?

18 Very simply, we have objected, you know, to what
19 is going on, to the building of these plants. And the reasons
20 for our objection -- and I will quote from -- this is our
21 mail.

22 "The City has alleged that CEI has taken steps to
23 isolate the City, thus making it impossible for the City to
24 share the benefits of reserve sharing, coordination, exchange
25 of power and energy, and general transmission and

1 interconnection benefits. Absent access to these benefits,
2 and in view of the size of the City, it is alleged that it is
3 not feasible for the City to achieve the economies necessary
4 for individual ownership in a nuclear project.

5 "Further; it is alleged that the Applicant has
6 denied the City access to participation in the Perry Unit,
7 as well as other nuclear plants in which the Applicant is a
8 participant, because of the Applicant's desire to protect its
9 competitive position.

10 "In addition to this claim, the City has alleged
11 that by the Applicant's dominance over high voltage trans-
12 mission, the Applicant has been able to prevent the City
13 from obtaining alternative sources of power. This dominance
14 over high voltage transmission is a factor which allows the
15 Applicant to participate in nuclear power and at the same time
16 prevents the City from receiving other sources of power."

17 So that it's not just a simple statement of, "We
18 want a piece of the nuclear plant." It's really the total
19 philosophy and the position that we are being put in. We
20 are stating many things. We're stating that, if they build a
21 power plant, and if they use all the high voltage lines for
22 their transmission, and we're denied the power plant, we
23 can't have access to these.

24 Now, in answer to our question, they in turn came
25 out with a proposal saying, "Fine. Give us \$70 million or

1 \$80 million, you may have part of it."

2 We have not replied to that. I mean, we did not
3 seek that proposal. This was their answer to our complaint.

4 MR. GAUL: Mr. Director, and Ray, I respectfully
5 submit this. You know, we have had differences of opinion,
6 and I've always tried to identify where I stand, and I try to
7 ask questions. But I get led around the bush.

8 You know, a little example of it is just like that
9 Account 2540. That was a bum answer. That's just grabbing
10 answer.

11 Now, we ask very simply how people in other cities,
12 in Washington or New York or wherever, could be negotiating
13 and talking to commit this City and this Council for X
14 millions of dollars buying ownership in a plant. And, Ray,
15 you answer me that we're not, in fact, trying to buy ownership
16 into. We are, per se, maneuvering for a position to be able
17 to tap some power.

18 Is that a fair statement?

19 MR. KUDUKIS: Yes.

20 MR. GAUL: All right.

21 Now — and I'd like to accept that, and I hope it
22 is. But here's a letter from Director Whiting. Now, you
23 quoted, and you know quotes around the bush, you're, you know,
24 talking about a lot of things. And, "I wrote you requesting
25 admission to membership in CAPCO. I wrote you on behalf of

1 the City of Cleveland, Division of Light and Power, requesting
2 access to the Perry Nuclear Power Plant through ownership
3 participation."

4 Now, we go over into this proposal, to make
5 absolutely sure ownership is what we're requesting. Now,
6 to make absolutely sure, "Principles of participation. The
7 City prefers to participate with CAPCO" -- "with the CAPCO
8 group in future power resource development through ownership
9 participation, provided that there are no prohibitions under
10 law."

11 Now, later on, and it's right in the next paragraph,
12 "In the alternative that there is a legal impediment to
13 ownership participation, the City will purchase the above
14 percentage's share of the output of the project through unit
15 purchases."

16 So, now, what I ask you -- and I find to be an
17 incorrect answer -- is, we're trying to ascertain a position
18 of ownership participation.

19 MR. KUDUKIS: All right. Now --

20 MR. GAUL: Now, this is signed by Whiting.

21 MR. KUDUKIS: All right. Now, wait a minute. Wait
22 a minute.

23 Now, just, you know -- now, when someone goes into
24 a negotiation with anybody, you have certain things up your
25 sleeve. Now, you're asking me to sit here publicly and to

1 lay everything out.

2 Now, I don't think that's right, Frank. If you
3 want to know and the Council members want to know, I'll
4 explain it to you.

5 MR. GAUL: But, Ray, I'm --

6 MR. KUDUKIS: You're going to destroy our bargaining
7 position at this point, because we're in the middle of it.

8 MR. GAUL: Mr. Chairman, Mr. Director, then maybe
9 that answer should have come prior to this, when we asked
10 how people are walking in saying, "We want a piece of the
11 action," that's going to commit the City --

12 MR. KUDUKIS: I told you, you know, I asked you
13 to have confidence in me. I don't think I've every come
14 before this Committee and spoken something, you know, that
15 is an out-and-out lie. I think that, you know, we have our
16 differences of opinion, we have our misunderstandings. But --
17 the fact of it is, you asked me a question, "Are we going --
18 are we dealing, are we going to buy a piece of that plant?"

19 I told you no.

20 Now, you are here trying to say that is not the
21 case.

22 MR. GAUL: It gets --

23 MR. KUDUKIS: Now, I'm trying to tell you that
24 possibly that may be a legal maneuver to arrive at a more
25 favorable position. Now, I don't think it's fair to go any

1 further. I would be willing to discuss this with you at
2 length.

3 VOICE: Mr. Gaul --

4 MR. GAUL: I'm in a little bit of a quandary,
5 Charlie. Well --

6 MR. KUDUKIS: Assume -- all right. Let me make a
7 hypothetical situation.

8 Assume that a situation existed where we could not
9 by law participate in ownership.

10 MR. GAUL: Yes.

11 MR. KUDUKIS: And assume that there were certain
12 regulations by a federal agency that would say that if you
13 ask for participation, you have to leave yourself open to A,
14 B and C. You cannot say, "I only want it one way." Assume
15 that to be the case.

16 Then, if our Law Department were to write a letter
17 saying, "We only want to buy power. We -- under no conditions
18 can we participate in it," it would then possibly destroy a
19 position that they wanted to attain. It may be in a position
20 where they're saying yes, knowing damn well we'll never buy
21 it because we can't by law, Frank.

22 Now, I'm willing to, if I have to go --

23 MR. GAUL: No.

24 Director, I say they know it isn't by law, because
25 they lay out the alternatives, that since it is not

1 permissible, because you can't join an organization, Mr.
2 Chairman, and Director, that would commit you down the road
3 five years when the City is under a different administration
4 or something.

5 MR. KUDUKIS: Frank, we cannot commit the City for
6 \$70 million or \$80 million or \$90 million without the approval
7 of this Council. You know that, and we know it.

8 So, you know, you showed me a letter written by
9 Director Whiting. I state to you that whatever he is doing,
10 he is putting it in certain legal language. He is taking a
11 position that is most favorable to us to achieve our goal.

12 You asked me if it is our intention to buy a piece
13 of that plant, and I told you no, and I still maintain that
14 position.

15 MR. GAUL: Well, then, we're using it to bribe
16 somebody to get what we want.

17 Now, is that -- you know, let's be fair now.

18 VOICE: (Inaudible.)

19 MR. KUDUKIS: Now, I -- you know, our Law
20 Department, you know, is more familiar with the law than I
21 am in these things. And if they feel in certain instances
22 that we ought to assume a certain position and say that we
23 are willing to participate according to this, this or this,
24 and -- you know, in our own minds, we should have an idea of
25 which one of the three ways we want to go, don't you think?

1 But in order to be in a certain position, we have
2 to maybe propose the three ways, in any event. But this is
3 the judgment of the Law Director which he has exercised in
4 that letter, which is fine.

5 But when you ask me what position I would support,
6 where we are going, what I have said, you know, in private
7 conversations with the Law Director, I've stated it to you.
8 I'll repeat it, and I'll stick to it.

9 MR. GAUL: Okay.

10 Well, then, Mr. Chairman, and Ray -- and I respect
11 your professional background and expertise. You know I do.
12 But it's the number of times that I get led down blind alleys,
13 and then, all of a sudden, you know, it's "Who shot John?"
14 And finally you say, here, "Who shot John?" Here it is, you
15 know. And then the focus of attention changes to another
16 department or somebody else.

17 Now, if Director Whiting had a track record of
18 being a very honorable guy and a very sharp guy and a very
19 businesslike guy, I would have a hell of a lot more faith in
20 what he's trying to jockey into. But when he comes in to --
21 and, you know, just as a former judge and finds a way to
22 legally bribe somebody into a position, then -- and I don't
23 care what flag he flies under to do it, but in my mind it's
24 an immoral position to take.

25 And I'm saying that when we ask you -- you know,

1 I've got no hangup about buying the power on a reserve basis
2 or something like this. But to stoop to this and then to
3 help develop a wider credibility gap between Council and the
4 administration, I think it's most unfortunate.

5 MR. KUDUKIS: You know, Frank, if you had, you
6 know, asked this in a work session or executive session or
7 something, I would be willing to go into a lengthy discussion.
8 But whenever, you know -- even if we're negotiating here for
9 leasing this parking lot, you know, and if you ask in a
10 meeting, "Well, what's the rock-bottom price you're willing
11 to give them," and I'm forced to say it, you know, that
12 explodes the negotiation right there. And this is what you're
13 trying to make me do in this case.

14 MR. GAUL: Excuse me.

15 No. I'm not trying to have you ascertain a
16 position of ultimately what we want. It would seem to me that
17 if the question were asked or if the Committee should know,
18 the Committee should know beforehand there are some negoti-
19 ations going on, we have some ultimate thoughts of this or
20 that. And, bingo, you'd come back with some -- but, you know,
21 to read about it in the newspapers and to be chairman of a
22 committee or a member of a committee and not know what the
23 hell's going on, to know people are talking in terms of X
24 million dollars when we don't have enough to pay our payroll,
25 it's pie-in-the-sky, Ray.

1 And then we ask, and "No, we're not going to buy."
2 And then we go on record to say we're not going to buy, and
3 before you know it, we're going to embarrass you if we ask you
4 your plea. Then we've got to find a way to conduct government
5 some way where we can protect the best position and still
6 negotiate.

7 MR. KUDUKIS: No. No. The only thing I would
8 ask, that if negotiations are under way for us to obtain a
9 most favorable position, that during the middle of the
10 negotiation, I don't think that our, you know, sort of rock-
11 bottom offer should be made public.

12 MR. GAUL: Did anybody on the Committee know, Ray,
13 from an administration presentation standpoint that a Mr.
14 Goldberg, or whatever his name is, is negotiating for the City
15 of Cleveland? And if you see figures in the paper thrown
16 around like \$125,000, \$125 million, don't be excited; we're
17 just negotiating. Did anything like that happen before the
18 fact, or did we happen to pick it up and read it in the Plain
19 Dealer, who is sometimes accurate?

20 MR. KUDUKIS: Well, first of all, the fact that
21 we have filed objections on the Perry plant and on some of the
22 others, I think we have made, you know, we have made reference
23 to that at various meetings, just like we've let you know
24 we're negotiating with PASNY to get that hydroelectric power.
25 And if it's going step by step and once in a while some

1 movement is made that is newsworthy and is written up --
2 but none of these things, you know, are -- I think you're all
3 aware of the fact that we have asked for antitrust hearings on
4 this Perry plant, that we're negotiating with PASNY, that
5 we're members of AMP-O, that --

6 MR. GAUL: Well, those things have passed us,
7 but --

8 MR. KUDUKIS: Yes.

9 MR. GAUL: -- they came to us the same way, you
10 know. They came to us the same way.

11 MR. KUDUKIS: Well, I'm --

12 MR. GAUL: And we balked, and we object, but we
13 passed them.

14 MR. KUDUKIS: I'm trying to correct that situation,
15 but we're trying to undo many years' of doing. You know,
16 there's a lot of background information, and in our workshops,
17 we're trying to catch up somewhat.

18 Now, this is a good point that you brought up. I
19 would be, you know, most happy to take that up at the next
20 workshop session and, you know, get into the various ramifica-
21 tions of it. But still, there are many things, of course,
22 that are supposedly done that you may not be aware of, or
23 on a case that was initiated with certain steps that we are
24 taking, you know, that one leads to another, that you may not
25 be aware of.

1 MR. GAUL: Mr. Chairman -- and then I won't say
2 any more. I agree with him 100 percent, Director.

3 But when you're talking about something of the
4 magnitude of this, then we have to take it out of the category
5 of a case that was filed and be kept abreast of the inter-
6 mediate steps. I think that it's just a little bit bigger
7 ballpark than that.

8 And I feel that we have to play catch-up ball for
9 eliminating this question of a credibility gap, what the
10 intent was or the reason for it, it's unfortunate. But we've
11 got to address ourselves to these and a lot of other problems,
12 right, in the next month or two or three, and we'd just
13 better --

14 MR. KUDUKIS: Suppose we do it at our next meeting,
15 this particular subject. All right?

16 MR. GAUL: I have no objection.

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1 CHAIRMAN RIGLER: What Mr. Smith is doing is
2 putting the parties on notice, as to how he heard and under-
3 stood the tape and that he will read that question as an
4 acknowledgment that he is being asked to respond.

5 Now, Mr. Hjelmfelt, we had granted your motion
6 for rebuttal testimony. I assume that rebuttal will come
7 through Mr. Kudukis as a witness.

8 MR. HJELMFELT: That is correct.

9 CHAIRMAN RIGLER: Would you like to call him to
10 the stand?

11 MR. HJELMFELT: At this time the City will
12 call Mr. Kudukis.

13 CHAIRMAN RIGLER: Who is under oath in these
14 proceedings.

15 MR. HJELMFELT: That is correct.

16 Whereupon,

17 RAYMOND KUDUKIS

18 was recalled as a witness on behalf of the City of
19 Cleveland and, having been previously duly sworn, was
20 examined and testified further as follows:
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1 CHAIRMAN RIGLER: You understood the two
2 questions the Board wants addressed, which are, what was
3 the posture of the City in March 1974 with respect to
4 participation in the CAPCO units, the nuclear units, and
5 what is the present posture of the City?

6 MR. HJELMFELT: Yes, sir.

7 DIRECT EXAMINATION

8 BY MR. HJELMFELT:

9 Q Mr. Kudukis, you have offered testimony earlier in
10 these proceedings; is that correct?

11 A That's correct.

12 Q When you testified previously, you stated that
13 as part of your duties as director of Public Utilities,
14 you sometimes attend City Council Committee Meetings.

