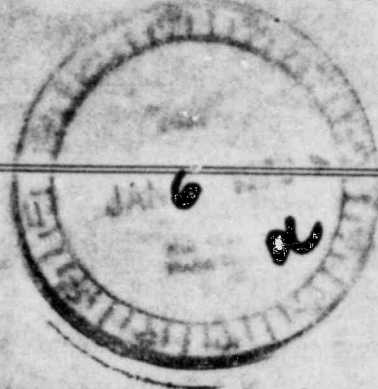


Regulatory Docket File

NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY AND
CLEVELAND ELECTRIC ILLUMINATING CO.

Docket Nos.
50-346A
50-500A
50-501A

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

and

CLEVELAND ELECTRIC ILLUMINATING CO.,
et.al.

50-440A
50-441A

(Perry Nuclear Power Plant,
Units 1 and 2)

Place Silver Spring, Maryland

Date - 5 January 1976

Pages 2473 - 2624

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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TOLEDO EDISON COMPANY and	:	Docket Nos.
CLEVELAND ELECTRIC ILLUMINATING CO.:	:	50-346A
	:	50-500A
	:	50-501A
(Davis-Besse Nuclear Power Station,	:	
Units 1, 2 and 3)	:	
	:	
and	:	
	:	
CLEVELAND ELECTRIC ILLUMINATING CO.:	:	51-346A
et al.	:	50-341B
	:	
(Perry Nuclear Power Plant,	:	
Units 1 and 2)	:	
	:	
	:	

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First Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland

Monday, 5 January 1976

Hearing in the above-entitled matter was reconvened, pursuant to adjournment, at 10:00 a. m.,

BEFORE:

Mr. Douglas Rigler, Chairman

Mr. John Frysiak, Member

Mr. Ivan Smith, Member

APPEARANCES:

(As heretofore noted.)

C O N T E N T S

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<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REBUTTAL</u>	<u>RESUMPT</u>
Warren D. Hinchee	2513			

<u>EXHIBITS:</u>	<u>IDENTIFICATION</u>	<u>EXHIBIT</u>
NRC Staff Exhibit 53 NRC Document No. 22	2478	2481
NRC Staff Exhibit 54 NRC Document No. 23	2478	2481
NRC Staff Exhibit 55 NRC Document No. 24	2484	2488
NRC Staff Exhibit 56 NRC Document No. 37	2485	2487
NRC Staff Exhibit 57 NRC Document No. 38	2488	2487
NRC Staff Exhibit 15 NRC Document No. 42	2490	2490
NRC Staff Exhibit 14 NRC Document No. 66	2496	2481
NRC Staff Exhibit 58 NRC Document No. 405	2497	2498
NRC Staff Exhibit 59 NRC Document No. 405, Attachment	2497	2499
NRC Staff Exhibit 60 NRC Document No. 413	2500	2500
NRC Staff Exhibit 61 NRC Document No. 414	2500	2500
NRC Staff Exhibit 62 NRC Document No. 415	2500	2500

bw

	<u>EXHIBITS (Continued):</u>	<u>IDENTIFICATION</u>	<u>EVIDENCE</u>
1			
2	NRC Staff Exhibit 63	2500	2500
3	NRC Document No. 416		
4	NRC Staff Exhibit 64	2501	2501
5	NRC Document No. 417		
6	NRC Staff Exhibit 65	2502	2502
7	NRC Document No. 418		
8	NRC Staff Exhibit 66	2501	2501
9	NRC Document No. 419		
10	NRC Staff Exhibit 68	2503	2503
11	NRC Document No. 442		
12	NRC Staff Exhibit 69	2505	
13	NRC Document No. 446		
14	NRC Staff Exhibit 70	2581	2583
15	NRC Document No. 91		
16			
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P R O C E E D I N G S

1
2 MR. MELVIN BERGER: I would like to make a brief
3 statement.

4 The Department of Justice understands there has been
5 an exchange of correspondence between Mr. Baruch and the
6 Board.

7 We would like to request that we be provided with
8 copies of that correspondence.

9 CHAIRMAN RIGLER: At the time of that arrangement the
10 Board indicated the correspondence would be made a part of
11 the public record. It is agreeable with us.

12 MR. MELVIN BERGER: Thank you.

13 MR. HJELMFELT: Does that mean that suggestion is
14 to furnish parties copies of the correspondence or the Board
15 will?

16 CHAIRMAN RIGLER: We will, if you deem it necessary.
17 It really is a matter that has no relevance on any subsequent
18 portion of any of these proceedings. Although we will make it
19 available because we feel that all exchanges of correspondence
20 between the Board and the attorney for any party definitely
21 should be a matter of public record.

22 You were not copied because it really is a matter
23 which related to the presentation by Mr. Baruch of some of
24 his points and his subsequent response to the Board which he
25 quarreled with the method of presentation.

1 MR. HJELMPELT: The City of Cleveland would
2 like to have copies of the correspondence.

3 MR. GOLDBERG: The Staff does have a copy of letter
4 from the Board to Mr. Lerach. We would like, however, to have
5 a copy of the letter from Mr. Lerach to the Board.

6 What concerns the Staff mostly about this exchange
7 of correspondence is that in the Board letter to Mr. Lerach
8 there was some mention of Staff's argument with respect to the
9 scope of evidence to be received in this proceeding, and
10 Staff believes that it was not quite accurate, not an
11 accurate representation of Staff's argument, and in light
12 of the fact that we are in the middle of our case-in-chief, we
13 would like any documents about the scope of evidence to be
14 received in this proceeding to be eliminated.

15 Therefore, if there is any question in the Board's
16 mind as to the scope of evidence to be received, we would
17 like to file a brief on the subject and have the Board rule on
18 it.

19 CHAIRMAN RIGLER: Mr. Reynolds, Mr. Lerach does not
20 appear to be with us this morning. Could you undertake to
21 get a copy of his letter to the Board and make it available
22 to the other parties?

23 MR. REYNOLDS: I will do so, Mr. Chairman.

24 Mr. Rieser --

25 CHAIRMAN RIGLER: I see him sitting there now.

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1 MR. REYNOLDS: -- is here, but he and I will
2 coordinate and take -- undertake to make those letters
3 available.

4 MR. HJELMFELT: If there is a question with respect
5 to the scope of the evidence to be admitted, the City of
6 Cleveland would also like to brief the issue.

7 CHAIRMAN RIGLER: There is not a question as to the
8 scope of the evidence to be admitted because that would be
9 addressed in the context of an individual witness or individual
10 document.

11 I mean if Mr. Goldberg wants to make a submission,
12 I suppose we would look at it. But right now I don't see
13 any issue outstanding.

14 MR. HJELMFELT: Fine.

15 MR. LESSY: We have our next witness available.
16 But before we proceed with him, the Board requested a
17 clarification with some documents. I would like to do that at
18 this time.

19 I would like to also ask leave of the Board to do
20 this sitting because of the number of documents involved.

21 CHAIRMAN RIGLER: Surely.

22 MR. LESSY: With respect to the documents that were
23 handed out prior to Mr. McCabe's testimony, the first document
24 I would like to address this morning is the document that bears
25 the NRC Staff Document Number 22 and the attachment to that

1 document which is a -- which bears the Staff Document Number
2 23.

3 The reporter was given copies of these documents
4 this morning in triplicate and we would ask that the document
5 as previously mentioned, 22 and 23, be marked for identifica-
6 tion as Staff Exhibits Numbers 53 and 54 respectively.

7 Now --

8 CHAIRMAN RIGLER: Wait a minute. All right.

9 (The documents referred to were marked
10 NRC Staff Exhibits Numbers 53 and 54
11 respectively for identification.)

12 MR. LESSY: With respect to these documents,
13 Exhibits Numbers 53 and 54, we will take together.

14 53 is a memorandum on the letterhead of
15 Leslie Henry who was and is counsel for Toledo Edison, and
16 it is a memorandum to John K. Davis, who at that time we
17 believe was President of Toledo Edison.

18 The memorandum indicates the response of the
19 Duquesne Light Company which is the enclosure, Exhibit
20 Number 54, to the request of Mr. McCabe to the Duquesne
21 Light Company requesting CAPCO membership.

22 It was discussed by Toledo Edison counsel and
23 officers on at least two occasions and a draft response was
24 circulated.

25

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1 CHAIRMAN RIGLER: Mr. Reynolds?

2 MR. REYNOLDS: The documents speak for themselves.

3 I believe that counsel's characterization may be a
4 little off the mark. I will object to his characterization.
5 I have no objection to him referring to the document and
6 letting it speak for itself. I believe that is the proper
7 way to proceed.

8 CHAIRMAN RIGLER: Is it contested that the two
9 documents were appended to each other?

10 MR. REYNOLDS: No. It is not contested that they
11 were appended.

12 CHAIRMAN RIGLER: From whose files were the documents
13 obtained?

14 MR. REYNOLDS: I will ask Mr. Lessy to answer that.

15 MR. LESSY: Our records indicate they were
16 from Toledo Edison. Presumably Mr. Davis, but we are not
17 absolutely certain because the executive files
18 of Toledo Edison were not really allocated on the same floor
19 and were segregated from the rest. It came from the
20 executive file room of Toledo Edison.

21 CHAIRMAN RIGLER: So there is no dispute that the
22 two documents go together, that the document designated
23 Staff Exhibit 22, which is NRC Number 53, was the cover to
24 NRC 54.

25 MR. LESSY: That's correct. The reason why I was

1 simply making an offer of proof for an unsponsored exhibit.

2 If Mr. Reynolds feels that is not necessary I would
3 be happy to move them in evidence as they are.

4 CHAIRMAN RIGLER: All right.

5 MR. SMITH: What is the NRC document number?
6 What is the Staff document number for NRC-54?

7 MR. LESSY: The Staff document number is 23.

8 MR. SMITH: What is Document Number 24? That is
9 not included in this?

10 MR. LESSY: That's correct. We will get to that
11 next, sir.

12 Accordingly, I would like to move into evidence
13 Documents Exhibit Numbers 53 and 54, the two documents that
14 were just discussed.

15 CHAIRMAN RIGLER: Mr. Reynolds?

16 MR. REYNOLDS: Mr. Chairman, there is no dispute
17 that these documents came from the Toledo Edison file. The
18 cover memorandum I think is clear and speaks for itself. The
19 attachment which is Staff Exhibit 54, NRC Exhibit 23, appears
20 to be an unsigned draft and there is no indication who
21 prepared it or when it was prepared.

22 The only thing that we can indicate is that that
23 draft was attached to the memo that is Staff Exhibit 53,
24 but outside of that Toledo Edison is not prepared to enter into
25 any kind of stipulation with regard to the document.

jon

1 In addition to that, I would like to note for the
2 record the continuing objection of the other Applicants to
3 this proceeding to both of these documents on the grounds
4 that we have stated earlier in the proceeding, and I
5 believe is contained in Volume 1 of the transcript.

6 I can restate it now or if it is sufficient just
7 refer back to the earlier continuing objection and ask
8 that it be continued for these documents.

9 CHAIRMAN RIGLER: That would be sufficient.

10 The objection will be overruled. Staff Documents
11 53 and 54 will be admitted into evidence.

12 (Staff Exhibits Numbers 53 and 54,
13 previously marked for identification,
14 were received into evidence.)

15 MR. HJELMFELT: Mr. Chairman, I notice Mr. Lansdale
16 is present today.

17 For the record, I would like to note the City of
18 Cleveland objects and ask that that be a continuing objection
19 for each day so I won't have to repeat it for the record.

20 CHAIRMAN RIGLER: We already understood that to be
21 the position of the City of Cleveland.

22 Although we are moving as fast as we can to decide
23 the issue of possible disqualification.

24 We earlier had reminded you that we considered the
25 City's motion to be filed at the eleventh hour. Because of

1 the untimely nature of the motion, we are going to permit
2 Mr. Lansdale to continue to sit with us until the
3 motion has been resolved.

