

NUCLEAR REGULATORY COMMISSION



**IN THE MATTER OF:**

TOLEDO EDISON COMPANY AND  
CLEVELAND ELECTRIC ILLUMINATING  
CO.

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

and

CLEVELAND ELECTRIC ILLUMINATING  
CO., et al.

(Perry Nuclear Power Plant, Units 1 & 2)

Place - Silver Spring, Maryland

Date - Wednesday, 18 February 1976

Docket Nos.

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

50-440A  
50-441A

Pages 5109- 5245

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C O N T E N T S

<u>WITNESS:</u>	<u>DIRECT</u>	<u>GROSS</u>	<u>REDIRECT</u>	<u>TOTALS</u>
CHARLES W. ALLEN	4761	4783	4790	4792
Robert Hart	4794 (Cont'd)	4829		

<u>EXHIBITS:</u>	<u>MARKED</u>	<u>RECEIVED</u>
DJ EXHIBIT 188		4786
DJ EXHIBIT 189 (DJ-00006934)	4796	4800
DJ Exhibit 190 (DJ-----6932)	4815	
DJ Exhibit 191 (DJ-00006928 thru 00006930)	4817	4822
DJ Exhibit 192 (DJ-114931)	4823	4824
DJ Exhibit 193 (letter dated October 31, 1975, from R. M. Copper to Robert D. Hart.)	4826	4839
DJ Exhibit 178		4839
DJ Exhibit 194 (11000028)	4863	
DJ Exhibit 195 (11000029)	"	
DJ Exhibit 196 (11000038)	"	
DJ Exhibit 197 (11000038)	"	
DJ Exhibit 198, document dated October 23, 1958, captioned "Report of Visit with Pennsylvania Power on October 21, 1958."	"	

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1			
2			
3	Applicants Exhibit 61 (CEI)	4875	4955
4	(letter dated Sept. 10, 1973, from Mr. Whiting to Mr. Rudolph)		
5	Applicants Exhibit 62 (CEI)	4876	4953
6	(letter dated October 31, 1973, from Mr. Whiting to Mr. Howley.)		
7	Applicants Exhibit 63 (CEI)		4955
8	(Letter dated March 29)	4903	
9	Applicants Exhibit 64 (CEI)		4955
10	(Letter dated 4/10/74, from Mr. Goldberg to Mr. Hauser)	4904	
11	Applicants Exhibit 65 (CEI)		
12	(letter dated August 6, 1974, from Mr. Hauser to Mr. Whiting and Mr. Goldberg.)	4905	
13	Applicants Exhibit 66 (CEI)	4905	
14	(letter dated Aug. 22, 1974, from Mr. Goldberg to Mr. Hauser.)		
15	Applicants Exhibit 67 (CEI)	4906	4953
16	(letter dated August 30, 1974, from Mr. Hauser to Mr. Goldberg.)		
17	Applicants Exhibit 68 (CEI)	4908	4953
18	(letter dated Sept. 6, 1974, from Mr. Goldberg to Mr. Hauser.)		
19	Applicants Exhibit 69 (CEI)	4911	
20	(letter dated Nov. 11, 1974, from Mr. Hauser to Mr. Goldberg)		
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4	(letter dated NOV. 19, 1974, from Mr. Goldberg to Mr. Hauser)		4955
5	Applicants Exhibit 71 (CEI)	4913	"
6	(letter dated May 15, 1975, from Mr. Mayden to Mr. Hauser.)		
7	Applicants Exhibit 72 (CEI)	4915	"
8	(letter dated June 23, 1975, from Mr. Hauser to Mr. Goldberg.)		
9			
10	Applicants Exhibit 73 (CEI)		
11	(Letter dated June 19, 1975, from Mr. Rudolph to Mayor Perk)	4917	"
12	Applicants Exhibit 74 (CEI)		
13	(Letter dated July 1, 1975, from Mr. Goldberg to Mr. Hauser)	4918	"
14	Applicants 75 (CEI),		
15	(Letter dated July 22, 1975, from Mr. Rudolph to Mr. Perk)	4920	"
16	Applicants Exhibit 76 (CEI)	4920	"
17	(letter dated August 4, 1975, from Mr. Hart to Mr. Rudolph.)		
18	Applicants Exhibit 77 (CEI)	4933	"
19	(letter dated August 15, 1975, from Mr. Hart to Mr. Rudolph)		
20	Applicants Exhibit 78 (CEI)	4935	"
21	(letter dated August 18, 1975, from Mayor Perk.)		
22	Applicants Exhibit 79 (CEI)	4937	"
23	(letter dated August 25, 1975, from Mr. Hart to Mr. Rudolph.)		
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4			
5	Applicants Exhibit 81 (CEI) (letter dated Sept. 15, 1975, from Mr. Hauser to Mr. Cummins.)	4942	"
6			
7	Applicants Exhibit 82 (CEI), (Letter dated October 9, 1975 from Mr. Hart to Mr. Hauser)	4945	"
8			
9	Applicants Exhibit 83 (CEI) (Letter dated October 9, 1975, from Mr. Hart to Mr. Hauser)	4947	"
10			
11	Applicants Exhibit 84 (CEI) (letter dated October 19, 1975, from Mr. Hauser to Mr. Hart.)	4949	"
12			
13	Applicants Exhibit 85 (CEI) (letter dated October 15, 1975, from Mr. Hauser to Mr. Hart.)	4952	"
14			
15	Applicants Exhibit 86 (CEI) (letter dated October 21, 1975, from Mr. Hart to Mr. Hauser.)	4953	"
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CHAIRMAN RICLER: Good morning, everyone.

MR. CHARNO: Mr. Chairman, prior to beginning examination of witnesses, I would like to take care of one preliminary matter.

The Department previously introduced into evidence Exhibit DJ 2. At that time it was noted that page 105006 was either missing or illegible, and the Department committed itself to supply a substitute copy.

We have passed out an entire copy of the exhibit, including that page, and we would now propose to withdraw the document that is in evidence as DJ 2 and substitute the corrected copy.

CHAIRMAN RICLER: It will be received and substituted.

MR. AIUVALAIST: The Department would like to call Charles W. Allen to the stand.

Whereupon,

CHARLES W. ALLEN

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

DIRECT EXAMINATION

BY MR. AIUVALASIT:

Q Would you state your full name, please?

1 A Charles W. Allen.  
2 Q What is your present home address?  
3 A 509 Spring Street, Grove City, Pennsylvania.  
4 Q What is your present business address?  
5 A 315 Park Street, Grove City, Pennsylvania.  
6 Q What is your current employment?  
7 A I am employed as a supervisor of the  
8 Municipal Electric Department of the Grove City Borough.

9 Q How long have you held that position?  
10 A Since 1954, about 22 years.  
11 Q Would you please outline your education and job  
12 experience prior to becoming Grove City's supervisor  
13 of electric system?

14 A I'm a high school graduate. I have had five or six  
15 years of work in the utility field, power utility field,  
16 and had availed myself of various home study courses prior  
17 to the time I came to work for Grove City.

18 MR. STEVEN BERGER: Could I have that read back?  
19 (Whereupon, the reporter read from the  
20 record, as requested.)

21 BY MR. AIOVALASIT:

22 Q Who did you work for prior to going to work as  
23 supervisor of Grove City's Municipal Electric System?

24 A Pennsylvania Power Company.

25 Q What are your responsibilities as supervisor?



1           A       Primarily it is to construct, maintain and  
2 operate a power utility and electric power system, distribu-  
3 tion system.

4           Q       What was the last annual peak of the Grove  
5 City Municipal Electric System?

6           A       Between 5700 and 5800 kva.

7           Q       What is the total number of customers served  
8 by Grove City?

9           A       Slightly over 2700.

10          Q       Are all of these customers located within the  
11 city limits?

12          A       Yes.

13          Q       Does Gove City currently generate power?

14          A       No.

15          Q       Does Grove City buy power?

16          A       Yes.

17          Q       Who does it buy power from?

18          A       Pennsylvania Power Company.

19          Q       Is that pursuant to a contract?

20          A       Yes, it is.

21          Q       What is the largest single retail load located  
22 within the city limits?

23          A       About 3000 KVA, a little over 3000 KVA.

24          Q       What would be the name of that load?

25          A       Until just within the past few weeks, it was

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known as the Cooper-Bessner Corporation.

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Q What is it known as now?

A I believe it is Cooper Engineering Associates or Research. The name is so new I haven't caught onto it myself yet.

Q What type of business is Cooper Engineering or Cooper, Bessner engaged in?

A Primarily it is the manufacturer of air compressors and diesel engines to be used in the oil fields, primarily, and gas fields.

Q Does Grove City currently serve this industrial customer?

A We do not.

Q Who does?

A Pennsylvania Power Company.

Q Does your system currently have the capacity to serve Cooper Bessner?

A Yes, we have.

Q Since you started buying power from Pennsylvania Power, has Grove City ever attempted to serve this industrial customer?

A No.

Q Mr. Allen, are you aware of the provisions of the contract between Grove City and Pennsylvania Power Company?

A Yes.

Q Is there anything in the contract which you believe



would prevent you from serving Cooper Bassner?

MR. REYNOLDS: Objection.

CHAIRMAN RIGLER: What is the objection?

MR. REYNOLDS: I think that the contract speaks for itself. It is the best evidence. I think it calls for the kind of conclusion that this Witness is not in a position to speak to.

CHAIRMAN RIGLER: The contract would speak for itself. However, the question was whether the Witness viewed the contract as an impediment to Grove City's service.

MR. REYNOLDS: In his capacity as supervisor, or does it call for a legal conclusion?

CHAIRMAN RIGLER: We will permit it.

MR. AIUVALASIT: Could we have the question back?

(The reporter read the pending question.)

THE WITNESS: As I would interpret the contract, there is , as I can recall, it says we shall not serve any customer now being served by Pennsylvania Power Company.

BY MR. AIUVALASIT:

Q Has this provision in the contract had an effect on Grove City's willingness to try to serve Cooper Bassner?

A Yes, I think it has.

Q How did Grove City supply its power requirements before becoming a customer of Pennsylvania Power Company?

A We generated our own power.

1-3  
Q Do you know when Grove City first began to generate its own power requirements?

A 1908 or 1909, one of the two years.

Q When did Grove City cease self-generation and become a customer of Pennsylvania Power Company?

A In November of 1967.

Q Before becoming interconnected with Pennsylvania Power Company, was Grove City ever interconnected with any other electric utility system?

A No.

Q What was the condition of Grove City's generating units in late 1965?

A They were very much in need of repair.

Q Why didn't you just turn off the generators and repair them?

MR. STEVEN BERGER: I object to the form of the question, your Honor.

CHAIRMAN RIGLER: Rephrase it.

BY MR. ANUVALASIT:

Q You have stated that the generators needed repair. Did you believe that it was necessary to repair the units?

A Yes, it was necessary.

Q Were you cable -- could you repair them?

A Not and carry our peak loading.

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Q Why was that?

A To take an individual unit off the line for the repairs that were required, the time involved would not be a matter of hours, but days and, in some cases, a week, two, three weeks and, obviously, we couldn't just drop load for two or three weeks.

We were required to keep our units available for peak loading.

Q Are you aware of any attempts by Grove City since September 1965 to get partial requirement power, in order to repair your generating units?

A Yes, the matter was talked about.

Q Do you recall when that was?

A It was about that time or 1966.

Q Who did Grove City request partial requirements power from?

A From Pennsylvania Power.

Q Who made the request?

A To the best of my recollection the request would, of course, to become official, would have to be made by an official of the Borough government. I don't recall who made the request specifically. I have a feeling that it was or was our borough manager. I'm not positive about that.

Q Did you ever discuss this request with representatives of Pennsylvania Power Company?



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MR. STEVEN BERGER: I object, your Honor. I believe the question is based upon the assumption that the request was made from a responsible representative of Grove City and the Witness has already stated that he is not sure that such a request was made.

CHAIRMAN RIGLER: Overruled.

MR. AIUVALASIT: Would you read the question?

(The reporter read the pending question.)

THE WITNESS: You directed that question to me for a personal answer.

MR. AIUVALASIT: Yes.

THE WITNESS: Yes, I did personally.

BY MR. AIUVALASIT:

Q Who did you speak with?

A I can't be specific in that. I have talked -- I recall talking to one or two people, but to name the person or to be absolutely specific, I cannot do it.

Q Do you recall the names of the people that you do remember talking to during this period?

A Yes. One would be Mr. Knight, Mr. Robert Knight, who then was division manager in the area. He would have an official status, yes. That I would be certain of.

Q Do you recall anyone else, specifically?

A A Mr. Dunleavy, I believe, in the Newcastle office. I'm not positive if I had talked to him in the sense

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that I made a direct request or specified this particular thing, but I know that I had talked to him on occasion relative to the matter.

Q Did either Mr. Knight or Mr. Dunleavy communicate to you any information concerning the request for power?

MR. REYNOLDS: Objection.

MR. AIUVALASIT: I withdraw the question.

BY MR. AIUVALASI:

Q Do you recall whether the request by Grove City was oral or written?

A My request or the Borough's, are you asking me?

Q Either one.

A Either? Well, my request would not be written. It would be oral, if I made such a request. The request made by the Borough would no doubt both be oral and written.

Q Do you recall specifically making --

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1 MR. STEVEN BERGER: I move to strike the witness'  
2 answer on the grounds that he has already stated as to the  
3 Borough's request he has no specific knowledge with regard  
4 to it.

5 MR. AIUVALASIT: I do not believe that is an  
6 accurate characterization of the witness' testimony. I  
7 believe it went to a question of identity of the specific  
8 individual perhaps who made the request.

9 MR. STEVEN BERGER: That is not my recollection of  
10 the witness' testimony.

11 CHAIRMAN RIGLER: My recollection is that he  
12 believed that a request had been made by a responsible  
13 Borough official, but you weren't sure which official,  
14 because you really didn't know the details of any  
15 request. Is that correct?

16 THE WITNESS: That's correct.

17 CHAIRMAN RIGLER: Motion to strike will be granted.

18 BY MR. AIUVALASIT:

19 Q Was there a response to any request that you  
20 were aware of during this period for power?

21 A There was a response in writing.

22 MR. STEVEN BERGER: Excuse me. Could I have a  
23 clarification perhaps at this point -- it can be handled  
24 on cross-examination, but I would like it as clear as we can.

25 I believe that as to Mr. Allen's request, and I

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1 believe we are talking about a request for partial requirements  
2 service, the request that he is aware of was his request  
3 that was made orally to somebody.

4 Beyond that, we don't know what we are talking  
5 about. I want first to know if the request we are talking  
6 about now is a request for partial requirements service,  
7 and that the answer received -- we are just talking about  
8 the request as being in writing was a response to his oral  
9 request for partial requirements service.

10 CHAIRMAN RIGLER: You may answer the inquiry.

11 THE WITNESS: Could I have the question again,  
12 please?

13 CHAIRMAN RIGLER: There is no question pending.  
14 Mr. Berger was inquiring as to whether the written  
15 response that you just referred to dealt with Grove  
16 City's request for partial power requirements.

17 MR. AIUVALASIT: If I may, perhaps we can  
18 clarify the situation.

19 CHAIRMAN RIGLER: Let him answer that, Mr.  
20 Aiuvalasit.

21 THE WITNESS: I'm sorry, I did misunderstand  
22 that.

23 The request for power, the one I'm thinking of,  
24 didn't necessarily deal with partial requirements. The  
25 request for power to which the answer was given in writing,

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1 as I recall, was a request for total power and the use of  
2 that power or freedom to use it.

3 CHAIRMAN RIGLER: Were you aware of any written  
4 response to a request for partial power?

5 THE WITNESS: I was not, to the best of my  
6 recollection.

7 MR. STEVEN BERGER: Could we have the witness  
8 speak up?

9 MR. REYNOLDS: Mr. Chairman, I'm a little  
10 confused now.

11 Could we ask the witness if there was any request  
12 for partial requirement power, or whether he misunderstood  
13 that question?

14 Now that I have heard what he said, I'm not so  
15 sure from the prior testimony that the witness was  
16 responding to the same thing that was being asked.

17 CHAIRMAN RIGLER: I think he was, but I will  
18 permit the clarification at this time.

19 THE WITNESS: There was a request for partial  
20 power. It is true.

21 BY MR. AIUVALASIT:

22 Q Who made the request?

23 A It would be a member of our Borough council  
24 or the president of the council, or possibly the Borough  
25 manager. Specifically, I don't know.

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1 Q I believe you testified this was late in 1965 or  
2 1966; is that correct?

3 A True.

4 Q Are you aware of a response by Pennsylvania  
5 Power to this request?

6 A For partial power?

7 Q For partial power.

8 A Not a written response, but their reply, oral, as I  
9 recall, was negative. It took a negative approach. They  
10 didn't come right out and say flat out, "No, we will not  
11 do it," but they did about everything but that.

12 Q Who would have communicated this oral response  
13 to you?

14 MR. STEVEN BERGER: I think that was asked and  
15 answered.

16 MR. AIUVALASIT: I was doing this in hopes of  
17 clarifying the record, because of the intervening  
18 communications and exchanges. We would like to clarify it  
19 by having him answer the question.

20 CHAIRMAN RIGLER: You mentioned Mr. Knight and  
21 another name.

22 THE WITNESS: Mr. Knight and Mr. Dunleavy.

23 BY MR. AIUVALASIT:

24 Q Those would be the individuals?

25 A Yes, particularly Mr. Knight.

1 Q Was any reason given for the refusal?

2 A Not specifically, as I recall.

3 MR. REYNOLDS: Objection.

4 MR. AIUVALASIT: I'll rephrase it.

5 BY MR. AIUVALASIT:

6 Q Was there any reason given for the responses  
7 given?

8 A It was pointed out, as I recall, that the  
9 economics of such an arrangement wouldn't be to our  
10 advantage. Other particulars, I don't recall, but the  
11 general approach was negative to the question.

12 Q At that time, how far away were Pennsylvania  
13 Power Company transmission lines from Grove City, would  
14 you say?

15 A From our switch gear, our distribution switch  
16 gear, from 75 to 100 feet. Let's say 100 feet.

17 Q Besides Pennsylvania Power Company, what is the  
18 nearest electrical utility to Grove City?

19 A West Penn Power Company, I believe.

20 Q How far away are its lines from Grove City?

21 A Four miles, as I recall. That would be the  
22 county line.

23 Q Was West Penn Power considered by Grove City  
24 as a possible source for the partial requirements it needed  
25 to repair its generating units?



1 A During this period of time?

2 Q During this period of time.

3 A No.

4 Q Why not?

5 A Because he had made a request some years

6 earlier, as I recall, in '59, for such an arrangement.

7 This was preceded by a meeting between two or three of our

8 people, including myself and representatives of West Penn

9 Power in the nearby district, their district, at which

10 time they offered to sit down and talk about it.

11 Then when the request came through, finally,

12 for real serious negotiations, in '59, as I recall, then

13 we received a letter in response to a letter written by our

14 Borough manager stating the specifics of our request, more

15 or less, to the effect that since we were outside of their

16 franchise territory, they felt they were not in a

17 position to negotiate with us on the sale of power or

18 purchase of power on our part.

19 MR. STEVEN BERGER: I move to strike the

20 entirety of the witness' response in regard to the incident in

21 the '50s as being remote in time from the factual matters

22 that this Board will consider in evaluating the issues

23 before it.

24 MR. AIUVALASIT: I believe the witness'

25 testimony is relevant to determining why in 1966 Grove

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1 City did not believe that West Penn Power was a  
2 potential source for partial requirements power.

3 CHAIRMAN RIGLER: We will consider the answer only  
4 for that limited purpose and we will exclude from our  
5 consideration the details of the incident.

6 Is that clear, Mr. Berger?

7 MR. STEVEN BERGER: Yes, it is.

8 MR. REYNOLDS: While we are at a stopping place  
9 I should have interjected earlier the continuing objection  
10 on behalf of Applicants other than Pennsylvania Power to  
11 all testimony by this witness.

12 CHAIRMAN RIGLER: That objection is overruled.

13 BY MR. AIUVALASIT:

14 Q Mr. Allen, after you received Penn Power's  
15 response to Grove City's request for power in 1966, did  
16 Grove City ever discuss with Penn Power the possibility of  
17 Penn Power purchasing or leasing the Municipal Electric  
18 System?

19 A Yes, we did.

20 Q Did Penn Power make any offers?

21 A Yes, they did.

22 Q What were those offers?

23 A All offers followed the same line, but the final  
24 offer, as I recall, was a plan whereby they would pay the  
25 Borough the sum of \$200,000 a year for a period of 30 years

1 which would permit Penn Power to take over the entire  
2 system, including the generating plant, with an option  
3 on the Borough's part at the end of 30 years to purchase  
4 the system back.

5 That was the general arrangement or the offer  
6 that they made generally.

7 Q Who proposed this plan?

8 A A person you are talking about.

9 Who proposed this plan, initially?

10 Q Yes.

11 A It would be Penn Power.

12 Q Again when did this occur, Mr. Allen?

13 A It would be in '65 or '66. '66, as I recall.

14 Q And what would the relationship of this instance  
15 be in relation to your getting the response from Penn  
16 Power with respect to partial requirements?

17 MR. STEVEN BERGER: I object to that question.

18 CHAIRMAN RIGLER: Let me hear it again.

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

21 BY MR. AIUVALASIT:

22 Q Did this follow the incident with respect to  
23 partial requirements?

24 A Yes, it would follow.

25 MR. AIUVALASIT: The Department has suggested to

1 the Applicants a method for expediting Mr. Allen's  
2 examination by making an offer of proof for certain  
3 evidence to which Applicants intend to object.

4 Applicants have agreed to this suggestion. We  
5 therefore request that Mr. Allen be temporarily excused.

6 CHAIRMAN RIGLER: All right. You may step  
7 down.

8 Is there a place where Mr. Allen can wait?

9 MR. AIUVALASIT: Yes, sir.

10 (Witness temporarily excused.)

11 MR. AIUVALASIT: All remaining testimony by  
12 Mr. Allen on direct would deal exclusively with events  
13 occurring prior to September 1, 1965. In view of the  
14 Board's prior rulings, the Department felt that the hearing  
15 might be expedited if we made an offer of proof of this  
16 evidence prior to beginning our examination.

17 The Department intends to prove that through  
18 Mr. Allen and through the introduction of documents  
19 identified with the Department's internal designation as  
20 11000028 and 11000029, that Pennsylvania Power refused a  
21 request by GroveCity in 1959 to sell the city partial  
22 requirements power to enable the city to serve an  
23 industrial retail customer located within the city.

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This customer was thereafter served by Pennsylvania Power. This evidence would be offered in support of the Department's allegations that were in our interrogatory answers and prehearing brief. The Department would further prove through Mr. Allen and documents bearing Justice internal numbers 11000033 and 11000039 that Grove City requested bulk power from West Penn Power in 1959 and was refused on the ground that Grove City was not in West Penn's service area.

This evidence would be offered in support of the Department's allegations concerning the structure of the Applicants and CAPCO, specifically, and the availability of competition.

Finally, the Department would prove through an unnumbered document which the Department first became aware of last night that Penn Power also refused to sell power to Grove City for resale in 1958.

At that time Pennsylvania Power also refused to operate in parallel with Grove City. I might add that with respect to this last document, as soon as we became aware of its existence we gave copies to the Applicants.

MR. STEVEN BERGER: Your Honor, I believe that the offer or proof on its face, while perhaps having some relationship to the issues that the Board has delineated

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in this proceeding, has no relationship to any factual matters, other than as came out on direction examination of the Witness with regard to the West Penn Power incident.

Except with regard to that and the limited treatment the Board has stated it will treat that evidence in regard to that, I can see no good cause for going back to factual matters prior to September 1, 1965, which is remote from the time the Board has said it will consider in determining the issues delineated for this proceeding.

CHAIRMAN RIGLER: You are asking us to reject the offer of proof?

MR. STEVEN BERGER: I certainly am.

MR. REYNOLDS: On behalf of other Applicants, I would add that CAPCO was not in existence then and did not come into existence until 1967, and to the extent this offer of proof relates to some aspect of the CAPCO situation or the structure of the industry in the Ohio area, I would say that it is clearly objectionable and that is a pretty slender reed to try to bootstrap this kind of testimony into the hearing.

(Board conference.)

MR. AIUVALASIT: Mr. Chairman, I would just like to point out that the Department believes that this evidence would show a continuing course of conduct with respect to Pennsylvania Power Company, specifically as it

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relates to competition between municipal electric systems and Pennsylvania Power for industrial customers.

For that reason, we feel that it should be allowed.

MR. STEVEN BERGER: Your Honor, if that completes the statement of the Department, I would like to respond to that, if I may.

I don't believe that the incident in question any more establishes a continuing course of conduct than any incident prior to 1965 could be alleged to establish a continuing course of conduct.