15 Did you attend a meeting of the Finance Committee
16 of the City of Cleveland on March 5, 1974?

17 A Yes, I did.

18 Q What was the purpose of that meeting?

19 A At the meeting, the participation in the nuclear
20 power plants as proposed by the City was the topic of
21 discussion.

22 MR. BUCHMANN: I can't hear you. Could you speak
23 up, please?

24 THE WITNESS: I'm sorry.

25 At the meeting the topic of discussion was the

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1 City's proposal for participation in the nuclear power plants.

2 BY MR. HJELMFELT:

3 Q Was that the reason that that meeting was called?

4 A I don't recall exactly, but I don't believe that
5 specifically was the reason why the meeting was called.

6 Q Were you appearing for the purpose of offering
7 testimony?

8 A That's correct.

9 Q And what was the purpose of your testimony?

10 A Well, at that time Mr. Gaul tried to ascertain
11 the basic position of the City. In other words, which way
12 we were going in terms of the participation that we requested
13 in the nuclear power plants.

14 Q Was that -- was it to offer that testimony, is
15 that why you attended that particular committee meeting?

16 A I would have to explain something at this point.

17 When committee meetings are called, the topic isn't
18 very specific usually. We stated to discuss a certain
19 ordinance or a certain aspect -- in other words, before
20 coming to the meeting, I wasn't aware that we were going to
21 get into the detail of the discussions as we did.

22 The agenda simply lists the topics, not the
23 specific issues to be discussed.

24 Q Do you have a copy of Applicants 281, the
25 transcript, before you?

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1 A No, I don't.

2 Yes, I do now.

3 Q On page 6, in the first -- second paragraph, it
4 is the first time where you are shown speaking, the last
5 two lines state:

6 "You asked me if it is our intention to buy a
7 piece of that plant and I told you no, and I still maintain
8 that position."

9 Could you tell the Board what you meant by that
10 statement?

11 A Well, as in the preceding questions, Mr. Gaul was
12 trying to determine of the two proposals, which way we were
13 going. Are we going for an ownership participation or
14 are we going for unit power?

15 At that time I felt that unit power was the way
16 to go and the other alternative would be ownership participa-
17 tion, and I felt that this was the quickest and the best way
18 to achieve our goal, which was to obtain power, and I was
19 advocating that position.

20 Q On page 3, in the long paragraph in the middle,
21 where Mr. Gaul is speaking, in the last three lines of his
22 statement, Ray, you answer me that, "We are not in fact
23 trying to buy ownership into -- we are, per se, maneuvering
24 for a position to be able to tap some power.

25 "Is that a fair statement?"

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1 Your answer was, "Yes."

2 Could you explain what you meant by that "yes"
3 response?

4 A Well, again, as I indicated before, there were
5 basically two ways to go: ownership participation or unit
6 power.

7 During these meetings, there were various phrases
8 used, and since I think I established that these two
9 alternatives exist, when Townsend Gaul said to tap some
10 power, obviously the assumption was we were talking about
11 unit power.

12 And without picking words, I chose to use the
13 term "negotiating." He used terms such as "maneuvering."

14 Without getting into the semantics of those terms,
15 I interpreted his statement as meaning we were trying to
16 get into a position to buy unit power. He asked me if that
17 was a fair statement, and I agree.

18 CHAIRMAN RIGLER: Exactly what do you mean when
19 you use the term "unit power"?

20 THE WITNESS: I mean that a certain amount of
21 power would be allocated to the City. We would pay a
22 certain bulk rate for that power, and this power we could
23 do with as we wish.

24 In other words, we could use it or we could --
25 possibly if we don't have a full use for it, we could

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1 possibly sell it to another party.

2 CHAIRMAN RIGLER: Would this be power obtained
3 from a generation of a particular unit?

4 THE WITNESS: Not necessarily. The way I
5 envision ownership participation would be if we would
6 take a specific unit, contribute capital dollars, and then
7 pay for all of the costs except the costs of debt service
8 and capital dollars, since we had contributed those in
9 advance.

10 That would be my definition of ownership.

11 Unit power would be where a block of power is
12 allocated to us and we have an agreement as to what the
13 rates would be, and that power is available to us at all
14 times.

15 CHAIRMAN RIGLER: How does that differ from a
16 purchase of partial firm?

17 THE WITNESS: Only to the extent that when we
18 purchase a firm power, partial firm, we buy what we could use.
19 In this area we would be assured of a certain block of
20 power, and we could, as I said before, either use it our-
21 selves or sell it possibly to another party.

22 In other words, we are guaranteed that amount.

23 CHAIRMAN RIGLER: Under partial firm, aren't you
24 guaranteed that amount?

25 THE WITNESS: My feeling was that that would be

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1 only specifically for our needs and as the needs changed,
2 that we could obtain additional power.

3 BY MR. HJELMFELT:

4 Q Mr. Kudukis, is the City today considering obtaining
5 access to nuclear generation by way of ownership participa-
6 tion?

7 A As far as the City's position today is concerned,
8 as I stated earlier, our position at that time was unit
9 power based on, well -- basically getting it the quickest
10 way possible. Some time has elapsed and we still have
11 the two options open.

12 Obviously ownership participation is more economical.
13 I would have to say this, that if there are no legal
14 problems, and if the City can overcome its financial
15 difficulties, then the time factor, I feel, is no longer
16 as important as it was then and with these two conditions,
17 I would have to say that we would have to be looking at both
18 alternatives again.

19 MR. BUCHMANN: I object, your Honor. The question
20 was whether the City was presently interested. He has not
21 answered that question.

22 CHAIRMAN RIGLER: Let's see if you can direct
23 yourself to the exact question.

24 THE WITNESS: The City is interested, but the City
25 also realizes that we have a couple of obstacles to overcome.

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1 If these obstacles cannot be overcome, then we
2 would have to assume a position that we can't go that way.

3 BY MR. HJELMFELT:

4 Q In March of 1974, was the City interested in
5 ownership participation if it were available?

6 A You state a specific date, March '74. I would
7 have to say that our requests started prior to that, and
8 certainly we were initially interested in both approaches.

9 It was my feeling at the time that going into
10 ownership participation would cause us too many problems.
11 There were legal questions raised. There was a question
12 of financing raised and again I felt that the best way to
13 go at that time was unit power.

14 MR. HJELMFELT: I have no other questions.

15 MR. BUCHMANN: I have just a couple.

16 Could I have just a moment, please?

17 MR. CHARNO: Mr. Chairman, before we begin,
18 what order is the cross-examination going to proceed in today?

19 CHAIRMAN RIGLER: I believe we will follow our
20 usual order and let all opposition parties examine before
21 the Applicant.

22 MR. LESSY: Staff has no questions at this point.

23 CROSS-EXAMINATION

24 BY MR. CHARNO:

25 Q Mr. Kudukis, were you deposed by the Applicants in

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1 this proceeding in April and May of 1975?

2 A Yes, I was.

3 Q Do you recall being asked questions during that
4 deposition by counsel for the Applicants concerning the
5 posture of the City in 1974 concerning participation in
6 nuclear units?

7 A Yes. I have part of the transcript before me.

8 MR. CHARNO: Mr. Chairman, we would like to offer
9 excerpts from Mr. Kudukis' deposition. It has the initial
10 cover page of April 30, and then an additional cover page
11 for the May 13 volume, and we would ask that pages 172
12 through 176, which are the text pages following these, be
13 underlined, and we would offer this as DJ 640 for identifica-
14 tion.

15 I misspoke. I said "underlined" and meant red-
16 lined.

17 (The document referred to was
18 marked DJ Exhibit 640, for
19 identification.)

20 BY MR. CHARNO:

21 Q Mr. Kudukis, would you look over the pages I have
22 just referred to?

23 MR. BUCHMANN: I don't know if this has been
24 offered or not, but I object to having a witness be handed a
25 document to hand it over and then testify. He is here. He can

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1 be cross-examined.

2 If his answers are not consistent with what he
3 testified on deposition, then the deposition can be used to
4 refresh his recollection or to impeach. I object.

5 MR. CHARNO: I want to ask Mr. Kudukis to
6 identify this document and then I will move it into evidence.

7 MR. BUCHMANN: I object to that. I see Mr.
8 Kudukis is now reading it as this is going on.

9 MR. CHARNO: I would like to move it into evidence
10 as his prior testimony under oath, at a time a year and a
11 half in the past.

12 CHAIRMAN RIGLER: And what conclusion are you
13 asking the Board to draw from it in the event it is accepted
14 into evidence?

15 MR. CHARNO: That Mr. Kudukis' version of the
16 matters which took place at the meeting was inquired into.
17 His explanation was given under oath, in response to the
18 Applicants' questioning.

19 They have been in possession of those facts from
20 May of 1975. To the extent that it coincides with his
21 testimony here today --

22 CHAIRMAN RIGLER: I think it may be premature
23 then, because his testimony here today hasn't been
24 challenged yet.

25 I may permit that after we hear examination from

1 the Applicants.

2 However, at this time I don't see any basis for
3 supporting his testimony. You are saying that his testimony
4 is consistent with what he just testified to, his prior
5 testimony on deposition was consistent with his testimony
6 today; is that correct?

7 MR. CHARNO: That is one of the things I said, sir.

8 CHAIRMAN RIGLER: That may be so, but it doesn't
9 really contribute anything unless there has been some
10 challenge to his testimony today.

11 MR. CHARNO: I think the other aspect of the
12 relevance I was pointing out is that the Applicants have
13 alleged bad faith and in the context of having this deposition
14 before them, having had opportunity to inquire into it,
15 certainly that is an untenable position for them to have
16 taken.

17 MR. REYNOLDS: Could I hear that again?

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

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2 CHAIRMAN RIGLER: Mr. Charno, we are going to
3 sustain the objection the the use of the deposition on the
4 terms that you just suggested and thereby reject most of
5 the pages you have introduced.

6 However, we are independently interested in the
7 material appearing on -- in the answer which appears at
8 the top of page 175. It is not clear -- is this
9 connected to the material on the preceding page?
10 Mine says 17. Is there a 4 omitted?

11 MR. BUCHMANN: Tht is 174. I have the full
12 deposition here.

13 CHAIRMAN RIGLER: In that case, although we won't
14 receive it for the purposes for which you recovered it, we
15 are interested in question appearing on the last two
16 lines of page 174 and the answer given on the first three
17 lines of page 173, because that does not seem completely
18 consistent with the answer the Witness just gave to the Board,
19 when we asked him his understanding of unit power.

20 I would like to hve it cleared up in my mind,
21 any discrepancy or confusion here.

22 If you wish to reoffer it for those purposes
23 and inquire into that, we will permit you to do so.

24 MR. CHARNO: Let me take another tack and perhaps
25 I can do that and at that point I will reoffer it.

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BY MR. CHARNO:

Q Mr. Kudukis, had officials representing the City administration made a proposal to CEI that embodied both ownership and unit participation as alternatives?

A I believe that is correct.

Q Sir, I would like to hand you a copy of DJ-185, which is an August 3, 1973, letter from Mr. Whiting to Mr. Rudolph, and ask you if that is the proposal you just testified concerning?

A Yes, this was the proposal for CAPCO membership.

Q Does that proposal also encompass participation in nuclear units, both by ownership or in the alternative by unit power participation?

A I believe that is correct. It does indicate ownership for purchase of unit power.

Q And were the alternatives you were discussing with Mr. Gaul, the alternatives set forth in that proposal?

A In a general sense, yes. Not the specific numbers, but the principles.

Q Sir, does page 4 of that make reference to unit power purchases from specific units?

MR. REYNOLDS: I will object to that question. The document speaks for itself.

CHAIRMAN RIGLER: Denied.

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1 THE WITNESS: It makes referecne to unit purchases
2 from respective project managers.

3 CHAIRMAN RIGLER: From what?

4 THE WITNESS: The wording is through unit
5 purchases from the respective project managers.

6 BY MR. CHARNO:

7 Q What precedes that wording, sir?

8 A In the alternative in the event there is a
9 legal bar to ownership participation, the City will purchase
10 the above percentage share of the output of the projects.
11 Through unit purchases their respective project managers
12 and the City will pay each year an appropriate amount
13 representing the City's proportionate share of the ownership
14 cost of the respective projects.

15 Q Do you rcall testifying on deposition that unit
16 power was restricted to specific units?

17 MR. BUCHMANN: I object to the form of that
18 question.

19 MR. REYNOLDS: I object to that.

20 CHAIRMAN RIGLER: Sustained.

21 BY MR. CHARNO:

22 Q Do you recall defining unit power on deposition?

23 A I don't recall it.

24 Q Can you tell us what the basis for your definition
25 in response to the Board's question today as to whether unit

bw4 1 power was related to specific units?

2 A Yes, basically, when we were looking at the
3 two avenues, at the two approaches, unit power versus owner-
4 ship, the basic principle that I was guided by was the fact
5 that ownership means that we would contribute capital and
6 that in the cost of power is the cost of capital, overhead,
7 maintenance, et cetera.

8 And that if a a source of less expensive
9 capital is available, which it owuld be to us, the overall
10 cost of the pwoer owuld be cheaper. In terms of unit power
11 the same cost factors would enter into the exception that
12 we would have to pay the cost of capital at whatever cost
13 that would be incurred by the entity financing the unit.

14 These were the basic principles that I was
15 guided by. Some of the detailed numbers and units were
16 worked out by my staff.

17 I didn't get into a specific, shall we say, numbers
18 and percentages.

19 I could refer to them, but I have not committed
20 them to memory.

21 Q Is it your testimony at this point in time that
22 unit power is power from a specific unit or it is not
23 power from a specific unit?

24 A The way this proposal is written, it refers
25 to specific units, but as far as I'm personally concerned, I

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1 don't think this was a very important issue, whether it was
2 designated to a specific unit or not. The overriding issue
3 to me was the w tow principles I explained. The fact that
4 this proposal does indicate and name specific units is more
5 or less a fact that is put here.