4 MR. HJELMFELT: I understand that was the Board's
5 position. I simply did not want it to appear the City was
6 waiving any objections.

7 MR. REYNOLDS: I wanted to go back to these
8 documents. I am not sure I was totally clear on my position.

9 As to Document 22, Staff's Exhibit 53,
10 Toledo Edison is not a party to that continuing objection.

11 As to Staff Exhibit 54, that continuing objection
12 was made on behalf of all applicants.

13 I just want to make the record to be clear.

14 CHAIRMAN RIGLER: Yes.

15 One thing that troubles me with respect to your
16 argument -- and I don't think it is fruitful to go into this at
17 length since we have already ruled -- as we look to what
18 apparently is going to be Mr. Lessy's next exhibit, it has the
19 same language in part that we find in the Toledo Edison
20 files and yet it is a Duquesne document.

21 Certainly that begins to suggest at least
22 discussion or interplay between the companies.

23 That, I think, undercuts your argument that these are
24 five companies acting in an individual capacity.

25 But you have your objection. You have it on the

1 record and we have overruled it and I think we can proceed.

2 MR. REYNOLDS: You would rather I not respond to
3 that. That is fine.

4 CHAIRMAN RIGLER: You may, although we understand
5 your position.

6 MR. REYNOLDS: I do have a disagreement with the
7 Board and I think the Board is aware of the disagreement
8 and I can address that later.

9 CHAIRMAN RIGLER: We are. Thank you.

10 MR. LESSY: With respect to a document identified
11 as Staff Document Number 24, it is a letter from Mr. Philip
12 A. Flegler to Mr. McCabe. We would like to have that marked
13 for identification as Staff Exhibit 55.

14 The document in the first paragraph refers to
15 Mr. McCabe's letter of December 5th, which is in evidence as
16 NRC Exhibit Number 1, and I would be happy to make an offer
17 of proof with respect to this document. If not, it was
18 discussed in the testimony and I would like to move it into
19 evidence as Staff Document Number 55.

20 If Applicants desire, I would be happy to make an
21 offer of proof with respect to it.

22 MR. REYNOLDS: I will just note the continuing
23 objection of all Applicants other than Duquesne Light Company
24 with respect to this document.

25 Duquesne Light Company does not have an objection

1 to the introduction of this document.

2 (The document referred to was marked
3 NRC Staff Exhibit Number 55 for
4 identification.)

5 CHAIRMAN RIGLER: Our ruling will be consistent.
6 It will be admitted into evidence.

7 Again I can't help noting that the language in
8 NRC Number 55 apparently is in large part identical to the
9 language contained in a letter which is found in yet
10 another Applicant's file.

11 MR. REYNOLDS: Well, I appreciate that, although
12 going back to 23, which is what I -- I am sorry. Going back
13 to 54, what I believe you are referring to, that as near as I
14 can determine is a draft that was received by Mr. Henry
15 and for that reason it was found in his file.

16 I don't know that it indicates anything more than
17 that.

18 Whether it was received from Duquesne Light
19 Company or not has to be established. It may well be there
20 can be a connection made at some point in the hearing as to
21 that. But I am not disputing the fact. But in terms of the
22 objection I am making, it seems clear as to Staff
23 Exhibit 55 that is a Duquesne Light document.

24 Duquesne Light is not contesting the authenticity
25 of the document. The only point I want to make as to that

1 document -- the other Applicants do have a continuing
2 objection.

3 CHAIRMAN RIGLER: All right. The objection will
4 be noted.

5 Overruled.

6 And we will receive it into evidence as NRC Exhibit
7 55.

8 (NRC Staff Exhibit Number 55, previously
9 marked for identification, was
10 received in evidence.)

11 MR. LESSY: The next I would like to turn our
12 attention to Staff Document Number 37. It is a letter dated --
13 or memorandum dated December 22, 1967 from Mr. Maxl H. Rudolph
14 to Mr. John K. Davis, P. A. Fieger and D. Bruce Mansfield,
15 and have it marked as Staff Exhibit Number 56.

16 Now, the document refers on its face to an
17 enclosure which was not included in the original submission.
18 We have rechecked our files and have located the enclosure
19 and I would like to distribute it at this time.

20 (The document referred to was marked
21 NRC Staff Exhibit Number 56 for
22 identification.)

23 The Document Number 56 refers to an attachment which
24 is a copy of the letter sent to Mr. McCabe by Pigeon.

25 That was circulated according to our files. This

1 was attached to this letter and this attachment is already
2 in evidence as Mr. Rudolph's response to Mr. McCabe's
3 December 5th letter and has been received as Staff Exhibit
4 Number 10.

5 Unless an offer of proof is requested, I would like
6 to move the Document Number 56 into evidence at this point.

7 I would just identify Mr. John K. Davis at the
8 time of Toledo Edison. Mr. Fleger was president of
9 Duquesne Light. Mr. D. Bruce Mansfield was either president
10 or chairman of Ohio Edison at that time.

11 MR. REYNOLDS: Could I ask Mr. Lessy to read this
12 letter he just distributed into the record? Unless there
13 is somebody else that has a better copy. It is awfully
14 difficult to make it out.

15 MR. LESSY: With respect to the original document.
16 This is it. Mr. Hauser provided a legible copy at the time
17 NRC-10 went into evidence. I believe a more legible copy was
18 distributed.

19 MR. SMITH: It was read into the record.

20 MR. LESSY: That's correct.

21 MR. SMITH: At the time it was received, it was
22 read into the record at 12:00 o'clock on the date of the
23 receipt.

24 MR. REYNOLDS: Just for purposes of moving this
25 along, to make the ruling here, I was trying to -- can I take

1 a few minutes break, then, and try to piece together
2 what this says?

3 CHAIRMAN RIGLER: You may.

4 (Discussion off the record.)

5 CHAIRMAN RIGLER: Are you ready to respond?

6 MR. REYNOLDS: Yes.

7 I believe what was moved into evidence was
8 Exhibit 37, which is Staff Exhibit 56; is that correct?

9 CHAIRMAN RIGLER: Staff Exhibit 56 bears the
10 notation NRC Exhibit 37. That is correct.

11 MR. REYNOLDS: All right. I don't think that there
12 is any objection to that.

13 I have been advised that Mr. Lessy's reference to
14 the December 18, 1967 letter as the attachment to the
15 December 22 letter is correct. That was the one that was
16 attached.

17 We don't have any objection to the Staff Exhibit 56.
18 I think the continuing objection has already been asserted as
19 to the earlier Staff Exhibit 10.

20 CHAIRMAN RIGLER: All right. The continuing
21 objection will be overruled and NRC Exhibit 56 will be
22 received into evidence.

23 (Staff Exhibit Number 56, previously
24 marked for identification, was
25 received in evidence.)

1 MR. LESSY: Now, turning our attention to the
2 document identified as Staff Exhibit Number 38, it is a
3 memorandum dated January 1, 1968, addressed to Mr. J. W. O'Man
4 and signed by Mr. John W. Merriman. We ask that it be
5 marked for identification as Staff Document Number -- Staff
6 Exhibit Number -- NRC Staff Exhibit Number 57.

7 If we were to red-line it, we would red-line the
8 entry under Thursday, December 28, 1967.

9 I would like to make an offer of proof with
10 respect to the Thursday, October 23, 1967.

11 This illustrates Mr. Merriman contacted a
12 newly elected council of the Borough of Pitcairn concerning
13 possible disposition of the Pitcairn Electric Company to
14 Duquesne.

15 I would like to move this document into evidence
16 as Staff Exhibit Number 57.

17 (The document referred to was marked
18 NRC Staff Exhibit Number 57 for
19 identification.)

20 MR. REYNOLDS: We have a continuing objection for
21 all Applicants except Duquesne Light Company.

22 CHAIRMAN RIGLER: The continuing objection will be
23 overruled and NRC Exhibit Number 57, bearing the Staff
24 identification Number NRC-38, will be admitted into evidence.
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1 (NRC Staff Exhibit Number 57, previously
2 marked for identification, was
3 received in evidence.)

4 MR. LESSY: I would like to go forward to the
5 document previously identified as Staff Document 42, NRC
6 Exhibit Number 15.

7 This is a memorandum dated January 26, 1968 signed
8 by Mr. W. F. Gilfillan, Jr., addressed to Mr. Philip A. Fieger
9 of the Duquesne Light Company.

10 Previously the Staff moved this document
11 into evidence and an objection was made with respect
12 thereto inasmuch as the document, although not indicating
13 there is an enclosure, refers in the first sentence thereof
14 to "The attached letters on Pitcairn are self-explanatory."

15 The Staff has searched its files with respect to
16 this document and does not have any information with respect
17 to the attached letters on Pitcairn, although we have written
18 to the counsel for the Duquesne Light to ask them if they can
19 provide copies of the attached letters based on Mr. Lerach's
20 statement to the Board at transcript page 1622 that he
21 would try to provide the Board and the parties with the
22 appropriate attachment.

23 MR. RIESER: I, on behalf of Duquesne Light, did
24 attempt to find copies of the attached letters and unfortunately
25 we can't find the attachments either.

1 However, I was authorized to say that we have no
2 objection to this document coming in without the attachment.

3 CHAIRMAN RIGLER: All right.

4 MR. REYNOLDS: Just for clarification, my record
5 shows this document is already in evidence.

6 CHAIRMAN RIGLER: Consulting my records, Mr. Reynolds,
7 I agree with the Staff's position. My notation shows that
8 we reserved the decision pending the search for the
9 attachment with respect to this and also with respect to
10 NRC-14.

11 (The document referred to was NRC-14
12 NRC Staff Exhibit Number 14
13 for identification.)

14 CHAIRMAN RIGLER: Based on Mr. Richter's statement
15 the continuing objection will be overruled and we will
16 admit into evidence NRC Exhibit 15.

17 (NRC Staff Exhibit Number 15, previously
18 marked for identification, was
19 received in evidence.)

20 MR. LESSY: Now, following the sequence of the
21 documents handed out prior to the testimony of Mr. McCabe,
22 I will now recite a listing of document numbers that we do
23 not intend to introduce, to offer at this time, but I reserve
24 the right to offer them at a subsequent time relating to
25 Mr. McCabe's testimony.

1 These are Documents Numbers 48, 49, 50, 51, 52, 53,
2 54, 55, 56, 56, 62, 74 and 65.

3 Turning now to NRC Document Number 66 --

4 MR. RIBSER: Excuse me, Mr. Chairman. I am unable
5 to find Documents 48 and 49 and I would appreciate if Staff
6 could give me copies of those. As they say, they passed them
7 out before Mr. McCabe's testimony.

8 CHAIRMAN RIGLER: We don't have them, either. I
9 believe the Staff would willingly provide you copies. How-
10 ever, they are not before the Board in any fashion right now.

11 MR. REYNOLDS: I guess I have a question whether
12 they should be before the Board before the Staff makes up
13 his mind what it is going to do with this material.

14 CHAIRMAN RIGLER: The Board is not requesting
15 copies.

16 MR. REYNOLDS: I think if it does have copies of
17 materials Mr. Lessy just read, perhaps Mr. Lessy should
18 collect those materials back.

19 CHAIRMAN RIGLER: Yes, Mr. Smith had indicated that
20 at some earlier stage in the record.

21 The Board will consider only those documents which
22 have been moved into evidence.

23 MR. REYNOLDS: Right. Thank you, sir.

24 MR. LESSY: With respect to the document identified
25 as NRC Document 66, this was previously identified and the

1 Staff made a motion to move this into evidence as Document
2 Number 14. It was also incomplete, as the attachment
3 referred to thereon had not been distributed and at this time
4 I would like to distribute the attachment to that.

5 I would point out with respect to the attachment
6 circulated, the signature on this attachment is different from
7 the letter that was actually sent. Namely the initials. The
8 original document moved into evidence has -- and the letter
9 as originally sent to Mr. McCabe bear the signature of
10 Mr. McClellan.