If that is the basis for a good cause showing for the basis of going back in time before this, I think the Board will find itself broadening this case back in time before September 1965 on a justification of continuing course of conduct, which can be stated with regard to any instance.

CHAIRMAN RIGLER: The offer of proof will be rejected.

Mr. Goldberg, will you have an cross-examination?

MR. GOLDBERG: I don't anticipate any.

CHAIRMAN RIGLER: Mr. Hjelmfelt?

MR. HJELMFELT: I have no questions for this Witness.

MR. STEVEN BERGER: May I have a ten minute recess?



CHAIRMAN RIGLER: Is that the conclusion of the Department's direct?

MR. AIUVALASIT: That is correct.

CHAIRMAN RIGLER: Yes.

(Recess.)

Whereupon,

CHARLES W. ALLEN

resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

CHAIRMAN RIGLER: Are you read for cross-examination, Mr. Berger?

MR. STEVEN BERGER: Yes, Mr. Chairman.

CROSS-EXAMINATION

BY MR. STEVEN BERGER:

Q Mr. Allen, I believe you testified that in 1966, Borough of Grove City had sufficient capacity to serve the Cooper Bessemer load; is that correct?

MR. AIUVALASIT: Objection. I wouldn't agree with that characterization of the testimony.

CHAIRMAN RIGLER: I will permit it. The Witness can explain if that is not what he testified to.

THE WITNESS: As I recall that is not what I testified to. My recollection of the question had to do with our present situation.

BY MR. STEVEN BERGER:

Q You presently have sufficient capacity to serve the Cooper Bessener load?

A That is correct, sir. We do have.

Q You are speaking now of your own generation?

A We no longer generate.

Q Do you have any capacity at all?

A No generating capacity.

Q Thank you.

At the time of your discussion with a representative of Pennsylvania Power Company with regard to the possibility of partial requirements service from Pennsylvania Power Company would it be a fair characterization to say that those discussions were of a very preliminary nature?

A In light of a completed contract, yes, they were preliminary.

Q And that a lot of things were being discussed in and about that time frame? What I mean by that is, I think you testified that the possible purchase of system was being discussed, the leasing of the system was being discussed and other things were being discussed.

A That is true.

Q Are you aware of any study that was prepared in and about that time frame which stated that it was in the best interests of the Borough of Grove City to buy all of

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their requirements from Pennsylvania Power company?

A. I'm trying to recall specifically. We made two or three studies from time to time. You are talking about the time frame that would be encompassed by the year '65, '66, in that area.

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1 Q Yes.

2 A I know that there was -- you can call it a study,  
3 if you like -- a study represents something to me as a  
4 very formal attack on something.

5 Let me say this: We did study the problem, all  
6 facets of it, yes.

7 Q And the conclusion was that the best solution  
8 was to buy all of your requirements from Pennsylvania  
9 Power Company at that point in time?

10 A Well, at that point in time, we didn't have much  
11 of an alternative.

12 Q Well, was the council of the view that there was  
13 a substantial amount in the way of expenditure that had to  
14 be made in order to repair the generating plant of Grove  
15 City?

16 A Yes, they were aware of that.

17 Q Was that a major factor which moved the Borough  
18 to purchase all of their requirements from Pennsylvania  
19 Power Company?

20 A Yes, it was one of the major factors.

21 Q Now in your discussions with a representative  
22 of Pennsylvania Power, with regard to the obtaining from  
23 them of partial requirements, I think you stated -- correct  
24 me if I am wrong -- that it was said that it was in "our  
25 best interests" not to take partial requirements from an

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1 economic standpoint. Is that correct?

2 A That would apply, yes.

3 Q When the word "our" was used in your answer,  
4 were you referring to Grove City?

5 A Yes, to Grove City.

6 Q Do you know what would have been involved in  
7 terms of an expenditure for a substation or what-have-you  
8 in order to establish partial requirements service to Grove  
9 City at that point in time?

10 A So far as expenditure would be concerned, our  
11 expenditure would cover the cost of equipment necessary  
12 to provide not only partial power requirements, but full  
13 power requirements.

14 A little knowledge of the circumstances involved  
15 in the situation, we would be foolish to install equipment  
16 limited to the capacity of partial.

17 Okay. Do you follow my meaning?

18 So our consideration would be given to the cost  
19 of installing a full-sized substation. Yes. The  
20 dollar figure was approximated on our part.

21 Q Do you recall what that dollar figure was?

22 A I think \$125,000 at that time.

23 Q Certainly no final decision had been made with  
24 regard to expending \$125,000 for a substation. Again this  
25 was in the preliminary stages of discussion?

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1           A       The consensus of our council was that if this  
2 route were to be the one we were to follow, then, yes,  
3 we would expend that amount of money.

4                    But no decision to write a check for \$125,000  
5 was made, if this is your point.

6           Q       Yes, sir.

7                    Do you recall any discussions with regard to how  
8 long a period of time, if partial requirement was what  
9 was the route that Grove City would go, in order to, I  
10 think you stated -- that they needed in order to meet their load  
11 and repair their generating equipment, how long a period of  
12 time it would take them to repair their generating  
13 equipment so that they could again be self-sustaining?

14           A       Fully self-sustaining? In other words, return  
15 all of our equipment to good operating condition?

16           Q       Yes, sir.

17           A       In answer to this -- it was brought up, of course.  
18 We went afield, actually to the Cooper-Bassener position,  
19 who were the prime manufacturers.

20                    We were talking about a period of some three months  
21 as a minimum.

22           Q       Mr. Allen, approximately how much are we  
23 talking about at that point in time that was computed,  
24 even if it be an approximation, to repair the Grove City  
25 Plant?

1                   CHAIRMAN RIGLER: I don't understand the  
2 question.

3                   MR. STEVEN BERGER: I'm asking him how much  
4 would have been required at that point --

5                   CHAIRMAN RIGLER: How much what?

6 BY MR. STEVEN BERGER:

7                   Q       How much money would have been required to have  
8 been expended in order to repair the Grove City Plant to  
9 the point of it being a self-sustaining system once again?

10                  A       I'm going to have difficulty giving you a true  
11 answer there, because our people who were responsible for  
12 the maintenance of anything but major repair, who  
13 possibly their limited knowledge of the major repairs that  
14 might be required, were at odds with representatives  
15 from Cooper-Bessemer who didn't necessarily think the  
16 same.

17                   Therefore, what I'm trying to say is we had a  
18 couple of different price estimates and it ranged anywhere  
19 from \$50,000 to 350,000, with I think my honest opinion  
20 that the true answer would be some place between the two.

21                   We are saying possibly \$200,000. That is  
22 possible.

23                  Q       When you say Cooper-Bessemer was consulted, they  
24 were the manufacturers of the engines; is that correct?

25                  A       That is true.



1 MR. STEVEN BERGER: I have no further questions,  
2 Your Honor.

3 MR. REYNOLDS: There is no further cross by  
4 any of the other Applicants of this witness.

5 CHAIRMAN RIGLER: Any redirect by the Department?

6 MR. AIUVALASIT: Yes.

7 REDIRECT EXAMINATION

8 BY MR. AIUVALASIT:

9 Q Mr. Allen, when you testified with respect to  
10 Grove City having available capacity to enable it to serve  
11 Cooper-Bessemer, what did you mean by capacity?

12 A You are speaking of our present capacity?

13 Q That's correct, yes, sir.

14 A I guess very simply that we have the substation  
15 cable. The fact that Cooper-Bessemer's point of distribution  
16 on thir substation lies within three to four hundred feet  
17 of our own, there is no major problem in that respect. We do  
18 have the facilities.

19 Q Mr. Allen, in 1965 to 1966, in that period,  
20 were you told by Penn Power that it was in your -- that is  
21 Grove City's best interests, not to buy partial requirement  
22 power, or did you tell Pennsylvania Power that it was in your,  
23 Grove City's, best interests not to buy partial requirement  
24 power?

25 A I understand the question.

1 Penn Power did some study on the problem in an  
2 effort to help us make up our mind what we should do. In  
3 this respect, as I recall, they prepared cost estimates on what  
4 our rate per kilowatt hour would be under a partial purchase  
5 power arrangement and then as I also recall, based on their  
6 calculations, I agreed that this was true on the rate that  
7 would apply.

8 Now I admit that my understanding of such a  
9 rate, should it come to pass, or such a purchase agreement,  
10 should it come to pass, would be covered by a separate  
11 contract which would have a direct bearing, direct impact  
12 on the rate structure itself.

13 Now there my recollection is a bit hazy, but I  
14 get the strong feeling that sticks with me that under the  
15 then-known rate application or rate schedule application,  
16 it would be to our best advantage to disregard this at least  
17 from that point of view.

18 What we should do, in my opinion, at that time, was  
19 to make a total power purchase. This all ties in with the  
20 fact that the die, so to speak, had been cast, things  
21 had gone so long that we were in such a condition with  
22 our generating equipment that had we wanted to, I doubt very  
23 much if the time element would have permitted us to go any  
24 other route.

25 MR. AIUVALASIT: That is all.

RECROSS-EXAMINATION

BY MR. STEVEN BERGER:

Q Mr. Allen, when you talk about capacity to  
serve Cooper-Bessemer, you are talking about distribution  
capacity; is that correct?

A Yes.

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Q And do you know what voltage Cooper Bessemer is being served at now?

A 4160, their distribution voltage. What they buy at, I'm not positive. I'm not positive whether they buy it at 69,00, but their distribution voltage is 4160.

Q They get it at 69 and they step it down to 4160?

A Yes.

MR. MIUVALASIT: Objection. That is not what he testified to.

CHAIRMAN RIGLER: He said they might take it at 69. He wasn't sure what they took it at.

BY MR. STEVEN BERGER:

Q It is your understanding they take it at a higher voltage than 4160 and it is stepped down to 4160 after that?

A The transmission line from which they are being served is 69,000 volts. How they take it, and by that I mean on where the metering is, whether it is metered on 69,00 or on a secondary voltage site, I don't know.

I do know their distribution voltage at 4160 is compatible with that of our own.

MR. STEVEN BERGER: No further questions, your Honor.

CHAIRMAN RIGLER: Thank you very much, Mr. Allen.

(Witness excused.)

CHAIRMAN RIGLER: Are we ready to proceed?

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MR. MELVIN BERGER: We are ready for Mr. Hart

to resume.

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Whereupon,

ROBERT HART

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

DIRECT EXAMINATION (Contd)

BY MR. MELVIN BERGER:

Q Mr. Hart, I believe when we left off yesterday afternoon we were discussing the December 13, 1973, meeting with you and numerous other City of Cleveland people had with CEI people.

I would like to ask you if you can recall whether third party wheeling was discussed at this particular meeting?

A I believe it was discussed, although only peripherally, because as is stated here and as I indicated yesterday, the main part of the meeting was taken up discussing those items that appear on the bottom of the first page of this document, and the top of page two of that document.

In all of our meetings we, at one time or another brought up the question of third party wheeling.

Q Do you recall the nature of the discussion

about third party wheeling that occurred at that meeting?

A. No, I don't recall it.

Q. Do you recall if CAPCO membership was discussed at that meeting.

A. I think CAPCO membership was discussed and it was discussed in the sense of what the benefits of CAPCO were and would there be any way possible that the City of Cleveland could get the benefits of CAPCO without really being a member?

Q. Do you recall if anyone from CEI indicated whether Cleveland would or would not be allowed into CAPCO?

A. As I remember they very emphatically said that we could not become a member of CAPCO.

Q. Who would have said that?

A. Lee Howley.

MR. MELVIN BERGER: At this time I would like to move DJ-188 into evidence.

MR. BUCHMANN: No objection.

MR. REYNOLDS: Continuing objection by Mr. Reynolds.

CHAIRMAN RIGLER: The continuing objection is overruled and 188 will be received into evidence.

(The document heretofore marked Exhibit DJ-188 for identification, was received in evidence.)

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BY MR. MELVIN BERGER:

Q Mr. Hart, subsequent to the December 13 meeting, did the City respond in writing to that letter given to you by Mr. Howley?

MR. REYNOLDS: Couldn't speak up a little bit, please. We can't hear you.

THE WITNESS: I believe over the course of time Mr. Goldberg, or perhaps Jay Whiting's name was actually used on the document, would have responded to this.

MR. MELVIN BERGER: I would like to have marked for identification as DJ-129, a letter from Herbert Whiting to Lee C. Howley, dated January 2, 1974, and bearing Department of Justice internal document number 00006934.

(The document referred to was marked Exhibit DJ-129 for identification.)

CHAIRMAN RIGLER: That continues to internal document number 00006935.

MR. MELVIN BERGER: That is correct.

CHAIRMAN RIGLER: Be sure to mention the complete listing of the numbers.

THE WITNESS: This would have been the letter that I was specifically referring to, which was in answer to the December 13 letter.



MR. MELVIN BERGER: I would like to move DJ-189

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into evidence.

MR. BUCHMANN: I have no objection.

MR. REYNOLDS: Continuing objection.

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1 CHAIRMAN RIGLER: Tell me again about the  
2 continuing objection, Mr. Reynolds.

3 MR. REYNOLDS: Well, as I understand the  
4 Board's ruling, the correspondence in question would come in  
5 as against all of the Applicants.

6 This is a correspondence that is between the  
7 city of Cleveland and CEI, and there is nothing in this  
8 correspondence that indicates to me that it ever came into  
9 the possession of any of the other Applicants.

10 CHAIRMAN RIGLER: It concerns a request for  
11 membership in CAPCO.

12 MR. REYNOLDS: Yes, and it was received by --

13 CHAIRMAN RIGLER: Do we have evidence before  
14 us that as of January 2, 1974, the other CAPCO members  
15 had advised Cleveland or made known to Cleveland that it  
16 should deal with CEI with respect to request for participa-  
17 tion in CAPCO?

18 MR. REYNOLDS: Are you referring -- I'm not sure  
19 what you are referring to unless it is a letter that Mr.  
20 Smith, I believe, alluded to yesterday in connection with  
21 whether CEI was or was not speaking on behalf of other  
22 Applicants.

23 CHAIRMAN RIGLER: Applicant's Exhibit 25.

24 MR. REYNOLDS: I don't know what the date of  
25 that is, but this letter, as I understand it, is one that is

1 written by Mr. Whiting to Mr. Howley. Not one written by  
2 Mr. Howley to Mr. Whiting.

3 CHAIRMAN RIGLER: I'm not sure that is  
4 responsive to my question.

5 If the other members of CAPCO had indicated  
6 that they preferred the City to deal with CEI with  
7 respect to questions relating to CAPCO membership --

8 MR. REYNOLDS: If they had -- well, I assume if  
9 that were the fact, then we could -- if the facts were  
10 shown that way, then that might affect the validity of  
11 the Board's ruling on my continuing objection; but it  
12 certainly at the moment, as I understand the record, would  
13 not be a basis for me not to make the continuing objection  
14 with respect to this correspondence.

15 Our position has been all along until such  
16 time as there is a connection up at some point in this  
17 hearing, that would go to whatever it be, combination,  
18 consensual action in restraint of trade that any evidence  
19 that comes in should come in only against the particular  
20 Applicant that was involved.

21 Here it is clear to me that this correspondence  
22 shows that the only Applicant that could possibly have  
23 been involved in this particular correspondence is CEI.

24 CHAIRMAN RIGLER: Continuing objection is over-  
25 ruled, and we will receive 189 into evidence at this time.

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(DJ 189, previously marked

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for identification, was

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received in evidence.)

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MR. LERACH: Mr. Chairman, I would like to point

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out to the Board a distinction that may exist, and may

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assist you in passing on the continuing objection made

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by Mr. Reynolds.

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To the extent that the Board is relying on

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Applicant's No. 25 to overrule the continuing objection

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as to correspondence between the City and CEI, I would

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point out to the Board that there is in evidence an

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independent and separate response by Duquesne to Cleveland,

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which would appear to be inconsistent with any nomination

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of CEI by Duquesne to deal with the City, and I point this

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out to the Board so that you will realize that perhaps

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Duquesne is on somewhat different footing in your ruling

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on the continuing objection.

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CHAIRMAN RIGLER: We also have before us the

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fact that CEI delivered a copy of a letter.

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MR. LERACH: I submit to you it was not a copy of

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the letter, sir. It is different in form and in words from

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the actual response.

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CHAIRMAN RIGLER: All right.

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MR. LERACH: There has been no evidence whatsoever

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as to how Cleveland came into possession of that document,

1 CEI came into possession of that document.

2 By the witness' own testimony, it was delivered  
3 to him, Mr. Hart, after receipt of the written response  
4 from Duquesne.

5 MR. STEVEN BERGER: Your Honor, can we have just  
6 one moment?

7 (The Board conferring.)

8 CHAIRMAN RIGLER: We will take a five-minute  
9 break.

10 (Recess.)

11 MR. REYNOLDS: Mr. Chairman, if I might add to  
12 my response to your inquiry about the continuing objection,  
13 in light of your reference to Applicant's Exhibit 25, which I  
14 have now been able to locate, I would like just to say  
15 initially that I think on its face it is clear that  
16 Applicant's Exhibit 25 does not have any suggestion of an  
17 agency relationship whatsoever.

18 I would also submit that the Department of  
19 Justice Exhibit 188, which is the letter to which 189  
20 responds, clearly carries with it an inference that there is  
21 no such agency relationship, and the Duquesne Light letter  
22 would tend to refute any agency relationship.

23 Beyond that, I think that it should be pointed  
24 out that to the extent there is some indication at some  
25 later date in this record of a possible agency relationship,

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1 this Board has the further responsibility to ascertain the scope  
2 and nature of that agency relationship, and the authority  
3 that the agent has from the principals that would warrant  
4 the agent's action to bind the principals as a separate  
5 question, quite apart from the question of whether there is some  
6 kind of an agency relationship that exists.

7 It has to be ascertained the nature and extent  
8 of that agency relationship.

9 Clearly at this point the record has in our view  
10 no evidence of an agency relationship, and has not even  
11 addressed, assuming there is that, any question as to what  
12 might be the nature of the agency relationship or the extent  
13 of it, or how the Applicants might have been operating in  
14 connection therewith.

15 For those reasons, the continuing objection is,  
16 it seems to me, very well taken.

17 CHAIRMAN RIGLER: We have been talking about  
18 this during the break ourselves, Mr. Reynolds.

19 I think there would be an obligation on the part  
20 of the Applicants to present their positions with candor  
21 to this Board, and if such a relationship can be established  
22 and is known to have been in existence to the Applicants  
23 that an attempt to deny it would be frivolous, it would be  
24 quibbling, and it would not be advancing these proceedings.

25 With that in mind, we took a look at some things

1 that have been submitted to the Board which have not been  
2 introduced into evidence, but which have come to our  
3 attention.

4 MR. SMITH: You make expressions indicating you  
5 disagree with the Chairman.

6 I'm addressing this to Mr. Lerach.

7 I recommend rather than making faces, that  
8 the Board observe that you delay and make your objections  
9 on the record.

10 MR. LERACH: I will make my objections on the  
11 record, Mr. Smith.

12 CHAIRMAN RIGLER: The problem I'm having with  
13 respect to candor, I'm having is -- we took another look  
14 at some of the documents that were appended as exhibits  
15 to the City of Cleveland supplement to the disqualification  
16 brief under date of December 10, 1975.

17 The exhibits have not been introduced at this  
18 point, and are not a matter of record.

19 Nonetheless, the Board is familiar with them  
20 because we read the brief in connection with the disqualifica-  
21 tion proceeding.

22 These minutes purport to be drafted by  
23 representatives of CEI, and turning to a document which  
24 bears identification number 00014388, we begin to find a  
25 discussion of the alternative to CAPCO membership.



1           On page 17 of the minutes, which can't be  
2 identified further due to the poor copy, we see that no  
3 decision was made on any of these positions to recommend  
4 to the CAPCO companies.

5           It continues, it was agreed a meeting should be  
6 held with the chief executives of the other CAPCO  
7 companies to discuss this prior to the next meeting with the  
8 City.

9           We go from there to the next document, which  
10 apparently is the minutes of a December 13 meeting, which  
11 is the crucial date in question here.

12           These minutes state in paragraph 3 that Mr.  
13 Howley opened the meeting by referring to the December 10,  
14 1973 letter of Duquesne Light addressed to Ralph Purk,  
15 Mayor.

16           L. C. Howley said this letter reflected the fact  
17 that the CAPCO companies -- I emphasize the CAPCO  
18 companies -- were the reasons stated in that letter that it  
19 didn't make sense for MELP to be a member of CAPCO, et  
20 cetera.

21           The last page of these minutes contains this  
22 paragraph.

23           Mr. Goldberg again raised the question as to  
24 was membership in CAPCO completely out. He stated he  
25 thought Mr. Howley's statements at the beginning of that

1 meeting were not categorical.

2 He was advised that membership in CAPCO was  
3 definitely out. He said that he was unwilling -- I guess  
4 he refers to Mr. Goldberg -- said he was unwilling to  
5 accept that, and inquired whether CAPCO had ever considered  
6 associate members.

7 He was advised that the question had never  
8 come up.

9 Certainly there are more than inferences that  
10 the question of CAPCO membership was discussed among the  
11 executives of those companies, and that Mr. Howley at the  
12 December 13 meeting was making representations on behalf of  
13 CAPCO and not of CEI alone.

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If that turns out to be the case, and if we do find evidence that these meetings occurred and that Mr. Howley was indeed speaking on behalf of other members of CAPCO, then I would be concerned about the quibbling that is going on and about the candor.

MR. REYNOLDS: May I respond?

CHAIRMAN RIGLER: You certainly may.

MR. REYNOLDS: I don't have the documents in front of me that you are reading from, but as I recall your statements with regard to them, I don't think that any of those documents establish that CEI was acting on behalf of all of the CAPCO companies with regard to these matters. To the contrary, it does appear to me from your reading of those documents that all of the companies were acting individually and making their own mind up on their own, rather than on any kind of an agency basis, that might be ascribed to CEI.

I would, therefore, at this point state only that I'm not so sure we are -- it is appropriate to leap to the conclusion that there is quibbling going on.

I feel very strongly that the burden in this case is on the other side and not on Applicants, and I really will say with all candor, I do not feel I have an obligation to this Board to come in and help the other side make their case. And I do not intend to do that.

I'm not trying to be impertinent now, but it does seem to me that the other side has made charges. We are talking about an arrangement which has been characterized as a pool. The way that the companies feel within that framework is something that on our direct case we are prepared to forward with and explain to this Board, but I do not think that I have an obligation prior to that time to come in and make any statements that would impact on that whole aspect of the case.

I am not here to quibble with the Board on --

CHAIRMAN RIGLER: Right. There is a distinction, I would agree with you, between any obligation to assist the other parties in developing charges against you, and in responding to questions from the Board about what the true facts were.

You have indicated to me that the true facts may be other than an inference that I think can be drawn from these documents, and you will have that opportunity.

The caution I was exercising was against quibbling where you know the facts are contrary to any representations you may make.

I'm not saying you did that.

MR. REYNOLDS: I have not done that and I don't intend to do that in this hearing.

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I think the issue is an important one in this hearing, and I think it is important for the record at the appropriate spots to make clear to the Board where we object to characterizations as to agency relationships or as to the one or more of the companies acting on behalf of other companies, because my position is, and it will continue to be throughout, that that is an inappropriate characterization.

When the time comes for the Applicants to put on their direct case, we certainly intend to explain to the Board fully what the situation is, and how the companies operate and how they operated with specific regard to the matters that we are focusing on right now.

It was for that reason that I made the statement with respect to his document and for that reason that I continue to think it is important that we make the continuing objection that we have been making throughout.

CHAIRMAN RIGLER: All right.

MR. STEVEN BERGER: May I supplement Mr. Reynolds' comments somewhat?

I believe that Mr. Reynolds making the statement he made after the recess, I believe is somewhat precipitated by the fact that there is, at least in the minds of some of the Applicants, the belief that if you establish some connection, whatever that connection may be, between the CEI

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acting in some capacity in dealing with the City, that whatever CEI did with the City, in terms of proposals, counterproposals, conditions that are alleged or proven in this proceeding with regard to participation in CAPCO, it does not necessarily follow that those conditions, counterproposals, proposals, whatever we are talking about, are necessarily attributable to all of the Applicants.

If, in fact, the decision was made by each of the companies that the City of Cleveland would not reap benefits to any one of them, then whatever they would have done in negotiating on their own with the City of Cleveland is, I think, a horse of a different color, if you will.

CHAIRMAN RIGLER: That may be. But the references we had, you see, were to a proposed meeting of the chief executives of CAPCO to discuss Cleveland's request for membership, and then we come to the meetings in December of 1973 and Mr. Howley, as I read the document, infers that he is delivering a message to the City on behalf of CAPCO companies.