6 MR. SMITH: When you mentioned considering unit
7 power as reflecting the cost of capital, but it is of the
8 vendors capital, how could you determine the capital costs,
9 if you don't know which unit is involved in the sale?

10 THE WITNESS: Well, I would imagine when an
11 agreement is worked out that a specific unit would be referred
12 to at that time, and the capital that was borrowed for that
13 unit at a given time under certain conditions would be
14 disclosed to us, and we would arrive at whatever the cost of it
15 is.

16 CHAIRMAN RIGLER: I'm more confused than ever now.
17 Sometimes you seem to define unit power as coming from the
18 system generally and reflecting, let's say, an average cost
19 to the CEI system.

20 At other times you cross back and relate those
21 costs to the cost of particular generating stations. Which
22 is it, when you talk about your alternative for purchasing
23 unit power?

24 THE WITNESS: Well, specifically, I have not
25 personally gotten into that level. But my understanding of it

For example, if we went to, say, a Davis-Besse or
another plant and which said we are going for 50 megawatts,
it could even be a specific unit, because one individual
unit could produce more than 50 megawatts.

Could it be one part of a given unit?
When the cost, involving the capital cost we were
looking at, would then be made known and these factors
worked out.

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CHAIRMAN RIGLER: But then you are looking at the costs of purchasing some of the production of a particular generating station.

THE WITNESS: It would have to be related to some physical unit, because if you are -- I'm sure that the way they work out their capital, that they don't come up with a total capital for the total project. ~~If you relate~~ it to the specific unit, it is the only way to arrive at cost of their capital for pricing purposes.

CHAIRMAN RIGLER: You are saying your own analysis hasn't gotten to the point of investigating unit power costs in detail. Who would make the ultimate decisions on this for the administration of the City?

THE WITNESS: It would be my staff, primarily. We would get into a specific analysis such as outlined here, for example, in this proposal. They would -- they indicated service dates, nameplate ratings and percent of the units.

CHAIRMAN RIGLER: Do you go to somebody like Mr. Mayben?

THE WITNESS: We would probably employ a consulting firm, that's correct.

CHAIRMAN RIGLER: When they report back, to whom do they report?

THE WITNESS: They would report back to us.

CHAIRMAN RIGLER: To you officially, or to other

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1 officials of the City? Where would the decision be made?

2 THE WITNESS: The numerical analysis would be
3 worked up by our staff, as indicated, with the consultant
4 supplementing our staff.

5 The numbers would be put together by our Commissioner
6 of Light & Power, who would in turn present them to me and
7 representatives of the law department, and we in turn
8 would formulate some form of agreement.

9 CHAIRMAN RIGLER: Would you look at your deposition,
10 pages 174 and 175. The question appearing at lines 24 and
11 25 of 174 and your answer on 175.

12 Now look at the question appearing on lines 21
13 and 22 of 174.

14 My question to you is: Does your answer at the
15 top of page 175 refer to one of the two alternatives? That
16 would be either unit power or ownership? Is your
17 answer meant to apply to one of the two alternatives?

18 THE WITNESS: Give me a second to read it.

19 The question preceding that was whether we were
20 looking at both alternatives and that is unit power or
21 ownership. My answer was that's correct.

22 The next question was asked in reference to the
23 participation what is meant by that. And my answer was my
24 understanding is that this is designating a unit in purchasing
25 power from that unit at the cost of production.

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1 CHAIRMAN RIGLER: But what is designating the
2 unit? Is that joint ownership, unit power, or is that
3 either or both?

4 When in the fourth word of your answer, on page
5 175, you said "this," what did you have in mind by "this"?

6 THE WITNESS: The question was both alternatives.
7 We were discussing both alternatives. The question was
8 what do we mean? My answer was we designate a unit and
9 purchase power.

10 CHAIRMAN RIGLER: That would cover ownership or
11 unit power?

12 THE WITNESS: In the way the question was phrased,
13 I would have to say yes.

14 CHAIRMAN RIGLER: On line 2 on 175, the transcript
15 on that should be corrected. The third word from the end,
16 the "as" should become an "at."

17 Isn't that how you just read it to us?

18 MR. HJELMFELT: Should be changed to what?

19 CHAIRMAN RIGLER: "At."

20 MR. CHARNO: The Department would like to re-
21 offer DJ 640 for the limited purposes stated by the Board.

22 MR. BUCHMANN: Is that the excerpts of the
23 deposition?

24 CHAIRMAN RIGLER: Yes.

25 MR. BUCHMANN: I renew my objection.

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1 In addition, if your Honor please, it is by no
2 means a complete transcription of that portion of the
3 transcript in which this issue was addressed.

4 I'm curious as to why the Department didn't
5 continue on, for example, for part of the next seven, eight,
6 or 10 pages.

7 MR. CHARNO: Because it doesn't relate to the
8 matter contained in these pages.

9 MR. BUCHMANN: I certainly assert that they do,
10 Mr. Charno.

11 CHAIRMAN RIGLER: Wait a minute, Mr. Buchmann.
12 Do they relate to my problem about the definition
13 of unit power, or do they relate to the problem of the
14 consistency of Mr. Kudukis' testimony?

15 MR. BUCHMANN: I think the situation is so confused
16 that they relate to both.

17 CHAIRMAN RIGLER: I disagree with you on the
18 confusion.

19 MR. BUCHMANN: Well, I suggest to you that the
20 use of the word "participate" and "participation" is one of
21 the problems that we have been encountering right here.

22 If you think the record is clear now, then the
23 introduction of these other pages will help to confuse it
24 again.

25 If you think the record is confused now, as I do,

1 that will clarify it.

2 But I must say these words are used indiscriminately
3 in this whole section.

4 CHAIRMAN RIGLER: You made objection to the
5 introduction of any of this material on the basis that it
6 was not proper to attack -- or for Justice to support
7 the consistency of the witness' testimony by reference
8 to the deposition.

9 MR. BUCHMANN: That's correct.

10 CHAIRMAN RIGLER: We sustained your objection to
11 that. If we sustained your objection, there is no reason
12 to put in additional pages. The one reason for which we
13 are willing to receive it relates to the witness' definition
14 of unit power.

15 If there is more material related solely and
16 specifically to the more limited use of the deposition,
17 then I may be willing to hear you.

18 MR. BUCHMANN: I'm not waiving my first objection.

19 CHAIRMAN RIGLER: We sustained your first
20 objection. You can't have it both ways. You can't ask us
21 to sustain the objection and then complain because we didn't
22 let in additional pages.

23 MR. BUCHMANN: I never asked this panel to have
24 it both ways. Once would be enough.

25 At the bottom of 174 and the top of 175, you are

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1 addressing yourself to a limited question, it does not
2 contain the phrase "unit power" at all. It contains the
3 question when you say you might participate, what do you
4 mean by that? That is what you have been exploring.

5 If my objection that this is improper which relates
6 now to the specific bit of this transcript is overruled
7 with respect to this specific bit, then I renew my objection
8 on the further ground that if what we are talking about
9 is participating and there are more pages on that subject --
10 the witness has been examined on this subject now, and
11 the record shows with quotations what was in it.

12 To put a piece of the deposition in in that way
13 as long as the witness did not deny what he said on
14 definition, I think is improper.

15 CHAIRMAN RIGLER: Who was conducting the examination
16 at this particular point in the transcript?

17 MR. REYNOLDS: I was.

18 Are you going to ask what my understanding was?

#8 19 CHAIRMAN RIGLER: No, I'm wondering about Mr.
20 Buchmann's complaint about the confused deposition. I
21 didn't know if he was attacking the answers or the questions.

22 MR. REYNOLDS: I thought he said the answers were
23 confusing.

24 MR. BUCHMANN: If I did not, I meant to so state.

25 MR. REYNOLDS: Might I suggest addressing this

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1 particular portion of the deposition? Mr. Kudukis has now,
2 as I recall, read into the record what we were addressing.

3 I must admit I'm not clear in my mind what he
4 is talking about as far as what his understanding is, and
5 that perhaps might be something that we could probe further.

6 I really question what value -- what probative
7 value or what value in any other respect there is to
8 putting in now this -- this excerpt, if you will, from the
9 deposition which might well require additional pages relating
10 to the term "participation," which really, as I understand
11 the focus of the interrogation thus far, doesn't go to
12 the points that we were exploring, the other two terms were
13 being explored.

14 To the extent we are really interested in getting
15 Mr. Kudukis' understanding of those two terms either by
16 reference to this to refresh recollection or otherwise, I
17 think we could do it without introducing an excerpt of the
18 deposition.

19 I don't know that the excerpt would advance that
20 discussion in any way.

21 CHAIRMAN RIGLER: All right.

22 The Board will sustain the objection, recognizing,
23 Mr. Charno, that you were invited to do this at the request
24 of the Board, I think Mr. Reynolds' last point finds a
25 satisfactory solution and we will sustain the objection.

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1 MR. CHARNO: The Department has no further ques-
2 tions.

3 BY MR. BUCHMANN:

4 Q Mr. Kudukis, the City of Cleveland now has a
5 firm power contract with the Illuminating Company, does it
6 not?

7 A One has been agreed to. I don't know what stage
8 it is at.

9 Q It has been filed with the FPC?

10 A It has been filed.

11 Q Do you assume in the charges under that firm
12 power contract there is some recovery made by the
13 Illuminating Company for its capital costs?

14 A I would have to assume that the revenue derived
15 as part of it certainly would be used for some capital costs.

16 Q That contract is not keyed to any specific generating
17 unit, is it?

18 A No, it is not.

19 Q Now the letter of Mr. Whiting to which you refer,
20 that of August 19, 1973, that was the letter to which Mr. --
21 letter from which Mr. Gaul was reading at that meeting
22 in May 1974, was it not, in part? March 1974?

23 A I believe so. It sounded as if it was the same.

24 Q Now turning your attention to Applicants Exhibit 281,
25 which is the piece of the transcript developed by Ms. Coll,

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1 I notice that on the second page, about seven or six
2 lines up from the bottom, you assert, or rather you quote
3 from a City pleading which asserts that -- and I'm not
4 quoting from this -- that the Illuminating Company has
5 been able to prevent the City of Cleveland from obtaining
6 alternative sources of power.

7 Do you see that?

8 A Yes, I found it.

9 Q That, I suppose, was an allusion to the fact
10 that you were seeking power from PASNY and from our
11 sources such as Buckeye?

12 A That's right.

13 Q So when you testified a few minutes ago that
14 at that time that your reference on page -- that at that
15 time there were two ways to go, ownership or unit power,
16 did you intentionally leave out seeking power from these
17 other sources, or weren't you serious about those, either?

18 MR. CHARNO: Objection.

19 MR. HJELMFELT: Objection.

20 CHAIRMAN RIGLER: Let me hear the question.

21 MR. HJELMFELT: The question contains a fact not
22 in evidence, that is that the City wasn't interested in
23 obtaining ownership or unit power.

24 MR. BUCHMANN: I would withdraw the question.

ar10

1 BY MR. BUCHMANN:

2 Q Do you recall testifying a few minutes ago with
3 respect to page 3 of this transcript that there were
4 "two ways to go"? That is my note.

5 A That is right.

6 Q And that those two ways were ownership in nuclear
7 units or unit power. Do you recall that testimony?

8 A Yes.

9 Q Why didn't you refer to taking power from other
10 sources which you had discussed just a minute or two
11 before at that meeting on page 2 of the transcript?

12 A Because that was not what Councilman Gaul was
13 asking me about.

14 Q But you described it on page 2 to him, didn't you?

15 A Yes, but he wasn't interested in that. He was
16 concerned with pursuing which alternatives as far as the
17 nuclear power plants are concerned, which of the two
18 alternatives we were going to pursue.

19 Q Does Mr. Gaul use the phrase "two alternatives"
20 anywhere in that transcript?

21 A I don't know if he does or not.

22 Q We heard the tape a few minutes ago. Do you recall
23 any reference to Mr. Gaul talking about two alternatives?

24 A Those specific words or the meaning? I don't
25 quite understand the question.

1 Q Those specific words: Do you recall that?

2 A No, I don't recall him saying the specific words
3 "two alternatives."

4 Q Now, Mr. Kudukis, this incident in March of
5 1974, of course, is not the only time you appeared before
6 the Cleveland City Council or its committees?

7 A That's correct.

8 Q One of your expressed duties under the Cleveland
9 charter is to furnish information to the Council at any
10 time, as the Council may require it; is that correct?

11 A That's right.

12 Q You take an oath to uphold your duties, do you
13 not?

14 MR. LESSY: Mr. Chairman, I object to the relevancy
15 of this line. I think we are getting much beyond what the
16 witness' direct was here. If Mr. Buchmann wants to tie
17 up this to relevance, but the oath he takes and his duties
18 under the charter, for the limited purpose the witness is
19 here, this is beyond that.

20 CHAIRMAN RIGLER: I deny the objection.

21 BY MR. BUCHMANN:

22 Q The Cleveland City Council or its committees, in
23 making a great many important decisions, must rely on
24 information coming from you and from the other directors?

25 A In part, not solely.

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1 Q Of course not.

2 But with respect at least to the Municipal
3 Electric Light operation, the information they get from
4 you is pretty important, is it not?

5 A I would have to agree it is important.

6 Q I think you have elsewhere characterized
7 the City Council as in effect your board of directors?

8 A It is a good analogy.

9 Q Well, it was yours. You do try to give them the
10 information to the best of your ability, do you not?

11 A That's right.

12 Q There is no question that that was your voice
13 on the tape which we heard a little while ago?

14 A No, that was my voice.

15 Q I notice that during that, you say at page 5 of
16 the transcript, and I paraphrase, that you don't
17 think you have ever come before the committee and spoken
18 something that was an out-and-out lie. I assume, Mr.
19 Kudukis, you wouldn't tell them any lie at all, would you?