11 This document identified as 14 was a draft of a reply
12 that had been circulated and I refer to the second full
13 paragraph of Exhibit Number 14, Staff Document 66.

14 "The attached suggested reply is the result of the
15 joint efforts of MacRae, Hobelman, Munson and myself at our
16 meeting last Friday."

17 This record indicates the attachments to this
18 document and accordingly, based on the fact the document is
19 now complete, we would like to remove that Exhibit 14 which is
20 the March 18, '68 memorandum with the draft reply attached
21 be received into evidence.

22 CHAIRMAN RIGLER: Mr. Reynolds?

23 MR. REYNOLDS: Mr. Chairman, I don't want to make
24 a whole lot of this but I am not sure I understand how
25 Mr. Lessy arrived at the conclusion that the March 18 document

1 was the attachment to the March 18, '68 document.

2 As I read the March 18 document, it may have had
3 attached to it a letter, the text of which may well have been
4 identical to this one.

5 However, this appears to me to be a copy of
6 what, as I would read it, was in fact the letter sent out,
7 perhaps the one referenced in March 18.

8 I don't understand how we arrive at the conclusion
9 that it was the attachment.

10 If we want to put them in separately or discuss
11 them separately, I have no difficulty with that, except for
12 my continuing objection.

13 But unless there is some better evidence of why
14 they are linked up, I do have some serious questions about
15 talking of it in terms of an attachment.

16 MR. LESSY: The actual document that was sent with
17 is already in evidence.

18 The distinction, as you mentioned, is the signature.
19 We have no knowledge as to -- let's see if I can locate that
20 document for you.

21 I believe it is Document Number 47, Exhibit 10,
22 as you will see is dated March 19, 1968 and it has the full
23 signature of Mr. Gilfillan.

24 This is the one that Mr. McCabe testified that he
25 in effect received. This document is the document -- the

1 attachment has only the initial signature and our records
2 indicate that this was the attachment to the exhibit as we
3 received it on discovery.

4 Why it is dated a day later and at what point in
5 time that date was put on there, we have no knowledge.

6 MR. SMITH: Mine is not a day later. My Document
7 46 contains the same date as your Document 47 which is Y-13.

8 MR. LESSY: Okay.

9 MR. REYNOLDS: It may have been a day later --
10 excuse me. I believe you mean it was a day later than Staff
11 Exhibit 14, Exhibit 66. I think that is what the reference
12 to a day later was. I think that is what the reference to a
13 day later was.

14 MR. LESSY: Thank you, Mr. Reynolds.

15 MR. REYNOLDS: I guess the difficulty I am having
16 is this could have easily have been a carbon copy that went
17 out under initial as opposed to signature. I don't know
18 whether the reference in the March 18 document was an
19 entirely different draft than what was sent out on March 18
20 or the identical draft.

21 I haven't yet been satisfied by Mr. Lessy's comments
22 that he is any more educated on this matter than I am, to be
23 frank about it.

24 CHAIRMAN RICLER: I wonder if Mr. Rissner could shed
25 any light on this.

1 MR. RIESER: You are asking me whether or not what
2 Mr. Lessy passed out is the attachment to Staff Exhibit 14
3 is the attachment.

4 We can't tell from our records what the attachment
5 was to that exhibit.

6 CHAIRMAN RIGLER: Duquesne has searched and has been
7 unable to locate the attachment to the March 18 letter; is
8 that correct?

9 MR. RIESER: The March 18 memorandum; I
10 believe it was a memorandum rather than a letter, or letter --
11 whatever you want to call it.

12 CHAIRMAN RIGLER: NRC Exhibit 66.

13 MR. LESSY: Would Duquesne be willing to accept into
14 evidence Document Number 14 without the attachment?

15 MR. RIESER: Could I have a minute just to review
16 it?

17 MR. SMITH: We are getting our exhibits and documents
18 mixed up again, and Mr. Lessy did it, too.

19 MR. RIESER: We have no objection.

20 CHAIRMAN RIGLER: Now to make the record come out
21 correctly, we will receive into evidence without an attachment
22 NRC Exhibit 14 which bears the Staff Exhibit Number 66, but it
23 will be received into evidence as NRC 14, even though the
24 attachment is not included. And Applicants' continuing
25

1 objection is overruled.

2 (The document referred to was marked
3 NRC Staff Exhibit Number 14 for
4 identification and was received
5 in evidence.)

6 CHAIRMAN RIGLER: That is Applicants rather than
7 Duquesne I meant in this instance.

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1 MR. LESSY: I would like to turn our attention
2 to Staff Document Number 405 and the attachment thereto.
3 405 is a letter dated April 20th, 1966 from W. R. Haury,
4 to Mr. Zimmerman.

5 The attachment is a letter dated April 18, 1966
6 from Bruce Clevidence to Mr. William Haury.

7 I would like to have the April 20th letter
8 marked for identification as Staff Exhibit Number 58,
9 and the April 18th, 1966 letter, as Staff Exhibit Number
10 59.

11 I will make an explanation or offer of proof
12 with respect to these.

13 (The documents referred to were
14 marked NRC Staff Exhibit No. -
15 58 and 59 for identification.)

xxx

16 CHAIRMAN RIGLER: All right.

17 Slow down a minute.

18 MR. REYNOLDS: Can we wait a second while we
19 locate what you are referring to.

20 CHAIRMAN RIGLER: You have asked to have identified
21 as NRC Exhibit 58, Staff Document Number 405.

22 MR. LESSY: That is correct.

23 And as Exhibit 59, a document attached thereto,
24 but bears no numbers.

25 CHAIRMAN RIGLER: That would be the April 19th

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1 1966 letter of Mr. Clevidence to Mr. Haury?

2 MR. LESSY: That is right.

3 CHAIRMAN RIGLER: Thank you.

4 MR. REYNOLDS: Can we go off the record?

5 CHAIRMAN RIGLER: Yes.

6 (Discussion off the record.)

7 MR. REYNOLDS: All right.

8 We have caught up now.

9 MR. LESSY: Does counsel desire an offer of
10 proof, or will there be no objection to moving these in
11 evidence?

12 MR. STEVEN BERGER: Ohio Edison has no objection.

13 MR. LESSY: We would like to move into evidence
14 then, 58 . 59, the two reference documents.

15 MR. REYNOLDS: Can we do them one exhibit at
16 a time?

17 MR. LESSY: All right.

18 I would like to move into evidence Staff Document
19 Number 405, which has been identified as Exhibit Number 51,
20 dated April 20th, 1966.

21 MR. REYNOLDS: Continuing objection of all
22 Applicants other than Ohio Edison.

23 CHAIRMAN RIGLER: Overruled.
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mm3 1 (The document heretofore marked
2 NRC Staff Exhibit No. 58 for
3 identification, was received
xxx 4 in evidence.)

5 MR. LESSY: We would also like to move into
6 evidence the enclosure to that, a letter dated April 19th,
7 1966, previously identified as Staff Exhibit Number 59.

8 MR. REYNOLDS: Same objection.

9 CHAIRMAN RIGLER: Same ruling.

10 The Exhibit will be received as Exhibit NRC-59.

11 (The document heretofore marked
12 NRC Staff Exhibit No. 59 for
13 identification, was received
xxx 14 in evidence.)

15 MR. LESSY: For housekeeping purposes, Staff
16 Document Number 406 was identified as Staff Exhibit Number
17 39. It was not received into evidence, and we will not
18 pursue further with respect to this document.

19 CHAIRMAN RIGLER: I have that noted as previously
20 withdrawn.

21 MR. LESSY: I would like to focus on the Staff
22 Documents Numbers 413, 414, 415 and 416, and ask that they be
23 identified as 4 -- that 413 be identified as Staff Exhibit
24 Number 60; that 414 be identified as Staff Exhibit Number 61;
25 that 415 be identified as Staff Exhibit Number 62; and that

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1 416 be identified as Staff Exhibit Number 63.

2 (The documents referred to were
3 marked NRC Staff Exhibits No.
4 60, 61, 62, and 63 for
5 identification.)

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6 MR. LESSY: I would be happy to make an offer of
7 proof with respect to these four documents, if counsel requires
8 it.

9 If not, I would like to move them into evidence,
10 if there is no objection.

11 MR. STEVEN BERGER: It won't be necessary for
12 Mr. Lessy to make his offer of proof. Ohio Edison has no
13 objection to these documents.

14 MR. REYNOLDS: Continuing objection by the other
15 Applicants.

16 CHAIRMAN RIGLER: The continuing objection will be
17 overruled and we will receive into evidence NRC Exhibits 60,
18 61, 62, 63.

19 (The documents heretofore marked
20 NRC Staff Exhibits No. 60, 61, 62
21 and 63 for identification, were
22 received in evidence.)

xxx

23 MR. LESSY: I would like to focus on Document
24 Number 417, 418, and 419 and ask that 417 be identified as
25 Staff Exhibit Number 64; that 418 be identified as Staff Exhibit

mm5 1 Number 65; and that 419 be identified as Staff Exhibit
2 Number 66.

3 (The documents referred to were
4 marked NRC Staff Exhibits No.
5 64, 65, and 66 for identification.)

xxx 6 MR. LESSY: I would like to move these into
7 evidence as Staff's Exhibits 64, 65 and 66.

8 If there is an objection, I would be happy to state
9 an offer of proof.

10 MR. STEVEN BERGER: Ohio Edison has no objection.

11 MR. REYNOLDS: Continuing objection.

12 CHAIRMAN RIGLER: Continuing objection will be over-
13 ruled and NRC Exhibit 64, 65 and 66 will be admitted into
14 evidence.

15 (The documents heretofore marked
16 NRC Staff Exhibits No. 64, 65 and
17 66 for identification, were
18 received in evidence.)

xxx 19 MR. LESSY: Staff Document Number 410 will not be
20 offered into evidence at this time, although we reserve the
21 right to offer it in evidence at a future date.

22 Turning now to Staff Document Number 421,
23 this is a memorandum dated January 17th, 1969. It bears, as
24 mentioned, the number 21, and we would ask that it be identified
25 as NRC Exhibit Number 67.

46

1 CHAIRMAN RIGLER: I can't read the third line from
2 the bottom; this is the sort of thing, if we can't get a
3 better copy, taking a large magnifying glass helps you pick
4 it out. Perhaps a suggestion that deferring it until you can
5 get a better copy, and read it into the record, may be a good
6 idea.

7 MR. LESSY: A number of copies were circulated. I
8 wonder if Ohio Edison could undertake to see if they can
9 provide a better copy.

10 MR. STEVEN BERGER: We will see if we can find the
11 original.

12 CHAIRMAN RIGLER: We will defer ruling on the matter
13 in evidence of NRC Exhibit 67 until Ohio Edison has an opportunity
14 to see if they have a more legible copy.

15 MR. LESSY: The following documents bear Serial
16 Numbers, and we will not introduce those for identification
17 or move them into evidence at this time, although we will
18 reserve the right to do it at a later date. These are Serial
19 Numbers 422, 423, 424, 425, 427, 428, 430, 431, 432, 433,
20 434, 435, 436, and 437.

21 MR. STEVEN BERGER: Mr. Chairman, perhaps I could
22 get some kind of clarification from Mr. Lessy as to what
23 the nature of the reservation is.

24 Is it that he doesn't intend to proffer these as
25 unsponsored at this time, but will do so at a later time;

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1 or he intends to put them in through a witness at some future
2 time?

3 I don't understand the nature of the recommendation.

4 MR. LESSY: We may, as to both of those, use them
5 for cross-examination or rebuttal.

6 MR. RIESER: Mr. Chairman, 423, which Mr. Lessy
7 did not mention, is attached to 424.

8 Did he intend to include 425?

9 MR. LESSY: Yes, sir.

10 Thank you.

11 Staff Documents Number 439, 440 and 441 are the
12 Winkler letters which have previously been identified and
13 introduced into evidence by Applicants.