Now, we will not form that conclusion. We will listen -- Mr. Reynolds tells us that the Applicants contest that conclusion and that during their direct case they will demonstrate that that conclusion is erroneous.

We will not form any conclusion. But, plainly, there is a basis for belief or to draw an

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inference, which may be rebutted, that there was some sort of joint decision or there could have been.

I strike that -- there could have been a joint decision among the CAPCO companies with respect to Cleveland's request for membership.

MR. STEVEN BERGER: I note the entire discussion, I believe, was precipitated by CJ-189.

CHAIRMAN RIGLER: Right, which was delivered at the very meeting which is covered by those minutes.

MR. LERACH: No.

MR. REYNOLDS: No.

CHAIRMAN RIGLER: No, I beg your pardon. That is where the copy of the Duquesne letter was delivered.

MR. LERACH: It is not a copy.

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1 MR. REYNOLDS: That is where DJ 186 was  
2 delivered, according to the testimony of the witness.

3 MR. STEVEN BERGER: All I'm saying is that it  
4 having been precipitated by 189, the Applicants felt  
5 there should be made a statement in regard to proposals  
6 or conditions or what-have-you that may have been stated  
7 by one of the Applicants to a particular entity in their  
8 area, and that those statements should not be attributable to  
9 all of the Applicants without a substantial amount of proof  
10 being introduced to establish that fact.

11 MR. SMITH: Of course, the issue now before us  
12 is the simple admissibility of evidence in relation to all  
13 Applicants, not the import of it, but the simple  
14 admissibility of it, which Mr. Reynolds continues to argue  
15 and press, ignoring the evidence that we have here that  
16 there has not been isolated unilateral action on the part  
17 of these Applicants.

18 You just simply fail to address yourself to that  
19 when you make your objection, so we don't understand what  
20 you are saying, or at least I don't.

21 Even in exhibits that refer to CAPCO people  
22 across the board, you continue to make that objection. It  
23 will be helpful to me if I understood the basis for it.

24 MR. REYNOLDS: Mr. Smith, the objection goes to  
25 whether this document comes in at this time as against one

1 of the Applicants or all of them. Our position is that it  
2 comes in against one subject to a connection that has  
3 to be made by the other side of joint action on behalf  
4 of the Applicants that falls within the Section 1 require-  
5 ment.

6 And what I'm saying at this juncture, because  
7 the Board has ruled at the outset contrary to the Applicants'  
8 position on the procedural matter of whether evidence comes  
9 in as against one initially, or against all initially,  
10 my objection goes to this document coming in at this time  
11 as against all prior to the connection up of whatever the  
12 combination is that they are alleging exists.

13 That is the basis of my objection.

14 If the government or the other parties can  
15 independently establish this kind of connection, then at that  
16 point my continuing objection is treated differently.

17 But what we are receiving at this time is  
18 evidence which is coming in as against all of the Applicants  
19 under the Board's ruling.

20 And until such time as there is a connection  
21 up, my position is that the other Applicants, that is others  
22 in this particular other than CEI are objecting to the  
23 admissibility of this evidence as against them.

24 I do feel that this record, as it now stands,  
25 has not established the connection that would be necessary

1 in my view to permit this to come in as against all of the  
2 Applicants.

3 CHAIRMAN RIGLER: The only qualification I  
4 might add to my understanding of your position, not  
5 necessarily agreeing with it, is your use of the phrase  
6 "as against."

7 It might be more accurate to say the evidence  
8 may be applied to other Applicants, because despite the  
9 fact that the evidence is in the record, it may not be used  
10 against them.

11 That would be a matter for weight and judgment  
12 on our part.

13 MR. REYNOLDS: I guess I have always been  
14 appreciative of the fact that it may be applied to. My  
15 feeling was that it may be applied to only if the other side  
16 meets the burden of establishing first this -- when I say  
17 conspiracy, I don't mean it in a criminal sense, but combina-  
18 tion, conspiracy, contract, whatever, in restraint of trade.

19 That is the basis for my objection. I don't  
20 want the Board to misunderstand me to the point --

21 CHAIRMAN RIGLER: I think we understand it.

22 MR. REYNOLDS: I do want to say I'm not  
23 contesting the fact, and the Applicants are not contesting  
24 the fact, that with respect to a request for membership in  
25 CAPCO, the CAPCO members did not get together to discuss

1 whether they are going to let somebody come in as another  
2 member of CAPCO.

3 The fact that that kind of discussion took  
4 place is not something that we are fighting, but I don't  
5 think that --

6 CHAIRMAN RIGLER: But the Department or Staff might  
7 contend that immediately after that meeting, they have  
8 already met their burden of establishing joint action, and  
9 you might contest that.

10 I guess that would be one of the conclusions to  
11 come out.

12 MR. REYNOLDS: I guess if you are telling me they  
13 might say it shows joint action, I'm not so sure that that  
14 is sufficient.

15 CHAIRMAN RIGLER: All right.

16 But that may be a conclusion of law.

17 Let's proceed. I think we have exhausted that  
18 topic right now.

19 MR. REYNOLDS: The Board suggested that  
20 perhaps I was being less than candid in my objection, and  
21 that I was doing it more to quibble than to further  
22 the proceeding, and perhaps trying to be obstructive.

23 That certainly is not the case.

24 CHAIRMAN RIGLER: Then this has been a universal  
25 airing, and I think we can all proceed now with our positions

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1 better known.

2 MR. MELVIN BERGER: I believe we had moved to have  
3 189 received into evidence.

4 CHAIRMAN RIGLER: I believe it was received.

5 BY MR. MELVIN BERGER:

6 Q Mr. Hart, after the January 2 letter was  
7 received, or was sent to CEI, do you recall if there was a  
8 response by CEI?

9 A I think there probably was a response back,  
10 although I don't remember distinctly. But I think there  
11 probably was a response.

12 MR. MELVIN BERGER: I would like to have  
13 marked as DJ 190 a letter from Lee Howley to Herbert  
14 Whiting, dated January 15, 1974, which bears the document  
15 number 00006932.

16 (DJ 190, the document referred  
17 to, was marked for identifica-  
18 tion.)

19 MR. MELVIN BERGER: It ends with Department of  
20 Justice document number 00006933.

21 BY MR. MELVIN BERGER:

22 Q Mr. Hart, do you recall seeing this before?

23 A Yes.

24 Q Would this be a response to that January 2 letter?

25 A This would be a response to the prior letter we

1 were talking about. That's correct.

2 MR. MELVIN BERGER: I would like to have DJ 190  
3 received into evidence.

4 MR. BUCHMANN: If Your Honor please, I note  
5 from the letter itself that this document is incomplete, and that  
6 an appendix was annexed to it.

7 I object to the admission of this document  
8 unless the appendix is attached.

9 MR. MELVIN BERGER: To my knowledge, we are not  
10 in possession of that appendix. If Mr. Buchmann will  
11 supply it, we will be glad to append it to this document.

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

13 MR. MELVIN BERGER: To my knowledge, we do not  
14 have the appendix or the attachment. At least I cannot  
15 locate it in our files. If you supply it, we would be glad  
16 to append it to this exhibit.

17 MR. BUCHMANN: Fine. If you intend to annex it,  
18 I will get a copy somehow.

19 CHAIRMAN RIGLER: We will defer receipt of 190  
20 into evidence until the appendices can be supplied.

21 BY MR. MELVIN BERGER:

22 Q Mr. Hart, subsequent to receipt of the January  
23 15 letter, was there other correspondence between CBI and the  
24 City of Cleveland?

25 A Yes, there was.

1 MR. MELVIN BERGER: I would like to have marked  
2 for identification as DJ 191 a letter from Lee Howley  
3 to Reuben Goldberg dated February 7, 1974, and bearing  
4 Justice document numbers 00006923 through 00006930.

5 (The document referred to  
6 was marked DJ 191, for  
7 identification.)

8 MR. RIESER: Mr. Chairman, we are having a  
9 substantial problem trying to find the Justice Department  
10 exhibits.

11 MR. MELVIN BERGER: It is in yesterday's pack.

12 MR. RIESER: Excuse me. We have finally  
13 located it.

14 BY MR. MELVIN BERGER:

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

16 A Yes, I have.

17 Q Would this have been -- well, can you tell us  
18 what this document is?

19 A What this document is, is it is a response to  
20 the letter of December 13 -- or it refers to the letter  
21 of December 13 that was talked about before, and it covers  
22 some of the same subject matter as was referred to in the  
23 letter of December 13 that we talked about.

24 Where I was specifically looking was in the  
25 second paragraph of the letter that is before us right now,



1 where CEI has again said that they want -- if we have  
2 nuclear power, they want to have the first option or the  
3 option of first refusal on any excess capacity, and  
4 then he goes on to say -- he goes on to refer to the other  
5 points mentioned in the letter of December 13.

6 MR. REYNOLDS: Could I have the answer read  
7 back, please?

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

10 MR. BUCHMANN: I will move to strike the  
11 witness' attempt to interpret this document which has  
12 been marked for identification, which speaks for itself,  
13 and if I read that second paragraph, it doesn't speak for  
14 itself in the same way Mr. Hart speaks for it.

15 CHAIRMAN RIGLER: The motion will be granted.

16 BY MR. MELVIN BERGER:

17 Q Mr. Hart, did you receive a copy of this letter?

18 A Yes, I did.

19 MR. MELVIN BERGER: I would like to move DJ 191  
20 be admitted into evidence.

21 MR. BUCHMANN: This was originally planned to  
22 come in unsponsored. It has what I presume to be red  
23 marks on the side. For my own information, does this red  
24 lining apply to documents coming in through witnesses?

25 CHAIRMAN RIGLER: It does.

1 MR. BUCHMANN: It does?

2 CHAIRMAN RIGLER: Yes.

3 MR. MELVIN BERGER: If it please the Board, I  
4 think since it has come in through a witness, we might  
5 ask that the red lining be disregarded, but we have no  
6 objection going the other way, either.

7 CHAIRMAN RIGLER: We want all lengthy documents  
8 red-lined, whether they come in through a witness or un-  
9 sponsored.

10 So unless you want to direct our attention to  
11 some other portion of the document, we would concentrate on  
12 the red-lined portion.

13 MR. BUCHMANN: Can I ask something off the  
14 record?

15 (Discussion off the record.)

16 CHAIRMAN RIGLER: There is a request for  
17 admission.

18 MR. BUCHMANN: I have no objection.

19 MR. REYNOLDS: Continuing objection.

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CHAIRMAN RIGLER: I don't want to belabor the point we discussed, but if you turn to the red-line paragraph on page 2, which bears 0006929, it begins with a discussion of "We" which I interpret to mean CEI, and then the second sentence reads further, It is our view that membership in CAPCO would not be productive, because of legal and practical considerations. Once again I would view our view relating to CEI standing alone.

Then we come to the end of the paragraph, and the second from last sentence says to submit CAPCO decisions to either a vote or to pocket veto is not any more acceptable to CAPCO than the idea of the company having a veto of rates over the City of Cleveland.

That suggests that the emphasis has shifted and Mr. Howley is speaking on behalf of CAPCO.

That inference, at least, arises. It may be rebuttable, but that is what gave rise to our earlier concern.

MR. REYNOLDS: I appreciate that. Maybe I can help clarify. I think Mr. Howley can speak to the City of Cleveland about CAPCO Matters without speaking on behalf of CAPCO companies, and I think that that may be where some confusion is resulting.

the fact that somebody does make reference to CAPCO or a CAPCO procedure or a CAPCO matter does not indicate, I don't believe, that he is speaking on behalf of CAPCO.

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CHAIRMAN RIGLER: I would agree that there are many references where you still could draw the conclusion that it is a unilateral reference, but this sentence I just point out, to me, anyway, creates an inference the other way.

MR. REYNOLDS: All right. I don't want to get into one of these arguments every time. I will say, though, that certainly my continuing objection would be applicable to this document in any event, because it is coming in as a piece of evidence which contains a lot more than the one sentence that you referenced, without addressing myself to that one sentence, because I have not had a chance to focus on it at all. I don't believe that that sentence, even assuming he were talking on behalf of CAPCO would be a reason to withdraw my continuing objection with respect to this document.

CHAIRMAN RIGLER: All right; the continuing objection is overruled.

MR. LERACH: I would like to object specifically on behalf of Duquesne Light, because this letter is dated subsequent to an individual response of Duquesne to the city of Cleveland. There is no evidence currently in the record suggesting either real or apparent authority of Mr. Howley to speak on behalf of Duquesne Light.

I object to the evidence being admitted against Duquesne Light or applied against Duquesne Light.

And I think if it is to be admitted for

either of those purposes the admission should be specifically conditioned on a subsequent showing of authority.

CHAIRMAN RIGLER: I'm having trouble distinguishing your objection. I see Mr. Reynolds nodding. You are not nodding agreement to the Chairman's statement?

MR. REYNOLDS: Mr. Zahler said something to me, and I was nodding to him.

CHAIRMAN RIGLER: All right. Nonetheless, I have trouble distinguishing your objection from the continuing objection. In any event, it is overruled and 191 is received into evidence.

(The document heretofore marked Exhibit DJ-191 for identification, was received in evidence.)

BY MR. MELVIN BERGER:

Q Mr. Hart, subsequent to this February letter, did the City receive a draft participation agreement from CEI?

A I believe they did, yes. There was a continuing exchange along this period of time.

MR. MELVIN BERGER: I would like to now have marked for identification as DJ-192, a letter from Mr. Howley to Mr. Ruben Goldberg, dated February 27, 1974, and bearing Department of Justice Document Number 144931 through 144950.

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1 MR. BUCHMANN: Do you have 144 or 114?

2 MR. MELVIN BERGER: I'm sorry. I have 114. If  
3 I said the other number, I misspoke.

4 (The document referred to was  
5 marked Exhibit DJ-192 for  
6 identification.)

7 BY MR. MELVIN BERGER:

8 Q Mr. Hart, would this be what you referred to as  
9 a participation agreement sent to the City by CEI?

10 A Yes, it is.

11 Q Do you recall what you did with this participation  
12 agreement when -- strike that.

13 Did you receive a copy of this?

14 A Yes, I did. My name is on page 2 of this  
15 document, as receiving a copy and I did, in fact, receive  
16 a copy of it.

17 Q Do you recall what you did with this draft agreement  
18 when it was received?

19 A What I would generally do with this type of a  
20 complex document was, I would make a copy for my  
21 ownself and copy it in the files and I would then send a copy  
22 to our engineer, R. W. Back, and then I would, probably  
23 talk the thing over with Mr. Goldberg.

24 MR. MELVIN BERGER: I would like to move DJ-192 into  
25 evidence.

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1 MR. BUCHMANN: No objection.

2 MR. REYNOLDS: I will make the continuing  
3 objection. It is a transmittal letter and draft agreement  
4 between the City of Cleveland and CEI only. It fairly  
5 warrants the continuing objection of the other applicants.

6 CHAIRMAN RIGLER: The continuing objection will  
7 be overruled and we will receive 102 into evidence.

8 (The document heretofore marked  
9 DJ-192 for identification, was  
10 received in evidence.)

11 BY MR. MELVIN BERGER:

12 Q Mr. Hart, subsequent to this letter and draft  
13 participation agreement, have there been exchanges of  
14 correspondence between the City and CEI regarding  
15 participation in nuclear units?

16 A I believe there have. As I indicated earlier,  
17 there was a whole series of exchanges here.

18 Q Does the City have a participation agreement  
19 with CEI at this time?

20 A No, they do not.

21 Q Mr. Hart, a little earlier in referring to  
22 the December 13, 1973, meeting, you indicated -- I believe  
23 you indicated there was a discussion of CEI proposal that  
24 they have a right of first refusal on power not needed by  
25 the City. Do you recall that?



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1 A That is right. Yes, I do recall that, in answer  
2 to your question.

3 Q To your knowledge, has that proposal ever been  
4 withdrawn by CEI?

5 A No.

6 Q As a condition to participation?

7 A As far as I am concerned, it still is, today.

8 Q I believe in your testimony, you at one time  
9 or another referred to Judge Whiting, as a signator to some  
10 of these correspondence. Perhaps you can clarify it for the  
11 record, why you called him Judge Whiting?

12 A Judge Whiting was a judge before he became the  
13 law director of the City of Cleveland and he was the law  
14 director for about a year. He ran for public office, i.e.,  
15 Judge of the County Court of Cuyahoga County. He was  
16 now elected and so he now has the title of judge.

17 Q At the time he signed these letters he was not a  
18 judge?

19 A At the time he signed these letters he was not a  
20 judge. It was merely an honorary title at that time.

21 Q Mr. Hart, yesterday, you mentioned that you had  
22 had an exchange of correspondence with a Mr. Copper,  
23 C-o-p-p-e-r, of Indiana and Michigan Electric Company. At  
24 this time I would like to have marked as DJ-193 a letter  
25 from R. M. Copperto Robert D. Hart, dated October 31, 1975.

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1                   It does not bear an internal Justice Department  
2 document number.

3                                   (The document referred to was  
4                                   marked Exhibit DJ-193 for  
5                                   identification.)

6                   BY MR. MELVIN BERGER:

7                   Q       Mr. Hart, is this letter you have referred to  
8 as being Mr. Cooper's response to your letter which is marked  
9 as DJ-178?

10                  A       That is correct. Although, I don't personally  
11 think it was responsive to my letter, but, yes, he does  
12 refer to my letter of October 9.

13                  MR. BUCHMANN: I object, to move that that go  
14 out, that middle part.

15                  CHAIRMAN RIGLER: We will strike it. We will  
16 strike the reference to Mr. Hart's personal interpretation  
17 of the response.

18                  MR. MELVIN BERGER: I would like to move that DJ-178  
19 and 193 be admitted into evidence.

20                  MR. BUCHMANN: Might I inquire of the Department  
21 what this is intended to prove? I asked for an offer, I  
22 guess.

23                  MR. MELVIN BERGER: The Department did not intend  
24 to introduce either of these yesterday. I believe we were  
25 requested to do so.

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1 MR. BUCHMANN: I requested DJ-193, if you were  
2 going to put in DJ-178. I would like to know what  
3 this is supposed to prove?

4 MR. MELVIN BERGER: I believe Mr. Hart referred  
5 to these in his testimony and then we were requested to  
6 put the letters in evidence, since it was referred to in  
7 Mr. Hart's testimony.

8 CHAIRMAN RIGLER: Requested by whom?

9 MR. BUCHMANN: I requested 193, there is no  
10 question about that.

11 MR. MELVIN BERGER: I believe it may have been  
12 by the Board.

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1 CHAIRMAN RIGLER: Mr. Buchmann, if you  
2 requested 193 be made a part of the record, then it seems  
3 to me you are somewhat estopped to challenge its introduc-  
4 tion.

5 With respect to 178, it seems it would follow  
6 our rule of putting in both parts of a piece of correspondence.

7 MR. BUCHMANN: I objected to 178 in part because  
8 193 wasn't available to us, but I don't see why I'm estopped.

9 MR. CHARNO: I think we can clarify this matter.

10 On page 4711 of the transcript, Mr. Buchmann  
11 objected to the witness' testimony concerning correspondence  
12 with the City of Richmond and said that the best evidence of  
13 that correspondence would be the correspondence itself.

14 It was in response to that objection that the  
15 Department ultimately put the letter in the record.

16 CHAIRMAN RIGLER: All right.

17 We will not require an offer of proof under  
18 those circumstances.

19 MR. BUCHMANN: My objection is overruled,  
20 if Your Honor please.

21 CHAIRMAN RIGLER: You hadn't made an objection.

22 MR. BUCHMANN: I'm sorry. I object.

23 CHAIRMAN RIGLER: Overruled.

24 MR. REYNOLDS: Continuing objection.

25 CHAIRMAN RIGLER: Overruled, and we will receive

1 into evidence DJ 178 and 193.

2 (DJ 178 and 193, previously  
3 marked for identification,  
4 were received in evidence.)

5 MR. MELVIN BERGER: That concludes the Depart-  
6 ment's questioning of Mr. Hart.

7 CHAIRMAN RIGLER: Mr. Vogler?

8 MR. VOGLER: Yes, sir, we have very limited  
9 cross.

10 MR. REYNOLDS: I object to any cross-examination  
11 on behalf of Staff.

12 CHAIRMAN RIGLER: Overruled.

13 CROSS-EXAMINATION

14 BY MR. VOGLER:

15 Q Mr. Hart, I would like to direct your attention  
16 to the Department of Justice Exhibit 186 and 187.

17 186 is the reconstituted letter, I believe you  
18 have testified --

19 MR. LERACH: I object to the characterization.

20 MR. VOGLER: The transcript says reconstituted.

21 THE WITNESS: If it would help, those are the  
22 words I used, reconstituted.

23 CHAIRMAN RIGLER: We will accept that as the  
24 witness' characterization which may or may not reflect the  
25 contents of the document.

1 MR. GOLDBERG: Page 4745, line 19.

2 CHAIRMAN RIGLER: Proceed.

3 BY MR. VOGLER:

4 Q Do you have the exhibit?

5 A Yes, I do.

6 Q When Mr. Howley distributed this exhibit at the  
7 meeting on December the 13th, I believe is the closest date we  
8 could approximate, did he say anything to the parties when he  
9 distributed this exhibit?

10 A He passed this particular document out, and it  
11 was the understanding that this was the -- that he was  
12 speaking for CAPCO. There was no mention whatsoever that  
13 he was speaking for Duquesne or that he was an agent of  
14 Duquesne or what-have-you.

15 However, I have heard the conversation here.

16 CHAIRMAN RIGLER: How did you come to understand  
17 he was speaking for CAPCO?

18 MR. BUCHMANN: He didn't say he understood. He  
19 said it was the understanding.

20 CHAIRMAN RIGLER: I think you might take care of  
21 that on cross rather than through objection if we don't  
22 clear it up now.

23 I will let Mr. Vogler pursue it.

24 MR. VOGLER: I'm trying to get to the same  
25 position that counsel for CEI is. I'm trying to clarify

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1 the record.

2 BY MR. VOGLER:

3 Q I would like to direct your attention, and  
4 then we will come back to that question, Mr. Hart, to the  
5 first paragraph of DJ 186 and DJ 187, which is the letter on  
6 letterhead stationery from Duquesne, where the author of  
7 the letter, Mr. John Arthur, advises he is speaking only  
8 for Duquesne.

9 Now if you will, I don't know whether the  
10 witness responded before the objection or not as to what Mr.  
11 Howley said.

12 A When Mr. Howley handed this out, the name  
13 Duquesne did not, and I underscore it, did not come up. The  
14 word Duquesne was not mentioned.

15 CHAIRMAN RICLER: Let's back up a minute.

16 How did you form your understanding that  
17 Mr. Howley was speaking on behalf of CAPCO?

18 THE WITNESS: Because the entire general  
19 conversation which had dealt with CAPCO -- he had led the  
20 entire discussion, and we had talked about CAPCO. It was  
21 CAPCO this and CAPCO that, and this letter, of course,  
22 was handed out at the meeting.

23 And it was our understanding -- when I say  
24 "our," I can speak for the City of Cleveland at this  
25 point -- it was our understanding that he was speaking for



1 CAPCO.

2 CHAIRMAN RIGLER: Did he ever specifically  
3 say, "I am speaking on behalf of Capco"?

4 THE WITNESS: It is my understanding -- I'm  
5 sorry. The answer to that, sir, is no.

6 CHAIRMAN RIGLER: All right.

7 Did he ever say, "CAPCO's position is," or  
8 words to that effect?

9 THE WITNESS: Words to that effect, yes, sir.

10 CHAIRMAN RIGLER: All right.

11 MR. LERACH: I object to the question as leading  
12 and ask that the answer be stricken.

13 CHAIRMAN RIGLER: Request denied.

14 Proceed.

15 BY MR. VOGLER:

16 Q Mr. Hart, again with DJ 196, to the best of  
17 your recollection, did Mr. Howley at this meeting on  
18 December 13 say anything else about this exhibit other  
19 than what has been elicited on my cross, and the questions  
20 from the panel would relate that it was CAPCO?

21 MR. BUCKMANN: I have no objection to the  
22 question, but the preamble to it, as far as I know, this  
23 witness has not testified that Mr. Howley said anything  
24 about this letter.

25 Indeed, he said the name Duquesne wasn't

1 mentioned. It is hard to imagine how the letter was  
2 passed out without the mention of Duquesne.

3 MR. VOGLER: I'm at a loss to understand the  
4 nature of the objection. It is simple explanation from  
5 you. I don't understand your objection.

6 MR. BUCHMANN: You asked whether Mr. Howley  
7 said anything about DJ 186 other than the things to which  
8 he has testified, and he hasn't testified to a single  
9 thing Mr. Howley said about the letter.