20 MR. LESSY: I object to that question.

21 MR. BUCHMANN: There is in evidence --

22 MR. LESSY: I object to the question.

23 CHAIRMAN RIGLER: Overruled.

24 BY MR. BUCHMANN:

25 Q Am I correct?

1 A I wouldn't lie to them.

2 Q Certainly not.

3 And you said the things on this transcript, didn't
4 you?

5 MR. LESSY: Asked and answered.

6 MR. BUCHMANN: I'm not sure that is so.

7 CHAIRMAN RIGLER: I will permit it.

8 THE WITNESS: I'm sorry.

9 BY MR. BUCHMANN:

10 Q You said these things that were on this transcript
11 or on that tape?

12 A On the tape, yes.

13 MR. BUCHMANN: Thank you very much.

14 MR. SMITH: Mr. Kudukis, I want a moment of
15 clarification.

16 At the time you testified, was there any legisla-
17 tion pending before the City Council with respect to owner-
18 ship of nuclear units or anything of the nature of your
19 testimony here?

20 THE WITNESS: If I understand the question,
21 was there any legislation allowing us to participate,
22 either in terms of ownership or purchasing of unit power?

23 MR. SMITH: Did you testify here in response to
24 specific legislative proposals, or was this a general
25 oversight function of the committee?

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1 THE WITNESS: This particular discussion was not
2 in response to a specific piece of legislation, to accomplish
3 the things discussed in this transcript.

4 CHAIRMAN RIGLER: Mr. Reynolds, did you have any-
5 thing?

6 BY MR. REYNOLDS:

7 Q Mr. Kudukis, has there ever been any legislation
8 introduced into City Council with regard to the matter of
9 participating in nuclear facilities either way?

10 That is, either by ownership or by unit power
11 purchasing?

12 A Specific legislation authorizing us to do the
13 two items you mentioned?

14 Q Either one of the two.

end 8 15 A Not directly, to my knowledge, no.

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REDIRECT EXAMINATION

BY MR. HJELMFELT:

Q Mr. Kudukis, Is it necessary to obtain specific
legislation relating to ownership or unit participation
prior to negotiating an agreement for such participation?

A No, it is not.

MR. HJELMFELT: I have no other questions.

CHAIRMAN RIGLER: Staff?

MR. LESSY: No questions.

MR. CHARNO: Nothing.

CHAIRMAN RIGLER: Thank you, Mr. Kudukis.

(Witness excused.)

CHAIRMAN RIGLER: In view of the hour, I think
we are going to hear Mr. Hart after lunch. Before we
break for lunch, I want to chat with you for a minute about
the City's motion to reopen discovery. We have had an
opportunity to consider the motions and the objections.
Basically, we are not disposed to reopen discovery.
With respect to the attorney-client privilege argument, we
are unpersuaded by the arguments of the City and to the extent
that the motion affects those documents, it is denied.

Under the broad category, Noerr-Pennington, there
are requests relating to certain specific interrogatories
of the City. Many of those are going to be denied, either
on the grounds of timeliness or not relating to --

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1 specifically enough to matters put in issue as to which the
2 City did not receive sufficient notice for preparation or
3 because nothing that transpired in the hearings affected
4 the Boards earlier rulings.

5 I may come back to these numbers again after
6 lunch, when I have the complete file before me.

7 However, we intended to deny, the question so
8 far as it relates to document requests number 58, 82, 85,
9 86, 16-F, 18-A, and then there is a second request relating
10 to number 58, 59 and 88. As you can see our interest focuses
11 on request 70, 72, 74 and perhaps 81. We would like the
12 parties to be able to offer a little bit of argument with
13 respect to the issues posed in those requests and as further
14 set forth in the moving papers of the City. And so we will
15 start out with Mr. Hart, and then we will address that
16 question.

17 MR. HJELMFELT: Also on page 4, I had a request
18 which, in effect, was a new document request, relating to
19 any CEI documents relating to Applicants 204, which was the
20 ordinance which was introduced in the City Council which
21 would have created a power supply authority.

22 CHAIRMAN RIGLER: We will be prepared to discuss
23 or rule on that also this afternoon.

24 MR. HJELMFELT: I have one more item, if we could
25 take it up before we break, in view of the admission of its

1 documents, Applicants 278, I believe through 283, the City
2 would seek or move to add red-linings to Applicants Exhibit
3 102. We would like pages 7 and page A-13 red-lined --

4 MR. BUCHMANN: I didn't get those numbers.

5 MR. HJELMFELT: Page 7 and page A-13 and
6 Applicants 206, V, page 3, V, page 4, paragraph relating
7 to project number 51025 and also Applicants 45.

8 I am informed Applicants 45 may be red-lined
9 in its entirety already.

10 MR. REYNOLDS: While we are still playing the
11 red-line game, I believe I inadvertently failed to mention
12 with respect to 278, to 282, any red-lining. In light of
13 the tape and everything else, it is easiest to ask that the
14 documents be red-lined in their entirety to the extent
15 they are over three pages.

16 CHAIRMAN RIGLER: All right.

17 1:05. Resume at 1:45.

18 (Whereupon at 1:05 p. m., the hearing was
19 recessed, to be reconvened at 1:45 p.m., this same day.

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AFTERNOON SESSION

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(2:00 p.m.)

MR. LESSY: Inasmuch as the deposition of Wayne Milburn has been received into evidence as an Applicants' exhibit, the Staff would like to call Mr. Robert Hart briefly at this time.

CHAIRMAN RIGLER: Mr. Hart, you are still under oath.
Whereupon,

ROBERT HART

was recalled as a witness on behalf of the Staff and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. LESSY:

Q Mr. Hart, did you attend the deposition of Wayne R. Milburn in Painesville, Ohio on August 13, 1975?

A Yes, I did, sir.

Q At what approximate time did the deposition conclude?

A It concluded between around 4:00 and 4:30 on that afternoon. I would say probably closer to 4:30.

Q Did you leave Mr. Milburn's offices immediately after the deposition concluded?

A No, I didn't.

Q Can you tell us why not, sir?

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1 A As I remember, during the course of the deposi-
2 tion there had been some exhibits, and I did not have copies
3 of them, and so Mr. Milburn had offered to supply copies
4 at that time, and so I was staying around while his secretary
5 made copies.

6 Q Now approximately how long did you remain in Mr.
7 Milburn's offices while those copies were being made?

8 A It was about an hour.

9 Q Did anyone else who attended the deposition
10 previously stay on with you?

11 A Yes, there were two other individuals. There was
12 Mr. Mel Berger and there was Mr. Roy Lessy.

13 Q Did Mr. Reynolds and Mr. Hauser leave immediately
14 after the deposition had been concluded?

15 A Yes, they did.

16 Q During the hour in which you remained in Mr.
17 Milburn's offices, could you tell us what occurred, if any-
18 thing, during that time?

19 A During that hour, that period of time, Mr. Milburn
20 initiated questions as to exactly -- he was asking questions
21 about nuclear participation, PASNY power, third-party
22 wheeling, and things like that.

23 Q Did Mr. Milburn ask any questions or inquire
24 concerning the draft Painesville interconnection agreement
25 with CEI?

1 A He was very interested in whether the statement
2 that Lee Howley had made was true, that statement being that
3 the agreement that they had signed or were in the process
4 of signing with CEI was a model agreement which had been
5 represented to him by Lee Howley and he was asking us if this
6 was in fact the truth.

7 MR. BUCHMANN: I object and ask that the answer
8 go out partly on the ground that it is not responsive, and
9 on the other ground that the statement that was what
10 Milburn was interested in is a conclusion of the witness.

11 MR. LESSY: It certainly was responsive to the
12 question that was asked and the conclusion of a fact witness
13 or observation of a fact witness is permitted under the rules.

14 MR. BUCHMANN: The question asked could have been
15 answered yes or no.

16 MR. LESSY: It could have been, but it wasn't,
17 Mr. Buchmann.

18 MR. BUCHMANN: That is the reason I object.

19 CHAIRMAN RIGLER: I think under Federal Rule 701,
20 it qualifies as opinion testimony, rationally based on
21 the perception of the witness.

22 The objection is overruled.

23 MR. BUCKMANN: What about my objection on the
24 ground it wasn't responsive? If your Honor please, the
25 guy was asked did he ask any questions. I think I can safely

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1 sit here and wait for the yes-or-no answer before I
2 interpose an objection.

3 When this kind of answer comes forward, I'm
4 precluded from those objections. The matter is spread on
5 the record and I ask that the witness be requested to answer
6 the question asked so that I can maintain my position on the
7 record.

8 MR. LESSY: Will the reporter read the question
9 and answer?

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

12 MR. LESSY: I phrased the question carefully,
13 did Mr. Milburn ask any questions or inquire.

14 CHAIRMAN RIGLER: That could be answered yes or no.
15 That observation of Mr. Buchmann's was well taken. The
16 witness should respond yes or no and wait for the follow-up
17 question.

18 Knowing what the follow-up question was going to be,
19 would you object to the follow-up question?

20 MR. BUCHMANN: Yes, sir.

21 CHAIRMAN RIGLER: On what ground?

22 MR. BUCHMANN: On what ground is hearsay evidence
23 admissible in this particular situation? Here is a witness
24 who has just been deposed as the evidence shows. If there
25 was material -- we know the witness is presently incapacitated

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1 or we can assume that.

2 This is not something that has come to anybody's
3 attention now or where evidence must be submitted because
4 the witness is not available.

5 On the day of the deposition there was ample
6 opportunity to reopen the deposition or go forward in one
7 way 'or another.

8 To have one of the counsel interrogate the witness
9 and close the deposition and come in here afterward and say
10 afterwards, "I talked to him and he told me these things," I
11 think is improper.

12 CHAIRMAN RIGLER: We have had substantial argument
13 on the record. I don't know if you have had opportunity
14 to examine the transcripts. The question of whether to
15 permit into evidence, to accept into evidence the deposition
16 of Mr. Milburn was a very close one.

17 That deposition was offered by the Applicants,
18 and as a condition of accepting it, notwithstanding the fact
19 that at the time we had a signature problem and in view of
20 the credibility problems and in view of the lack of opportunity
21 to cross-examine one of the more important witnesses live
22 on the stand, notwithstanding the fact he testifies on
23 deposition earlier, on a very close call, we permitted the
24 admission of the Milburn deposition.

25 However, in order to put that in proper context and

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1 not to prejudice the other parties because they had been
2 deprived of the right of cross-examination, we determined
3 that we would hear collateral contemporaneous -- we would
4 hear testimony of collateral, contemporaneous events which
5 might reflect on Mr. Milburn's state of mind.

6 This is a problem I think is inherent in having
7 the witness who is incapacitated and cannot be examined.
8 The objection to the general procedure in permitting this
9 line of questioning generally will be overruled.

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1 MR. BUCHMANN: I'm not objecting to that at this
2 specific time. There is no evidence in this record that
3 Mr. Milbaurn was in incapacitated in the late afternoon
4 of Wednesday, August 13, 1975. Nor when you come right
5 down to it, is there anything which would go to show
6 or, any way to test the credibility of this kind of testimony
7 of people sitting around after a deposition, and I suggest
8 to your Honor -- if somebody wants to go to his state of
9 mind, I haven't heard anything about that and, if that is
10 your ruling, I will abide by that without waiving objection.

11 This is not what we are hearing. This is, did
12 you have a further conversation with him after. The proper
13 question before this Board before this becomes admissible
14 is why didn't you say something about it then? Why didn't you
15 take that deposition so we all could have a chance to test it?
16 All of the parties were represented at this deposition.

17 Now, what we are getting is, in effect, something
18 tantamount to an ex parte subsequent deposition which cannot
19 be tested at all. This has nothing to do with the
20 admissibility of Mr. Milburn's deposition, where everybody
21 was there.

22 It has a lot to do with the admissibility of this
23 kind of stuff coming in now and where none can have the
24 opportunity to test it.

25 I object.

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MR. LESSY: I don't think I need respond.

This matter of the subsequent events after the Milburn deposition, which is Applicants' own exhibit has come to our attention.

CHAIRMAN RIGLER: We do have a problem. I suppose one answer might be that the other parties anticipated an opportunity to cross-examine Mr. Milburn and to raise this matter with him, when he was being examined life in these proceeding.

MR. BUCHMANN: I thought about that. I anticipated that. That is the risk you take in depositions.

CHAIRMAN RIGLER: I'm not suggesting that to be the case. That representation should come from the staff.

MR. BUCHMANN: I expected it sooner or later, so I can address it now. That is the risk you take on deposition at any time.

That is, we take, for example, a witness' deposition, and for a variety of reasons I might refrain from asking him questions, or I may think I really got him, if he testifies to that, I think, on the witness stand, and then he dies.

CHAIRMAN RIGLER: The burden is on the other parties to pose their questions when they have the first opportunity.

MR. BUCHMANN: Yes, sir.

CHAIRMAN RIGLER: I agree with you on that, but

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1 as I understand the offer that has been made in connection
2 with Mr. Hart's testimony, there is a suggestion that the
3 opposition parties had no basis to ask that type of question,
4 because Mr. Milburn -- I'm paraphrasing, what we had been
5 informed earlier flip-flopped in part during that last
6 hour. They had really no opportunity or no way of knowing
7 that they should have pursued these subjects at the deposition.

8 MR. BUCHMANN: There is some merit to that, if
9 your Honor please. He didn't become unavailable. Discovery
10 was in process. Something could have been done to memorialize
11 this. And the man could be confronted, did you not say, to
12 me last night and this kind of interrogation. To wait now,
13 when there is no way to do anything about it under the fact
14 we are all assuming in this situation, seems to be unfair.

15 I haven't heard anything which was contradiction
16 by this man of his terms. I presume what we are getting
17 into is that after Mr. Hart and Mr. Lessy and Mr. Berger
18 had showed him the light, he changed his mind.

19 MR. LESSY: That is not a correct characterization
20 of what is going to happen. I would like to get that clear
21 on the record right now.

22 MR. BUCHMANN: Let me guess a little bit on it.
23 But if that should be the case or something of the sort, we
24 have representatives some of the parties here. Not the
25 adverse parties, by any means, who talked to a man and then

1 we will have a witness say it seemed to us, as you say, he
2 flip-flopped. I suggest that is not proper.

3 CHAIRMAN RIGLER: Your point, Mr. Buchmann,
4 is not without merit and, obviously, will affect the
5 weight with which we receive this evidence.