14 442 is the next document I would like to address,
15 and have it marked for identification as Staff Exhibit
16 Number 68.

17 (The document referred to was
18 marked NRC Staff Exhibit No. 68
19 for identification.)

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21 CHAIRMAN RIGLER: Staff Exhibit 68 is NRC Document
22 442?

23 MR. LESSY: Yes, Mr. Chairman, that is correct.

24 I would like to make a clarifying statement.

25 The closing memorandum is a closing memorandum of a document

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1 of a sale agreement identified in paragraph number 1. The
2 sale agreement is already in evidence as Staff Exhibit
3 Number 41.

4 CHAIRMAN RIGLER: Are you moving 442 in evidence?

5 MR. LESSY: No, I am going to make a brief offer
6 of proof with respect to it because it is a closing memorandum
7 and it would maybe make it clear on the record.

8 442 is a closing memorandum accompanying Staff
9 Exhibit Number 41, a contract which was subject to the closing
10 which sets forth the payment of consideration at the closing
11 and the assignment of title by the City of Wadsworth to Ohio
12 Edison of those matters identified in paragraph 7, assignment
13 of title for policy agreements, licenses, permits, contracts
14 or other agreements provided in paragraph 14 of the sale
15 agreement.

16 I hope that clarifies the closing memorandum and
17 I would like to move it in evidence as Staff Exhibit Number 68.

18 MR. STEVEN BERGER: Your Honor, I have no specific
19 objection to the document.

20 One point I would like to make with regard to it,
21 it is being offered as an unsponsored exhibit.

22 Mr. Lyren signed the document. Mr. Lyren was on
23 the stand for quite a bit of time. Many other documents were
24 put in through Mr. Lyren.

25 I am not suggesting there would have been

mm9 1 substantial cross-examination of Mr. Lyren with regard to
2 this document, but it does seem to be irregular, if you will,
3 to be putting in as an unsponsored document, a document signed
4 by Mr. LYren and which we might have had an opportunity to
5 cross-examine Mr. LYren with regard to.

6 I am just saying for the future it would be a
7 suggestion for all parties concerned with regard to the
8 sponsoring of documents generally.

9 CHAIRMAN RIGLER: It is not a bad suggestion, but
10 there being no objection, except for Mr. Reynolds' continuing
11 objection, I see him on his feet with his hands up, we will
12 overrule the continuing objection and let NRC 68 into evidence
13 at this time.

14 (The document heretofore marked
15 NRC Staff Exhibit No. 68 for
16 identification, was received in
17 evidence.)

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19 MR. LESSY: Now I would like to address a document
20 identified as Staff Exhibit 446. It is a memorandum dated
21 July 13th, 1972 from Richard L. Miller to W. R. Henry; or it
22 could be classified as a letter inasmuch as it is signed as a
23 letter, but it is on Ohio Edison stationery, and ask that
24 it be identified as Staff Exhibit 68.

25

(The document referred to was marked NRC Staff Exhibit 69 for identification.)

LESSY: If the Staff were to require a particular document, although it is only a page, is the date of the document, there be an objection, I would be happy to make proof. If not, I would like to have it in evidence at 69.

STEVEN BERGER: I would like an offer of proof.

LESSY: This document indicates that transfer continued at least into the mid-year of

STEVEN BERGER: Which customers, pursuant

LESSY: Transfer of customers pursuant to the contract, the banking of customers pursuant to the contract, pursuant to the restrictive contract previously referred to.

STEVEN BERGER: I don't know Mr. Lessy's relationship between the so-called banking principle in place pursuant to this contract, a

LESSY: We rely on the document for Lyren was not a party to this document

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1 is being offered as an unsponsored exhibit on this issue.

2 If Ohio Edison wishes to rebut the facts relating to
3 this transfer, they have an opportunity to doing this case
4 in chief.

5 MR. STEVEN BERGER: Can I just have a moment with
6 regard to this document, Mr. Chairman?

7 Your Honor, there is nothing on the face of the
8 document that indicates that it is consistent with Mr. Lessy's
9 offer of proof. I think we had some discussion heretofore with
10 regard to this particular customer transfer, if you will.

11 These were originally customers of Ohio Edison
12 Corporation which were transferred to the City of Wadsworth
13 as a result of an annexation that was made by the City of
14 Wadsworth.

15 For Mr. Lessy to be proffering the document and
16 redlining the date of it for purposes of showing some kind
17 of, if you will, alleged anticompetitive practice on the part
18 of Ohio Edison with regard to what we have come to call the
19 banking practice, I don't think satisfies this board's test
20 to as an offer of proof of this document.

21 MR. LESSY: I would like to refer Mr. Berger to
22 Staff Documents 43 and 42, which bear the Staff numbers 444
23 and 445, Staff Exhibit NRC 43 includes a listing of names.
24 It says customers to be transferred from Ohio Edison to
25 Wadsworth service on August 1, '72, and a number of listings

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1 occurred.

2 I would suggest that Mr. Berger, and there has been
3 testimony with respect to both of these documents, and
4 its relationship to the banking practice, since the names on
5 the document 69 correspond almost entirely with the
6 names or exactly with the names on Staff Document 43 already
7 in evidence, we are offering this document as evidence of the
8 fact that the trading of customers, the banking of customers
9 continued at least until mid-July or July 13th, 1972.

10 MR. STEVEN BERGER: Can I ask Mr. Leszy to check
11 and see whether what he refers to as Staff Exhibit Number
12 43 is in fact in evidence?

13 CHAIRMAN RIGLER: My notes show both Exhibits 42
14 and 43 were rejected.

15 Refresh my recollection as to the basis for that
16 ruling. Is it because the Ohio statute provided for liquidation
17 which, in turn, allowed the City of Wadsworth to take over these
18 customers pursuant to legislative scheme?

19 MR. REYNOLDS: That is correct.

20 MR. STEVEN BERGER: I particularly wanted to object
21 to Mr. Leszy's characterization in his last statement, tying
22 this in any way to a so-called banking practice.

23 CHAIRMAN RIGLER: I tend to agree with the
24 objection raised, and I don't believe the offer of proof is
25 supported by the document, Mr. Leszy.

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MR. LEBBY: Okay, we will withdraw it and
reserve the right to introduce it at a later date.

MR. SMITH: I have a question about Exhibit 42.

Exhibit 42 refers to annexation in 1891. Is that
the annexation to which you refer now?

MR. STEVEN DECKER: I don't know if I can answer
that question. If you give me a moment, please I will give
honor.

MR. SMITH: Since it is now in evidence anyway,
it doesn't matter what your answer is. The jury.

CHAIRMAN REICHER: Yes.

Let's proceed.

MR. LEBBY: Documents marked 458 --

MR. REYNOLDS: Excuse me.

I am not sure where we left the exhibit 69.

CHAIRMAN REICHER: 69 is withdrawn. The Board
indicated that it would reject it; that it would reject the
offer of proof, at which point Mr. Leiby withdrew the
document.

MR. REYNOLDS: Thank you, sir.

MR. LEBBY: Staff documents exhibit 458 up to and
including 465, will now be offered in evidence on this side.
The Staff reserves the right to offer them in evidence at a
future date.

They will they be marked for identification.

25

JAN RIGLER: Now about 447, is that right?

ESSY: 447 was offered from [unclear]

I don't have the exact number, but it's

in the cross-examination of the [unclear]

JAN RIGLER: All right.

Document, Applicant Number 14.

ESSY: For identification purposes, 450 is

in evidence, or has been identified

has been identified as Staff [unclear] Number 22.

JAN RIGLER: All right.

ESSY: 450 and 451 will be [unclear] into

time, but we reserve the right to offer

at a future date.

Would request, with respect to document 451,

search their files to see if they can provide

copy. It may be a very [unclear] document.

Illegible in certain parts.

Request that from Ohio Edison.

EVERETT BERGER: I will try [unclear]

ESSY: That completes our deposition.

Will collect the documents [unclear] and we are

with our next witness, all [unclear]

JAN RIGLER: Dr. Reynolds?

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1 MR. REYNOLDS: Mr. Chairman, I would like to
 2 for the record that some of the documents listed by Mr. Lessy
 3 as those he may wish to return to us a later date, include
 4 depositions.

5 The Applicants have already made their position
 6 clear on that. We will oppose any effort to introduce
 7 depositions that were taken at an earlier time in this
 8 proceeding.

9 I also had handed to me in the past a list of
 10 Mr. Lessy handed out prior to Mr. Lyndon's deposition -- I'm
 11 sorry, prior to Mr. Lyndon's testimony, that included 407,
 12 408, 410 and 412, and I have not heard -- I don't think I
 13 have not heard him mention those numbers. Whether they are
 14 cross-referenced with something else, I don't know. But I
 15 just wonder if there was some reason for not mentioning those
 16 particular numbers, or if we can have some indication from
 17 Mr. Lessy, what his position on those are.

18 MR. LESSY: I believe I stated earlier, 407, 408,
 19 412, 414 will, 413 will not be offered into evidence.

20 MR. REYNOLDS: 413 and 14 were offered in.

21 MR. LESSY: 407, 408, 410, 411 and 412. I think
 22 the record is clear as to that.

23 MR. REYNOLDS: Clear as to what?

24 CHAIRMAN RIGLER: All right.

25 We will take five minutes, at which time we will

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proceed with the witness.

(REcess.)

end 2

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1 Whereupon,

2 WARREN D. WINCHEE

3 was called as a witness and, having been first sworn,
4 was examined and testified as follows:

5 MR. VOGLER: Your Honor, I would like at this
6 time to call Warren Winchee, a witness on behalf of the
7 Staff.

8 CHAIRMAN RIGLES: All right.

9 DIRECT EXAMINATION

10 BY MR. VOGLER:

11 Q Would you please state your name and business
12 address.

13 A My name is Warren D. Winchee, and my business
14 address is 164 West Magnolia, Burbank, California.

15 Q What is your occupation and by whom are you
16 employed?

17 A I am employed as the general manager for the
18 Public Service Department of the City of Burbank.

19 Q Would you related for us your formal education?

20 A Yes. I was graduated from the University of
21 Florida, bachelor of science, electrical engineering, power
22 operations, in 1948.

23 Q Do you belong to any technical or professional
24 societies?

25 A Yes. I have memberships in various organizations.

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1 I am on the board of directors of the American Public
2 Power Association, board of directors of the International
3 Power Project, president of Public Resources Question
4 Development Group, among a few.

5 Q How long have you been a professional engineer,
6 Mr. Hinchey?

7 A I have been in the -- as an engineer, professional
8 engineer, my entire career, since graduation in 1948.
9 Registered in the states of Ohio and in the state of
10 Louisiana.

11 Q Would you describe for us your professional
12 experience after your graduation from engineering school.

13 A After graduation from engineering school, I
14 was employed for a period of ten years by the Tampa Electric
15 Company, a privately-owned electric utility in the state of
16 Florida. In that course of employment, I held a number of
17 positions, the last of which was industrial development
18 coordinator.

19 After leaving the Tampa Electric Company, I
20 became general sales manager for the International Research
21 and Development Corporation in Worthington, Ohio, and was
22 employed in that capacity for approximately three years.

23 Leaving Worthington, leaving the International
24 Research and Development Corporation, I went to work for the
25 City of Columbus, Ohio, as assistant superintendent for

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1 the division of electricity. I was employed in that
2 capacity for approximately ten years prior to going to
3 Cleveland.

4 I moved to Cleveland in 1978 -- I'm sorry.
5 In '71. And was commissioner of light and power in Cleveland
6 for a little over two years, approaching three years before
7 moving to Burbank, California, to my present position.

8 Q Would you describe briefly your duties and
9 responsibilities when you were in Columbus, Ohio.

10 A Well, yes. In Columbus, Ohio, as assistant
11 superintendent in the division of electricity, I was responsible
12 for engineering activities, operations of the power plant
13 and distribution and transmission facilities of that
14 municipal system.