10 CHAIRMAN RIGLER: I think Mr. Buchmann is  
11 saying he understood the witness' testimony to be that  
12 Mr. Howley merely passed out the letter, and that there was  
13 no testimony with respect to any comments whatsoever  
14 relating to the letter.

15 MR. VOGLER: Perhaps we shouldn't get into too  
16 deep an argument in front of the witness, but it was my  
17 understanding that my first question was did he indicate  
18 that this was CAPCO's position, was it not?

19 MR. BUCHMANN: No.

20 MR. REYNOLDS: Ask the witness.

21 CHAIRMAN RIGLER: Let's go back and find the  
22 first question.

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

25 MR. BUCHMANN: Now I, having heard that answer

ar7

1 reread, move to strike it as not responsive to the question  
2 asked.

3 CHAIRMAN RICLER: I think that is a little  
4 tardy. I think we have cleared up any confusion. That  
5 will be overruled.

6 BY MR. VOGLER:

7 Q Mr. Hart --

8 A Yes, sir.

9 Q -- with regard to 186, DJ 186, rather than  
10 what has been previously asked and answered, did Mr.  
11 Howley have any additional comments concerning the source  
12 of DJ 186?

13 A No, he did not.

14 Q Did he have any additional comments concerning  
15 its purpose as to why he was distributing it?

16 A No, he did not.

17 As I remember, he passed this out and said you  
18 might not have received this yet, but that was it.

19 Now if it is all right to go ahead and say --

20 MR. LEPACH: No.

21 MR. REYNOLDS: The question has been asked and  
22 answered.

23 BY MR. VOGLER:

24 Q Did he indicate that DJ 186 set forth his  
25 position as general counsel for CEI?

ar8

1           A       No, he didn't indicate that this document did,  
2 because he was speaking for CAPCO at that time. In  
3 the conversation back and forth he did not refer to this  
4 document we are talking about, but in the total discussion  
5 about CAPCO and CAPCO membership is when he just said, "You  
6 cannot have membership in CAPCO."

7                       Now a conversation like that doesn't take a  
8 document in order to base it on. That is the thing  
9 I'm saying.

10                   MR. BUCHMANN: If Your Honor please, I move to  
11 strike that portion of the answer which says that he was speak-  
12 ing for CAPCO at that time as a conclusion of the witness.

13                   CHAIRMAN RIGLER: Granted.

14                   MR. VOGLER: We have had so many objections  
15 that the Staff is confused as to what has been asked and  
16 answer.

17                   I'm going to be hit with a repetitious question  
18 here. I thought the examination would help clarify what took  
19 place on 186, and I think I have managed to confuse it more  
20 than anything else.

21                   CHAIRMAN RIGLER: Do you have another area?

22                   MR. VOGLER: No, this was the extent of the  
23 Staff's cross.

24                   I think we have managed to confuse it rather  
25 thoroughly.

ar9

1 CHAIRMAN RIGLER: Does it conclude your cross?

2 MR. VOGLER: Yes, it does.

3 CHAIRMAN RIGLER: I'm going to ask Mr. Hart to  
4 step from the room a minute.

5 Mr. Hjelmfelt, were you intending any cross-  
6 examination of Mr. Hart?

7 MR. HJELMFELT: No, I'm not.

8 CHAIRMAN RIGLER: I agree with Mr. Vogler  
9 that the record is somewhat confused at this point.

10 The Board can ask some questions. I would  
11 prefer not to. I don't know the extent of cross-examination  
12 with respect to these letters that Mr. Buchmann or Mr.  
13 Reynolds has in mind.

14 What is troubling us once again is the minutes  
15 of the December 13 meeting which were included in the supple-  
16 mental brief of the City on the disqualification motion.

17 Now these minutes apparently were taken by  
18 representatives of CEI. And on page 1, the fourth paragraph  
19 reads as follows:

20 "L.C. Howley opened the meeting by referring  
21 to the December 10, 1973 letter of Duquesne  
22 Light Company, addressed to Ralph Park. L. C.  
23 Howley said this letter reflected the fact that the  
24 CAPCO companies, for the reasons stated in that  
25 letter, that it didn't make sense for WELP to be a

ar10

1 member of CAPCO, noting particularly the  
2 restriction offered municipalities by  
3 statute, or ordinance."

4 The witness will have to be impeached on his  
5 recollection, or there is a direct conflict between the  
6 minutes of CEI and his direct testimony.

7 There is confusion in the record right now as  
8 to what took place.

9 MR. BUCHMANN: Not confusion in the record.  
10 Those minutes are not in the record, as I understand it.

11 CHAIRMAN RICLER: From the Board's point of  
12 view, we want to know what the facts were, the objective  
13 facts or accurate facts.

14 If that involves impeaching the witness or  
15 refreshing his recollection, perhaps that should be done.

16 I thought I might explore with the parties their  
17 intention to developing an accurate record for the  
18 Board as to what transpired.

19 MR. BUCHMANN: It has been a long time since I  
20 have seen those minutes, if at all. I may suggest to the  
21 Board that an accurate record may be developed without  
22 cross-examining this witness about it.

23 These things can be done in another fashion. I had  
24 not intended to cross-examine the witness on this particular  
25 subject.

arll

1                   If I do not, and somebody else doesn't, there  
2 will be other witnesses, I presume, who will tell you  
3 what happened.

4                   CHAIRMAN RIGLER: The Board just doesn't want  
5 to leave the issue floating along in this way in the event  
6 the minutes are introduced.

7                   MR. BUCHMANN: I'm not sure what is troubling  
8 the Board.

9                   Can I put it to you this way, Your Honor?

10                  I could say to you that I believe, and I'm trying  
11 to be respectful -- but I believe Mr. Hauser will not buy you  
12 lunch today. That might be a good guess on my part, or good  
13 view on that.

14                  But it doesn't make me Mr. Hauser's agent. My  
15 problem is that anyone who looks at these situations can come  
16 to the same conclusion readily, and why, because Mr. Howley  
17 makes it his best opinion that CAPCO doesn't want these people,  
18 why that should be an agency thing is beyond us. That is the  
19 trouble we are having here.

20                  CHAIRMAN RIGLER: The conflict goes beyond that,  
21 because the witness said Mr. Howley said nothing at the  
22 time of the distribution of the letter, and the minutes  
23 here reflect that at least Mr. Howley made some sort of  
24 statement with the distribution of the letter.

25                  MR. BUCHMANN: I suggest to Your Honor that



arl2

1 I will read that, but I do not intend to rehabilitate  
2 this witness.

3 CHAIRMAN RIGLER: All right, let's get the  
4 witness back, and you can proceed with cross-examination.

5 MR. BUCHMANN: Would this be an appropriate  
6 time to adjourn for lunch?

7 MR. REYNOLDS: Can we take the luncheon break  
8 now, and maybe we could come back?

9 CHAIRMAN RIGLER: If you are prepared to go ahead,  
10 I would like to get in a half hour before lunch.

11 MR. BUCHMANN: I'm at your disposal.

12 MR. EJEIMFELT: While the witness is returning,  
13 I would like to make the City's objection to Mr. Buchmann  
14 conducting cross-examination of Mr. Hart, in that Mr.  
15 Buchmann is a member of the firm of Squire, Sanders &  
16 Dempsey.

17 The City believes it is prejudiced by going  
18 forth with cross-examination. Mr. Buchmann appears as the  
19 author of certain memos attached to memos which were  
20 claimed privileged which the City doesn't have available  
21 to it, and we have our claim of prejudice for this cross-  
22 examination.

23 CHAIRMAN RIGLER: With the privileged documents  
24 included in the list of 50 or so documents which were an  
25 appendix to the City's first disqualification brief?

1 MR. HJELMFELT: That's correct.

2 CHAIRMAN RIGLER: You are aware of the ruling  
3 of the Board that we have examined those documents?

4 MR. HJELMFELT: That's correct.

5 CHAIRMAN RIGLER: Upheld the claim of privilege  
6 and moreover, at least with respect to the disqualification  
7 motion, found them to have no relevance?

8 MR. HJELMFELT: That's correct. I understand  
9 the Board's ruling on that.

10 CHAIRMAN RIGLER: Mr. Buchmann, having heard  
11 the City's objection, I take it you are nonetheless  
12 prepared to proceed?

13 MR. BUCHMANN: I certainly am.

14 CHAIRMAN RIGLER: Let me ask you a preliminary  
15 question.

16 Have you ever represented the City in connection  
17 with any bond counseling legal matters or legal matters  
18 pertaining to the finances of the City?

19 MR. BUCHMANN: You mean me personally?

20 CHAIRMAN RIGLER: Yes.

21 MR. BUCHMANN: I suppose the City waives any  
22 claim of privilege by my revealing that information?

23 CHAIRMAN RIGLER: That information is not  
24 privileged. What you did may be privileged, but whether or  
25 not you were an attorney who performed services for the

ar14

1 City would not be privileged.

2 MR. BUCHMANN: If Your Honor please, in order  
3 to preserve the record, my first inclination would be  
4 with all respect to decline to answer that question.

5 However, since the answer to the question is  
6 no, I will give that answer to you now.

7 CHAIRMAN RIGLER: All right.

8 We will overrule the City's objection, and we  
9 will proceed. Someone can summons the witness, please.

10 MR. REYNOLDS: Let me just state I'm a little  
11 concerned my name appears on some of the privileged documents  
12 that were attached to the disqualification motion.

13 I hope that is not the City's basis for moving  
14 for disqualification of my participation.

15 MR. HJELMFELT: The City doesn't choose to answer  
16 frivolous remarks of counsel.

17 Whereupon,

18 ROBERT HART

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

22 CHAIRMAN RIGLER: You may proceed.

23 CROSS-EXAMINATION (Continued)

24 BY MR. BUCHMANN:

25 Q Mr. Hart, you are a member of the Bar of Ohio,

1 are you not?

2 A That's correct, sir.

3 Q And in your testimony yesterday and today, I  
4 presume you have attempted to be precise in your responses?

5 A Where I could be precise, I have attempted to be  
6 precise. When I have tried to be general, I have tried to  
7 be general.

8 Q You have told us that you drafted a good many  
9 of the letters sent by the City of Cleveland to the  
10 Illuminating Company, even though you did not sign them  
11 yourself.

12 A That is incorrect.

13 Q You did not draft any of those letters?

14 A That's correct. I said I helped draft them.

15 Q You did help draft them?

16 A That's correct, sir.

17 Q In helping to draft them, you were attempting at  
18 least to make those requests and responses to the  
19 Illuminating Company precise?

20 A I don't know if you can make that type of  
21 characterization here. I think we were trying to convey  
22 something, a communication to the Illuminating Company.

23 Perhaps when you talk in terms of preciseness,  
24 I don't understand what you are talking about.

25 Q You were attempting to convey your requests and

1 responses as clearly as you could?

2 A As clearly as we could, that's correct, sir.

3 Q You also, I presume, in filing briefs and  
4 things of that sort, in this and other proceedings, you  
5 also attempt as a lawyer to be precise and clear?

6 A Trying to be clear, I believe.

7 Now you are using the word "precise" here and  
8 I don't know what you are getting to.

9 Q I will take "clear."

10 A Okay.

11 Q Yesterday in response to a question by the  
12 Chairman, you indicated that you have attended American  
13 Law Institute courses.

14 A I indicated I attended one course.

15 CHAIRMAN RIGLER: I don't believe it was in response  
16 to my question.

17 MR. BUCHMANN: Page 4675.

18 CHAIRMAN RIGLER: Absolutely right, Mr.  
19 Buchmann.

20 BY MR. BUCHMANN:

21 Q I notice on that page you said, "I have attended  
22 the American Law Institute courses in New York. I attended  
23 courses in New York."

24 Do I understand that is one course?

25 A In response to that particular question, I was

1 saying I attended one American Law Institute course, and I  
2 think the preface to what you just read is I attended a  
3 practice law institute course. There is a distinction,  
4 you know.

5 Q That doesn't appear in the answer.

6 How many courses have you attended on  
7 municipal bond financing?

8 A Two.

9 Q When?

10 A When the American Law Institute had their last  
11 course and there were members of your firm there, so that would  
12 be easy to check.

13 I attended the practicing law institute and  
14 there were members of your firm there also, and that would  
15 be easy to check.

16 Q When, do you remember?

17 A No, sir.

18 Q Have you attended any such courses since  
19 December 1, 1975?

20 A Since December 1, 1975?

21 Q Last December, January, just past, or this part  
22 of February?

23 A No, sir.

24 MR. BUCHMANN: In view of that testimony, I  
25 renew my motion to strike the portion of an answer

1 appearing on 4670, lines 7 and 8, where Mr. Hart  
2 characterized the provisions of an ordinance of the City  
3 of Cleveland as being very unusual.

4 I direct Your Honor's attention to the brief of  
5 the City of Cleveland filed on December 1, 1975, and signed  
6 by Mr. Hart where at page 3 it said "the city law depart-  
7 ment, with a constant problem of low pay and heavy turn-  
8 over, has never managed to develop lawyers with the skills  
9 necessary to handle its own bond work.

10 "It is totally incapable of doing such work at  
11 the present time."

12 THE WITNESS: I think --

13 CHAIRMAN RIGLER: No response is called for.

14 I think your comments here would go  
15 to the weight and the motion to strike will be denied.

16 BY MR. BUCHMANN:

17 Q Mr. Hart, yesterday you put in some testimony  
18 about working what I would call the prospectus -- I'm  
19 not trying to give it the term of art -- for the  
20 \$9.8 million bond issue, do you remember that?

21 A That's correct.

22 MR. BUCHMANN: Mr. Rigler, I don't have copies  
23 yet. I want him to identify it. This is the prospectus  
24 we are talking about, is it not?

25 THE WITNESS: What you show me appears to be.



1 Whether it is a total prospectus, I don't know.

2 Well, you can direct a question to it. I acknowledge  
3 it does appear to be a copy of it.

4 BY MR. BUCHEMANN:

5 Q Mr. Hart, yesterday you said that your name  
6 appeared on the front page of that prospectus. Do you  
7 remember that testimony?

8 A That's correct, sir.

9 Q It appears on the front page along with the  
10 name of another firm, a firm in New York, because that  
11 firm and you were to approve the legality of it, was it not?

12 A I don't believe that is what it states, but you can  
13 read the entire statement.

14 Q I suggest that the cover shows the following:

15 "These bonds are offered when, as and  
16 if issued and received by us, and subject to  
17 the approval of legality by Wood, Dawson, Love  
18 and Sabatini of New York, bond counsel to the  
19 City, and Robert D. Hart, chief assistant  
20 director of law of the City of Cleveland. It  
21 is expected that the bonds in definitive form  
22 will be ready for delivery on about June 14,  
23 1974."

24 Did I read that correctly, Mr. Berger?

25 MR MELVIN BERGER: Yes, you did.

1 MR. BUCHMANN: That is a usual thing, something  
2 of that sort, to have on the face of a prospectus?

3 THE WITNESS: That was the first attempt I  
4 ever tried on something like that, so I wouldn't know. At  
5 that time.

6 If you are going back to your original question,  
7 there, as you know, inside bond counsel do not pass on the  
8 legality of a bond issue, so that sentence you read has to  
9 be read in the disjunctive, where Wood, Dawson was going  
10 to prepare the legal opinion on that.

11 BY MR. BUCHMANN:

12 Q You did not pass on the legality of this issue?

13 A As you know, that bond issue did not sell.

14 As you also know, the legality of an issue  
15 does not come into being until the bonds are sold.

16 Q Indeed, the only thing on which you were to  
17 render an opinion was a fairly limited subject which is  
18 revealed in a letter by you to Mr. Whiting, attached to this  
19 prospectus?

20 A I'm not sure the two are tied in together.  
21 There is an opinion of mind toward the tail end of that  
22 offering statement, but I'm not sure that the opinion at  
23 the tail end has anything to do with the statement on the  
24 front of it.

25 I reiterate my position that you know as being a

1 bond counsel firm that a person can do bond work on  
2 the inside, meaning house counsel work, and the market, the  
3 buying market, the purchase of bonds will not take any  
4 sort of a statement by inside house counsel.

5 Q I see.

6 Then your principal connection with this  
7 prospectus was gathering the information or some of the  
8 information which is shown in it?

9 A I think you would be accurate to say I was  
10 helpful in gathering some of the information.

11 Again, this was back in 1973 -- I'm sorry --  
12 I misspoke. It was the early part of 1974. It was my first  
13 exposure to anything like that.

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1 Q What information did you gather that is in this,  
2 if any?

3 A I would have to go through it point by point.  
4 Perhaps the information I was gathering was information  
5 that was available from my own technique and knowhow of the  
6 way the City operates, which you are aware of also, as our  
7 bond counsel.

8 MR. BUCHMANN: I move that that go out, your  
9 Honor. I am not his bond counsel.

10 THE WITNESS: Your law firm is, and the firm  
11 always signs Squire, Sanders and Dempsey.

12 MR. BUCHMANN: I move that go out too.

13 CHAIRMAN RIGLER: Motions to strike will be  
14 granted.

15 BY MR. BUCHMANN:

16 Q Mr. Hart, based on your testimony yesterday and  
17 today, with respect to your work on this prospectus, in  
18 your judgment is the information contained in the prospectus,  
19 accurate, at least as of its date?

20 A As of the date that it came out, it was our  
21 thinking that it was accurate.

22 Q Actually, you haven't sold any bonds pursuant  
23 to this?

24 A We have not sold any on the public market.

25 Q May I ask what other market there is?

1           A       There is a sinking fund in the treasury  
2 investment account which originally planned to sell those  
3 bonds. There was a sale to the treasury investment  
4 account of 1.1 million of this. I would say probably  
5 around October, maybe September of last year.

6           Q       Is that all?

7           A       As originally planned back in 1972.

8           Q       I'm sorry, I interrupted. Is that all that  
9 you have sold?

10          A       My intention was today -- that was one of the  
11 reasons I wanted to get back to Cleveland -- to sell another  
12 half a million dollars of this.

13          Q       To your sinking fund?

14          A       No, sir, to the Treasury investment account.

15          Q       Of the City of Cleveland?

16          A       Of the City of Cleveland.

17          Q       Is that an arm's length transaction?

18          A       We consider it an arm's length transaction,  
19 although it is provided for by state law.

20                    You could look at it as saying the City's really  
21 borrowing money from its own self.

22          Q       What is the end of that?

23          A       Although the particular transaction is provided  
24 by state law, it could be argued that the City is really  
25 borrowing money from its own self.

bw3

1 Q Now, the -- by the way, talking about the City,  
2 you said you were chief assistant director of law yesterday.  
3 Do I understand that to mean that you are the chief civil  
4 lawyer for the City of Cleveland under the law director?

5 A No, sir. This is being changed from time to  
6 time. I'm number two in the department, sometimes and number  
7 three in the department other times.

8 Q How does it stand today?

9 A I'm number 3.

10 Q And you said yesterday that you had many things  
11 other than handling this proceeding, I think?

12 A That is correct, sir.

13 Q Now, am I also correct that you do many things  
14 other than handling the affairs of the municipal  
15 electric light plant?

16 A That would be an accurate statement, sir.

17 Q Indeed, the municipal electric light plant is  
18 one of several utilities operated by the Cleveland Division  
19 of Utilities, is it not?

20 A I think I can clarify your question, if I may.  
21 The Division of Public Utilities has two, what you would  
22 call operating divisions. One would be the Division of  
23 Light and Power, which we were talking about here and the  
24 other would be the Division of Water and Heat.

25 Q And the Division of -- the Department of Utilities

bw4

1 is but one of many departments in the City of Cleveland.

2 A By our city charter, there are ten departments.

3 Q Do you do work for other departments?

4 A I do work for other departments, yes, sir.

5 Q In doing work for a variety of departments within  
6 the City of Cleveland do occasions arise where the  
7 interests of one department may clash or seem to clash with  
8 the interests of another?

9 A I don't think they do, but I don't know, I guess,  
10 that would be up to your own interpretation.

11 For instance, do you want me to continue on here?

12 Q Not particularly.

13 A I can give you a real good example, but you wouldn't  
14 like the answer.

15 MR. BUCHMANN: I move that go out.

16 CHAIRMAN RIGLER: Confine yourself to answering  
17 the questions.

18 BY MR. BUCHMANN:

19 Q Yesterday, you were describing your employment  
20 history and I think you said that when Mr. Park was elected  
21 Mayor you went from the County Auditor's office to the  
22 City?

23 A That is correct, sir.

24 Q As executive assistant, was that the title?

25 A That is correct, sir.



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1 Q You did not go directly from there to the law  
2 department, did you?

3 A No. I'm sorry, from there to where? I went from  
4 the auditor's office to the executive assistant to the Mayor  
5 and then from the executive assistant to the Mayor to the  
6 law department, all within the City of Cleveland.

7 Q You didn't have anything directly to do with  
8 municipal light at the auditor's office?

9 A No, sir.

10 Q And not when you were executive assistant, did  
11 you have anything to do with municipal light?

12 A Not directly, sir.

13 Q when did you go into the law department?

14 A As I indicated yesterday, it would be the  
15 later part of 1972 or the first of 1973.

16 Q You took -- during the most of '72 you were on  
17 leave of absence from the City, were you not?

18 A I was on leave of absence for about two months,  
19 three months.

20 Q During that time you were not doing any work in  
21 connection with the municipal light plant, were you?

22 A No, sir.

23 Q Now, you were discussing yesterday the original  
24 bond ordinance of the -- for the \$9.8 million issue. Do you  
25 recall generally that testimony? Do you recall the fact of the

hw6

1 testimony?

2 A Yes, sir. I recall it.

3 Q And you described some of the things that you  
4 or others who had talked to you felt were defects in  
5 that ordinance as passed by council?

6 Do you recall that?

7 A That is correct, sir.

8 Q Defect or not, that was the ordinance which was  
9 in fact passed by council, was it not?

10 A That is correct, sir.

11 Q And let me ask you this: one of the original --  
12 the original draft or an original draft, if I recall  
13 your testimony of yesterday, was that the money would all  
14 come from the sinking fund or treasury?

15 A That is correct, sir.

16 Q Does it make any difference, frankly?

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arl 1 A I'm not sure again. My expertise has not  
2 gotten that far. There is a distinction between the two,  
3 but it is all again within the City of Cleveland.

4 The state law does provide for sinking fund and  
5 treasury investment account.

6 Q And one of the things counsel did was to  
7 change that and require the sale outside, if I may put it  
8 that way?

9 A That's correct, sir, if that is the question, sir.

10 Q Can we not conclude from that, that counsel did  
11 not wish the City of Cleveland to borrow the money from  
12 itself, as you said would be the effect of selling it to  
13 the treasury?

14 MR. MELVIN BERGER: Objection. That is specula-  
15 tion as to what counsel had in mind when they passed the  
16 ordinance.

17 CHAIRMAN RIGLER: Let me hear it again.

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

20 CHAIRMAN RIGLER: I will permit it.

21 THE WITNESS: That would be the effect of it,  
22 although at the time I don't think anybody knew it, although  
23 there is a confidential memorandum from John Brueckel that  
24 does indicate that at the present time.

25 MR. BUCHMANN: I move the latter part go out,

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1 because it is incomprehensible.

2 CHAIRMAN RIGLER: Read it again, please.

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

5 MR. BUEHMANN: Do you want the question read,  
6 Your Honor?

7 CHAIRMAN RIGLER: No, I have the question in  
8 mind.

9 I will strike that part of the answer relating  
10 to the present knowledge of the Brueckel memorandum as  
11 being outside the scope of the question as asked.

12 BY MR. BUEHMANN:

13 Q Now when did the City sell the portion of this  
14 9.8 million that you have said they sold?

15 A I indicated it was probably around September or  
16 October of last year. I could be totally wrong on that,  
17 though.

18 Q Could we agree that the preliminary official  
19 statement was dated May 10, 1974, or thereabouts?

20 A We can agree on that, yes, sir.

21 Q Now in February, you are getting around to  
22 selling some more?

23 A That's correct, sir.

24 Q Another \$500,000, you said?

25 A That's correct, sir.

1           Q       Now do you have the Department of Justice's  
2 exhibits in front of you, that were marked during your  
3 testimony?

4           A       Yes, sir.

5           Q       I direct your attention to DJ 177 and attached  
6 to that is a letter of April 15, 1975 from Mr. Cummins of  
7 Buckeye to Mr. Meister of the Division of Light and Power,  
8 with a copy to you.

9                   Do you see that?

10          A       I'm sorry, sir. I don't have these marked.  
11                   Was that my letter to your president, Karl  
12 Rudolph, and the attachments thereto?

13          Q       Yes.

14          A       Yes, sir, I have it.

15          Q       Mr. Rudolph isn't really my president.

16                   Mr. Hart, do I understand from your testimony  
17 yesterday that you drafted or helped to draft the April 15,  
18 1975 letter from Buckeye to the City of Cleveland?