6 However, I see you smiling and, as you
7 anticipate, we are going to overrule your objection.

8 Proceed.

9 Now, that brings us back to the last pending
10 question which was not directly responsive.

11 In order to save time, we will permit the answer
12 to stand with the caution to the Witness to answer, yes or
13 now, and give Mr. Buchmann a chance to interpose his
14 objections.

15 BY MR. LESSY:

16 Q Mr. Hart, in a previous answer, you indicated that
17 there was a discussion or Mr. Milburn inquired about
18 access in financing nuclear power plants. Can you tell us
19 what the nature of Mr. Milburn's inquiry was with respect
20 to that subject?

21 MR. BUCHMANN: I presume I have a continuing
22 objection to this exploring?

23 MR. REYNOLDS: I object to that question as
24 leading.

25 MR. LESSY: He identified an area.

1 MR. REYNOLDS: He didn't identify it the way you
2 characterized it or even close to it.

3 CHAIRMAN RIGLER: It is not necessary to go back,
4 because I agree with Mr. Reynolds.

5 MR. LESSY: Could we get the answer read back,
6 please, of the question to the Witness, as what occurs
7 between -- what occurred that day during that hour or time
8 period.

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

11 MR. BUCHMANN: He apparently did ask questions
12 about financing.

13 BY MR. LESSY:

14 Q Can you tell us what the nature of Mr. Milburn's
15 inquiry was with respect to nuclear participation at that
16 time?

17 A His questions with regard to nuclear participation
18 were basically question like how much would it actually
19 cost, and he had been informed that it was very expensive.

20 Q Did he tell you or at that time who informed
21 him it would be very expensive?

22 A Yes, he did.

23 Q Who was that?

24 A Mr. Howley.

25 Q Now, did he put any numbers on the participation

1 or the cost that Mr. Howley indicated would be involved
2 for Painesville, if it were to participate?

3 MR. BUCHMANN: Your Honor, please, isn't this
4 getting to be a little bit like double hearsay?

5 MR. LESSY: I don't see tht.

6 The Witness testified it was expensive. The question
7 was, did he quantify that.

8 MR. BUCHMANN: You asked what Mr. Howley told
9 Mr. Milburn, who told Mr. Hart. If that is offered for
10 the truth of the fact that Mr. Howley said it, I object.

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1 CHAIRMAN RIGLER: I think it is being offered to
2 show the state of mind under which Mr. Milburn was operating
3 at the time of his deposition.

4 MR. BUCHMANN: Could I inquire whether the Staff
5 agrees with that, Mr. Rigler?

6 MR. LESSY: We do.

7 It also shows, we feel, the point that has been
8 in the record a number of times now, in the deposition, in
9 some of Applicants' own exhibits, that Mr. Milburn accepted
10 what Mr. Howley said as gospel.

11 We are going to see through this witness -- I
12 don't want to continue.

13 CHAIRMAN RIGLER: We will not accept it as to the
14 second factor set forth by Mr. Lessy.

15 However, to show a possible bearing on Mr. Milburn's
16 state of mind, we will accept it and overrule the objection.

17 MR. LESSY: Let me offer a new question.

18 BY MR. LESSY:

19 Q Mr. Hart, did Mr. Milburn quantify what his
20 understanding of the term, I think you have used "very
21 expensive," was with respect to the nuclear participation?

22 A Yes, he did.

23 Q Can you tell us what that number was, or numbers
24 were?

25 A That number was \$10 million.

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1 Q Did Mr. Milburn indicate what type of participa-
2 tion the \$10 million was — could be utilized for, or would have to
3 be utilized for?

4 MR. REYNOLDS: I object. It is a leading
5 question.

6 Mr. Chairman, I think we are in a peculiar type
7 of situation. I feel very strongly if we are going to walk
8 through this kind of testimony, Mr. Lessy should confine
9 himself to questions that are not leading or suggestive of
10 the answers he is looking for.

11 MR. LESSY: I object to the double-teaming
12 of Mr. Reynolds and Mr. Buchmann. I don't see any other way
13 in which the last question could be asked. What did the \$10
14 million relate to?

15 CHAIRMAN RIGLER: I will overrule it.

16 THE WITNESS: The \$10 million, the way I understood
17 it, was for the cost of Painesville to become a participant
18 in nuclear generation.

19 BY MR. LESSY:

20 Q Now one of the other matters that you listed
21 that was discussed was PASNY power.

22 Can you tell us what the nature of Mr. Milburn's
23 inquiry was with respect to PASNY power?

24 A He was totally surprised that a thing like
25 PASNY power could be available to the City of Painesville.

ar3

1 Q Now, one of the other items you listed was third-
2 party wheeling. Can you tell us what the nature of Mr.
3 Milburn's inquiry was with respect to third-party wheeling?

4 A The third-party wheeling there, of course, was
5 referring to other people other than PASNY wherein he would
6 try to wheel Ohio Edison Ohio power, or some power like that
7 up to the City of Painesville and he kept coming back to the
8 fact that he had been told that the interconnection agreement
9 would answer all of these problems.

10 In other words, that they would have third-
11 party wheeling. They would have anything else they wanted,
12 nuclear participation or anything else as long as they had
13 the interconnection.

14 MR. REYNOLDS: I move to strike that as non-
15 responsive to the question. The question is what inquiry
16 did he make to third-party wheeling.

17 That answer certainly doesn't address that question.

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

20 CHAIRMAN RIGLER: I'm going to let that answer
21 stand, but I will direct you to answer the question, which
22 was what inquiry did Mr. Milburn make with respect to third-
23 party wheeling.

24 THE WITNESS: I'm trying to -- I thought that was
25 responsive, but I certainly respect your judgment. I am

ar4 1 trying to think of a response.

2 CHAIRMAN RIGLER: Inquiry suggests that he asked
3 some question. The answer you gave suggests that he had
4 discussed it and was reiterating some conclusion, namely
5 his conclusion that the interconnection agreement was a
6 satisfactory substitute, but the question was what inquiry,
7 what questions did he raise with respect to third-party
8 wheeling.

9 THE WITNESS: I guess I did misunderstand the
10 question.

11 His inquiry about third-party wheeling was a
12 very general inquiry. If I may give an example of what
13 would be available with third-party wheeling. May I continue
14 on?

15 CHAIRMAN RIGLER: Are you discussing an
16 inquiry?

17 THE WITNESS: Yes, sir, I was going to go off
18 to discuss the inquiry.

19 After he did ask the inquiry, which I think is
20 responsive to the question, then we went into all of these
21 other things which I have possibly already answered.

22 CHAIRMAN RIGLER: All right.

23 BY MR. LESSY:

24 Q Did Mr. Milburn inquire concerning AMP-O at that
25 time?

1 A Yes, he did.

2 Q Can you tell us what the nature of Mr. Milburn's
3 inquiry was with respect to AMP-O?

4 A The nature of his inquiry with respect to AMP-O
5 was he didn't quite know what AMP-O was, and what AMP-O
6 could do for him.

7 I explained to him at that time that probably the
8 only way he could get hydro power from PASNY was to become a
9 member of AMP-O, and then he would probably share any
10 benefits that the City of Cleveland was able to obtain.

11 Q After that hour's discussion with Mr. Milburn,
12 did you come away from that discussion with any impressions
13 concerning Mr. Milburn's views concerning that discussion?

14 MR. BUCHMANN: I object to that.

15 MR. REYNOLDS: I object.

16 CHAIRMAN RIGLER: Present-sense impressions as a result
17 of a discussion; clearly permissible. What is the basis
18 for the objection?

19 MR. REYNOLDS: I think the proper way to proceed
20 is to go through a discussion and let the Board draw its own
21 conclusions as to what that discussion might reflect. Impres-
22 sions that somebody might have on the basis of an hour
23 discussion --

24 CHAIRMAN RIGLER: What is your question again?

25 MR. BUCHMANN: Could we have it read back?

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1 CHAIRMAN RIGLER: Let him rephrase it.

2 BY MR. LESSY:

3 Q The question is, as a result of the hour or so
4 discussion with Mr. Milburn, did you come away from the
5 discussion with any impressions concerning Mr. Milburn's
6 views on these matters?

7 CHAIRMAN RIGLER: On what matters?

8 MR. LESSY: On the matters discussed during the
9 hour-long meeting or hour-long discussion.

10 CHAIRMAN RIGLER: I still think that is too broad.
11 I'm not going to allow it as phrased.

12 MR. LESSY: I didn't hear you.

13 CHAIRMAN RIGLER: I think it is too broad in its
14 implications. I will not allow it as phrased.

15 If you can get this in, it will have to come in
16 under 701 of the Federal Rules. So that Mr. Hart's
17 testimony in the form of opinion or inferences is going to
18 be limited to those which are rationally based on his
19 perception.

20 BY MR. LESSY:

21 Q Mr. Hart, as a result of the hour-long discussion
22 which you have just described, can you tell us if you draw
23 any opinions or inferences with respect to the discussion
24 you had with Mr. Milburn on that date and the impact of that
25 discussion on what he had testified on deposition earlier?

ar7

1 MR. BUCHMANN: The question is yes or no, I suppose.

2 MR. REYNOLDS: As phrased, I don't object to that
3 question. It calls for a yes-or-no answer.

4 THE WITNESS: Yes.

5 BY MR. LESSY:

6 Q Can you tell us what those opinions or
7 inferences are?

8 MR. BUCHMANN: Object.

9 MR. REYNOLDS: Now I object.

10 CHAIRMAN RIGLER: Overruled.

11 THE WITNESS: My opinion was if he had to go
12 through the deposition again that he would have given
13 different answers.

14 CHAIRMAN RIGLER: Throughout the deposition?

15 THE WITNESS: On those particular topics that
16 we had talked about as we have discussed here.

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1 CHAIRMAN RIGLER: Tell us one more time for
2 the record what the topics as to which his answers may have
3 varied, would have been, in your opinion?

4 THE WITNESS: Yes, sir. The topics that we
5 discussed were nuclear participation. They were PASNY power.
6 They were alternative sources of power. They were AMP-O,
7 and they were all of these items in relationship to the
8 interconnection.

9 CHAIRMAN RIGLER: Did he at any point say directly
10 if I had known this fact, my testimony would have been
11 different?

12 THE WITNESS: No, sir. May I add one more thing
13 to the question you asked me, sir?

14 CHAIRMAN RIGLER: All right.

15 THE WITNESS: We discussed, as I testified earlier,
16 the interconnection agreement between the City of Painesville
17 and CEI, which I indicated earlier.

18 MR. LESSY: I have no further questions.

19 CHAIRMAN RIGLER: Justice?

20 MR. CHARNO: Nothing.

21 CHAIRMAN RIGLER: City?

22 MR. HJELMFELT: No questions.

23 CROSS-EXAMINATION

24 BY MR. BUCHMANN:

25 Q If you had that opinion that Mr. Milburn, if he

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1 had to go through the deposition again, would have given
2 different answers, why didn't you take the deposition again?

3 A I did not call that deposition. I was relying
4 on our outside counsel at the time. The only reason I was
5 there was because outside counsel was not available at that
6 time.

7 CHAIRMAN RIGLER: I'm not sure that satisfies
8 the thrust of the question being asked.

9 THE WITNESS: I suppose my best answer is, I don't
10 know.

11 BY MR. BUCHMANN:

12 Q You didn't know why -- did you suggest to your
13 outside counsel that he have that deposition over again
14 or reopen it?

15 A I don't think I made that suggestion to him,
16 although I did relate some of the facts, as I have indicated
17 here, to our outside counsel.

18 Q Did you related all of them?

19 A I related them as I have indicated here.

20 Q Did you relate to him your opinion that Mr. Milburn,
21 if he went through the deposition again could have given
22 different answers?

23 MR. LESSY: Asked and answered.

24 MR. BUCHMANN: No. I asked if he related it to
25 outside counsel.

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CHAIRMAN RIGLER: Overruled.

BY MR. BUCHMANN:

Q Did you relate to outside counsel your opinion that if Mr. Milburn had to go through the deposition again, he would give different answers?

A The best of my recollection is I did.

Q Which outside counsel?

A We would be talking about Ruben Goldberg or David Hjelmfelt.

Q Do you remember which one?

A, No, I do not, because I was dealing with both of them at the time.

May I expand on that some?

David Hjelmfelt at this time is very active in the whole case, but honestly, I do not remember.

Q In any event, the deposition was not held again or reopened; is that not true?

A That is true.

Q Now, you said that Mr. Milburn was totally surprised that PAsNY power could become available to the City of Painesville. Do you recall that testimony?

A Yes, sir.

Q Who advised them that it could be available to the City of Painesville, you or Mr. Berger or Mr. Lessy?

A I did, sir.

1 Q I thought you had been testifying in this
2 case that the PASNY power was available to the City of
3 Cleveland?

4 A It is not available at the present time. But
5 should certain restraints be removed, it would be available.

6 Q All 22.5 megawatts after you had deducted
7 from the Allegheny Co-op, right?

8 MR. LESSY: Is there a question?

9 MR. BUCHMANN: All 22.5 megawatts after the
10 deduction was made for the Allegheny Co-op; am I correct?

11 MR. LESSY: That is not a question. I object.

12 CHAIRMAN RIGLER: It is a question.

13 THE WITNESS: Your question is, would there be
14 22.5 megawatts of power?

15 BY MR. BUCHMANN:

16 Q I guess I misstated or badly stated it. I thought
17 you testified on this record that 22.35 megawatt of power,
18 after making allowance for the Allegheny Co-op would be
19 available to the City of Cleveland.

20 Am I not correct that you have so testified?

21 MR. CHARNO: Could we have a transcript
22 reference?

23 We are unfamiliar with the portion that Counsel
24 is citing.

25 MR. LESSY: I would like to join in that.

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1 MR. CHARNO: I would object to the questions as
2 ssuming a fact not in evidence.

3 MR. LESSY: As would I.

4 .If he is going to impeach him with prior
5 testimony, let's see the testimony.

6 CHAIRMAN RIGLER: Did you so testify, Mr. Hart?
7 Do you recall whether you did?

8 THE WITNESS: May I explain something
9 here? The problem I have is, yes, there would be 22.5
10 availabale. But there is additional power there also.
11 We might be talking as much as 180 megawats of total
12 project power that would be available out of the
13 Niagara and St. Lawrence project. If I said 22.5, yes, I
14 said 22.5, but I'm keeping in mind also, there is available
15 other power there too.