15 Q Let's skip the City of Cleveland for a minute
16 and describe for us briefly your duties as general manager of
17 Burbank, the public service department.

18 A As general manager of the public service department
19 I am the administrative and executive head of both the water and
20 electric utilities. We have a system of approximately the
21 same size as the City of Cleveland for electric power
22 distribution, transmission and the water system, and operate
23 the entire system for that city.

24 Q Why did you leave the City of Cleveland for your
25 present position at Burbank?

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1 A Well, career advancement, increase in salary and
2 an opportunity to participate in what I consider to be a new
3 and exciting part of power generation and that is involved
4 in the geothermal development in the West.

5 Q Were you frustrated or disappointed during your
6 tenure and your relations with the illuminating company?

7 A Not any more than ordinary business frustrations
8 anywhere else. I was rather pleased with the progress we
9 made in the City of Cleveland during the time I was there,
10 as a matter of fact.

11 Q Back to Cleveland, Mr. HYNCHES. When did you
12 first hear about the position at the Municipal Light Plant
13 with the City of Cleveland?

14 A Well, it would be difficult to answer. I was active
15 as president of the Ohio Municipal Electric Association and
16 familiar with the Cleveland people over a number of years. I
17 would be -- it would be difficult for me to pinpoint when
18 I first knew a position would be open in the city of Cleveland.

19 Q Who interviewed you for the job? Can you give
20 a little bit on that?

21 A Bill Gaskill, who was the director of utilities.

22 Q For the City?

23 A For the City of Cleveland.

24 Q At that time you were in the City of Columbus?

25 A Yes.

1 Q Were you aware of the electric generation
2 situation in the City of Cleveland?

3 A At that time I was aware and concerned about it.

4 Q You were aware of it before you accepted the job?

5 A Yes.

6 Q How? Can you relate how you were aware of it?

7 A Being president of the municipal association, I
8 had been a part of a committee which on several different
9 occasions met with members of the City Council, who were
10 concerned about the operation and the general condition of
11 the municipal power system and were seeking our advice and
12 whatever assistance we might be able to give them.

13 Q Were you satisfied with your position in
14 Columbia at that time?

15 A Yes. I was.

16 Q Why did you accept the position in the City of
17 Cleveland?

18 A Being familiar with the situation and knowing the
19 problems of the Cleveland Municipal Power System, I felt
20 that someone who was familiar with the Ohio Group and the
21 Ohio situation was needed in order to take care of bringing
22 the change, bringing a turnaround in the Cleveland problem
23 and it was the largest municipal in the State of Ohio.
24 It would have been a very severe setback to all the
25 municipals to lose the largest as a viable operating system.

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1 Q That is why you took the position?

2 A That is why I took the position.

3 Q Any more money involved?

4 A Not enough to pay the cost of moving.

5 Q Who hired you then for position? You say
6 Mr. Gaskill interviewed you. Who hired you?

7 A I was actually hired by Mayor Carl Stokes.

8 Q Under what circumstances did you accept the job
9 from Mr. Stokes?

10 A After Mr. Gaskill had informed me that I was
11 their choice and that the option of accepting the position
12 or not was up to me, I asked for an interview with the
13 Mayor, because I was much concerned about some of the
14 publicity that I had read concerning statements by the Mayor
15 that he did not intend to continue the municipal power
16 system, and that he did intend to actually sell it to the
17 private power company in the area, and I wanted to talk with
18 him and understand whether or not this publicity was true or
19 based in fact, and just exactly what he expected from me, if
20 such were the facts or conditions.

21 When I went in -- I met with Mayor Stokes and
22 Bill Gaskill on Saturday morning, and the Mayor's opinion
23 statement was, "I presume you have heard that I advocate selling
24 the municipal power system" and my response was, "Well,
25 Mayor, I have not only heard it, I have copies of your speech."

1 I pulled them out, because there was specific
2 phrasing I wanted to review with him. The outcome of our
3 conversation was, he said, "Well, I have advocated
4 that position and I now have reason to want to change that.
5 If it is possible to restore the municipal power system to
6 good, economically, sound and viable operation I would
7 like to do that."

8 And you will have every support from my office or
9 administration in bringing this about, if you would wish to
10 accept the position.

11 Q And on that basis you accepted it?

12 A On that basis I accepted the position.

13 Q Would you please describe your duties as
14 commissioner of light and power for the City of Cleveland,
15 Ohio.

16 A As commissioner of light and power for the City
17 of Cleveland, Ohio, I was responsible for the division of
18 light and power, as administrative and engineering head, also
19 for any executive duties that were necessary.

20 Q Would you describe briefly for us the conditions
21 of the City's electrical distribution at the time you
22 became commissioner?

23 A The distribution system and transmission lines
24 were in very good condition. The moral was very good in
25 those departments. The power plant was not in good condition.

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1 because of a failure of the largest generating unit and the
2 fact that repairs had been undertaken but had not been
3 completed at that point.

4 MR. SMITH: What year would this be, Mr. Vogler?

5 MR. VOGLER: I can't hear you.

6 MR. SMITH: Was this in 1971?

7 THE WITNESS: This was in March or April of 1971.

8 MR. VOGLER: It was upon his taking over as
9 commissioner. That date.

10 BY MR. VOGLER:

11 Q Do you recall the exact date, sir? We can verify
12 it with records, and I think we intend to subsequently.

13 A I am pretty sure it was in March, but I do not
14 recall the exact date.

15 Q Was there an apparent reason to explain the con-
16 dition or was there a reason to explain the condition of the
17 generating system, electric generating system in the City of
18 Cleveland, upon your taking office, the state of disrepair
19 that you found?

20 MR. REYNOLDS: Can I have that question back
21 again before the answer?

22 MR. VOGLER: Perhaps I can rephrase it.

23 CHAIRMAN RIGLER: Please.

24 MR. VOGLER: It doesn't matter.

25

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1 BY MR. VOGLER:

2 Q Are you aware of the reason for the condition
3 of the Cleveland electric system that you have just
4 described? The condition of it?

5 MR. REYNOLDS: The City ---

6 THE WITNESS: I have an opinion.

7 CHAIRMAN RIGLER: You mean the transmission
8 facilities were in good repair, but one of the large
9 generating units was down?

10 BY MR. VOGLER:

11 Q The generating end of the electric system.

12 A Was in need of repair. Those repairs had not been
13 completed. Some had been started.

14 Q Would you care to describe the generating units
15 on the City system at the time you were commissioner, briefly,
16 seeing that we are attorneys here.

17 A Yes. At the time I took over as commissioner
18 of light and power, there were three 25 megawatt generators
19 available for service and one 75 megawatt unit, out of service.

20 Q What did you do or recommend to correct the
21 generating situation at MELP, after you became commissioner?

22 A There were some gas turbines being installed and
23 I placed full emphasis on the completion and engineering into
24 service of those gas turbines as quickly as possible, in
25 order to bolster the reserves of the system and to decrease

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1 our need for reliance upon the CBI lead treatment plant.

2 Secondly, I proposed that we immediately plan
3 for installation of smoke and debris control equipment,
4 precipitators on the stacks of the various boilers, which
5 had been proposed, but had been delayed because of the
6 emergency concerning the large generating unit.

7 I proposed a plan for financing this.

8 Q I was going to ask you, who was going to pay for
9 this? How did you propose or how did the city propose to
10 pay for this rehabilitation?

11 A I proposed to the City that most of it would be by
12 bond issue, financing, but the bond issue financing would
13 be conducted in stages, the first issue being in the amount
14 of about \$5 million. That would be for completion of
15 existing contracts. The gas turbine installation,
16 precipitator installation and the proposed interconnection
17 between the two systems, CBI and the City of Cleveland.
18 The one that we had in mind.

19 Q What was your estimate as that time as to the total
20 amount needed?

21 A The first estimated was between \$14 and \$15 million.

22 Q To rehabilitate the generating unit of the
23 system?

24 A That is correct.

25 Q Were any bonds sold?

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1 A No. They were not Bonds -- a bond sale was
2 authorized and notes were issued by the City in the amount of
3 \$2 million, but no bonds were ever sold.

4 Q How much were the notes, sir? I missed that.

5 A \$2 million.

6 Q \$2 million. In other words, you received \$2 million?

7 A That is correct.

8 Q What did you do with that money?

9 A We completed the installation of the gas scrubber
10 and the precipitators on one boiler. I don't remember the
11 number of the boiler, but they were identical boilers, and
12 both the material that we would use later on in the same
13 connection between the two systems.

14 Q I take it then from your response that no money
15 was used for maintenance, other than the environmental
16 precipitators?

17 A That is right. No bond money.

18 Q No bond money was issued, I gather?

19 A Well, I consider the notes or bonds as the same
20 thing. The notes were to be paid off. When I say no bond
21 money was issued, that means that anything related to
22 maintenance would come out of current revenues.

23 Q Sir, at the time the license commission of street
24 and power, was some portion of the City's electric load
25 being served by CEI at that time?

1 A Yes, sir. That is correct.

2 Q Would you relate --

3 CHAIRMAN FISLER: Mr. Reynolds?

4 MR. REYNOLDS: Mr. Chairman, or will that do?
5 I make the continuing objection of the Applicant, rather
6 than the Cleveland Electric Illuminating Company, as to the
7 testimony by Mr. Binches?

8 CHAIRMAN FISLER: You say. The witness will be
9 to overrule that objection.

10 BY MR. VOGLER:

11 Q Would you relate some of the details as to how
12 load was being served by the illuminating company?

13 A As I recall, there were five or six main
14 load transfer points on the 11 kv system and two or three
15 load transfer points. These are connections with the
16 substation feeders that could be switched either to the
17 municipal system or to the CEI system could also be switched
18 by both.

19 It had to be from one or the other --
20 represented -- and this would vary. The number of
21 connections could vary between specific and general
22 connections, but I think about five. I suppose we
23 It seems that about 25 percent of the load was
24 served that way, as that particular area.

25 Q While you were commissioner was this transfer of

1 load over the transfer points from CEI to the City
2 permanent or temporary arrangement?

3 A It was intended to be a temporary arrangement
4 at least on the part of the City. I did study letters
5 and documents which had been exchanged between the City and
6 CEI which indicated there would be a temporary arrangement
7 between the City and the CEI Company.

8 First would be an interchange for an emergency
9 or load transfer points for emergency needs. These were
10 to be replaced by different load connection points at the
11 request of CEI, where they could better supply the load
12 continuing through the summer and which a contract study was
13 undertaken as rapidly as possible for a full test of cooperation
14 between the two systems, at a 69,000 volt connection point.
15 The latter to be the -- the latter connection point to be the
16 permanent arrangement.

17 Q Was the City taking power over these load transfer
18 points on a continuous basis at this time?

19 A Yes. The City took power over these load transfer
20 points on a continuous basis until such time as the City
21 turbine was returned to service.

22 Q Was this request for load transfer, was it for
23 reasons of emergency only?

24 A Originally, the load transfer had been intended
25 for purposes -- and arranged, as a matter of fact, for purposes

1 of supplying power to the City while the City installed
2 environmental control equipment on the boilers.

3 The precipitators, so to speak, that were
4 had been scheduled, agreed to and scheduled to go in about in
5 the spring of, I believe, 1969. On '70. Prior to my coming
6 there.

7 There was an emergency that occurred after the
8 load transfer points had been agreed upon, in which one of the
9 unit went down and out of service, and the request of the
10 City was that they move the date of those load transfer points
11 up to take care of this emergency and CBI could do so.

12 Q So originally it was also for maintenance?

13 A Originally it was for maintenance only.

14 Q While you were commissioner, were there any
15 operating problems with this 11 kv load transfer, I mean
16 you and the -- between the City of Cleveland and the
17 Illuminating Company?