19          A       That's correct, sir.

20          Q       I presume you attempted to draft that to set out  
21 your agreement with Buckeye or what Buckeye was saying as  
22 clearly as possible?

23          A       That's correct, sir.

24          Q       And you also, when you drafted that, intended,  
25 did you not, to contemplate -- contemplated the possibility

that you would be forwarding that letter at some time to the Cleveland Electric Illuminating Company, with a request for transmission services?

A That's correct, sir.

Q And yesterday you testified that Buckeye had indicated that it had bulk power supply available?

A That's correct, sir.

Q And that indication is represented by this letter of April 15, 1975?

A It is indicated by this, plus the meeting.

Q Plus the meeting?

A Which took place on this date.

Q Does that letter accurately reflect what Buckeye told you at that meeting?

A I think that it -- it does not accurately reflect everything that took place at the meeting.

It accurately reflects what it is trying to state here, I believe.

Q It accurately reflects what it is trying to state?

A Yes, sir.

Q In that letter which you participated in drafting, Buckeye told you it was unable to sell power to the City of Cleveland, did it not?

A That it was unable to sell power to the City of

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Cleveland.

No, sir, I don't believe the letter or the meeting ever stated that.

Q In this letter which you drafted, or helped draft, I notice that the fourth paragraph begins with the words, "Under the Buckeye arrangement, Buckeye is precluded from selling power directly to non-members."

Did I read that correctly?

A You did read that correctly, yes, sir.

Q Is the City of Cleveland a member of Buckeye?

A No.

May I offer explanation here?

Q Not on my question.

MR. BUCHMANN: I did not mean to be impertinent, if Your Honor please.

CHAIRMAN RIGLER: Maybe this would be a good time to take this up.

Maybe we should let the witness clarify it.

MR. BUCHMANN: I object to him going into these things without a question pending.

CHAIRMAN RIGLER: All right.

BY MR. BUCHMANN:

Q I notice in the last paragraph of that letter, which you participated in drafting or the last closing salutation, Buckeye said it would need assurance that some



of the things that they had been talking about would be legal.

A That's correct, sir. That is what it states.

Q Did you ever give them that assurance?

A No, sir, they never did ask for that assurance.

Q Did they ask the City of Cleveland?

A No, sir.

May I explain that also?

MR. BUCHMANN: I object to that.

CHAIRMAN RIGLER: Well, if it is an explanation that gives a full answer. If it is volunteering additional information, I would entertain a motion to strike; but he is entitled to give a full explanation, as long as it is responsive to the question.

MR. BUCHMANN: My question was did he ask the City of Cleveland and his answer was no. It doesn't leave much dangling.

CHAIRMAN RIGLER: It doesn't, but let's see what the explanation is.

THE WITNESS: There was never intent to ask the City of Cleveland about this. This goes to the anti-pirating statute, and the anti-pirating condition in that Buckeye agreement.

Buckeye was going to have to go, number one, and get an acquiescence from Ohio Power, and acquiescence

from Cleveland Electric Illuminating that they would not raise this issue, because these gentlemen at that time were under the impression that the anti-pirating statute applied to wholesale sale of electricity.

MR. BUCHMANN: I move to strike not only on my original ground, but it is pure conjecture.

CHAIRMAN RIGLER: Motion to strike would be granted on your original ground.

MR. BUCHMANN: If Your Honor please, I am about to go to another line. Would this be a good time?

CHAIRMAN RIGLER: Let's try at ten of by this clock. The Board will not have a great deal of discussion over the lunch hour, so we anticipate being here on time today.

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

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AFTERNOON SESSION

(2:00 p.m.)

MR. CHARNO: Before we recommence, I would like to identify for the record and move into evidence the five documents we referred to during our offer of proof this morning.

CHAIRMAN RIGLER: All right.

MR. REYNOLDS: Objection.

Have you moved them into evidence?

MR. CHARNO: Not yet.

We would offer for identification as DJ 195 a document bearing the number --

CHAIRMAN RIGLER: I have you at 194.

MR. CHARNO: Sorry, 194, a document bearing the internal identification number 11000028.

We would offer for identification as DJ 195 a document bearing the identification number 11000029.

We would offer for identification as DJ 196 a document bearing the internal number 11000030.

We would offer for identification as DJ 197 a document bearing the number 11000039.

And we would offer for identification as DJ 198 a document which is unnumbered, which bears the typed date October 23, 1958, and the typed caption "Report of Visit with Pennsylvania Power on October 21, 1958."

1                   CHAIRMAN RIGLER: The documents will be marked  
2 as noted and consistent with the Board's earlier ruling  
3 will be rejected from admission into evidence.

4                   MR. BUCHMANN: May I resume, Your Honor?

5                                   (The documents were marked  
6                                   DJ 194 thru 198, inclusive,  
7                                   for identification.)

8                   Whereupon,

9                                   ROBERT HART

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

13                                   CROSS-EXAMINATION (Continued)

14                   BY MR. BUCHMANN:

15                   Q       Mr. Hart, I direct your attention to DJ  
16                                   is  
17 Exhibit 18, which/Mr. Whiting letter of April 4, 1973 to  
18 Mr. Rudolph.

19                   A       Okay, sir.

20                   Q       In that letter, Mr. Whiting requests admission  
21 to and participation in the CAPCO power pool.

22                                   I believe you testified yesterday you helped draft  
23 this letter?

24                   A       That's correct.

25                   Q       Did you distinguish admission to, from  
participation in, in any fashion?

1 A No.

2 Q Then you were asking to become a member of the  
3 organization known as CAPCO?

4 A That's correct, sir.

5 Q How could you do that when you did not  
6 know what the rules of the organization were?

7 A I'm not sure there were any rules at that time,  
8 sir.

9 Q I direct your attention to the third paragraph  
10 which refers to a memorandum of understanding.

11 I gather at the time this letter was written,  
12 you knew there was a memorandum of understanding?

13 A We were aware there was a memorandum of  
14 understanding, at this date there, yes, sir.

15 Q Had you had a copy of the memorandum of under-  
16 standing at that point?

17 A I'm not sure what the memorandum of understanding  
18 is. I'm thinking back. Remember, there was a document, I  
19 believe, where we had requested certain documents.

20 Q Yes.

21 A And I'm not sure if that is inclusive in that other  
22 request or not.

23 end 14  
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1           Q       The question I am asking you is, do you now recall  
2 whether on April 4, 1973, you had a copy of the memorandum  
3 of understanding?

4           A       You are asking if I recall, and my answer is,  
5 no, I do not recall.

6           Q       Now, directing your attention to BX-132, which is  
7 Mr. Whitings letter of April 13, 1973, to Mr. Rudolph, do  
8 you have a copy of that?

9           A       Yes, sir.

10          Q       Now, in the second paragraph, you refer to among  
11 other things ownership participation in the Perry Nuclear  
12 Plant. Do you see that?

13          A       Yes, sir.

14          Q       Had you made any determinations at that time as  
15 to whether ownership participation by the City of Cleveland  
16 in the Perry Nuclear Plant was lawful?

17          A       I believe --

18                   MR. MELVIN BERGER: Excuse me. Do you  
19 mean by you, Mr. Hart, or the City of Cleveland?

20                   BY MR. BUCHMANN: Mr. Hart.

21          A       I believe I had -- there was a series of exchanges  
22 between Lee Howley and myself and Don Hauser and myself,  
23 and they had contended tht it was not legal, and I think I had  
24 contended that it was legal, and the firm of Squire, Sanders  
25 and Dempsey said later that it was legal.

                  MR. BUCHMANN: Let me have that back.

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(The reporter read the record as requested.)

CHAIRMAN RIGLER: And the question too.

(The reporter read the record as requested.)

CHAIRMAN RIGLER: I'm having difficulty with the time frame on that too. I will grant the motion to strike.

BY MR. BUCHMANN:

Q Had you, Mr. Hart, determined at the time you wrote this or drafted this letter or participated in the drafting of the letter on April 13, 1973, that ownership participation of the City of Cleveland in a nuclear plant was lawful under the law of Ohio?

A I'm not sure if it was this time here or thereabouts -- I'm trying to be responsive to your question.

Your question is, have I made a determination that it is lawful? Yes, I have made a determination that it is lawful.

Q The question was on April 13, 1973?

A I don't remember. I would have to see the document. They speak for themselves.

Q What documents?

A The exchange between the illuminating company and my own self.

Q I think there was an exchange prior to April 13, 1973.

A Sir, you are trying to pin me down here. I have to give you my best answers. I don't know. I know there



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1 was an exchange.

2 Q Mr. Hart, the next piece of correspondence in the  
3 sequence is DJ-183 from Mr. Dudolph to Mr. Whiting,  
4 April 17, 1973, and that simply suggests to Mr. Whiting that he  
5 arrange a meeting with Mr. Howley, or it makes that  
6 suggestion; am I correct on that?

7 A You are talking about the letter of April 17, sir?

8 Q Yes.

9 MR. MELVIN BERGER: I think the document  
10 would speak for itself.

11 MR. BUCHMANN: I'm trying to connect this up.

12 THE WITNESS: Yes.

13 CHAIRMAN RIGLER: I think the objection was  
14 well-taken, but in interest of moving along, we will accept  
15 the answer.

16 MR. BUCHMANN: I understand documents speak  
17 for themselves. But I'm trying to illustrate a long  
18 sequence of things and these connecting questions, I think,  
19 are proper.

20 CHAIRMAN RIGLER: But your question, the  
21 troublesome aspect of your question was you asked him to  
22 interpret the document and the objection was the document  
23 speaks for itself, and that was a well-taken objection.

24 BY MR. BUCHMANN:

25 Q Directing your attention to DJ-184, Mr. Whiting,  
to Mr. Howley of April 27, 1973, which shows on its face

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1 that it is a request for certain agreements of the  
2 CAPCO group, and I ask you how on April 4, you could request,  
3 formally request admission to the CAPCO group when you  
4 did not have access to those agreements which stated the  
5 rules of the game, so to speak?

6 A You are asking me how it can be done, or what  
7 is your question?

8 Q I am asking you how the City could request formal  
9 admission to an organization when it didn't know what the  
10 organization was?

11 A Well, the fact is that the City did. I don't  
12 quite understand your question still, when you ask, how.

13 Q Am I to construe, Mr. Whiting's letter of April  
14 4, 1973, DJ-181, as a request for admission to the CAPCO  
15 pool, whatever the CAPCO pool might have involved?

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arl 1 A It is a request to join the CAPCO pool, that's  
2 correct.

3 Q Whatever it may have involved?

4 A Well, I will stand on that answer, sir. It is a  
5 request to join the CAPCO pool as we knew it at that time.

6 Q As you knew it, without having any of the  
7 documents before you?

8 CHAIRMAN RIGLER: Let me ask you a clarifying  
9 question, Mr. Buchmann:

10 As I look at DJ 181, that refers to their  
11 understanding that there is a memorandum of understanding  
12 relating to CAPCO. If we come over to DJ 184, which says  
13 the City is missing certain documents, it lists those  
14 documents as the basic generating capacity agreement,  
15 basic operating agreement, and the application before  
16 the REC for the Perry Plant.

17 Your question seems to carry a presumption  
18 that they did not have the memorandum of understanding,  
19 and that doesn't necessarily follow from 184.

20 Do you see what is troubling me?

21 MR. BUCHMANN: I see that, but when someone  
22 says as we understand it, you have a memorandum of  
23 understanding, it doesn't imply they have it in their hand.

24 All I want to know is if this is a request to  
25 join the pool, no matter what it involved.

1 CHAIRMAN RICLER: I can see the relevance of  
2 that.

3 BY MR. BUCHMANN:

4 Q Now, Mr. Hart, the next -- you testified yesterday  
5 that the request for documents which was contained in DJ 184  
6 was satisfied in one fashion or another.

7 Am I correct in my recollection on that?

8 A No, sir, you are incorrect. I said that it was  
9 partially complied with. I don't think it was ever satis-  
10 fied.

11 Q The record will show.

12 In any event you had some more documents in  
13 your hand after that time?

14 A That's correct, sir.

15 Q Now the next document is DJ 185, Mr. Whiting  
16 to Mr. Rudolph of August 3, 1973. Do you have that?

17 A Yes, sir.

18 Q Now this contains the City's -- accompanies  
19 the City's proposal for admission to CAPCO. That is what  
20 the attachment is, isn't it?

21 A The attachment proposal for membership in Central  
22 Area Power Coordination Group and participation in the  
23 nuclear units.

24 Q Did you distinguish "participation" in nuclear  
25 units from "admission" to CAPCO?

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1           A       This agreement was -- I'm sorry, not agreement --  
2       this proposal was prepared by R. W. Beck, and I have  
3       really sort of -- are you asking for my own opinion, or what  
4       it was at the time?

5           Q       I'm asking you if this was the proposal of the  
6       City of Cleveland for Cleveland membership in CAPCO. Do  
7       you distinguish participation in the nuclear units from  
8       membership in CAPCO? I want your opinion.

9           A       I actually think of them as two different  
10      things, sir.

11          Q       Now I notice you did help draft that letter to  
12      Mr. Rudolph.

13          A       The letter of August 3, 1973?

14          Q       Yes.

15          A       Yes, sir.

16          Q       Did you review the attached proposal?

17          A       I might have glanced at it in a very cursory  
18      sense, but I could not -- it is really a complex engineering  
19      document.

20          Q       The attached proposal is what you described?

21          A       Yes, sir.

22          Q       Had you yourself by that time reviewed the  
23      CAPCO materials, whatever they were, which were in your  
24      possession?

25          A       No, sir.

1 Q You had not.

2 Am I correct you are not able to testify as to the  
3 compatibility of this proposal with those CRPCO agreements?

4 A That's correct, sir.

5 Q Now I noticed, by the way, on pages 6 and 7,  
6 bottom of page 6 of that proposal, there is a reference  
7 to 345 kV transmission, and carrying over to the top of the  
8 next page it says, "The City proposes" -- and I'm not  
9 attempting to quote -- to interconnect with CBI at the  
10 Fox, Harding and Inland Substations.

11 Do you see that?

12 A Yes, sir.

13 Q Now was it not about this time that the City of  
14 Cleveland participated in litigation to prevent the  
15 Illuminating Company from bringing his transmission lines  
16 to feed the Fox and Harding Substations?

17 A I'm not aware of that.

18 Q Your participation in the City of Independence  
19 case, the Park case you may think of it as --

20 A We were Intervenorers in that case to preserve  
21 the Cuyahoga County National Park, that is all.

22 Q You were aware that was a transmission line to feed  
23 those two substations, weren't you?

24 A No, I wasn't.

25 Q By the way, on page 2 of that proposal, one of the

1 proposals of the City is to maintain representation on the  
2 various committees of the CAPCO group.

3 In August 1973, do you believe the Cleveland  
4 Municipal Light Plant had enough persons qualified to  
5 serve on committees of the CAPCO group?

6 A I think if we had been invited to participate,  
7 we would certainly have run as fast as we could to catch  
8 up on all of these things, and we would have done our best  
9 to do whatever needed to be done.

10 Q Do you know how many committees there are?

11 A No, sir.

12 Q Do you have any knowledge yourself of what these  
13 committees might be?

14 A No, sir.

15 Q How did the City plan, if you know, to inter-  
16 connect with the Inland, Harding or Fox Substations or  
17 any or all of them?

18 A I don't have any idea about that, sir.

19 Q Do you know where their locations are?

20 A No, sir.

21 Q The next thing that happens is Mr. Rudolph's  
22 letter of August 13, 1973 to Mr. Whiting, which is  
23 apparently Applicant's Exhibit 25. Do you have a copy of  
24 that?

25 A I don't believe I do, sir. I believe you referred



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to it earlier, but I do not have a copy of it.

end 16

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1 Q Now, in that letter, Mr. Rudolph refers to our  
2 current labor problems. Do you have any idea what he is  
3 talking about?

4 A No, sir.

5 Q You were aware that the Cleveland Electrical  
6 Illuminating Company was on strike for 122 days at  
7 about that time?

8 A I'm unaware of it. I don't know.

9 MR. BUCHMANN: May I have marked for identification,  
10 if your Honor please, what should be Applicants Exhibit 61,  
11 CEI, a letter from Mr. Whiting to Mr. Rudolph on September  
12 10, 1973.

13 (The document referred to was  
14 marked Applicants Exhibit 61  
15 (CEI) for identification.)

16 BY MR. BUCHMANN:

17 Q Have you had a chance to look at that,  
18 Mr. Hart?

19 A Yes, sir.

20 Q Did you participate in the drafting of that  
21 letter?

22 A I believe I did, sir.

23 MR. BUCHMANN: I have marked As Applicants Exhibit  
24 62 (CEI), a letter from Mr. Whiting to Mr. Rowley of October 31,  
25 1973, and ask you, Mr. Hart, if you participated in the drafting

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1 of that letter?

2 THE WITNESS: I believe so, sir.

3 (The document referred to was  
4 marked Applicants Exhibit 62  
5 (CET) for identification.)

6 BY MR. BUCHMANN:

7 Q Do you have in front of you, Department of  
8 Justice Exhibit 188?

9 A I do, sir.

10 Q That letter, as I recall your testimony, was  
11 handed to you at the meeting on that date which I presume  
12 to be the -- let me withdraw that.

13 Go back to '62, Mr. Hart, the letter of October 3.  
14 That talks about a meeting on October 25. Did that meeting  
15 take place?

16 A I don't remember that meeting taking place, sir.

17 Q Can we draw the inference that the December 13  
18 meeting was the next meeting to discuss this subject?

19 A To the best of my recollection, that is true,  
20 yes, sir.

21 Q Now, you testified yesterday with respect to the  
22 December 13, 1973, letter -- I gather you reviewed that  
23 letter carefully?

24 A I have reviewed the letter.

25 Q In that letter the Illuminating Company

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1 committed itself to enter into negotiations for City partici-  
2 pation in certain specified plants at certain specified  
3 amounts. Now, were those plants and those amounts the same  
4 as has been requested by the City or do you know?

5 A I believe they were, but it is easy enough to  
6 check. It is in some of the other documents here.

7 Q Did you understand that that participation would  
8 come out of the Illuminating Company share, so to speak?

9 A That has always been my understanding.

10 Q What would have been capacity, but for participation  
11 of the City of Cleveland would belong to the Illuminating Company?

12 A That is correct, sir.

13 Q In that circumstance, you think it unreasonable  
14 for the Illuminating Company to request that if the  
15 City did not use its full entitlement, the Illuminating  
16 Company could have first refusal on the purchase?

17 MR. MELVIN BERGER: Objection.

18 CHAIRMAN RIGLER: What is the objection?

19 MR. MELVIN BERGER: He is asking an opinion as  
20 to reasonable or unreasonable, which would go more to  
21 engineering than other aspects.

22 MR. BUCHMANN: I'm not asking an engineering  
23 questions.

24 CHAIRMAN RIGLER: The objection is overruled.

25 THE WITNESS: You say, do I think it would be

reasonable or unreasonable?

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BY MR. BUCHMANN:

Q I said, did you think it would be unreasonable if you didn't use the power which came out of the Illuminating Company share in the first instance for the Illuminating Company to ask for the first crack at it?

A Yes.

Q Why?

A Because we were paying hundreds of millions of dollars, and we would have been as much an owner of that as you would have been for your share of it, for the rest of the plant and the other participations would have been the owners.

We could all have owned an entity.

CHAIRMAN RIGLER: When you say you would have been, you were referring to CEI Company and not Mr. Buchmann?

THE WITNESS: Yes, sir. I'm referring to him as the CEI Company. I'm referring to the CEI ownership.

BY MR. BUCHMANN:

Q Is it your understanding that what the Illuminating Company requested was that if you did not use the power, you would have to give it to the Illuminating Company for nothing?

A They would set the rates at which it would be sold back to them.

Q What is your understanding of the phrase

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\*right of first refusal?

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1 A Just what I indicated there. That we could not, we  
2 could not go on the open market and find a willing buyer  
3 for this power. We would have to offer it first as it  
4 states there, first refusal to purchase to CEI.

5 Q At what price?

6 A It doesn't state. We are at this time paying a real  
7 heavy price to the company for power.

8 MR. BUCHMANN: I move to strike that again.

9 CHAIRMAN RIGLER: Granted.

10 BY MR. BUCHMANN:

11 Q Mr. Hart, is it your suggestion that in the  
12 event that the City did not use its full entitlement  
13 in this participation power and had found a third-party  
14 purchaser at some stated price, that the right of first  
15 refusal meant that the Illuminating Company would force you  
16 to sell it to them cheaper?

17 A That's right.

18 Q What is the basis for that idea.

19 A The basis is the fact it is in there. I think  
20 the fact speaks for itself or it would not even be in there.

21 Q This doesn't say anything about price, does it?

22 A No, sir.

23 Q That price would be regulated, in any event, would  
24 it not?

25 A That's correct.



1 Q Now directing your attention to Department of  
2 Justice Exhibit 189, which is Mr. Whiting to Mr. Howley,  
3 dated January 2, 1974, did you have a copy of that, sir?

4 CHAIRMAN RIGLER: Before you go to that, do you  
5 intend to move Applicant's 61 and 62 at this time into  
6 evidence, or do you intend to wait to do that?

7 MR. BUCHMANN: I was planning to wait until we  
8 have all of these documents that fill out the  
9 Department of Justice stream. It doesn't make any difference.  
10 I will do the custom.

11 CHAIRMAN RIGLER: We have no customer.

12 BY MR. BUCHMANN:

13 Q Do you have 189?

14 A I have a letter of January 2, 1974 from  
15 Whiting to Allen.

16 A This is Mr. Whiting's formal response to the CEI  
17 proposal of December 13?

18 A That's correct, sir.

19 Q Did you participate in drafting this?

20 A That's correct, sir.

21 Q Now I direct your attention to the last paragraph  
22 beginning on the first page in which it is said:

23 "CEI proposal would also require the City  
24 to agree that its rates for the sale of electric  
25 energy to its retail customers in competition with

1 CEI would be subject to review and veto by CEI."

2 Do you see that?

3 A I'm sorry, I wasn't following you.

4 Q First sentence in the last paragraph on the  
5 first page.

6 A Okay, sir.

7 Q In the first place, the City of Cleveland's  
8 electric rates to its retail customers are not regulated  
9 by any third party; am I correct in that?

10 A They are regulated by City Council and the  
11 Board of Control.

12 Q There is no regulatory commission other than  
13 the City of Cleveland itself?

14 A Other than the City of Cleveland itself and its  
15 City Council and its Board of Control.

16 Q Where in DJ 188, to which DJ 189 is a  
17 response, do you find CEI proposing that it have a -- that  
18 the retail rates of the City of Cleveland be subject to  
19 CEI review and veto?

20 A You have lost me here. When you refer to DJ, I  
21 don't have the DJ. You are still referring to the letter  
22 of January 2?

23 Q No, I am referring to the letter of December 13,  
24 1973, DJ 188, and ask you where in that letter do you find  
25 a CEI proposal that the rates to the municipal's retail

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1 customers be subject to review and veto by CEI?

2 A Down in the last paragraph where it states:

3 "Another provision would be that the  
4 City would agree that it would not sell electric  
5 energy to its retail customers below cost."

6 Q Is there anything in that that says CEI will  
7 review the rates?

8 A I think it is implicit in it.

9 Q Did you see anything in there that says CEI would  
10 veto the rates?

11 A I think it is implicit in it.

12 Q Does that sentence you read from the December 13,  
13 1973 letter, is that all that you are relying on for this  
14 idea of review and veto by CEI?

15 A No. As I indicated this morning earlier, there  
16 is another piece of correspondence before us here that  
17 reinforces that position.

18 Q Could you direct my attention to that?

19 A I'm sorry, I have it mixed up with something else.

20 Q Then am I correct that that --

21 A Wait a minute. Stop.

22 Okay. Yes. I am also referring to a letter  
23 of February 7, 1974 from Mr. Howley to Mr. Goldberg.

24 Q That, by the way, is DJ 191.

25 All right, show me where in that letter CEI asked

1 for the right to review and veto the retail rates of the  
2 City of Cleveland?

3 A Okay, on the paragraph at the top of page 2, it  
4 said the letter of December 13 did state that one of the  
5 provisions we expected to negotiate with the City is one  
6 that the city would agree it would not sell electric energy  
7 to its retail customers below cost.

8 Q Is that sentence what you are relying on in that  
9 letter?

10 A That is what I'm relying on when I said by this  
11 letter.

12 Q Anything else that you rely on for the assertion  
13 in January 2, 1974, DJ 189 letter that CEI proposed the  
14 review and veto?

15 A I'm referring to the discussion between the  
16 parties on December 13.

17 Q Are you saying that the parties -- that someone  
18 from CEI said that they wanted the right to review and veto  
19 the rates?

20 A This was one of the points. This was one of the  
21 questions we were raising at the December 13 letter when we had  
22 read this.