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BY MR. BUCHMANN:

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Q Of the 1000 pages of transcript -- he testified for two days previously, did he not?

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A I accept your word on that.

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Q This is the first time you mentioned in your testimony any 180 megawatts of power; is that right?

7

A The FPC had not ruled on that.

8

MR. BUCHMANN: I want an answer to my question.

9

MR. LESSY: You interrupted him.

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MR. BUCHMANN: He is not answering my question.

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MR. LESSY: You ask the question, and if it is not responsive, you can ask that he be directed to answer.

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MR. BUCHMANN: Will the witness answer my question?

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MR. LESSY: What was the question?

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MR. BUCHMANN: The question is had he mentioned 180 megawatts of power.

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MR. LESSY: Was there a prior question before that?

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CHAIRMAN RIGLER: That is the pending question, and we will permit the witness to answer.

21

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THE WITNESS: The pending question was had I testified as to project power, 180 megawatts, previously.

23

CHAIRMAN RIGLER: In this proceeding?

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THE WITNESS: I don't know if I did or not. I have not reviewed my testimony.

1 BY MR. BUCHMANN:

2 Q What is the basis for your present testimony
3 that 180 megawatts of power might become available from
4 PASNY?

5 A My present recollection on that is that in the
6 FPC order that came out six months -- whatever length of
7 time it was -- not six months -- I will say two months or
8 so ago, when the FPC ruled that the Power Authority of the
9 State of New York had to make available outside the State of
10 New York a total amount of project power. Then they made a
11 certain percentage of that had to be available outside
12 of the state. There is a complicated statutory formula
13 in the back of my mind, it has been the figure of 180 mega-
14 watts.

15 Q I don't want to hold you to the date of that
16 order, but your understanding is based on this FPC order that
17 you have just described?

18 A That's correct, sir.

19 Q Quite a while after you talked to Mr. Milburn,
20 isn't it?

21 A That's correct, sir.

22 Q Then when you were talking to Mr. Milburn, you
23 must have been talking about the 22.5 megawatts to which you
24 have previously testified, were you not?

25 A That's correct, sir.

1 Q Were you offering to give the City of Painesville
2 part of the City of Cleveland's entitlement, if any, from
3 that 22.5 megawatts?

4 A I was not offering it to him, no, sir.

5 Q Then how did Mr. Milburn, as you testified, get
6 surprised that PASNY power could be made available to the
7 City of Painesville?

8 A I suppose because I was telling him for the first
9 time.

10 Q What power are we talking about?

11 A We are talking about -- let me -- we are still
12 talking about that 22-1/2 megawatts, or if I may explain
13 that -- may I explain that --

14 Q I asked you what power you were talking about.
15 You say the 22.5?

16 A Or the 30 megawatts.

17 Q Of which 7-1/2 is locked up by the Allegheny
18 Co-op as you well know. Is that not true?

19 A It is locked up, but it is very questionable
20 for what period of time it is locked up.

21 Q So you surprised Mr. Milburn with the news that
22 the Allegheny Co-op might be required to discard that 7-1/2
23 megawatts for the City of Painesville?

24 A I did not indicate. I said there could be PASNY
25 power available to him and he was surprised at that.

1 Q I suspect he was.

2 MR. LESSY: I move to strike that last editorial
3 comment by counsel.

4 MR. BUCHMANN: I withdraw it. I'm sorry.

5 BY MR. BUCHMANN:

6 Q You told him about AMP-Ohio, you say; is that
7 correct?

8 A Yes, sir.

9 Q By the way, did Mr. -- were you the one giving
10 him all of this information, or were Mr. Berger and Mr.
11 Lessy giving him information as well?

12 A No, sir, I was the one doing the speaking.

13 Q They sat mute?

14 A They certainly didn't say anything relevant to the
15 topics that we are talking about.

16 Q You told them apparently -- what AMP-Ohio was?

17 A That's correct, sir.

18 Q You said you told him what it could do for him.

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1 A I advised him to become -- for his municipality
2 to become a member of AMP-O.

3 Q Did you tell him what it could do for him?

4 A Did you tell him what it could do for him?

5 A I told him he could probably not receive the
6 hydro power, unless he did become a member of AMP Ohio.

7 Q The hydro power we refer to is PASNY power?

8 A That is correct.

9 Q There is no other hydro power drifting around,
10 as far as you know?

11 A No, sir.

12 Q Now, Mr. Hart, you gave your opinion of Mr. Milburn's
13 state of mind. You, of course, have represented the City
14 of Cleveland throughout this matter, have you not?

15 A I have, sir.

16 Q And have been one of the principal parties dealing
17 on behalf of the City of Cleveland with the Illuminating
18 Company and the other CAPCO companies; is that not correct?

19 A That is correct, sir.

20 Q You stayed for an hour or hour or so talking with
21 Mr. Milburn after that deposition; is that correct?

22 A Yes, sir.

23 Q Is it possible your opinion of his state of mind
24 might have been influenced to some degree by your participation
25 in this matter?

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1 A I don't think so, sir.

2 Q You don't think so? Not possible at all?

3 A No, sir.

4 MR. BUCHMANN: Thank you very much. I have
5 nothing further.

6 MR. LESSY: I would object to any cross-
7 examination by Mr. Reynolds.

8 Mr. Hart has testified on a matter that -- on
9 a CEI matter. He has been cross-examined by Mr. Buchmann.
10 I would like to know the basis for Mr. Feynold's desiring
11 to cross-examine this witness.

12 CHAIRMAN RIGLER: It is not necessary. I will
13 permit it.

14 MR. REYNOLDS: Thank you.

15 BY MR. REYNOLDS:

16 Q Mr. Hart, when was it that you were first
17 contacted by Mr. Lessy to testify in this proceeding,
18 regarding the discussion you had with Mr. Milburn following
19 his deposition?

20 A As I recall, it was last Friday afternoon,
21 I could be entirely wrong on that. It was very recently.

22 Q How did he contact you? By telephone?

23 A Yes, sir.

24 Q Would you relate to us the nature of your
25 discussion at that time with Mr. Lessy?

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1 MR. LESSY: Objection, unless Mr. Reynolds
2 can state what his purpose is in going into this line
3 of questioning. I object unless we get the fact I asked
4 the Witness was he available to testify.

5 MR. CHARNO: I join in a relevancy objection.

6 CHAIRMAN RIGLER: Where are you going?

7 MR. REYNOLDS: I want to determine whether he is
8 testifying on personal knowledge and independent recollection,
9 as opposed to refreshing of his recollection during his
10 conversation with Mr. Lessy.

11 MR. LESSY: He can ask questions pertaining
12 to that.

13 CHAIRMAN RIGLER: I will permit the pending
14 question.

15 BY MR. REYNOLDS:

16 Q Will you relate the nature of your telephone
17 conversation with Mr. Lessy?

18 A You -- he called me up. His first question was,
19 are you going to come down here on Tuesday of next week?
20 He said Ray Kudukis would be in town.

21 I said, yes, I did intend to be down here,
22 although I had personal complications, but I thought I
23 could be down here. After he got that laid to one side,
24 he then said to me, do you remember the conversation with
25 Mr. Milbourn, after his deposition?

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1 And then I said, yes, I had some general
2 knowledge. Then he said, do you remember what you said
3 to him.

4 And so I indicated what I had said to him.
5 And then his retort to that was, what did Mr. Milburn
6 say back to you, and the conversation went back and forth
7 like that.

8 And we had covered pretty much the ground, as
9 I have indicated here in this testimony.

10 Q Did you talk with Mr. Lessy again about this
11 matter, before you appeared today?

12 A I talked to him five minutes before we walked
13 in the room this morning, and well, that was about 10:55
14 this morning.

15 Q Have you read this deposition of Mr. Milburn?

16 A That was one of the things that Mr. Lessy asked
17 me. Did I have a copy of Mr. Milburn's testimony? I
18 said, no, I did not have a copy.

19 And to answer your specific question is, no,
20 I have not read his testimony. I still have not seen a
21 copy of it.

22 Q Have you ever read a copy of his deposition?

23 A No, sir.

24 Q Well, then, what is it that you say that is
25 different with respect to what Mr. Milburn testified to and

believe was discussed following the deposition?

MR. LESSY: Objection, on the grounds of lack of

There have been five separate areas Mr. Hart
this afternoon.

MR. REYNOLDS: I will withdraw the question and
specific.

It may take longer.

CHAIRMAN RIGLER: I would rather save the
though the question was specific. I will permit
on.

THE WITNESS: Mr. Milburn had testified
for, I was there at the deposition-- he had testified
that Mr. Howley had told him that the interconnection
all of their problems.

After the deposition, and during the discussion
he then came to the realization that the
tion would not solve all of their problems.

MR. BUCHMANN: I move that --

MR. REYNOLDS: I move to strike that and object to

MR. LESSY: I think if we have the question -- if
g to permit a question as broad as that, we
mit answers as broad as that. If we want
estions like that, I think the Witness can give

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1 a general answer.

2 CHAIRMAN RIGLER: Let me hear the answer.

3 (Whereupon, the reporter read from

4 the record, as requested.)

5 CHAIRMAN RIGLER: You are asking me to strike
6 the part that begins "After the deposition, he then came"?

7 MR. BUCHMANN: That is my motion.

8 MR. REYNOLDS: Yes.

9 CHAIRMAN RIGLER: That is granted.

10 BY MR. REYNOLDS:

11 Q Let me ask you this, Mr. Hart. You indicated
12 in your discussion on nuclear participation, Mr. Milburn
13 suggested to you -- this is after the deposition, a
14 \$10 million figure for participation; is that right, as
15 being very expensive?

16 A That is right, sir.

17 Q What part of Mr. Milburn's deposition is it
18 that you feel is inconsistent with that particular
19 representation?

20 A I don't doubt that figure.

21 Q Well, explain to me how Mr. Milburn flip-flopped,
22 if you will, between the time that he testified in his
23 deposition and the time that I talked to you about Mr. Howley
24 saying that participation was, I believe you indicated very
25 expensive, and then talked about a \$10 million figure?

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1 MR. LESSY: I think if you are going to
2 refer back to his prior testimony, he didn't use the
3 word flip-flop, and he had used it in the general sense
4 of what he had testified to. I think if you wanted
5 me to track language during my question, I think you ought
6 to track his answer and ask how it relates generally.

7 MR. REYNOLDS: You can conduct your
8 examination the way you want.

9 CHAIRMAN RIGLER: I will permit it. Let's move along.
10 Let's stop the quibbling back and forth.

11 THE WITNESS: Is there a question? Did Mr. Milburn
12 or myself or anybody else quarrel with the \$10 million figure?

13 BY MR. REYNOLDS:

14 Q The question is, where is the inconsistency,
15 if you will, between that element of discussion you had
16 with Mr. Milburn after the deposition and what he testified
17 to.

18 A There was none, as to the \$10 million figure.

19 Q As to the discussion of third party wheeling,
20 where was its inconsistency with what he testified to on
21 deposition and what you were told after the deposition in
22 your discussion with him?

23 A My recollection was that at the deposition, he
24 testified that the interconnection would give the City of
25 Painesville third party wheeling. And afterwards, in the

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1 discussion, he was satisfied that the interconnecton would
2 not give them third party wheeling.

3 MR. BUCHMANN: I object and move that the
4 testimony on what he was satisfied about go out.

5 CHAIRMAN RIGLER: Granted.

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Q Did you talk to Mr. Milburn at any time during the discussion you referred to?

A No, I didn't.

Q Did you discuss with Mr. Milburn during the conversation a prior meeting which Mr. Milburn had with the members of the NRC staff in October of 1976?

A No, sir.

Q Were Mr. Lessy and Mr. Berger present during the discussion you had with Mr. Milburn throughout the deposition?

A Yes, sir.

MR. REYNOLDS: I don't have anything to ask.

MR. LESSY: I have no redirect.

CHAIRMAN RIGLER: Thank you, Mr. Hart.

(Witness excused.)

MR. LESSY: I would like to make a motion to set aside the deposition of Mr. Milburn with respect to the Milburn deposition. I left my copy of the Rules of Civil Procedure in my office. Can I have a moment to read them?

CHAIRMAN RIGLER: Let's proceed for a moment before we do that. Let's go off the record for a moment.

(Discussion off the record.)

MR. LESSY: Staff would like to move to set aside the Milburn deposition under Rule 32(d)(4) of the Rules of Civil Procedure, which recites in part that

1 errors and irregularities in the matter in which a
2 testimony is transcribed or a deposition is prepared, signed,
3 certified, sealed, endorsed, are waived unless a motion
4 to suppress the deposition or some part thereof is made
5 with reasonable promptness after such defect is or with due
6 diligence might have been ascertained.

7
8 We know the Milburn deposition was unsigned at
9 the time. NRC 222 states out the fact that Ace-Federal
10 Reporters, shortly after the deposition, sent a copy at
11 the government's expense to Mr. Milburn with a request
12 for signature. That signature, that signed copy, was not
13 returned.

14 The Ace people have related to me the fact that
15 they do an awful lot of depositions and their general
16 impression was, and I guess we can get an affidavit if we
17 need to, that it was a "big hassle" and it ended up not being
18 signed.

19 Their letter states forth the fact that they did
20 request signature. The Federal Rules and the cases we
21 argued before provide that if the circumstances are such
22 that the reason why the deposition was not signed may be
23 material, it should be suppressed and the vehicle to do that
24 is a motion to suppress under a Rule 32(d)(4).

25 I stated during the time of that argument that
the circumstances after the deposition were clearly curious

1 to me as to what Mr. Milburn's position had been. The
2 basis for that was the fact that as he states in his
3 deposition, that he relied almost entirely on the advice
4 and counsel of Mr. Howley as to what was industry standard
5 and what was available and what was not.

6 He had serious suspicions after that meeting
7 that the advice Mr. Howley gave him was not correct, or he
8 questioned it. There has been a question raised, I think,
9 as to why the deposition wasn't taken further.