18 A Only when we tried to use those 11 kv load transfer
19 points posed very severe operating problems and temporary
20 restrictions on the City. Whenever a switching change was
21 was necessary, large outages times, comparatively long,
22 outage times were necessary, anywhere from five minutes to
23 30 minutes, depending on the decision of the operators of
24 the private company, and occasioning distress and inconvenience
25 customers.

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1 These outages were necessary for switching,
2 but required for us to obtain the power.

3 MR. HAUSER: Mr. Chairman, I object and ask that
4 the response to the last question be excluded.
5 The issues with regard to the load transfer service, the date
6 in which the transfer took place, when the load transfer
7 points were to be utilized and the rates for the load
8 transfer service were fully litigated by the City of
9 Cleveland in proceedings before the Federal Power Commission
10 and have been the subject of a number of orders by the Federal
11 Power Commission.

12 In addition, the service for load transfer under
13 to May 30, 1972, was also the subject of litigation between
14 the City of Cleveland and the Cleveland Electric Illuminating
15 Company in the common pleas court of Cuyahoga County and
16 with regard to the case involving service prior to May 30,
17 1972, the court resolved those issues in favor of the
18 Illuminating Company. On the basis, as was argued in our
19 pretrial brief, the City and the other parties, including
20 the staff of the NRC and the Justice Department are estopped
21 from relitigating those issues before this Board.

22 MR. GOLDBERG: I believe Mr. Hauser is listed
23 on Applicants' witness list. In light of that, Staff objects
24 to his participating in this proceeding as both attorney
25 and witness. I think the Code of Professional Ethics is

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1 clear in disallowing a party to act as witness and counsel
2 in a proceeding. If Mr. Hauser is going to attempt to act as
3 an attorney we will object to his testifying in this
4 proceeding.

5 MR. HAUSER: In reply, I would point out I am
6 general attorney for the Cleveland Electric Illuminating
7 Company. I am also a counsel of record in this proceeding.
8 There is one fundamental principle, that a client, if permitted,
9 a person or corporation or individual, is entitled to
10 represent themselves in litigation.

11 I would also point out that as house counsel
12 the illuminating company for almost 25 years, I have acted
13 as counsel in proceedings before many courts and agencies,
14 including, not only this commission, the public utilities
15 commission of the state of Ohio, courts of Ohio,
16 Interstate Commerce Commission, the Federal Power Commission,
17 and I think clearly my client is entitled to have me represent
18 them in these proceedings.

19 The fact that I am listed as a witness is
20 extremely important. I think one of the reasons I am listed
21 as a witness, all of the witnesses listed by any party, my
22 experience and knowledge of the relationship between the
23 Cleveland Electric Illuminating Company and the City of
24 Cleveland is most extensive of any witness listed.

25 For example, Mr. Winches was commissioner between

1 1973 or 1971 and November of 1973. The only utility was the
2 City of Cleveland first became associated with the building of
3 light plant after the election in 1971, for the most part.
4 There are a few that extended beyond.

5 Clearly, I think CEI is entitled to be
6 represented here, and it is also entitled to have Mr. Hauser testify
7 for this board to give the board the advantage of his direct
8 personal knowledge of various matters involved in this
9 proceeding.

10 CHAIRMAN RIGLER: Mr. Hauser, those other
11 proceedings to which you referred, did you appear as a
12 witness in any of those proceedings?

13 MR. HAUSER: I can recall several personal injury
14 cases, and at least the once case before the public
15 utilities commission. In one of the PUC proceedings I would
16 point out that Mr. Lee C. Holly, who was then vice president
17 and general counsel, was also counsel of record in that
18 proceeding, did testify.

19 MR. GOLDBERG: The Staff is not denying that
20 CEI is entitled to be represented by attorneys and certainly
21 they have a sufficient number of attorneys. We are not
22 denying that Mr. Hauser has a right to testify in this
23 proceeding. But I think the case law is clear that he is
24 not entitled both act as an active participant as an
25 attorney and testify in the same proceeding.

1 CHAIRMAN RIGLER: Is he entitled to participate
2 in the taking of depositions?

3 MR. GOLDBERG: I am not sure about the
4 propriety of his taking part in depositions.

5 CHAIRMAN RIGLER: Did he do so with the full know-
6 ledge of the commission earlier in those proceedings?

7 MR. GOLDBERG: Yes, he did.

8 CHAIRMAN RIGLER: Was there any challenge made at
9 that time?

10 MR. GOLDBERG: I believe the question did arise
11 at that time, although I was not present. I believe there was
12 a question raised as to his participation at that point.
13 Perhaps Mr. Berger can further expand on that.

14 MR. MELVIN BERGER: Mr. Chairman, I believe that
15 question was raised at some point in time and I believe
16 a conference call was held during the deposition of
17 Mr. Moore.

18 CHAIRMAN RIGLER: The Board issued a written
19 opinion. However, I am not sure the question was the same?

20 MR. MELVIN BERGER: I am not sure the question
21 was the same either.

22 CHAIRMAN RIGLER: Yes, we did consider
23 Mr. Hauser's presence at a deposition. We did remain able to
24 continue in attendance based on our review of the Federal
25 Rules of Evidence. However, the question I just put to

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Mr. Goldberg was whether any party seasonally objected to Mr. Hauser's deposing of witness or enter objections or removal of witnesses while the deposition was in progress.

MR. HJELMELT: Mr. Chairman, my recollection also is that the question raised earlier during deposition was not related to Mr. Hauser's appearing as a witness. The parties, of course, had no knowledge at that time that Mr. Hauser was going to be named as a witness.

CHAIRMAN RIGLER: That is not correct, is it? After all, hasn't he appeared on the witness list of the opposing applicants?

MR. HJELMELT: No witness list, as far as I know of, as far as him being called in behalf of the time the depositions were being taken and the rule goes to counsel being called as a witness on behalf of the party which he represents, and indeed I think Mr. Hauser's argument simply points out the very basis of the rule - discussed, as one of the reasons that counsel should not act both as counsel and witness, is that it puts him and everyone else in the awkward position of that counsel and his credibility. He just stood up and started saying credibility as being the one witness that knows all the facts.

CHAIRMAN RIGLER: Let me see if I understand what you are saying. You are saying there would be a

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1 objection to parties other than Applicant calling Mr. Hunter
2 as a witness, notwithstanding his participation as counsel,
3 but it would be improper for Applicants to call Mr. Hunter
4 as a witness, if they intend to rely upon him as one of
5 their attorneys in these proceedings?

6 MR. HJELMFELT: That is the way I read the
7 Canons.

8 CHAIRMAN RIGLER: All right. Which
9 Canon did you have in mind.

10 MR. HJELMFELT: I believe it is Canon 5, but
11 I don't have it here.

12 MR. GOLDBERG: I can refer everyone to Canon 5,
13 Disciplinary Rule 5-101(b). Disciplinary Rule 5-102 a),
14 5-102(b). Ethical Consideration 5-9, Ethical
15 Consideration 5-10, and footnotes 10 to 14 of Canon 5.

16 CHAIRMAN RIGLER: Do you have the text of any of
17 those with you?

18 MR. GOLDBERG: Yes. I do.

19 CHAIRMAN RIGLER: Would you pick the one which you
20 consider to be most applicable and read it to the Board,
21 please.

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1 MR. GOLDBERG: Disciplinary Rule 5-102, withdrawn
2 as counsel when the lawyer becomes a witness. If after
3 undertaking employment in contemplated or pending litigation
4 a lawyer learns or it is obvious that he or a lawyer
5 in his firm ought to be called as a witness on behalf of his
6 client, he shall withdraw from the conduct of the trial
7 and his firm, if any, shall not continue representation in
8 the trial. Except that he may continue the representation
9 and he or a lawyer in his firm might testify in the circumstances
10 enumerated in DR5-101B1 through 4.

11 If after undertaking employment in contemplated or
12 pending litigation a lawyer learns or it is obvious that he
13 or a lawyer in his firm may be called as a witness other than
14 on behalf of his client he may continue the representation
15 until it is apparent that his representation is or may be
16 prejudicial to his client.

17 MR. HAUSER: Mr. Chairman, I would point out in
18 response to Mr. Goldberg's comment, as I stated earlier,
19 one of the fundamental rights that has been preserved in
20 our jurisprudence is that an individual or corporation may
21 represent itself in litigation in our system of justice.

22 I think for this reason the canon that
23 Mr. Goldberg cites is not applicable to someone such as
24 myself who is house counsel for the Cleveland Electric
25 Illuminating Company. That canon is clearly directed toward

1 outside law firms representing their client.

2 Here I am both a lawyer and a client and, as I say,
3 I think it is fundamental that the Cleveland Electric
4 Illuminating Company is entitled to represent itself in these
5 proceedings.

6 CHAIRMAN RIGLER: Are you an officer of the
7 corporation?

8 MR. HAUSER: No, I am not.

9 MR. GOLDBERG: If the Board would like, I have some
10 citations to case law concerning an attorney testifying in a
11 proceeding in which he is participating as an attorney.
12 That case law does not distinguish between whether he is an
13 attorney from an outside firm or house counsel.

14 CHAIRMAN RIGLER: Was it ever a relevant
15 distinction in the cases you have in mind?

16 MR. GOLDBERG: To my knowledge the cases I have
17 did not address that issue, but they did not make a
18 distinction.

19 I see no difference from the language which I have
20 read in the cases -- I see no difference in what should be the
21 proper disposition of the matter.

22 I would be glad to cite some cases.

23 CHAIRMAN RIGLER: Yes, please.

24 MR. REYNOLDS: Mr. Rigler, could I make a
25 request? If we are going to have case citations, that is

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1 fine.

2 Can Mr. Goldberg advise us whether all of those
3 cases involved outside counsel or whether any of those
4 cases did not involve outside counsel, either way?

5 MR. GOLDBERG: I cannot tell you which did or did
6 not involve outside counsel.

7 MR. REYNOLDS: Is it your representation that some
8 involved in-house counsel?

9 MR. GOLDBERG: I am not representing that, no.

10 MR. REYNOLDS: You don't know one way or the other?

11 MR. GOLDBERG: That's right. In the case of
12 Edmiston vs. Wilson, 146 West Virginia 511, 130 Southern 491
13 491 at page 502, a 1961 case. "Any practice which enables an
14 attorney while engaged in the prosecution or defense of
15 litigation to testify as a witness in the course of litigation
16 is emphatically disapproved by this court."

17 MR. REYNOLDS: If we are going to have this kind of
18 argument on the matter I would prefer if the Board doesn't
19 object to have Mr. Goldberg give us the citations, then we
20 will either have written submissions and argument at a later
21 date or give the other side an opportunity to read the cases
22 and also give their version of the quotations.

23 CHAIRMAN RIGLER: Okay. Let me ask GEX, either
24 Mr. Hauser or Mr. Reynolds, to respond to the point that,
25 if we looked to the purpose for the rule, the canon just cited,

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1 the weakening of the credibility of the attorney as a witness
2 and the calling into question of his arguing the case
3 unfairly as he makes objections and arguments, if there is any
4 real distinction between an attorney employee of the client
5 and an outside attorney.

6 MR. HAUSER: I think there definitely is because
7 of the dual capacity that house counsel serves, one as an
8 attorney and secondly, if you will, as a client, if I can use
9 that word, so that I think there is a distinction.

10 CHAIRMAN RIGLER: I have a question for the other
11 side, which is: is the purpose of the canon to safeguard
12 the affected client from the credibility problems which
13 would be created by the dual role of the attorney or is it
14 to safeguard some rights of the opposition parties, and
15 if so, what rights would those be?

16 MR. GOLDBERG: I believe that the purpose of the
17 rule may include both. When an attorney is allowed to
18 participate as an attorney and as a witness, a witness by
19 the opposition may give testimony that relates to transactions
20 with the attorney. That attorney is then in a situation
21 where not only can he take the witness stand, but he can
22 cross-examine the witness who has testified against him or
23 testified about matters relating to him.