23 Q Do you say somebody from CEI said that?

24 A There was a strong innuendo. I'm not saying  
25 anybody came out and said, "We want the right to veto your

ar6

1 rates."

2 Mr. Goldberg, on several occasions, asked them  
3 if it was not implicit in that statement in the December 13  
4 letter, and from the nods and smiles around the room, and  
5 the fact they would not answer the question, we termed it  
6 implicit in that statement.

7 MR. BUCHMANN: I move to strike as not  
8 responsive after the word "nor" or something like that.

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

11 CHAIRMAN RIGLER: The response to the motion was  
12 denied.

13 BY MR. BUCHMANN:

14 Q Who was nodding and smiling?

15 A Lee Howley and Don Hauswar would be two of them.

16 Q Any more?

17 A There were other engineers there, and I don't  
18 know their names, but I would say the same thing to them.

19 Q Looking again at the February 7, 1974 letter --  
20 let me withdraw that.

21 Obviously when you participated in the drafting  
22 of the January 2, 1974 letter, you didn't have the  
23 February 7 letter, right?

24 A That's correct, sir.

25 Q So that in making the assertion about the review

ar7

1 and veto in the January 2 letter, the only thing you were  
2 relying on was the single sentence to which you referred  
3 in the December 13 letter, and the nods and smiles at this  
4 meeting on that date?

5 A I would say it would go beyond nods and smiles. It  
6 was the general discussion and the letter of December 13.

7 Q What general discussion?

8 A As I indicated yesterday and today, we generally  
9 discussed the letter of December 13. We discussed those  
10 four points that are mentioned in that letter.

11 Q I ask you if it is not correct at that meeting --  
12 by the way, you attended that meeting, didn't you?

13 A Yes, sir.

14 Q I ask you if it was not correct at that meeting  
15 that it was pointed out to Mr. Goldberg that under Ohio  
16 law, CEI was precluded from selling below cost, and that  
17 this provision in the proposal was simply an attempt to make  
18 the same rules apply to municipal, its competitor?

19 A I think you can read that in the letter of  
20 December 7 --

21 CHAIRMAN RIGLER: February 7.

22 THE WITNESS: I'm sorry, February 7. That is true.

23 The answer to your question is yes, although  
24 those rules do not apply to the City of Cleveland.  
25

ar8

1 BY MR. BUCHMANN:

2 Q My question is whether this was told to  
3 Mr. Goldberg on December 13?

4 A I believe I answered it, too.

5 Q What was your answer? I didn't catch it.

6 A Yes.

7 Q Now the December 13 letter also at the very  
8 bottom of the first page proposed that the City agreed that it  
9 did utilize its other proprietary functions or its govern-  
10 mental functions to promote tie-in arrangements to compete  
11 with the Illuminating Company.

12 Do you see that?

13 A I see it, sir.

14 Q I note that there is no reference to that in  
15 the January 2, 1974 letter, DJ 189. Do you have any  
16 explanation for that?

17 A No, other than the fact that I personally have  
18 tried to find out where that statement would have come  
19 from, trying to find evidence of what you are talking  
20 about there, and I have never been able to find any evidence  
21 of it.

22 Q What do you think we are talking about there?

23 MR. MELVIN BERGER: Objection. That is  
24 speculation.

25 MR. BUCHMANN: He has tried to find evidence of it.



ar9

1 CHAIRMAN RIGLER: All right.

2 THE WITNESS: What you are getting at there,  
3 or I interpreted it as you are trying to tie water function  
4 into electric function.

5 BY MR. BUCHMANN:

6 Q Would it be more correct to state that at the  
7 meeting on December 13 you were advised that the company  
8 at least believed that the City was tying water and electricity  
9 services together?

10 A At the meeting on December 13, I don't remember  
11 that point being discussed at all.

12 Q Not at all?

13 A But as I say, that is the way I interpret that.

14 Q The way I have just stated?

15 A Right.

16 Q What you say is that you have been able to find  
17 no evidence of that practice?

18 A I have been able to find no evidence, and I have  
19 looked for it.

20 Q You did look for it?

21 A I have looked for it.

22 Q Now going back to the January 2, 1974 letter,

23 DJ 189 --

24 CHAIRMAN RIGLER: Mr. Buchmann, in the questions  
25 you have just been asking, what is the tied product and

1 what is the tying product?

2 MR. BUCHMANN: Without attempting to put this  
3 in substantive testimony --

4 BY MR. BUCHMANN:

5 Q The position of the Illuminating Company was  
6 that the City of Cleveland which sells water, was telling  
7 people they wouldn't get water unless they took Muni power?  
8 Wasn't that the accusation made?

9 A That was my interpretation of what was written  
10 there.

11 Q The City of Cleveland had sewage powers at that  
12 time, did it not?

13 A In December of '73 they had taken the large  
14 sewers away from it, but they still had small sewers.

15 Q They went through a regional sewer?

16 A Yes.

17 Q The City of Cleveland engages in a number of  
18 other functions with regard to the construction of new  
19 buildings, for example, and things of that sort; it issues per-  
20 mits?

21 A It issues permits, yes, sir. I didn't read that  
22 into this, now.

23 Q Have I clarified it? Does that mean you looked  
24 into the situation as you understood it, you only worked  
25 at the possible tie-in of water and electric?

1 A That's correct, sir.

2 Q Now going back to DJ 189, which is the  
3 letter of January 2, 1974, could you turn to the second  
4 page -- and I direct your attention to the second paragraph.

5 And the second sentence of that reads:

6 "This is to advise that the City will  
7 consider whether it will submit a counter-  
8 proposal."

9 Can I correctly infer from that, that on  
10 January 2, 1974 the City had not decided whether or not it  
11 was going to pursue the matter?

12 CHAIRMAN RIGLER: Which one?

13 MR. BUCHMANN: DJ 189.

14 THE WITNESS: If I may, we find out -- we  
15 considered our earlier proposal a continuing one.

16 BY MR. BUCHMANN:

17 Q So the only question here was whether you were  
18 going to do something more; correct?

19 A That's correct, because the outstanding  
20 proposal had not been answered.

21 Q By this time, as the letter indicates, you had  
22 studied the contracts between the CAPCO members?

23 A You are asking if I had studied them or the City  
24 had studied them?

25 Q The City would be proper.

1 A The answer to both of those would be no.

2 Q The City had not studied the contracts yet?

3 A That's correct, sir. We were relying on our  
4 outside counsel and our engineer.

5 Q The consultant for the City had studied them; is  
6 that correct?

7 A I assume that to be the case, yes, sir, although  
8 I couldn't speak for them.

9 Q Directing your attention to --

10 You notice that Mr. Whiting says in that letter  
11 next to the last paragraph, next to last sentence, that he  
12 fails -- or, "We failed to find why the City cannot  
13 meet the requirement for membership."

14 Did you, in drafting that letter or helping to  
15 draft it, consider the financial obligations of the CAPCO  
16 member as being part of the requirements of membership?

17 A Are you asking a question in relation to this, or  
18 are you asking an independent question?

19 If you are asking in relation to this letter  
20 right here, I will have to say I don't know.

21 Q You don't know.

22 Did you -- I direct your attention to DJ 190, the let  
23 letter from Mr. Howley to Mr. Whiting, January 15, 1974.

24 I think you said yesterday that even though  
25 copies of these letters were not directed to you on some

1 occasions that you got them for your file.

2 A I believe they are all in my file, yes, sir.

3 Q Looking at that letter, Mr. Howley raises  
4 questions of financial obligations that might be involved,  
5 did he not?

6 A That's correct.

7 Q On the top of page 2 he says:

8 "We would appreciate your explaining  
9 to us in detail how Muni could carry out  
10 the financial obligations associated with  
11 its proposal."

12 I ask you whether such an explanation was ever  
13 given?

14 A No, sir. No explanation was ever given to Mr.  
15 Howley.

16 Q Was it ever given to CBI?

17 A Not that I'm aware of.

18 Q You would be aware of it if it had been given,  
19 wouldn't you?

20 A That's correct, sir.

21 Q Going to the next letter, DJ 191, Mr. Howley  
22 to Mr. Goldberg, February 7, 1974, do you have a copy of  
23 that?

24 A That's correct, sir.

25 Q One of the things that had been included in the

1 CEI December 13, 1973 proposal was that the City would  
2 withdraw its opposition to certain pending regulatory  
3 proceedings. Do you recall that?

4 A I recall it as a condition precedent.

5 Q And would you put any significance on whether  
6 it is a condition precedent or a condition subsequent?

7 A I would put some significance on it.

8 Q I hesitate to do this, but what?

9 A The fact that the only relief that we could  
10 seek at the time was to go before the Nuclear Regulatory  
11 Commission and ask relief.

12 What CEI was asking us to do was give that up.  
13 Then they were saying then we could sit down and talk  
14 about this.

15 Q In any event, in the letter of February 7, 1974,  
16 that condition precedent was in effect withdrawn, was it?

17 A I don't read that, but let's review the letter.

18 Q Look at the last paragraph on the first page.

19 CHAIRMAN RIGLER: Do you want us to red-line  
20 that?

21 MR. BUCHMANN: It would be my intention to go  
22 through and red-line a number of things in these letters.

23 THE WITNESS: I don't put the same interpretation  
24 on that paragraph as you do, sir.  
25

1 BY MR. BUCHMANN:

2 Q What -- a copy of this letter came to you, did  
3 it not?

4 A That's correct.

5 Q What construction would you put on the  
6 phrase "pretty well made moot"?

7 A It was pretty well made moot by the Department of  
8 Justice, but that doesn't mean that CEI wouldn't like us to  
9 withdraw from this suit.

10 Q Subsequent to February 7, 1974 -- I withdraw  
11 that.

12 Turning to the next page of that letter --

13 MR. REYNOLDS: Mr. Chairman, I don't mean to  
14 interrupt this, and I don't want to belabor the point, but  
15 my understanding on the red-lining is that if documents are  
16 put in on direct are referred to on cross, and there is a  
17 direct reference in the record to a portion of it, it would  
18 not necessary be necessary to go back and red-line that by  
19 the party doing the cross-examination.

20 CHAIRMAN RIGLER: That's correct.

21 And after I asked Mr. Buchmann the question,  
22 I recall that we were using the procedure of reference  
23 to paragraphs cited by Applicants.

24 MR. REYNOLDS: Thank you.

25



1 BY MR. BUCHMANN:

2 Q Page 2 of that exhibit, DJ 191. The February  
3 7, 1974 letter.

4 You a few minutes ago referred to the third  
5 sentence as one of the things confirming your belief that  
6 the Illuminating Company wished to review and veto  
7 Muni's retail rates.

8 Do you remember that testimony a few minutes ago?

9 A Yes, sir.

10 Q Did you read the first two sentences?

11 A I did.

12 Q You did.

13 And you give no credence to those, I gather?

14 A You gathered correctly, in light of the subse-  
15 quent sentence.

16 Q Now down below, Mr. Howley, at the beginning of  
17 the second paragraph, asserts his belief or our belief that  
18 access to ownership or power generated in the indicated  
19 plants should be adequate to meet the requirement of the City  
20 without membership in CAPCO.

21 Did you agree with that at the time?

22 A I think this is one of the points where it is  
23 easy to confuse participation in nuclear units with member-  
24 ship in CAPCO.

25 I think Mr. Howley has confused it, too, here,

1 also.

2 In other words, he is equating one to the  
3 other, and it is not true.

4 CHAIRMAN RIGLER: Your answer to the question  
5 would be -- the question could have been answered yes or  
6 no, couldn't it?

7 MR. BUCHMANN: I presume the answer is no.

8 THE WITNESS: I'm sorry. If I could have the  
9 question back.

10 MR. BUCHMANN: I think the record is clear,  
11 isn't it?

12 BY MR. BUCHMANN:

13 Q Did you at the time agree that access to the  
14 indicated plant in the amounts proposed in the CEI  
15 proposal and in original proposal would meet all of the  
16 requirements of the City?

17 A It would -- the answer to your question is --  
18 well, you have to qualify that, I think, because  
19 remember, in our original proposal we were asking for only,  
20 as I read the documents here, 55 megawatts out of, say, the  
21 the Davis-Besse Plant.

22 Our load rate today will be 80, 78 megawatts.  
23 If you can put it into a point in time, the answer is no.

24 If you expand your time to be all-encompassing,  
25 I suppose the answer is yes. Because you add up all of the

1 requests, and they add up to 141 megawatts.

2 Q I notice that the paragraph beginning at the  
3 bottom of the page, Mr. Howley makes a request for an  
4 explanation of how the City proposes to meet the financial  
5 obligations involved. Do you see that?

6 A I see it, sir.

7 Q I ask you again after that letter, was any  
8 explanation given?

9 A No explanation was ever given to CEI.

10 Q Never given?

11 A Never given.

12 Q Page 3 indicates that a draft of a proposed  
13 interconnection agreement was enclosed. Did you get that  
14 draft?

15 A Yes, sir.

16 Q What did you do with it?

17 A We entered into an agreement on April 17, 1975.

18 Q April 17, 1975?

19 A That's correct, sir.

20 Q And that was the agreement that -- I will defer  
21 that.

22 Directing your attention to Department of  
23 Justice Exhibit 192, Mr. Howley to Mr. Goldberg, February  
24 27, 1974, do you have that?

25 A Yes, sir.

1 Q And that accompanied by a rough draft of a participa-  
2 tion agreement by which is meant, I presume, an agreement  
3 for participation by the City of Cleveland in CEI's share  
4 of the indicated nuclear units?

5 A I believe you read the details of this document,  
6 that is what it would say.

7 Q I notice that there was again a request in the  
8 next to last paragraph that the City explains how it proposes  
9 to meet its financial obligations and a reference to the  
10 fact that there would be an immediate down payment of  
11 about \$20 million, and eventually up to \$72 million?

12 A If you are asking the question do I see that,  
13 yes, I do see that.

14 Q Had the City at that time, to your knowledge,  
15 made any plans to raise an immediate down payment of \$20  
16 million?

17 A In February of '74, I believe that we had.

18 Q I'm sorry, I didn't hear you.

19 A In February of '74, I believe that we had.

20 Q What were the plans?

21 A The plans were to -- I had personally taken on  
22 the responsibility of visiting various underwriters and  
23 although we knew that Lee Howley was continually throwing  
24 up this straw to see if the City could finance during a  
25 period of time here, I visited some of your major underwriting

1 houses in this country, and I have talked with them, and I  
2 have entered into discussions with them for the financing  
3 of participation in the nuclear power plant.

4 MR. CHARNO: Could we have the answer back,  
5 please?

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

8 BY MR. BUCHMANN:

9 Q The straw that you were referring to from  
10 Mr. Howley is that you reiterated requests to tell him how  
11 you were to raise the money?

12 A No, because we asked for the details of how  
13 much the nuclear power plants were going to cost. Some of  
14 the responses that came back was, "This is proprietary  
15 information, and we can't tell you."

16 If you will look at this, a total of \$100  
17 million, and if you were to capitalize or take our small  
18 portion, it would mean that at least one of those plants would  
19 cost a billion dollars, and I don't think even the records  
20 of CEI will reflect that.

21 Q Do you have any correspondence from the  
22 Illuminating Company refusing to give you information like  
23 that?

24 A I'm not sure I have it, but as I remember, our  
25 engineer, Bill Mayben, wrote.

1 Q When?

2 A That I don't know.

3 Q Was it before February 27, 1974?

4 A That I don't know, sir.

5 Q Who were the underwriters you talked to?

6 A Halsey Stewart and John Servino, and I  
7 talked to -- this is one of your big houses down on  
8 Broadway.

9 Q That makes it a little hard for me to find. Do  
10 you have any recollection who it was?

11 A One of the names I remember was -- it just slips  
12 me. It will come back to me.

13 Q If you remember it, will you let me know?

14 A Yes, sir.

15 Q Did you at that time talk to them about buying  
16 that \$9.8 million worth that you haven't been able to sell  
17 yet?

18 A I certainly did, yes, sir.

19 Q Did any of them offer to buy that?

20 A They were very much interested in it, because  
21 what they were talking about, was really financing  
22 every thing, and that would encompass that.

23 The answer to your question is yes.

24 Q I'm correct, however, that you still have not  
25 sold the bulk of that 9.8 authorization?

- 1 A We have not sold it to the public.
- 2 Q The bulk of it you haven't sold to anybody, have
- 3 you?
- 4 A We have sold it to the City of Cleveland.
- 5 Q All of it?
- 6 A No, 1.1.
- 7 Q And you are proposing to sell another half
- 8 million?
- 9 A Right.
- 10 Q Did any of these financial outfits agree with the
- 11 City of Cleveland on any specific plan for the financing
- 12 of these obligations?
- 13
- 14
- 15
- 16
- 17
- 18
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- 24
- 25

end 18



s19

bwl

1 A They never indicated that it would be a  
2 tremendously big problem. We also talked to Goldman,  
3 Sachs about this. There are three firms, but I can't  
4 think of the fourth.

5 Q Who is Goldman, Sachs?

6 A Goldman, Sachs is an underwriter.

7 Q No, who?

8 A I forget. It was about this time we were  
9 talking about here. It was the gentleman who helped us put  
10 together the offering statement.

11 Q He was putting together the what? I'm sorry.

12 A Offering statement.

13 Q If you recall the name of the man at Goldman,  
14 Sachs, will you let me know?

15 A Okay, sir.

16 Q I hand you what has been marked Applicant's Exhibit  
17 63 (CEI) and ask you if you recall getting a letter from  
18 Mr. goldberg to Mr. Hauser, dated March 28, 1974, and ask you  
19 if you recall getting a copy of that?

20 A It indicates on it that I did receive it, and I  
21 believe I did, but I don't remember any of the specifics of  
22 it.

23 Q This purports to be commentary or preliminary  
24 commentary on the draft which accompanied the letter of  
25 February 27, 1974.

Did you have any disagreement with

bw2

1 Mr. Goldberg's comments?

2 Do you remember?

3 A I don't remember. I don't honestly remember.

4 Q You don't have any recollection of believing  
5 that Mr. Goldberg had omitted any matter of major  
6 importance to you?

7 A Well, I think we are talking about our  
8 participation agreement here.

9 There was lots and lots left out.

10 Q Do you have any specific recollection, was  
11 my question.

12 A I have no specific recollection, no, sir.

13 Q I would like to mark Applicants Exhibit 63  
14 (CEI), which is the March 28 letter.

15 (The document referred to was  
16 marked Applicants Exhibit  
17 63 (CEI) for identification.)

18 THE WITNESS: If I may, Mr. Buchmann, in  
19 response to your direct question, because I'm trying to think  
20 of the New York house, but more recently I have had inquiry  
21 from an underwriting firm in Cleveland about the  
22 financing of the municipal light plant. That is Fulton,  
23 Read and Stames. They approached me on it.

24 BY MR. BUCHMANN:

25 Q Who at Fulton, Read and Stames?

bw3

1 A That is a young gentleman that called me up  
2 by the name of Ed Sawyer.

3 MR. BUCHMANN: If the Chairman can't find one  
4 letter, and I want to keep it in sequence. We will make  
5 multiple copies of this.

6 BY MR. BUCHMANN:

7 Q Mr. Hart, I hand you what has been marked for  
8 identification as Applicant's Exhibit 64, (CEI), a letter from  
9 Goldberg to Mr. Hauser, 4-10-74, and ask you if you have  
10 seen that or a copy of that before?

11 (The document referred to  
12 was marked Applicants Exhibit  
13 64(CEI) for identification.)

14 THE WITNESS: I believe I have, sir.

15 BY MR. BUCHMANN:

16 Q That letter asks among other things for a  
17 meeting, does it not?

18 A I believe so, sir.

19 Q That is on April 10. Do you know when the  
20 meeting took place that was in response to that?

21 A I don't know if it is the same meeting or not, but  
22 Mr. Goldberg, myself, Lee Howley and Don Hauser had a  
23 meeting in Mr. Goldbergs.

24 Q When?

25 A It could have been in response to this letter.

bw4

1 CHAIRMAN RIGLER: The documents you are handing up  
2 have not been premarked, so you will have to do that on the  
3 record.

4 MR. BUCHMANN: If the Board please, I would like to  
5 have marked as Applicants Exhibit 65 (CEI) for identification  
6 a letter from Mr. Hauser to Mr. Whiting and Mr. Goldberg,  
7 dated August 6, 1974.

8 (The document referred to was  
9 marked Applicants Exhibit 65  
10 (CEI) for identification.

11 BY MR. BUCHMANN:

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

13 A I believe I did.

14 Q This again asks for a meeting, does it not?

15 A The copy I have is not a good copy. I will take  
16 your word for it; if it states it, I will accept your  
17 statement.

18 MR. BUCHMANN: I hand you what has been marked as  
19 Applicants Exhibit 66 (CEI) for identification, a letter of  
20 Mr. Goldberg to Mr. Hauser, dated August 22, 1974.

21 (The document referred to was  
22 marked Applicants Exhibit 66 (CEI)  
23 for identification.)

24 BY MR. BUCHMANN:

25 Q Do you remember receiving a copy of that?

bw5

1           A        I would have to indicate I probably did receive  
2 a copy of it, but I have no specific knowledge of it right  
3 now.

4           Q        Did you help in drafting of this letter?

5           A        I doubt if I helped in the drafting of it.

6           Q        Can we conclude -- does this help to refresh  
7 your recollection as to when the parties got together to discuss  
8 the draft agreement which accompanied the February 27, 1974  
9 letter?

10          A        Not really, because there were a couple of  
11 meetings that we had, as I recall.

12                    There was the meeting I referred to that we four  
13 had. This was a meeting I went to when the Staff and  
14 Department of Justice was there, along with CEI. I think  
15 this is all around that same period of time, although I  
16 could be entirely wrong on it.

17                    MR. BUCHMANN: Mr. Chairman, I have marked for  
18 identification as Applicant Exhibit 67 (CEI) a letter from  
19 Mr. Hauser to Mr. Goldberg, a letter dated August 30,  
20 1974.

21                                   (The document referred to was  
22                                   marked Applicants Exhibit 67  
23                                   (CEI) for identification.)

24                    BY MR. BUCHMANN:

25           Q        I ask, did you receive this letter?

1 A My answer is the same as on the prior one.

2 Q Does that again ask for another meeting?

3 A I don't see it specifically but, if you say it is  
4 in here, I will take your word for it. I believe these  
5 letters were all inrelaiton to the matter pending before  
6 the Federal Power Commission.

7 Q Is that your recollection?

8 A It has FPC Docket 7631, 7633 and from the people  
9 it was sent to, it indicates this was an FPC matter.

10 Q Would you look at the first paragraph of the  
11 first page of Applicant 67. That refers to the participation  
12 agreement, does it not?

13 A You are talking about the letter of August 30?

14 Q August 30.

15 A It refers to the participation agreement, but the  
16 main thrust of the letter is not in that direction.

17 MR. BUCHMANN: I would mark as Applicants Exhibit  
18 Exhibit --

19 CHAIRMAN RIGLER: Before we go, your questions have  
20 suggested that the letters request meetings and, as I read  
21 Applicant 67, I find no request by Mr. Hauser for a meeting.

22 MR. BUCHMANN: I think that is a fair statement.  
23 I think the letter demonstrates that there had not yet been  
24 a meeting, and that the company was pleading with these  
25 people to get back to them. I refer particularly to the last

bw7

1 paragraph.

2 If I have misstated it in the question, I  
3 apologize.

4 I have marked Applicants 68 (CEI), being a  
5 letter of September 6, 1974, from Mr. Goldberg to  
6 Mr. Hauser.

7 (The document referred to was  
8 marked Applicants Exhibit 68  
9 (CEI) for identification.)

10 BY MR. BUCHMANN:

11 Q Mr. Hart, do you recall getting a copy of that?

12 A I probably did receive it, although I don't  
13 remember specifically.

14 Q Can I conclude from that, that the City -- this  
15 clearly is referring to the participation agreement; is it  
16 not?

17 A It is referring to a participation agreement.

18 Q Well, it is referring to the draft agreement  
19 which was provided to the City on February 27, 1974; isn't it?

20 A I don't know. If you will show it to me, I will take  
21 your word for it.

22 MR. MELVIN BERGER: I think the document would  
23 speak for itself?

24 BY MR. BUCHMANN:

25 Q Are you aware that at that time, September 6,  
1974, whether the City had any other draft participation



bw8

1 agreement other than the one which accompanied the CBI  
2 letter of February 27, 1974?

3 A As I indicated earlier, there had been some  
4 earlier participation agreements and there were some outstand-  
5 ing at this time.

6 We never considered that CBI gave an answer  
7 back on our proposal.

8 Q I don't want to retrace our steps, but the  
9 February 27, 1974, letter which is Department of Justice  
10 192, presented a draft participation agreement; did it  
11 not? Is there any question about that?