10 I would like to get that clear on the record
11 now. I subpoenaed Mr. Milburn. I know Mr. Buchmann was
12 not involved in the case at this period of time, but there
13 was great difficulty in getting Mr. Milburn's deposition
14 to be taken the first time.

15 We subpoenaed him and asked him to come to
16 Washington along with Mr. Pandey. Mr. Pandey came and Mr.
17 Milburn did not.

18 Mr. Pandey carried with him a one-paragraph motion
19 to quash, which was untimely. We filed an answer to that,
20 and Mr. Milburn was again subpoenaed.

21 He refused to come to Washington. We finally
22 agreed lest the vehicle of having the Commission go for
23 judicial enforcement of its own subpoena in the Sixth Circuit,
24 to go to Painesville to take the deposition.

25 At the time the demeanor of the witness was such,

1 as it reads in the deposition, there was a stipulation among
2 counsel to remove certain profane language on behalf of
3 the deponent.

4 After the deposition I characterized Mr.
5 Milburn as a hostile witness.

6 After the deposition was over, I was surprised
7 at what his attitude and position was. The deposition in
8 fact was never signed. I would have never used Mr.
9 Milburn as a witness or quoted anything he said based on my
10 observations of him and the consistencies and inconsistencies
11 of what he said.

12 In any event, Mr. Pandy was available. Based on
13 these facts, the case in the D.C. Circuit under Rule 32(d)(4)
14 that if the circumstances were such that there has been a
15 reason to believe that there is failure to sign based on
16 those circumstances, the way to handle that is a motion to
17 suppress.

18 I would like to make that motion to suppress at
19 this time.

20 CHAIRMAN RIGLER: Do you have the Cannon letter of
21 June 30?

22 MR. LESSY: I have read that letter.

23 CHAIRMAN RIGLER: Are you challenging the veracity
24 of anything set forward by Mr. Cannon?

25 MR. LESSY: I have problems with the Cannon letter, as

1 I recall. Mr. Milburn is an attorney. Here he received
2 an original copy of the deposition at the government's
3 expense and retained it and did not sign it or return it.

4 Now the letter says that he would be willing
5 to sign the deposition now or have it waived. In the interim
6 between September, according to the Ace letter, and the next
7 nine months, according to Mr. Cannon's letter, Mr. Milburn
8 is seriously ill, he is unable to walk and has lost over
9 100 pounds.

10 And my question is, Mr. Milburn's willingness
11 to sign the deposition nine months later does not rebut his
12 refusal to sign it at the time he took it.

13 CHAIRMAN RIGLER: You don't challenge that he has
14 authorized Mr. Cannon to waive signature or that he has
15 indicated that he will sign it if he is further requested?

16 MR. LESSY: I do not challenge the fact he makes
17 that statement nine months later. I have serious doubts as
18 to why he didn't sign it at the time.

19 If he is not in a position to receive witnesses,
20 to receive counsel, if he is not in a position to be
21 interrogated even by written interrogatory, if he can't
22 travel anywhere, how can he then say at that point in time
23 the deposition was accurate according to his recollection
24 of what happened almost a year ago?

25 I realize the position --

1 MR. BUCHMANN: May I see that letter again?

2 MR. LESSY: I realize the position we are in with
3 respect to this witness being unavailable, and as I reiterated
4 before, there is a key witness here who has not been called,
5 and that is Mr. Howley, who was the prime CEI negotiator.

6 We have called Mr. Pandy and Mr. Helsel with respect
7 to this matter. To reserve my rights, I would like to move
8 to suppress the Milburn deposition.

9 MR. BUCHMANN: I don't think it takes much response.
10 I want the record to show on behalf of the Illuminating
11 Company we do not accept these numerous assertions of fact
12 as fact.

13 In any event, I must say that the attitude of
14 Mr. Lessy as to his appraisal or his opinion of Mr. Milburn's
15 state of mind doesn't quite accord with his witness'
16 suggestion that their conversation for an hour after the
17 deposition was something like the road to Damascus.

18 CHAIRMAN RIGLER: The motion is denied.

19 That brings us to the motion to reopen discovery
20 which the City filed.

21 We indicated before the lunch break that substantial
22 portions of that motion are denied on grounds of timeliness.

23 I should have added that we also reviewed the
24 Board's earlier ruling, initial ruling with respect to
25 discovery, and that reinforces our conclusion that reopening

1 would not be appropriate and that the terms and conditions
2 governing discovery in the initial ruling were correct, and
3 have not been changed sufficiently by the course of the
4 hearings to require reopening of discovery.

5 We did ask for remarks with respect to a few
6 particular items, however. I guess as the moving party, Mr.
7 Hjelmfelt, you may go first.

8 MR. HJELMFELT: I'm really not certain what
9 matters the Board is looking for additional argument on.
10 I think the City's position with respect to these items
11 is probably pretty well made or pretty well put before the
12 Board.

13 Certainly with respect to documents relating to
14 Applicants Exhibit 204, which was the ordinance relating
15 to the power supply authority, there would have been no
16 other occasion on which we could have sought discovery.

17 CHAIRMAN RIGLER: What could CEI have that would
18 bear on this? There is an ordinance of the City which
19 presumably is adverse to the interests of CEI. I would
20 hardly expect they are the sponsors of Applicants Exhibit
21 204.

22 MR. HJELMFELT: I'm not suggesting that they are
23 the sponsors.

24 MR. REYNOLDS: We can go on record to that effect
25 if you like.

1 MR. HJELMFELT: What I suggest is there might
2 very well be documents in which CEI gives its
3 assessment of the likelihood of its passage, the
4 possible effects upon it.

5 CHAIRMAN RIGLER: Suppose there are such documents;
6 so what? What is their probative value? To what point
7 does it relate?

8 MR. HJELMFELT: My understanding of the proposed
9 or purported value of introducing that Exhibit 204 was to
10 show the City's ability to protect itself and its
11 ability to regulate the activities of CEI.

12 I think if there is documents where CEI says,
13 such as their filing with the SEC in which they said
14 it is completely infeasible and impractical and there are
15 other documents they have to that effect, I think that is
16 relevant.

17 MR. SMITH: If you were able to produce such
18 documents on discovery, what would you do with them?

19 MR. HJELMFELT: Obviously I would then move to
20 introduce them as exhibits in this case.

21 MR. SMITH: To prove the contents of the truth
22 of them, that it is unlikely that the City will prevail in
23 what it is purportedly undertaking to do?

24 MR. HJELMFELT: Depending on the nature of the
25 document, I might.

1 CHAIRMAN RIGLER: All right, I think that the
2 better procedure would be to read each one, and its response,
3 so, Mr. Buchmann, do you want to address Applicants Exhibit
4 204, the reopening of discovery?

5 MR. BUCKMANN: Will it be all right if Mr.
6 Reynolds handles that?

7 MR. REYNOLDS: I don't know what there is to add.
8 Documents relating to that ordinance, as far as I can deter-
9 mine, based on the discovery requests, would be matters that
10 are in the possession of the City, in any event.

11 To the extent we are talking about internal CEI
12 documents, I don't see that they have any probative value
13 for any purpose whatsoever.

14 CHAIRMAN RIGLER: How about Mr. Hjelmfelt's
15 suggestion that they impact on the argument being offered
16 by the CEI that the City had ample means to protect itself?

17 MR. REYNOLDS: The ability of the City to protect
18 itself, it doesn't seem to me, is impacted on by virtue of a
19 statement that CEI may make internally or to its stockholders
20 as to what CEI's assessment is, and the success of it.

21 That outcome is still to be determined. I don't
22 see how a statement by anybody at CEI as to the absurdity or
23 nonabsurdity of this particular activity is a probative
24 mechanism.

25 CHAIRMAN RIGLER: It is CEI which introduced

ar10 1 Exhibit 204. How can they represent to this Board that this
2 represents a threat to their position and is an indication
3 of the bargaining strength, the power of the City's municipal
4 system, and at the same time be poo-pooing that suggestion in
5 some other forum, if that is the case?

6 I don't know if it is.

7 MR. REYNOLDS: The ability, introduction of the
8 documents indicates the ability of the City to take this
9 course.

10 Whether the City intends to proceed with it or
11 whether there is any realistic possibility that it will
12 proceed with it is a different matter. But it certainly is
13 clear that the City has the legal ability to do it. If
14 the City wants to exercise the authority that it
15 legitimately has it could in fact reach the end that it
16 has suggested it wants to reach.

17 CHAIRMAN RIGLER: Was that the sole purpose --

18 MR. REYNOLDS: Whether it drops it or doesn't
19 drop it, I don't know.

20 CHAIRMAN RIGLER: Was that the sole purpose for
21 the introduction of Exhibit 204?

22 MR. REYNOLDS: The introduction was to demonstrate
23 that the City of Cleveland or any municipality, for that matter,
24 has at its disposal a ready remedy or remedy, if you will,
25 which would give it the ability to -- and as a practical

1 matter take over the system of CEI and that the City knows
2 full well that it has that, and has used it.

3 CHAIRMAN RIGLER: And that is the extent of the
4 probative value of Exhibit 204?

5 MR. REYNOLDS: Right.

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1 CHAIRMAN RIGLER: Don't you accept that,
2 Mr. Hjelmfelt. Do you quarrel with that?

3 MR. HJELMFELT: I think if the question here is,
4 this is offered to show that the City has the remedy, then
5 I think whether that remedy is practicable or feasible
6 has some bearing.

7 If CEI assessment is that actually that
8 isn't feasible and it is not practicable, then, in effect,
9 it is not a remedy.

10 CHAIRMAN RIGLER: Next.

11 MR. HJELMFELT: Document Request Number 70,
12 since documents relating to attempts by City counsel --
13 attempts by CEI to have City Council remove money from the
14 City budget, especially concerning budget requests for
15 transmission lines and suggestions that this becomes relevant
16 in light of Mr. Caruso's testimony, that it was at all times
17 feasible for the City to go out and construct transmission
18 lines, which would give it access to alternative sources
19 of power.

20 CHAIRMAN RIGLER: My problem, Mr. Hjelmfelt, is
21 if I look back to our original ruling, the objection was
22 sustained only as it related to the years 1960, '61; isn't
23 that correct?

24 MR. HJELMFELT: My recollection was that we didn't
25 go back beyond '65, with respect to that.

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1 CHAIRMAN RIGLER: In that case you have '65 forward,
2 don't you? Wherein have you been denied discovery?

3 MR. HJELMFELT: We have been denied discovery
4 with respect to specific instances on-- when the City
5 was considering constructing transmission lines and CEI
6 was active in opposition.

7 CHAIRMAN RIGLER: When did that occur?

8 MR. HJELMFELT: I believe it was around 1962
9 or '63.

10 CHAIRMAN RIGLER: Well, again, referring to the
11 Board's ruling on the objections by CEI, it says, on
12 page 18, that we turn to the specific question under
13 objection. CEI objection to Request 70 relating to
14 events occurring in 1960-61 is sustained on the grounds that
15 these events occurred prior to the Board's cut-off date.
16 But it doesn't occur to me that the documentary request
17 set forth in number 70 was denied for any other period.

18 MR. HJELMFELT: We certainly didn't obtain
19 discovery with respect to the instances in the '62-63 area.

20 CHAIRMAN RIGLER: Let's hear from Applicants
21 on that.

22 MR. REYNOLDS: There was nothing, is the plain
23 reason they didn't get documentation in that area.

24 CHAIRMAN RIGLER: So this is not a case of needing
25 to reopen discovery. This is a case of discovery having been had.

1 MR. REYNOLDS: There are no documents.

2 CHAIRMAN RIGLER: That should satisfy the
3 City; I would think, Mr. Hjelmfelt.

4 MR. HJELMFELT: With respect to Document
5 Request 72 and 74, I think I can discuss them together.
6 They deal, of course, with financing of the City Electric
7 System, and its ability to finance. I think we have had
8 questions raised by the Applicants throughout this case,
9 going to the financing, financial ability of the City
10 and the City's failure to finance repairs to its system.

11 CHAIRMAN RIGLER: That is not what was discussed in
12 your motion. The motion concerns itself with the proposed
13 Painesville interconnection, the Orrville interconnection
14 and the feasibility of construction of transmission lines
15 by the City.

16 It has nothing to do with maintenance on the
17 City system.

18 MR. HJELMFELT: 72 and 74 did not relate
19 specifically to the Painesville or to the Painesville-Orrville
20 interconnection program. These occurred far after in time,
21 past that.

22 CHAIRMAN RIGLER: Then I'm not tracking your
23 motion, because the motion seems limited to testimony dealing
24 with Painesville, , Orrville or the construction of transmission
25 lines.

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1 MR. HJELMFELT: That is true that that is a
2 particular paragraph on page 3. But these documents were
3 requested under : the general Noerr-Pennington heading,
4 these particular document requests.

5 CHAIRMAN RIGLER: How about Number 81?

6 MR. HJELMFELT: The City will not pursue
7 Number 81 at this time.

8 CHAIRMAN RIGLER: Now, in connection with
9 Number 70 and 72 -- rather 72 and 74, you have had some
10 discovery; is that correct?

11 A MR. HJELMFELT: I believe there has been
12 limited discovery in that area.

13 MR. REYNOLDS: There was discovery.

14 CHAIRMAN RIGLER: All that was excluded, as
15 I refer to page 19 of our original ruling, was attempt
16 to persuade the City that it would be legislatively unwise --
17 tht is in connection with Request Number 72; is that correct?

18 MR HJELMFELT: I'm sorry. I don't have a copy
19 of the Board's ruling with me. If that is what you are
20 reading from -- yes.

21 CHAIRMAN RIGLER: So we granted some discovery
22 with respect to Document Request 72, but we excluded attempts
23 to persuade the City tht it would be legislatively unwise
24 to pass that ordinance; is that correct?

25 MR. HJELMFELT: That appears to be correct, yes.

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1 Although, there is general language in that same paragraph
2 that -- but I gather that is what it was.

3 CHAIRMAN RIGLER: Did Applicants make some
4 response under Request Number 72?

5 MR. REYNOLDS: I can verify it. The way I read
6 the order is the same way that you read the order which
7 required some discovery and in connection to that, we would
8 have responded with whatever we had. In terms of
9 how much specific documentation was turned over, I don't know.