24 I think this is an advantage which should not be
25 given to one participant in the proceeding.

1 In that respect I think the purpose may encompass
2 the latter suggestion that you made.

3 CHAIRMAN RIGLER: Mr. Hjelmfelt?

4 MR. HJELMFELT: Yes. I would like to speak to this.
5 I believe Ethical Consideration Number 59 speaks to this.

6 CHAIRMAN RIGLER: Which one?

7 MR. HJELMFELT: 5-9.

8 It points out that an opposing counsel may be
9 handicapped in challenging the credibility of the lawyer
10 when the lawyer also appears as an advocate in the case.
11 Therefore, I think the rule cuts both ways. I think
12 it is broader than that. I think it is a rule that goes to
13 the protection of the protection as a whole and has broad
14 general public policy considerations.

15 CHAIRMAN RIGLER: Do I take it from your
16 participation in this argument that you join in Mr. Goldberg's
17 motion, in the Staff's motion?

18 MR. HJELMFELT: Yes, I do.

19 CHAIRMAN RIGLER: Does the Department of Justice
20 have a position?

21 MR. MELVIN BERGER: I think we would join in
22 Mr. Goldberg's motion, yes.

23 MR. GOLDBERG: At the outset I said Mr. Berger's
24 name is on the witness list and if he continued to participate
25 as an attorney we would object to his testifying when that time

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1 arises.

2 We do not object to his testifying as a lawyer or as
3 a witness but I think there is an inconsistency when someone
4 participates both as a witness and attorney.

5 We would object to his participating as both.

6 CHAIRMAN RIGLER: Does Mr. Hauser appear on the NRC
7 Staff list of witnesses?

8 MR. GOLDBERG: No, he does not.

9 CHAIRMAN RIGLER: Does he appear on the City of
10 Cleveland's list?

11 MR. HJELMPFELT: No.

12 CHAIRMAN RIGLER: Does he appear on the Department
13 of Justice's list?

14 MR. MELVIN BERGER: No, he does not.

15 CHAIRMAN RIGLER: What do I do with the problem of
16 documents appearing on your designated list of documents as
17 to which Mr. Hauser may be an author?

18 Are there any such documents?

19 MR. HAUSER: Yes, there are. I think there are a
20 number of documents. In fact, the one document the Staff
21 has noticed that was going to be used with regard to
22 Mr. Hinchee's testimony is a letter dated Aug 28, 1963, of
23 which I was the author.

24 There are many other documents as well.

25 CHAIRMAN RIGLER: Does that pose any problem, the

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1 use of those documents?

2 MR. GOLDBERG: I believe that again Mr. Bancroft
3 should not be entitled to cross-examine with respect to that
4 document. That is another attorney on behalf of CEI -- that
5 another attorney on behalf of CEI should conduct that
6 examination if they choose to conduct such an examination.

7 CHAIRMAN RIGLER: Mr. Bjelkefeldt?

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MR. HJELMFELT: Yes.

I should think it would not cause a problem with respect to the admissibility of these documents. In fact they would be offered under the -- just as any of the other of the unsponsored exhibits were.

CHAIRMAN RIGLER: You are saying the documents might speak for themselves, and the burden of cross-examination on those documents would switch back to the applicant.

MR. HJELMFELT: Or perhaps in reversed testimony.

CHAIRMAN RIGLER: So Mr. HUGHES could be put on the stand as a rebuttal witness, with respect to a particular document as to which he was the author.

MR. HJELMFELT: I should think that he is in the position of choosing whether he appears as rebuttal or rebuttal witness or direct witness to them. He is aware that these documents will be offered and that they will be into his consideration.

MR. REYNOLDS: As to that last statement, I think it is the choice of the client as to who represents it in a proceeding.

We are facing at least one action, no litigation, outside counsel for Cleveland Electric Illuminating Company. I am not clear from Mr. Goldberg what the position is, and it has been joined in by the Board of the City --

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1 CHAIRMAN RIGLER: As I understand their motion, it
2 is that Mr. Hauser be limited to participation either as a
3 witness, or as an attorney with active rights to argue and
4 to cross-examine witnesses, but they may not appear in both
5 capacities.

6 Is that correct, Mr. Goldberg?

7 MR. GOLDBERG: Yes.

8 CHAIRMAN RIGLER: Is that now your understanding,
9 Mr. Reynolds?

10 MR. REYNOLDS: Well, that is my understanding.

11 We take exception to that. I think he is entitled,
12 as in-house counsel, to appear as a witness if the corporation
13 feels his testimony is essential to the defense of the corpora-
14 tion and as general counsel to represent the company as its
15 attorney.

16 I think that that is not contrary to the letter
17 or to the intent of the matter that was put to the Board,
18 which was addressed to outside counsel.

19 If this Board would like the parties to address
20 that fully, I think perhaps a better way to do it -- we first
21 learned of this this morning -- would give everybody an
22 opportunity to look at the language and consider the cases
23 Mr. Goldberg would like to cite, and give the Board the full
24 benefit of their view.

25 CHAIRMAN RIGLER: Mr. Hauser?

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MR. HAUSER: Mr. Chairman, when you asked me concerning prior instances in which I have appeared in a proceeding as both an attorney for the illuminating company, and a witness, I neglected to recall one very important one. That was in the Environmental and Safety Hearings involving the licensing of Perry No. 1 and 2.

I was counsel of record in that proceeding and did participate in it.

I also appeared as a witness for the illuminating company testifying to the extensive negotiations with the Department of Natural Resources of the State of Ohio for mineral rights underlying Lake Erie, which was one of the requirements of the NRC, to make certain that that area would not be mined, and present a potential hazard to the plant itself.

That was one of the contested issues in that, in fact, the Intervenor, the Coalition, contested that point very seriously and there was no objection by anyone, including the lawyers for the NRC Staff to my appearing in both capacities.

MR. GOLDBERG: The fact that Mr. Hauser previously has participated both as a witness and attorney does not make it proper.

The fact that the Staff did not object in that proceeding does not mean we have in any way objected to our right to object in this proceeding.

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1 CHAIRMAN RICLER: All right.

2 I am about to take our luncheon recess. The Board
3 will talk this over during the lunch hour.

4 At the present moment, I think that we feel that
5 the objection is a serious one and it at least has surface
6 validity. We are not ruling at this time, but perhaps at
7 your caucus during the lunch hour, Mr. Hauser and Mr. Reynolds,
8 Mr. Lansdale, you might ask yourself if you really think it
9 is in your client's best interest.

10 I appreciate the awkward position you are being put
11 in, it coming up sort of unexpectedly at lunch, I gather to
12 you.

13 At any rate, I am sure that now that they have
14 directed your attention to a particular provision of the
15 Ethical Canons, that you will want to review that and give it
16 your serious consideration before we come back to this
17 subject.

18 It just seems to me that the point Mr. Hialefoht made
19 about other counsel being disadvantaged may have some accuracy.
20 That is not said in the person vein at all, but it seems to
21 me as a general proposition it may be one to which we should
22 adhere.

23 I want you to think about it. I want you to give us
24 your further thoughts after the lunch hour, and any proposals
25 so that we can move along with this witness while we are

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1 deciding the question, if it is necessary.

2 However, I would encourage you to see if there
3 weren't some alternative so you can fulfill either the role
4 of the witness or the attorney, but not both.

5 It may be we would feel compelled to grant the notice
6 after we have a chance to reflect upon it.

7 Do you want a little extra time over the lunch
8 hour to consider this, or would it not be helpful?

9 MR. HAUSER: Perhaps 15 more minutes would be
10 helpful.

11 CHAIRMAN RIGLER: Shall we meet again at 2:15?

12 MR. REYNOLDS: Mr. Chairman, if I might, just
13 before we break, could you please explain one more time what
14 motion it is that you may be inclined to grant?

15 CHAIRMAN RIGLER: Yes.

16 MR. REYNOLDS: I guess maybe to clarify my question,
17 I am not sure whether the burden is being placed on Mr. Hauser
18 to make the decision, or whether the decision is being made for
19 him by the motion.

20 CHAIRMAN RIGLER: No.

21 As I understand it, it would be Mr. Hauser's
22 election. It would be the election, I suppose, really,
23 of the Cleveland Electric Illuminating Company as to whether
24 Mr. Hauser may appear subsequently in these proceedings, as a
25 witness, in which case he could not actively participate as an

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1 attorney, although he could remain on the council table and he
2 could participate in discussion with other counsel for the
3 company.

4 In other words, he could continue to hold his title and
5 he has to date, or if he chooses to resign, or his client
6 elects for him to become an active cross-examining and working
7 counsel in these proceedings, then if we granted the motion
8 he might be precluded as appearing as a witness for his
9 client.

10 But the election would be what or not.

11 MR. REYNOLDS: And I guess the question that is
12 still unclear is, if he chooses to go both ways, after the
13 Board will make the decision, or have the parties requested
14 that he go one way or the other?

15 Just for clarification?

16 CHAIRMAN BIGLEN: Yes.

17 It seems to me that the other parties simply are
18 precluded as excluding him as a witness, so that I suppose
19 the relief which would be in our power to grant, or at least
20 which would be appropriate, would be excluding his participation
21 in the active attorney role.

22 MR. REYNOLDS: Would that then necessitate another
23 motion, or would it follow on we would have a disqualification
24 motion that would be similar to what is pending with Service
25 Sanders, and the question as to that procedure being followed?

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1 CHAIRMAN RIGLER: I would want to reflect on that
2 over the noon hour myself. The answer might well be yes.
3 Again, it would be one of those, to my mind, irrational
4 situations in which the rule might require reference to yet
5 another presiding officer.

6 I say that because this is another situation
7 where the Board certainly has no dissatisfaction in any
8 way with Mr. Hauser's performance or participation.

9 MR. SMITH: Mr. Reynolds, you might, in your
10 consideration of this matter, you might consider the position
11 that the Board finds itself in. We wish to be in a position
12 to represent -- to accept any professional representation
13 made by Mr. Hauser as valid on its face.

14 Now we are going to be also required to judge his
15 credibility as a witness.

16 CHAIRMAN RIGLER: I am hoping on reflection that you
17 might make your own election. Take a careful look at those
18 Canons, because you don't want to be in an embarrassing posi-
19 tion.

20 I don't think it is really helpful to anyone to
21 be involved in a disqualification proceeding as might be
22 contemplated. I don't know that that is really serving your
23 client in the best manner.

24 MR. REYNOLDS: I just wanted to make sure what we
25 were considering so we could consider everything during the

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1 lunch hour.

2 That was one of the questions.

3 CHAIRMAN RIGLER: I know it is a predicament, and
4 I am sympathetic to you, but I do think you are going to
5 have to think about it very long and hard from the point of
6 what is in the best interest of your client, and how you can
7 be most helpful to your client.

8 MR. GOLDBERG: I would like to make it very clear
9 that we do not make this motion in any way due to
10 Mr. Hauser, himself. It is just the situation, and I would
11 like that understood.

12 CHAIRMAN RIGLER: Yes.

13 All right.

14 We will come back at 2:15.

15 (Whereupon, at 12:40 p.m., the hearing was recessed,
16 to resume at 2:15 p.m. this same day.)

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AFTERNOON SESSION

(2:15 p.m.)

1 CHAIRMAN NIGLER: Are we ready to proceed?

2 Mr. Reynolds?

3 MR. REYNOLDS: Mr. Chairman, over the luncheon
4 recess we have conferred, Mr. Hauser, Mr. Lunsdale and
5 myself, with respect to the motion by the other parties on
6 Canon Number 5.
7

8 After careful consideration we do feel very strongly
9 that that canon is not applicable to the present situation.
10

11 We think that the interests protected here is the
12 clients' interests in those situations where an outside
13 counsel's credibility may be impugned.