12 A Well, okay, if you are referring to that one now.  
13 Let me find the letter of -- okay.

14 Now, in our documents here, which was the  
15 one sent by the City of Cleveland.

16 Q One what?

17 A Participaption agreement.

18

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arl 1 A That was introduced into evidence this  
2 morning, I believe.

3 Q Are you suggesting that by September 6, 1974  
4 the City of Cleveland had provided to the Illuminating  
5 Company a draft participation agreement?

6 A It is in evidence, yes, sir.

7 Q I think you will have to indicate it to me.

8 A I'm referring to August 3, 1973, there is a  
9 documental proposal for membership in Central Area Power  
10 Coordination Group and participation in nuclear units.

11 Q Do you think it is that agreement which Mr.  
12 Goldberg is describing in his letter of September 6, 1974 as  
13 a skeletal draft?

14 A As I indicated to you before, I don't know. As  
15 I indicated earlier, there were exchanges of draft  
16 agreements, both by them and by us.

17 Q I'm trying to ascertain, Mr. Hart, whether  
18 subsequent to February 27, 1974 -- and we are now with  
19 Exhibit 68 up to September 6, 1974 -- the City gave to the  
20 Illuminating Company any revised draft of a participation  
21 agreement?

22 A My answer is I don't know.

23 MR. BUCHMANN: I would mark as Applicants  
24 Exhibit 69 (CEI) a letter from Mr. Hauser to Mr. Goldberg,  
25 dated November 11, 1974.

1

(The document referred to

2

was marked Applicants Exhibit

3

69 (CEI) for identification.)

4

BY MR. BUCHMANN:

5

Q This is a bad copy, and I will try to do better.

6

MR. BUCHMANN: I will get a better copy, Your

7

Honor, if this gets admitted, or retype it.

8

BY MR. BUCHMANN:

9

Q Mr. Hart, do you remember getting that letter?

10

A I don't remember specifically getting this

11

letter, but I imagine I did receive a copy of it.

12

Q You will note, if you can read it, in the

13

second paragraph that Mr. Hauser asserts that since February

14

27, 1974, the company has continually attempted to get

15

together with Mr. Goldberg to discuss the draft participa-

16

tion agreement.

17

Do you have any disagreement with that statement?

18

A That is what it says there.

19

Q Well, is it true?

20

A I don't know.

21

CHAIRMAN RIGLER: Do you have any disagreement

22

with the statement?

23

THE WITNESS: I don't have any disagreement

24

with the statement.

25

MR. BUCHMANN: I will mark as Applicants Exhibit

70 (CEI) a letter from Mr. Goldberg to Mr. Hausen dated November 19, 1974.

(The document referred to was marked Applicants Exhibit 70 (CEI) for identification.)

BY MR. BUCHMANN:

Q Mr. Hart, have you seen that, or a copy of that letter before?

A Yes, I have, right. Yes.

Q Does that refresh your recollection that during the time from February 27, 1974, at least up until November 19, 1974 the City had not presented any proposal or counterproposals with respect to the draft participation agreement given to it?

A What is your question? You say do I --

Q From February 27 to November 19, 1974, the City never got back to us, did it?

A I wouldn't go as broad as that. I would say there had been perhaps no participation agreement submitted to you. I think in our ongoing discussions, however, that the subject came up.

Q Do you disagree with anything in Mr. Goldberg's letter?

A No.

CHAIRMAN RIGLER: Is this a good time for a short

recess, Mr. Buchmann?

(Recess.)

MR. BUCHMANN: I apologize to the panel. Copies of this are being run off.

I mark Applicants Exhibit 71 (CEI), a letter from Mr. Mayben of R. W. Beck & Associates to Mr. Hauser, dated May 16, 1975.

(The document referred to was marked Applicants Exhibit 71 (CEI) for identification.)

BY MR. BUCHMANN:

Q Did you receive a copy of that?

A Yes, sir.

Q Did you participate --

MR. MELVIN BERGER: Perhaps we can wait until we receive some copies of this, if it is all right with you.

MR. BUCHMANN: If it is all right with the panel.

CHAIRMAN RIGLER: How long will it be?

MR. BUCHMANN: It should be a matter of minutes.

THE WITNESS: You asked if I have seen this, and the answer is yes, I have seen this.

BY MR. BUCHMANN:

Q Did you participate in the drafting of this letter?

A No, I did not.

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Q I ask you, Mr. Hart, if this is not the first -- I will withdraw that.

Attached to the letter or list of things called "Technical and Economic Questions Relating to the Nuclear Generating Plant in Question," is that not correct?

A I will take your word for it, although I have not found it. I see where you mean, yes.

Q A three-page document of questions; do you have that?

A Yes, sir.

Q I ask you if that is not the first time -- R. W. Beck was acting on behalf of the City of Cleveland; is that correct?

A That's correct, sir.

Q They were your consultants?

A That's correct, sir.

Q Is that not the first time that anyone on behalf of the City of Cleveland had inquired of the Illuminating Company about the technical and economic questions with respect to these plants in which you requested participation in April 1973?

A That I don't know, sir.

Q Are you aware of any prior request for information on such technical and economic questions?

ar6

A I'm not aware of anything as technical as this prior to this.

MR. BUCHMANN: I mark for identification Applicants Exhibit 72 (CEY), a letter from Mr. Hauser to Mr. Goldberg, dated June 23, 1975.

(The document referred to was marked Applicants Exhibit 72 (CEY) for identification.)

BY MR. BUCHMANN:

Q I ask you, Mr. Hart, did you receive a copy of that letter?

A Yes, I did, sir.

Q Mr. Hauser says he was forwarding answers to the list of questions in Mr. Mayben's letter and he did in fact do so, did he not?

A He forwarded answers. I'm sure that the answers were appropriate or that the answers were complete.

Q I didn't have that rather lengthy attachment duplicated, if Your Honor please. I would like to reserve the right to attach the answers to this Exhibit 72.

CHAIRMAN RIGLER: All right.

BY MR. BUCHMANN:

Q Mr. Hart, do you regard yourself as qualified to determine whether the answers to the technical and economic questions attached to Exhibit 71 were full and



ar7

complete?

MR. MELVIN BERGER: Can I have that question read back, please?

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

THE WITNESS: My general impression is they were not.

No, I'm not qualified, but my general impression is that they were not.

MR. BUCHMANN: I move to strike his general impression.

CHAIRMAN RIGLER: Granted.

MR. BUCHMANN: I am advised that the attachment may already be in evidence. If that be the case, I will advise the Board of the number.

It is attachment to Applicants Exhibit 43 (CEI).

BY MR. BUCHMANN:

Q One of the things, Mr. Hart, we discussed earlier, were the questions, repeated questions to the City from the Illuminating Company asking for the City's plans on the financing involved in participation in these units.

Do you remember those questions?

A Yes, sir.

Q And I have marked for identification as

Applicants' Exhibit 73 (CEI) a letter from Mr. Rudolph to Mayor Park dated June 19, '75, and ask you if you saw that letter?

(The document referred to was marked Applicants Exhibit 73 (CEI) for identification.)

THE WITNESS: Before I answer that, let me say the name of the fifth firm on underwriting was the name of Cumlocb.

The answer to your specific question is yes.

BY MR. BUCHMANN:

Q Who at Cumlocb?

A I do not recollect the gentleman's name now.

Q If you do, you will let me know that?

A Certainly.

Q How did this letter, which is Exhibit 73, come to your attention?

A How would it have come to my attention? Mayor Park's office would have given it to me.

Q Did you help to draft a response to this letter?

A I don't recollect there was a response to it, but perhaps I'm wrong on that.

Q You don't recollect?

A At this point, if you show me a document that an answer went back, I would know about it, but off the top of

my head, I do not recall one.

Q Presumably if there was a response, you would remember?

A If there was a written response or an oral response, I would remember. If there was an oral response to this.

MR. BUCHMANN: If the Chairman please, I would have marked for identification Applicants Exhibit 74 (CEI) letter from Mr. Goldberg to Mr. Hauser, July 1, 1975.

(The document referred to was marked Applicants Exhibit 74 (CEI) for identification.)

BY MR. BUCHMANN:

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

A I imagine I did. I'm on the service list. Although I don't remember it specifically, but maybe if I look at it closely enough, I will remember it. I probably did.

Q Do you recall telling Mr. Goldberg either in writing or orally that there was anything left out, material left out of this letter?

A Okay, now. This answers the other question that you asked of whether the responses we got back were incomplete.

This answers that question. They were incomplete.

Then your question now is did I have any input into this letter?

I honestly can answer I don't think I did have any input into this letter.

Q Would that -- do you recall whether or not you had any input in the letter, do you recall after this letter telling Mr. Goldberg that he omitted anything?

A No, sir, I don't recall.

Q Apparently the incompleteness which you believe is confirmed by this letter is with respect to Question No. 26?

A That would appear to be from reading this.  
Now, again -- let me stop there.

Q Can we infer from that, that there were at least 25 questions that were answered?

A I don't know what you infer from that. I would have to look at the other document. Then we wouldn't know if they were completely answered.

Q Mr. Goldberg at least isn't asking any question about it?

A I don't think you can conclude that from this, either.

MR. BUCHMANN: I will say for the record that the next item in the sequence of correspondence would be DJ 177, the letter of Mr. Hart to Mr. Rudolph, of July 9,

1975, on which I have already interrogated the witness.

I have marked for identification, if Your Honor please, Applicants Exhibit 75 (CEI), a letter of July 22, 1975 from Mr. Rudolph to Mr. Park.

(The document referred to  
was marked Applicants Exhibit  
75, for identification (CEI).

BY MR. BUCHMANN:

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

A Yes, I did.

Q And this is a response to the letter which is Department of Justice 177, July 9 letter, 1975 letter, from you to Mr. Rudolph, requesting transmission services, is it not?

A I believe that is what it purports to be, yes, sir.

Q And I believe you have testified about this yesterday, although the letter wasn't marked. You will see that Mr. Rudolph, toward the end of the letter, asks for the opinion of counsel that there is no legal or conspiratorial impediment to the company, being the Illuminating Company, obtaining energy from the same sources at the same prices.

Do you remember testifying about that yesterday?

A Yes, sir.

Q You testified yesterday that you asked what the company meant by a conspiratorial impediment, and that

you have yet to find out the answer.

Do you remember that testimony?

A That's correct.

Q Is that true, you have yet to find out the answer?

A That's correct, sir.

Q Read the last sentence of the letter. "By conspiratorial impediment, we mean any concerted refusal to deal by those who have access to Buckeye Power."

Do you see that?

A I see that, sir.

Q Do you have any trouble understanding what that means?

A I do, sir. I asked Mr. Hauser and Mr. Radolph what that meant. I had this letter in my hand when we discussed it.

Q When?

A July 22, 1975, or thereabouts, and I asked them specifically what it meant, and they would not answer it.

Q Do you have any conception of the phrase "conspiratorial impediment"?

A I do not know what it means when you put it in this context here.

Q Do you know what it means in any context?

A I suppose you are talking about antitrust violation, and for the sake of me, I can't imagine what he was talking

about here.

Q Do you know what a concerted refusal is?

A Concerted refusal?

Q Yes.

A No, sir.

CHAIRMAN RIGLER: Haven't you participated in briefs in this very proceeding charging the Applicants with concerted refusals to deal?

THE WITNESS: We have charged them with refusals to deal. I don't know that I have used the term "concerted refusals to deal."

Then you have to read that in the context, Your Honor, with those that have access to Buckeye Power.

BY MR. BUCHMANN:

Q Who has access to Buckeye Power?

A It is my understanding that everybody has access to Buckeye Power.

Q I direct your attention to the letter of April 15, 1975, which is attached to Department of Justice 177, the letter in which you participated in drafting for Buckeye, and addressed to the City of Cleveland.

Do you remember that letter?

A That's right.

Q Does that refresh your recollection as to whether Buckeye Power is available to everybody?



A      It is my understanding Buckeye Power is  
available to everybody.

end 20

1 Q I ask you to look at the fourth paragraph on the  
2 first page of the letter which begins "Under the Buckeye  
3 arrangement, Buckeye is precluded from selling directly  
4 to nonmembers."

5 A This is what I was trying to explain to you before.  
6 You do not ever buy from the entity called Buckeye. If  
7 you read the rest of that paragraph that paragraph that  
8 you are reading from there, it describes how you go about this  
9 and there has been certainly no conspiratorial impediment.

10 There are other towns that have done what  
11 we are trying to do. YOU do not enter into an agreement  
12 with Buckeye, but you enter into an agreement with  
13 those municipalities.

14 Then they sell the power to you. Buckeye indicated  
15 to us that they were the negotiating arm and that they had a  
16 great deal of influence on all of the members of Buckeye  
17 and that they were sure there was excess capacity of  
18 seasonal power available to the City of Cleveland, as indicated  
19 in the last paragraph of that letter.

20 There have, in fact, been other municipalities  
21 that have entered into contracts. Now, how that could  
22 be a conspiratorial impediment, I don't know.

23 Q Did I ask you, if it was?

24 A I thought that was the question that was  
25 pending.

bw2

1 MR. MELVIN BERGER: Can I have the second  
2 to the last question and answer read back?

3 (The reporter read the record as requested.)

4 MR. BUCHMANN:

5 Q Bu the way, this indication that Buckeye had a  
6 lot of influence on its members is not something you saw  
7 fit to put in the April 15 letter; is it?

8 A It does not appear in that letter. When you asked  
9 me prior, if that letter embodied everything at the meeting,  
10 I said, not, it did not. There were discussions behind that  
11 letter.

12 Q Your statement is then that the arrangement that can  
13 be made -- is it your understanding, based on that meeting and  
14 the information you have about Buckeye that Buckeye  
15 Power Company be available to the Illuminating Company?

16 A It is my understanding that that is the case.

17 Q Could be available at the same price as it might  
18 be available to the City of Cleveland?

19 A It is my understanding that that is the case.

20 Q Based on that understanding the qualification  
21 that Mr. Rudolph puts in this letter of July 22, 1975, would  
22 mean that this was an offer to wheel Buckeye power for you,  
23 wasn't it?

24 A I think you have -- again, I don't know what that  
25 statement means. I'm going to where I came from. I don't

1 mean to argue with you, but you read that clause in this  
2 context, and I wonder why it is even there, if it doesn't  
3 mean anything.

4 Q Let me look at the four lines on page two of  
5 the June 22, 1975 letter. With respect to what you have  
6 just testified, you understand that the Illuminating Company  
7 can get power from Buckeye.

8 A That is my understanding.

9 Q Which is the same source from which you claim the  
10 City could get power, right?

11 A That is my understanding, yes, sir.

12 Q You say that it would be -- could be at the  
13 same price?

14 A That is my understanding, yes, sir.

15 Q Do you believe that -- what, therefore, in this  
16 letter suggests to you that the Illuminating Company was not  
17 willing, at least, in that point in time to wheel  
18 Buckeye power for the City of Cleveland?

19 A Unless somebody can explain to me what that clause  
20 means, I would be very suspect. If it doesn't mean anything,  
21 why put it in there. You are saying to me it doesn't  
22 mean anything, and I say back to you, sir, why put it in there.

23 (The reporter read the record as requested.)

24 MR. BUCHMANN: I think that is nonresponsive.

25 I move to strike.

1 CHAIRMAN RIGLER: I was thinking about it, as  
2 I heard the answer back, and I think it is responsible, so  
3 we will allow it to stand.

4 He was indicating what caused him to draw that  
5 conclusion.

6 MR. BUCHMANN: I think it is close.

7 CHAIRMAN RIGLER: You know the rule, when it  
8 it is close.

9 MR. BUCHMANN: Yes, sir, I always lose.

10 (Laughter.)

11 BY MR. BUCHMANN:

12 Q And your problem in trying to determine whether  
13 or not this was an offer by the Illuminating Company, based  
14 on the assumptions you make as to the availability of  
15 power to wheel Buckeye power lies in your failure to under-  
16 stand the phrases "conspiratorial impediment" and  
17 "concerted refusal to deal."

18 A After a request of somebody to explain them to  
19 me.

20 Q Pardon?

21 A After a request for somebody to explain them to me.

22 Q Is that what you based your conclusion on?

23 A My conclusion is based on the lack of answers  
24 to what these clauses mean. That is the reason I suspect them.

25 MR. BUCHMANN: I mark Applicant Exhibit 76 (CEI)

1 a letter from Mr. Hart to Mr. Rudolph, dated August 4,  
2 1975.

3 (The document referred to was  
4 marked Applicants Exhibit 76 (CEI)  
5 for identification.)

6 BY MR. BUCHMANN:

7 Q You wrote that letter, did you not?

8 A Yes, I did, sir.

9 Q And that is in response to a letter we have just  
10 been discussing, the July 22, 1975, marked Exhibit 75?

11 A That is correct.

12 Q You characterized the language we have just  
13 been describing as plain and straightforward language; do  
14 you not?

15 A NO, I don't think so. I say in plain, straight-  
16 forward, and your company refuses to provide wheeling.

17 Q You quote the paragraph from the July 22, 1975,  
18 letter which we have just been discussing; right?

19 A That is correct, sir.

20 Q And that is the paragraph that talks about  
21 "conspiratorial impediment; right?

22 A That is correct.

23 Q I notice when you quote that paragraph you do not  
24 quote the last sentence of that paragraph which talks about  
25 a concerted refusal to deal. You quote it in the next

b76

1 sentence; right? So we have all the language we have just  
2 been talking about?

3 A I believe all the language you have just been  
4 talking about, yes, sir.

5 Q Then in your next paragraph you say, in plain  
6 and straightforward language, your company refused to  
7 provide wheeling service to the City, where to do so would  
8 be injurious to your company's competitive position, vis-a-vis  
9 the City's municipal electric department. I read that  
10 correctly?

11 A You read that correctly, sir.

12 Q On August 4, 1975, you had no difficulty  
13 understanding the plain and straightforward language of  
14 the July 22, 1975, letter which seems to give you  
15 so much difficulty today; am I correct?

16 A No, you aren't correct. I say in plain,  
17 straightforward language. You don't say that; I say that. This  
18 is my letter. I am saying, I, Bob Hart, in plain,  
19 straightforward language, am telling you when you cut  
20 through everything else, what you are saying here is that you  
21 are refusing to provide wheeling service to the City, where  
22 to do so would be injurious to your company's competitive  
23 position.

24 I'm saying it in plain, straightforward language.  
25 Let's cut through the other stuff in the quoted portion up



1 there, and get down to the bottom line and that is its  
2 refusal to wheel.

3 Q You knew what they were talking about; didn't you?

4 A I perceived that they were putting in the straw  
5 of the conspiratorial impediment in saying to me in very  
6 sophisticated language that we will not wheel to you.  
7 That is what I was saying in plain, straightforward language.

8 Q the next sentence says you interpret that as a  
9 refusal to wheel, period.

10 A That is the way I interpret it, sir. You put  
11 the two contingencies attached and that is the part you  
12 still can't understand.

13 Q You say this is a reiteration of your company's  
14 position in refusing to wheel PASNY power to the City's  
15 municipal electric department. Do you see that?

16 A I see that, sir.

17 Q Where do you assert in this letter at all that  
18 there is a refusal to wheel Buckeye power?

19 A Because the whole thrust of everything that we  
20 have discussed prior to this has been the refusal to wheel  
21 Buckeye power, attaching the two contingencies upon the  
22 wheeling of the Buckeye power.

23 Now, that refusal to wheel would also encompass  
24 the PASNY power.

25 Q By the way, I see in your first paragraph you refer

bw8

1 to power for the City of Cleveland which the City will  
2 have purchased from Buckeye, Incorporated, of Columbus,  
3 Ohio.

4 Do you see that?

5 A I do see that.

6 Q I thought you told us a few minutes ago, you  
7 didn't buy the power from Buckeye?

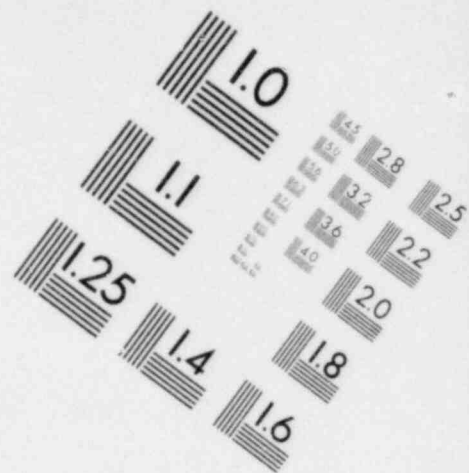
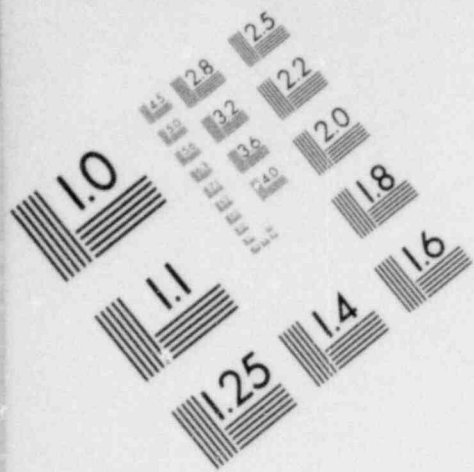
8 A Technically, you do not buy the power from  
9 Buckeye. As a local matter we always refer to it as Buckeye  
10 power and treat it as an entity for linguistic purposes.

11 Q At that point in time had you reached agreement  
12 with any member of the Buckeye organization, any  
13 co-op for the purchase of power.

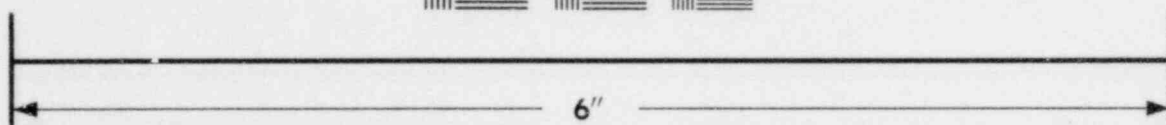
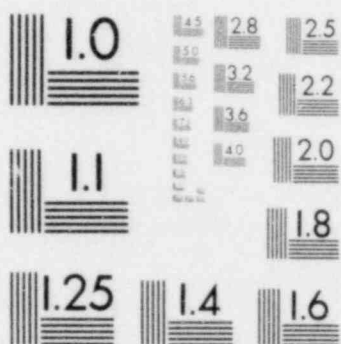
14 A No, we haven't, because of the letter of April 15.  
15 It assures it, it would be available.