10 CHAIRMAN RIGLER: All right. I think the nitty-
11 gritty question for us relates to the Caruso testimony.

12 The matter that is of principal concern to the
13 Board is that we did indicate in November of 1975 that if
14 there were a showing that the City could or could not construe
15 the Painesville transmission lines, that we might reopen
16 discovery; is that correct, Mr. Hjelmfelt?

17 MR. HJELMFELT: That is the substance of it,
18 yes. And --

19 CHAIRMAN RIGLER: Now, you contend that such a
20 showing has been made that would justify the reopening of
21 the discovery by the terms of our earlier order.

22 MR. HJELMFELT: That is correct.

23 CHAIRMAN RIGLER: One problem we have is one
24 of timeliness. When the issue became ripe, so to speak, instead
25 of moving for discovery at that time the City waited to the

1 very close of the hearing. That is very troublesome to us.

2 MR.HJELMFELT: I don't know when the Board
3 believes the matter became ripe. I would suggest that my
4 understanding of the Board's earlier order, that this certainly
5 wouldn't have become ripe until CEI had presented some
6 evidence, that is, until Mr. Caruso's evidence was offered
7 and my recollection was that was around June 2. We filed
8 this June 23, and this, of course, was a period when we
9 were in hearings.

10 I don't think that that is really undue.

11 MR. REYNOLDS: Mr. Chairman, I just want to
12 jump in with one point, because I think it may be relevant.
13 Without appearing to quibble too much, I would take
14 exception to your characterization of the nature of the
15 showing that would precipitate further discovery. As I
16 understand the Board's ruling, it was at the point in the
17 proceeding that the Board was satisfied that the City
18 had made a prima facie showing of the necessary for CEI
19 transmission. Now, that point in time as we discussed
20 in our responsive papers and as the City had indicated
21 in its motion, was at the time that the City put on
22 testimony through Mr. Hinchee and Mr. Mayben, which
23 arguably, anyway, went to the necessity for CEI transmission.

24 And I think the characterizing of the nature of
25 the showing in that light, and I'm using the language that

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1 the Board used, just high note, if you will, the relevant
2 time period when it would have been timely to come in with
3 this kind of request.

4 CHAIRMAN RIGLER: Okay. What we said, was that
5 the initial burden would be with the City to prove that
6 CEI transmission is essential to Cleveland's access to
7 outside power.

8 And we said, thus, before the discovery requested
9 by the City is required, it must meet substantial
10 evidentiary burdens.

11 At the point in the proceeding at which the
12 Board is satisfied that the City has made a prima facie
13 showing of the necessary for CEI transmission, the Board
14 will reconsider permitting the requested discovery.

15 We would contemplate a more precise specification
16 of the grounds for CEI asserting that alternate transmission
17 was or is available.

18 This would enable us to control more closely the
19 boundaries of initial discovery, if any.

20 We held out specifically the possibility of
21 reopening discovery. And we said that if any delay occurred,
22 it would be chargeable to Applicants, because it would be
23 they, who for their purposes, attempted to introduce evidence
24 in an area where they resisted or prevented discovery.

25 Now, at what point did the City make a prima facie

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1 showing. Didn't they do that in their case in chief, if they
2 did it?

3 MR. HJELMFELT: It was provably done when
4 Mr. Hinchee testified. Certainly, it was done with
5 Mr. Mayben's testimony. Certainly there remained the
6 point where CEI delineated the points at which we could
7 build our own transmission lines. That occurred when
8 Mr. Caruso testified.

9 CHAIRMAN RIGLER: This came about because
10 you had the advance, written, filed testimony of Mr. Caruso.

11 MR. HJELMFELT: Certainly, but we had the advance,
12 written testimony of Mr. Lensler, and it was never offered.

13 MR. REYNOLDS: Mr. Chairman, I was just going to
14 say and I don't have a record reference, but I remind the
15 Board that I was asked and, indeed, on the record
16 indicated that witnesses right after Mr. Mayben, that we
17 intended to call. At that time we withdrew Mr. Lensler's
18 testimony.

19 We said we contemplated Mr. Caruso in as a
20 fact witness, before he came in to give expert testimony.
21 I would anticipate that discovery in this area would have
22 taken place at the times when they would have had the documents
23 available to cross-examine Mr. Caruso.

24 That would have been the logical reason for
25 advancing discovery.

bw9 1 CHAIRMAN RIGLER: With respect to the Board's
2 observation that in the event we did permit discovery, the
3 plan of action we outlined would enable us to control more
4 closely the boundaries. Let's talk about the boundaries.

5 What is it you are asking for precisely?

6 Assume you are starting from rather a negative
7 position right now. Tell us in more precise terms why
8 coming in at this late date, you want particular documents --
9 assume we are not disposed to give you broad-scale
10 discovery?

11 MR. BUCHMANN: Could I go off the record for
12 a minute? I have to catch a plane.

13 (Discussion off the record.)

14 MR. HJELMFELT: Although CEI in this proceeding
15 has offered evidence, which they could argue shows it
16 would have been economically feasible for the City to have
17 built transmission lines of its own, in the past CEI
18 has taken the position before City Council that construction
19 of such lines would be economical.

20 CHAIRMAN RIGLER: Haven't they also argued that the
21 City was too broke to rehabilitate its own equipment?

22 MR. HJELMFELT: Right. I don't see the connection
23 there.

24 CHAIRMAN RIGLER: I'm curious about any discrepancy
25 and in an argument that they could finance transmission lines,

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1 but at the same time we are arguing they were too broke to
2 fulfill other maintenance functions.

3 MR. HJELMFELT: That is an argument I will keep
4 in mind.

5 Nevertheless, I think there is evidence that
6 could be developed on discovery that would tend to
7 show although they are here offering evidence that would
8 show, and Mr. Caruso said in his testimony not only is it
9 feasible today, but it would have been more feasible in
10 the past, and if that is evidenced in CEI documents that
11 shows that CEI earlier position was at the earlier time
12 that it wasn't feasible, I think that is directly relevant.

13 CHAIRMAN RIGLER: That still seems pretty broad.
14 Do you have any indication that there are such documents?

15 MR. HJELMFELT: I think Mr. Howley took that
16 position before the City Council with respect to the
17 Painesville-Orrville interconnection.

18 I'm satisfied with any documents that CEI
19 has realting to the feasibility of the construction of
20 transmission lines by the City.

21 CHAIRMAN RIGLER: In what period?

22 MR. HJELMFELT: I would say from 1960 on.
23 Be sure to include the Orrville-Painesville.

24 CHAIRMAN RIGLER: Through what period?

25 MR. HJELMFELT: Through today.

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Mr. Caruso's testimony apparently went right up to 1976.

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CHAIRMAN RIGLER: Haven't you had some of this discovery already?

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MR. HJELMFELT: To the extent we have had discovery, obviously, they won't need to duplicate it.

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1 CHAIRMAN RIGLER: What is the burden on CEI,

2 arl if any?

3 MR. HAUSER: I'm not sure of the breadth of Mr.
4 Hjelmfelt's request.

5 CHAIRMAN RIGLER: Neither am I.

6 MR. HAUSER: If it is confined to transmission
7 lines involving Painesville, Cleveland and Orrville, that
8 burden would be very great, because again, based solely
9 on my knowledge, there isn't much of anything in our files
10 available with regard thereto.

11 That burden would be great.

12 CHAIRMAN RIGLER: How about the feasibilities of
13 Cleveland's construction of transmission lines generally?14 MR. HAUSER: In that area, the only -- again,
15 based on personal knowledge, without going back, the only
16 information we would have would involve the City of
17 Cleveland's construction of the 1.6 mile, 138 kV line between
18 their Lake Plant and our Lake Shore Plant.19 We have built a lot of transmission lines in this
20 period. I can't recall of any involving the City of Cleveland.
21 Mr. Reynolds points out in the civil case also there was
22 extensive discovery that went back beyond the '65 cut-off
23 date.24 I would also note that the City of Cleveland has
25 been involved in at least two litigated transmission lines

1 of CEI and has access to the extensive filings that we made
2 for the Ohio Power Siting Commission.

3 CHAIRMAN RIGLER: That is not --

4 MR. HAUSER: Related to Cleveland, the only thing
5 I can think of would be the interconnection that was built
6 by the City of Cleveland and I frankly can't recall of
7 anything involving Painesville, Orrville or Cleveland, but
8 if there is anything there, it isn't extensive.

9 MR. HJELMFELT: At this point we are not
10 interested in documents relating to construction of 138 kV.
11 Presumably we would have had all of those, anyway.

12 I think what we are concerned with here is inter-
13 connections with utilities other than CEI.

14 CHAIRMAN RIGLER: And you would place that limitation
15 on your request?

16 MR. HJELMFELT: That's correct.

17 CHAIRMAN RIGLER: I anticipate that we will rule
18 on this in a day or so.

19 MR. REYNOLDS: What is the limitation? I'm sorry.
20 I don't understand it. Proposed interconnections by the
21 City of Cleveland with somebody other than CEI?

22 MR. HJELMFELT: The feasibility of the City of
23 Cleveland constructing transmission lines to a utility
24 other than CEI and other than its internal own transmission
25 system.

1 MR. HAUSER: That makes it a big bundle.

2 MR. HJELMFELT: The City's internal. I'm looking
3 for our outside transmission to interconnect with a party
4 outside, other than CEI.

5 CHAIRMAN RIGLER: Do you agree that is a limited
6 request then?

7 MR. HAUSER: Yes, it is, Mr. Chairman, and the
8 only -- if it is solely between the City of Cleveland and
9 an entity other than CEI, that is limited.

10 I would point out that we did provide at the
11 request of the City the back-up material for Mr. Caruso's
12 expert testimony. A good part of that came from the City.

13 CHAIRMAN RIGLER: In view of the minimal burdening
14 ahead and provide it for him.

15 Now, upon receipt of the documents, that brings
16 up the question of what we would do with them. After the
17 City has reviewed them, Mr. Hjelmfelt, write us a letter
18 giving the numbers.

19 If you wish to introduce them into evidence,
20 explain precisely what the offer of proof would be.

21 I will then permit written response and objections,
22 and I believe that the Board should be able to rule without
23 the necessity of the parties convening.

24 Do you agree with that, Mr. Hjelmfelt?

25 MR. HJELMFELT: I believe that is a very feasible

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1 suggestion.

2 MR. REYNOLDS: The only thing I want to make sure
3 on the record is it does occur to me that there may be
4 some material, not very much, but some material that would
5 come within the attorney's work product privilege under
6 the request Mr. Hjelmfelt has reformulated.

7 We would like to state we want every privilege
8 available asserted.

9 CHAIRMAN RIGLER: Send those such documents to
10 the Board, and we will review them without the assistance
11 of a special master and give them immediate ruling.

12 MR. REYNOLDS: I object to that procedure.

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1 CHAIRMAN RIGLER: The objection will be overruled.

2 MR. REYNOLDS: Mr. Chairman, can I -- The
3 reason I indicated an objection, what I had in mind was
4 drafts of this brief that we have to be doing and documents
5 which relate to the feasibility of the City interconnecting
6 with somebody outside of CEI, would bring within it certain
7 discussions that have been going on among counsel in
8 connection with the final filings in this case.

9 CHAIRMAN RIGLER: Which Counsel?

10 MR. REYNOLDS: Counsel with CEI and myself.

11 CHAIRMAN RIGLER: You may exclude Shaw Pittman
12 documents.

13 MR. REYNOLDS: Documents prepared by inside
14 counsel for Shaw PITTMAN. Why I was indicating reservation
15 is that they are in the draft stage.

16 CHAIRMAN RIGLER: These would have been
17 documents generated within the last six months?

18 MR. REYNOLDS: Yes.

19 CHAIRMAN RIGLER: You would agree to exclude
20 those?

21 MR. HJELMFELT: I understand he is talking
22 about drafts of briefs, he is going to file. I assume the
23 July 1, 1976, cut-off date solves your problem.

24 MR. REYNOLDS: Some of the work has been going
25 on before that.

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CHAIRMAN RIGLER: Let's make it February 1, 1976.

You may exclude those materials.

MR. REYNOLDS: That is the only category I had in mind. Anything else within the privilege we will send to the Board.

CHAIRMAN RIGLER: You would include documents that you otherwise might claim Noerr-Pennington, as to?

MR. REYNOLDS: Right.

CHAIRMAN RIGLER: If Mr. Hjelmfelt desires to put them into evidence, if there are any such documents, he will write us a letter outlining the offer of proof, Applicants may respons by writing and we will rule without necessity of another get-together.

Mr. Hjelmfelt agreed that is reasonable.

Do you want another get-together?

MR. REYNOLDS: No. I was thinking of another writing, but I guess that is the best way to handle it.

CHAIRMAN RIGLER: All right. That will be our ruling then.

Is there any other business?

MR.. HJELMFELT: The other ones you will rule on in the next day or so?

CHAIRMAN RIGLER: Which other ones?

MR. HJELMFELT: Request for documents relating to Applicants 204.

1 CHAIRMAN RIGLER: Same procedure.

2 MR. REYNOLDS: Have you ruled on that?

3 CHAIRMAN RIGLER: We have not. That is the only
4 pending issue then. We will let you know whether you
5 get them or not. If you do get them, we will follow the
6 same procedure with respect to their possible introduction
7 into evidence.

8 CHAIRMAN RIGLER: Any other business?

9 MR. REYNOLDS: The only other thing is the letter
10 I will provide, as soon as I get a response from the people
11 at Simpson, Thatcher and Ohio Power, with regard to the back-
12 up of the Turner letter.

13 CHAIRMAN RIGLER: All right. Upon receipt
14 then, we would be in a position to rule on the admissibility
15 of number 248.

16 MR. REYNOLDS: I would anticipate moving it into
17 evidence again.

18 CHAIRMAN RIGLER: There is a motion pending.
19 It was never rejected according to my notes.

20 Shall we go off the record for a minute.

21 (Whereupon, at 3:50 p.m., the hearing was
22 adjourned.)

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