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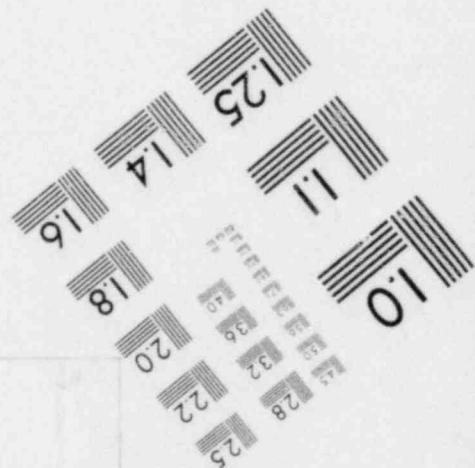
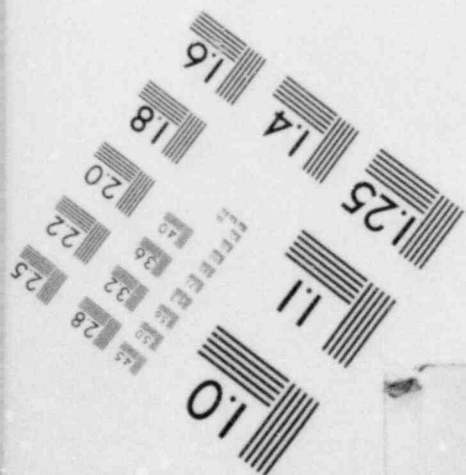
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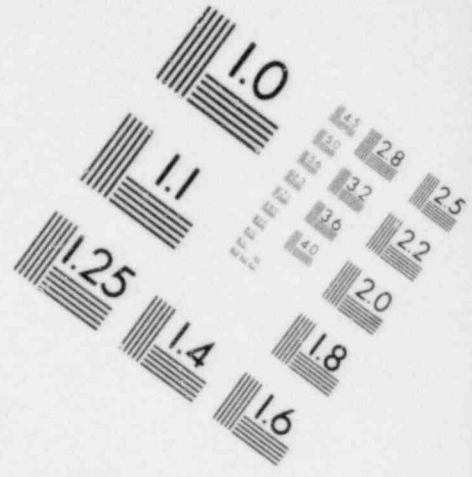
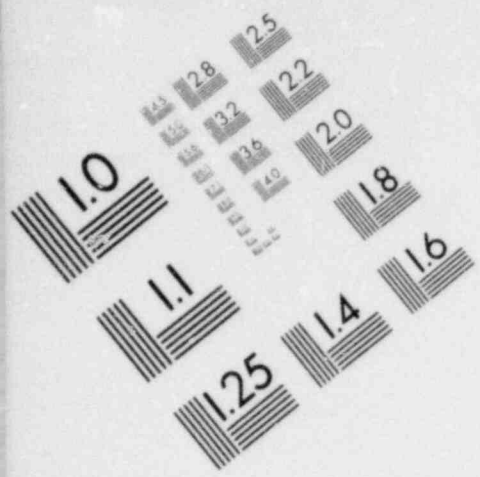


**IMAGE EVALUATION  
TEST TARGET (MT-3)**

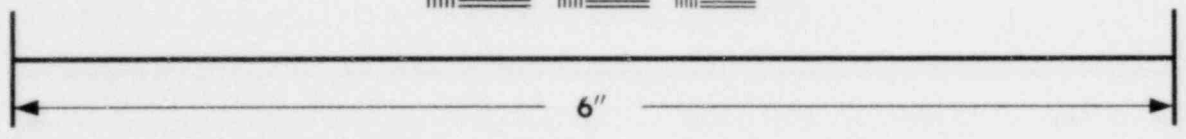
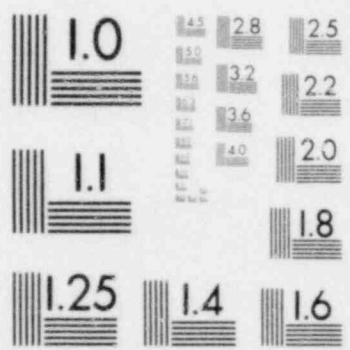


**MICROCOPY RESOLUTION TEST CHART**

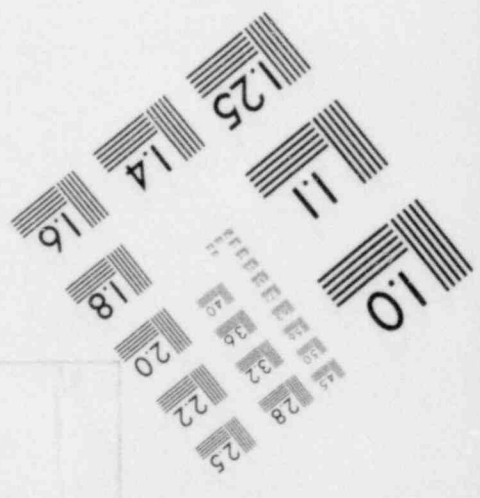
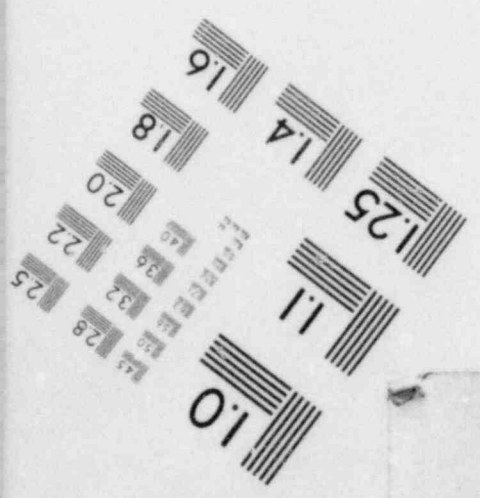




**IMAGE EVALUATION  
TEST TARGET (MT-3)**



**MICROCOPY RESOLUTION TEST CHART**



arl

Q If they get assurance that such purchases would be legal and would not violate the Buckeye contract, am I right on that?

A That is where we go into the anti-pirating matter that we were talking upon this morning.

Q I am correct in that the assurance of power from Buckeye or what you refer to as the assurance of power, was conditioned on the Buckeye being assured that there would be no legal or contractual impediment; isn't that right?

A Buckeye being assured of that?

Q Yes.

A That's right.

And there never seemed to be indication that there would be problem along those lines?

MR. BUCHMANN: I move that last go out. How does he know the indications of Buckeye Power?

THE WITNESS: You asked about Buckeye Power and our discussions with them, and you are talking about the fourth paragraph of the April 15 letter.

The fourth paragraph assures us that the Buckeye Power would be available. That is what I thought we were talking about.

CHAIRMAN RICLER: I want to go back to the first question.

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

MR. BUCHMANN: I don't see how we can go on. He testified previously that he had nothing to do with getting them assured.

CHAIRMAN RIGLER: The motion to strike would be granted.

MR. BUCHMANN: I have had marked as Applicants Exhibit 77 (CEI) a letter from Mr. Hart to Mr. Rudolph, dated August 15, 1975.

(The document referred to was marked Applicants Exhibit 77 (CEI) for identification.)

BY MR. BUCHMANN:

Q Have you gotten it already, Mr. Hart?

A Yes.

Q You did prepare that letter?

A I helped in drafting it, that's right.

Q Who else helped in drafting this letter that you signed?

A This gets pretty technical, and it would have been Bill Mayben.

Q This is a request for firm wholesale power service from the Illuminating Company, right?

A That's correct.

ar3

Q And you say in the last paragraph that the division is prepared to pay. What preparation had the division made to pay for such service?

A What preparation?

Q Yes.

A I'm sorry, I don't understand what your question is.

They do have an appropriation. They do have a cash flow. This is written around August 15 of 1975, meaning at the time we might have gotten around to it, it would have been January 1 of 1976.

There would have been a new appropriation which, as you know, the company has been paid over a million dollars in January.

Q How much do you owe?

A I don't know.

Q Quite a bit of money, do you know that?

A I don't know.

Q Approximately how much?

A I couldn't tell you.

Q Over \$10 million?

A I don't know.

Q Over \$9 million?

A I indicated I don't know.

MR. BUCHMANN: I have marked for identification



Applicants Exhibit 78 (CEI), a letter from Mr. Rudolph to Mayor Perk, dated August 18, 1975.

(The document referred to was marked Applicants Exhibit 78 (CEI) for identification.)

BY MR. BUCHHANN:

Q Did you receive a copy of that letter and the attachment, Mr. Hart?

A Yes, sir.

Q It attached as one of its attachments your letter of August 4, which is Exhibit 78. Do you know if there was ever any response to Mr. Rudolph's letter of August 18, 1975?

A I don't know if there was in fact a response. I imagine there was a response.

However, after a series of my sending letters over questioning what these terms meant, I finally gave up.

Q What series of letters questioning these terms?

A Asking what the legal or conspiratorial impediments are.

Q Can you refer to any other letter other than the one dated August 4, 1975, which is Exhibit 76?

A This is the only one I can think of right at the present time. If you remember, there was a meeting in the mayor's office at which this was discussed. Then we come

along with this letter of August 4.

Then we come along with his letter of August 18. There may possibly have been one more letter after this. Although I can't say for certain.

Q I thought your reference was to a series of letters from you, inquiring about the meaning of those words. Is my recollection incorrect?

A In reference to this right.

Q Can you think of any other letter?

A As I indicated to you, no, not offhand.

Q Now, by the way, did you discuss Mr. Rudolph's letter of August 18, 1975 with Mayor Perk?

A No, I'm not sure Mayor Perk ever did see this letter.

Q Letters from the Cleveland Electric Illuminating Company addressed to Mayor Perk routinely routed to you?

A That's correct, sir.

Q Before Mr. Whiting made his request for participation in CAPCO, which is DJ 181, April 4, 1973, or for participation in the nuclear units, which is April 13, 1973, DJ 182, do you know if Mr. Whiting, or to your knowledge, did you discuss those requests with the Mayor?

A I might have discussed it with him. I'm sure I discussed it with him. I'm sure Judge Whiting discussed it with him. Whether they were before or after those

particular dates that you referred to, I don't know, but, yes, this has all been discussed with him.

Q You mean you may have told the mayor after requests for admission to CAPCO were sent, that you had sent the requests?

A We may have told him afterwards that we had sent it, but we had told him before that we were going to send the letter.

MR. BUCHMANN: I mark as Applicants Exhibit 79 (CEI) a letter from Mr. Hart to Mr. Rudolph dated August 25, 1975.

(The document referred to was marked Applicants Exhibit 79 (CEI) for identification.)

BY MR. BUCHMANN:

Q Mr. Hart, you in fact wrote that letter?

A This is the one I referred to earlier. That is the fact. The answer to your question is yes.

Q This is in this letter you enclosed the Ohio Power AMP-Ohio agreement. I'm advised that is Staff Exhibit 141B, and asked the company to suggest modifications to that schedule to satisfy its condition in the August 18, 1975 letter?

A That's correct, sir.

Q And did the company so indicate to you?

A I'm sorry, did they indicate what to me?

Q How they would propose to modify Schedule A.

A As I said earlier, there was a series of proposed Schedule A. And the answer to your question is yes.

Q Did you accept it?

A Did I accept the firm power?

Q Did the City accept the --

A No, we have not entered into a firm power agreement, because I don't know what the legal and conspiratorial impediments are in the letter.

Q Who is talking about a firm power agreement?

A I'm sorry. I misspoke. You are talking about the transmission. That is attached to Schedule A there in the last proposal that went over to CEI.

If I may, in the last paragraph of the August 25 letter, I request the implication of legal and conspiratorial impediment because I still don't understand.

MR. BUCHMANN: I ask that that be stricken and ask the Board to inform Mr. Hart not to say so when there is no question pending.

CHAIRMAN RIGLER: That is good advice, Mr. Hart. Please don't do it.

MR. BUCHMANN: I have had marked as Applicant's Exhibit 80 (CEI) a letter from Mr. Hauswer to Mr. Hart, dated September 13, 1975, and I ask you, Mr. Hart, if you in

fact received a copy of that letter?

THE WITNESS: Yes, I did.

(The document referred to  
was marked Applicants Exhibit  
30 (CRI) for identification.)

BY MR. BUCHMANN:

Q I notice a carbon copy is indicated to Mayor  
Perk. Do you think he received a copy of that letter?

A Are you saying did his office receive one, or  
did he personally?

Q He personally.

A I doubt he did, sir. He receives hundreds of  
letters every day that hardly get into his hands personally.

Q What was the last part?

A He receives hundreds of letters every day and  
they don't get into his hands personally.

Q I presume his secretary puts in his hands  
correspondence considered of crucial importance to the  
City of Cleveland?

A On technical matters they are referred to that  
department first, or those entities which could shed light  
on what the particular matter is.

Q Do I understand that on technical matters of  
this sort the reference is to the Department of Law?

A This would have been deferred to me. It would

have been deferred to other people other than my own self. This particular one was deferred to Bill Mayben of the R. W. Beck Company and to Reuben Goldberg, and I think probably Mr. Goldberg, yes, he is in the service list.

Q Now this is an offer of firm wholesale -- this, among other things, is an offer by CEI to sell to the city firm wholesale power under a Schedule, a copy of which is attached to the letter. Is that not correct?

A That's correct. Which is the reason I guess I was getting it mixed up earlier when we were talking about the transmission schedule.

Q I note on page 3, Mr. Hauser inquires how the Municipal Electric Light Plant will provide assurance that the rates and charges for such service would in fact be paid. Do you note that?

A I don't see it specifically, but I will take your word for it if you will show me the point in the paragraph.

Q It is not unlikely that he would have made such a request, is it?

A I'm working on your other question.

Q The third paragraph on page 2.

A Right.

Q Did you provide Mr. Hauser or anybody else at CEI with such assurance?

A Yes, sir.

Q In what form, and when?

A The law director of the City of Cleveland and the Federal District Court in Cleveland about two weeks ago gave CEI those assurances.

Q You have reference to verbal assurances?

A Before a Federal District Judge on the record thereto, I believe. So it is a little bit stronger than just that, sir.

In fact, we have fulfilled everything here, also.

Q Have what?

A We have fulfilled everything. We gave the assurances and we have lived up to our assurances also.

Q You haven't paid your back bill?

A That was not part of the assurances. That is not part of what was discussed here.

Q You see a reference to the letter which we have discussed previously, the April 15, 1975 letter from Buckeye, which you helped draft, which is annexed to DJ Exhibit 177.

You see the reference toward the end of Mr. Hauser's letter to the assurances that Buckeye said it needed, that such a purchase arrangement --

A Yes, sir.

Q Mr. Hauser asked you if you obtained such assurance. I gather the answer is no?



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A The answer would be no, because CEI would not agree in principal to wheel this power.

Q I see you say --

MR. BUCHMANN: I have marked for identification as Applicants Exhibit 31 (CEI) a letter of September 15, 1975 from Mr. Hauser to Mr. Cummins, who is the author of the April 15, 1975 letter from Buckeye.

(The document referred to was marked Applicants Exhibit 31 (CEI) for identification.)

BY MR. BUCHMANN:

Q You received a copy of that letter, did you not?

A Yes, sir.

Q Did you ever inquire of Mr. Cummins whether he had answered it?

A I didn't inquire of Mr. Cummins as to whether he had answered it or not. I did inquire of Mr. Cummins, however.

MR. BUCHMANN: Could I have that read back?

CHAIRMAN RIGLER: He said he didn't ask if he answered it, but he made inquiry of Mr. Cummins.

BY MR. BUCHMANN:

Q Did you ask Mr. Cummins whether he had responded to this letter?

A No.

Q Whether or not -- you read this letter when you received a copy of it, didn't you?

A Yes.

Q Whether or not Mr. Cummins responded to Mr. Hauser's request, I gather, was of no significance to you?

A It was of significance to me as to whether a meeting could be set up. That is the reason I called him up and made inquiry of him.

Q Called who up?

A Mr. Cummins.

Q What did you ask him? Whether a meeting had been set up?

A I asked him generally if the power was still available, and he indicated to me, yes, it was still available, and I asked him if the three of the parties -- if you will read this letter, I believe it will say something to the effect that CEI wants to meet with Buckeye Power and I made a request, and inquiry of Mr. Cummins if I could not be present, and if the three of us couldn't sit down and possibly work these things out.

Q Did he have objection to your being there?

A No, sir.

In fact, he invited me and he invited his own self to the City of Cleveland and sat down to meet with the two parties, meaning CEI and the City of Cleveland.

Q Are you asserting Mr. Cummins met with the Illuminating Company with or without you?

A I didn't say that. If you said that, you interpreted it incorrectly.

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Q Let's see if we can straighten out my confusion. Has there been a meeting, to your knowledge, with CEI and Buckeye, either with or without you?

A No.

Q To your knowledge, has Buckeye requested a meeting with CEI?

A They indicated that they wanted to meet with CEI and the City of Cleveland.

Q Indicated to you?

A To me, yes, sir.

Q Do you have any indication or any knowledge that they indicated that to the Illuminating Company?

A No, I would have no way of knowing that, other than through Mr. Cummins.

Q Did you get such information from Mr. Cummins as to them having requested a meeting with the Illuminating Company?

A As of September 15 or whenever it was, no, I didn't.

Q After September 15, which is the date of the letter from Mr. Hausow to Mr. Cummins?

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A Do you have a pending question?

Q I want to know if you have any knowledge of the Buckeye having asked to meet with the Illuminating Company.

A No, sir.

Q Did you ask them to meet with the Illuminating Company?

A I asked if we all three could sit down, as I indicated earlier. I asked if we could all three sit down and work out our differences.

Q Did you attempt to set up a three-way meeting?

A No, sir, because Mr. Cummins indicated to me they were busy with some important financing and could he get back to me some time later on. So that is where it stands.

Q That is where it stands?

A Well, I have made an attempt to call him within the last, say, three weeks. But I have not reached him yet. He has been out of town.

MR. BUCHMANN: I have marked for identification Applicants Exhibit 32 (CEI) which was a letter from Mr. Hart to Mr. Hauser dated October 9, 1975.

(The document referred to was marked Applicants Exhibit 32 (CEI) for identification.)

BY MR. BUCHMANN:

Q You did write that letter, Mr. Hart?

A That's correct.

Q I notice you show carbon copies to Mayor Peck. Does he get your letters?

A I showed it as a carbon copy because I told it to the girl, to send it to everybody that you had sent your letter to. To be perfectly blunt with you, I doubt if he ever saw my letter.

Q Or know anything about it?

A No, that is being a little bit too broad, I believe. I probably would have discussed it, either I personally or the law director would have discussed it with the mayor verbally.

Q Now, Mr. Hart, I gather from this letter that on October 9, 1975, the City had not yet completed its study or analysis of the proposals contained in Mr. Hauser's letter of September 15. Am I correct?

A I think that is a correct summarization of this letter.

MR. BUCHMANN: I have had marked for identification as Applicants Exhibit 83 (CEI) a letter from Mr. Hart to Mr. Hauser dated October 9, 1975.

(The document referred to  
was marked Applicants Exhibit  
83 (CMT) for identification.)

BY MR. BUCHHEIM:

Q You did in fact write that letter, didn't you,  
Mr. Hart?

A Yes.

Q You copied to Mr. Park again, too?

A Yes, because the service list had been  
established by CMT.

Q Did anyone else participate in the drafting of  
this letter?

A I don't believe they did. I would have to refer  
to the letter of September 15, 1975.

To the best of my recollection, this was the  
culmination of that whole series of letters wherein the  
company had indicated their refusal to wheel.

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Q You think this is the last of the letters?

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That again is the best of my recollection right now, on the wheeling.

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Q Mr. Hart, would you go back to the September

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15, 1975, letter from Mr. Hauser to you and tell me what you are talking about on the last page. As referenced in

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Exhibit 83?

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A You are asking me to -- wait a minute, okay.

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MR. MELVIN BERGER: Which letter are you referring

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to?

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MR. BUCHMANN: Exhibit 83, he says on the last

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page of your letter of September 15, 1975, and so on.

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I want him to identify which in Exhibit 80, September 15

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letter or what in that letter he is talking about. We have

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had difficulty in trying to decide.

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THE WITNESS: I think on the last page of the

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September 15 letter, we were back where we started from.

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CHAIRMAN RIGLER: Just identify the paragraph.

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THE WITNESS: Last paragraph, sir.

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CHAIRMAN RIGLER: Which begins --

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THE WITNESS: Wait a minute.

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BY MR. BUCHMANN:

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Q Take your time.

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A Yes, I'm sorry. It is the paragraph that begins in

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reply to your letter of August 15.



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1 Q How far does it go?

2 A Well, you are back where we started from.

3 Q How far does it go, Mr. Hart? I want to know  
4 what you are relying on.

5 A My answer was that paragraph.

6 Q Does it pick up the words, have you obtained such  
7 assurance?

8 A I read that as another paragraph, sir.

9 Q Does it pick up the quote?

10 A I believe there is a semicolon about that, so that  
11 makes it a part of the paragraph.

12 Q Is that all of what you are relying on in your  
13 reference in the October 9, 1975, letter?

14 A That paragraph and all that is implicit in  
15 that paragraph, sir.

16 MR. BUCHMANN: I have had marked for identification  
17 as Applicants Exhibit 84, the letter from Mr. Hauser to  
18 Mr. Hart, dated October 19, 1975.

19 (The document referred to was  
20 marked Applicants Exhibit 84 (CEI)  
21 for identification.)

22 BY MR. BUCHMANN:

23 Q Did you in fact receive that letter, Mr. Hart?

24 A I probably did, although I have no general  
25 knowledge of it. Let me look over it.

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CHAIRMAN RIGLER: Do you want a CEI designation of the 84?

MR. CHAPNO: Could we have the date on the letter? It doesn't agree with what you stated.

MR. BUCHMANN: October 14, 1975.

BY MR. BUCHMANN:

Q Do you remember yet if you received that?

A I believe I did. Yes, sir, I have a general knowledge of receiving it.

Q Do you see in the middle of the second paragraph Mr. Hauser's assertion that the Illuminating Company was obviously willing to wheel for the City of Cleveland from, let's say, Ohio Power, Ohio Edison or PENELEC?

A As long as there were those two contingencies built into in.

Q All right. This will take longer than I thought. In the first sentence of that paragraph Mr. Hauser asserts that the company is willing to provide wheeling under conditions similar to those in the contract between Ohio Power and AMP Ohio with respect to electric energy as to which there is no legal or conspiratorial impediment. I haven't read the whole sentence, but do you see that sentence?

A Yes. I was really someplace else on here.

Q Then in the next sentence and that sentence has the conditions which you regard as a problem or which you are

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unable to understand; am I correct?

A. That is correct, sir.

Q. In the next sentence Mr. Hauser says with this commitment, can we agree that that is a reference back to the first sentence?

A. Yes, sir.

Q. It goes on to say the company obviously is willing to wheel for the City of Cleveland with respect to electric energy it might wish to purchase.

For example, from Ohio Power. Don't you interpret that as a statement by Mr. Hauser that the conditions which the company has put on wheeling are not regarded by the company as inhibiting such a purchase?

A. I would read this --

CHAIRMAN RIGLER: I think the language speaks for itself, Mr. Buchmann. We are getting to a point on this where it is not fruitful to continue. I think Mr. Hauser sets forth the qualifications on the offer to wheel.

They are contained there in the letter. It is not necessary to go back and forth on this.

MR. BUCHMANN: The problem is you don't know what is coming up next.

I want marked for identification as Applicant Exhibit 85(CBI) a letter from Mr. Hauser to Mr. Hart, dated October 15, 1975.

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(The document referred to was  
marked Applicants Exhibit 85  
(CEI) for identification.)

BY MR. BUCHMANN:

Q This, Mr. Hart, is a response to your letter of  
October 9, 1975, dealing with firm power?

A That is correct.

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Q By this time, firm power and wheeling are proceeding as parallel things. You wrote two letters on October 9, one on each subject?

A I will take your word for it. I think I did, yes.

MR. BUCHMANN: I have had marked as Applicants Exhibit 36 (CEI) a letter from Mr. Hart to Mr. Hauser, dated October 21, 1975, and that is your response to Mr. Hauser's letter of October 14, 1975, which is Exhibit 34.

THE WITNESS: That is what it states there. I imagine it is true.

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

BY MR. BUCHMANN:

Q Your first sentence is:

"We have received your letter of the 14th confirming your company's position rejecting wheeling."

Did I read that correctly?

A Yes.

Q How can you reconcile that sentence from your letter of October 21, 1975 which I have just read to you with Mr. Hauser's statement:

"With this commitment the company obviously is willing to wheel or provide transmission services

for the City of Cleveland with respect to electric energy it might wish to purchase, for example, from Ohio Power, Ohio Edison or Penelec " --

A Your question is how can I reconcile?

Q " -- with which the Illuminating Company presently has interconnection agreements providing for the purchase and sale of energy."

A You are rejecting wheeling because you are putting on there a contingency that there be available a like power and price, and that there be no conspiratorial impediment.

Again it comes back to the same thing. I don't mean to belabor it, but the answer comes out a rejection.

Q Do you seriously suggest, Mr. Hart, that the October 14, 1975 letter which is Exhibit 84 -- there are things in addition -- but that it does not contain a firm offer to wheel power to the City of Cleveland from, say, Ohio Power?

A Your question is does it --

Q Do you have any real doubt that Exhibit 84 is a firm commitment by the Illuminating Company to wheel power to the City of Cleveland from, for example, Ohio Power?

A Yes.

Q You do?

MR. BUCHMANN: I think we ought to end with that.

CHAIRMAN RIGLER: I think that is a good time to end it. I understand your position, and your position.

MR. BUCHMANN: I move Applicants Exhibits 61 to 86 (CEI) into evidence.

MR. MELVIN BERGER: I ask that 65, 66, and 69 be deferred until more legible copies are obtained.

MR. BUCHMANN: I'm agreeable or I may have to have them retyped.

CHAIRMAN RIGLER: We will receive into evidence Applicants 61 through 64, 67 -- what were the numbers being deferred?

MR. MELVIN BERGER: 65, 66, 69.

CHAIRMAN RIGLER: We will receive into evidence Applicants 67 and 68, and we will receive into evidence Applicants 70 through 86.

(Applicants Exhibits 61 thru 64, 67, 68, and 70 thru 86 (CEI), previously marked for identification, were received in evidence.)

MR. BUCHMANN: If Your Honor please, I don't want to leave an inference on the record that I have finished this stream of documents, so that is clear.

CHAIRMAN RIGLER: All right.

We will resume then on Tuesday, the 17th, at



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9:30 a.m.

MR. MELVIN BERGER: Mr. Chairman, I believe that when there was cross-examination which was suspended in midstream of Mr. McCabe, the Board indicated Mr. Lerach in that case to state the general areas that were to be covered in the remainder of cross-examination and I think that would be proper at this time, too.

CHAIRMAN RIGLER: I don't think we are far enough into it. I think the situation is a little different here. I'm not going to require it.

We are adjourned.

(Whereupon, at 4:45 p.m., the hearing was adjourned, to reconvene at 9:30 a.m., Tuesday, February 17, 1976.)

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