14 That, we think, calls for much different
15 considerations than when you are talking about an in-house
16 counsel who is both at the same time the advocate and the
17 client, that the client does certainly have the right and
18 the ability to represent itself in a proceeding, so we do
19 have a very strong believe that this canon is not applicable
20 in this situation.

21 On reflection it has occurred to us that
22 this Board could well be troubled by the situation that could
23 possibly arise at a later date when Mr. Hauser, following
24 testifying as a witness, might have occasion to present
25 the concluding argument or final arguments on summation on

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1 behalf of CEI, the other party in that situation might feel
2 that this would give him an opportunity to in effect testify
3 without there being benefit of cross-examination and perhaps
4 present his earlier testimony or the earlier testimony in a
5 different light.

6 I think that we are sensitive to that possible concern
7 of the Board and in view of that we would be prepared to go on
8 record to state that Mr. Hauser would not be involved in
9 presenting the concluding arguments on behalf of CEI following
10 his testimony.

11 On the other hand, we can see no basis for concern
12 by the Board or the other parties for Mr. Hauser's continuing
13 participation in cross-examination of witnesses or in direct
14 examination of CEI witnesses at the time that Cleveland
15 Electric Illuminating Company is to put on its case.

16 I don't believe that his doing so would be
17 contrary to the rule or compromise the rule in any way.

18 I don't see how opposing counsel could claim that
19 they may be prejudiced thereby. They would have an
20 opportunity to cross-examine Mr. Hauser at the time that he
21 appeared as a witness and to the extent they want to protect
22 their interests or feel that they need to, they would have
23 an opportunity to do so through that cross-examination process.

24 So our view and position on this matter is that it
25 does raise potential -- a potential area of legitimate concern

1 with regard to argument by Mr. Hauser following his testimony
2 and as to that we feel that the proper way to proceed would
3 be to remove that problem from the Board as a whole
4 from the Board, but we don't see how his participation in
5 cross-examination or in the direct examination of other witnesses
6 would in any way prejudice the other parties or interfere with
7 question in any regard by the court.

8 MR. MELVIN BERGER: Mr. Chairman, I would like to
9 clarify a remark I made earlier this morning which may have
10 slight misimpression to the board. I believe we found out
11 if Mr. Hauser was listed on the Department of Justice witness
12 list and in response to that I said no, he was not.

13 Mr. Hauser is not listed on the Department of
14 Justice witness list. However, the Department of Justice
15 document list does contain a listing of depositions which we
16 had intended to put in as evidence and we noted that in
17 particular deposition which we want to introduce in evidence
18 is not allowed into evidence, that we would reserve the
19 right to call that particular deponent as a witness.

20 Mr. Hauser's deposition is listed on that list
21 so that if we wish to use a portion of Mr. Hauser's deposition
22 and if it is not allowed into evidence, the Department may
23 well call Mr. Hauser as a witness.

24 MR. ECKHART: Now that Mr. Hauser is not on the list,
25 I am in the same position because I also indicated I would

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1 rely on Mr. Hauser's deposition.

2 CHAIRMAN RIGLER: Does the fact that the opposing
3 parties intend to call Mr. Hauser as a witness affect the
4 Applicants' position?

5 MR. REYNOLDS: Well, I guess my belief is it probably
6 strengthens it considerably to the extent that it is my
7 weakness in it.

8 I think if the other parties are desiring to
9 call him as a witness, that should be no basis for
10 discontinuing his representation of the Cleveland Electric
11 Illuminating Company throughout the hearing, and that
12 they put him on a list or intend to interrogate him as a
13 witness.

14 MR. HJELMFELT: I don't think he would be
15 disqualified because I intend to call him as a witness, but
16 that is a much different question than him being called as a
17 witness on behalf of CEI.

18 The fact that Mr. Hauser might agree not to make
19 final argument I don't think answers the problem.

20 As I pointed out before when he was making his
21 argument to the Board, he started talking about things that
22 showed he was in a unique position to know the facts and about
23 sort of things are going to come up in objections to relevance
24 or cross-examination questions or whatever.

25 It is impossible to separate it out, hard enough

1 when attorneys are doing it, but when also a witness is doing
2 it, I think you still have the same problem.

3 CHAIRMAN RIGLER: Mr. Goldberg, do you have any part
4 of the canons on which you rely with regard to this?

5 MR. GOLDBERG: Yes, I do.

6 CHAIRMAN RIGLER: All right.

7 MR. GOLDBERG: Would you like to ask me any questions?

8 CHAIRMAN RIGLER: Yes.

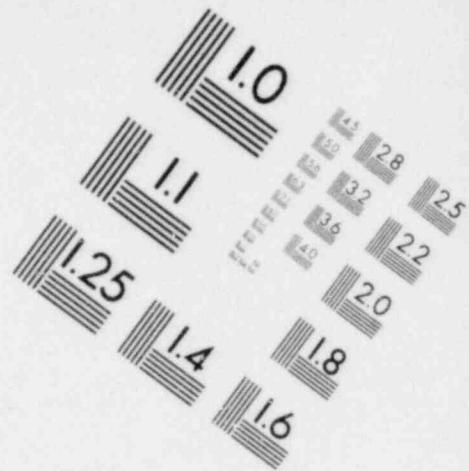
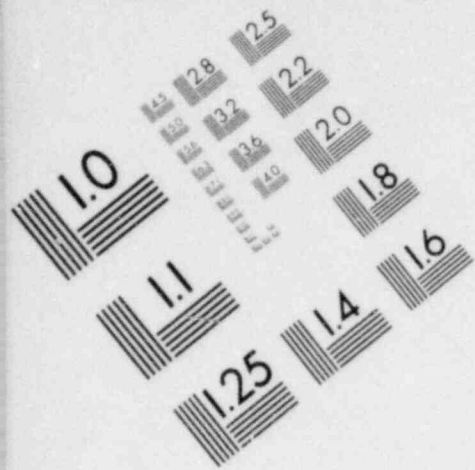
9 As I look at Ethical Canons 5-9 and 10, I am assuming
10 for the moment on Canon 5-10, I take it we would
11 all agree that if Mr. Hauser does become a witness, he will
12 testify with respect to contacted matters and not to
13 issues.

14 I see affirmative nods from counsel.

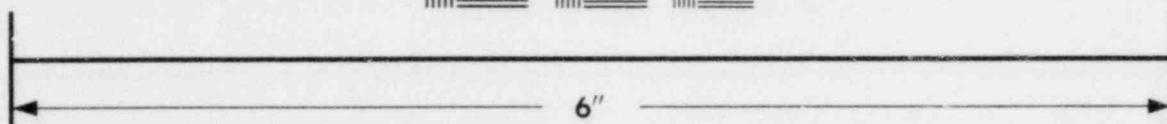
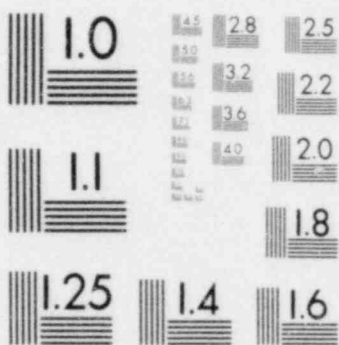
15 MR. HAUSER: Would you read the statement in
16 Mr. Reporter?

17 CHAIRMAN RIGLER: Yes. I -- I will give it to you
18 again, Mr. Hauser. I am addressing your question in
19 Ethical Canon 5-10 and in that canon it states that it is not
20 objectionable for a lawyer who is a potential witness to be an
21 advocate if it is unlikely that he will be called as a witness
22 because his testimony would be merely corroborative or if his
23 testimony will relate only to an uncontested issue.

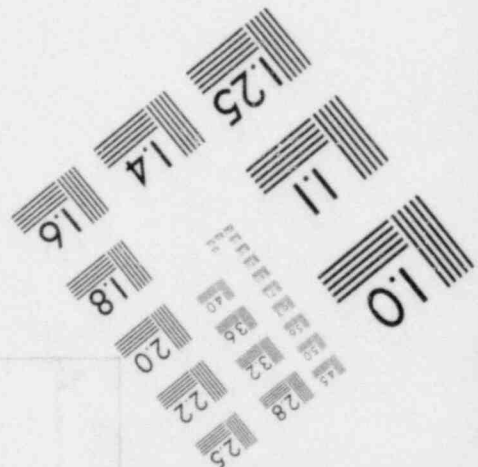
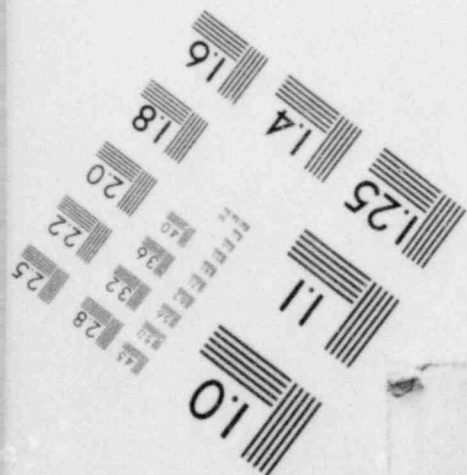
24 I was asserting that it appears that that particular
25 statement would not apply because your testimony would be

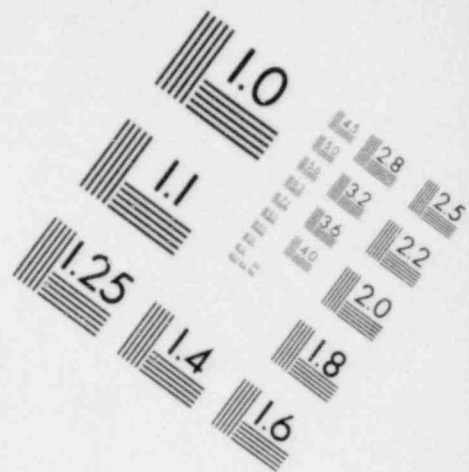
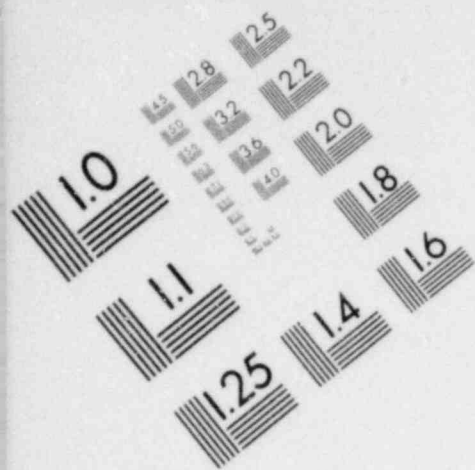


**IMAGE EVALUATION
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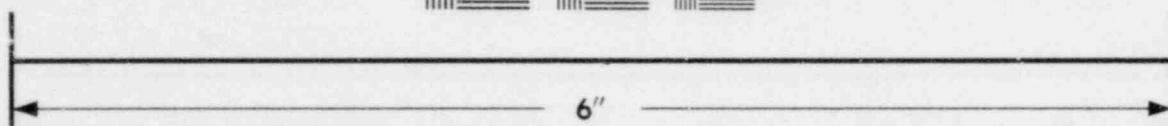


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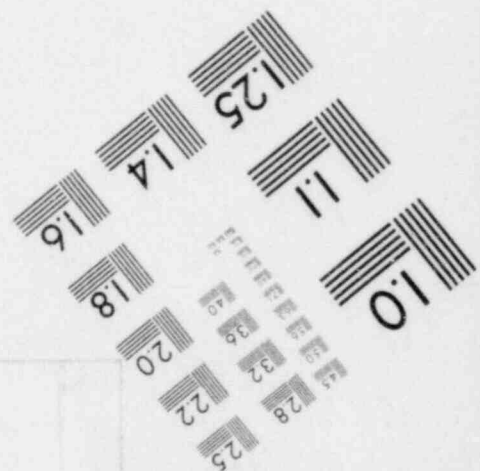
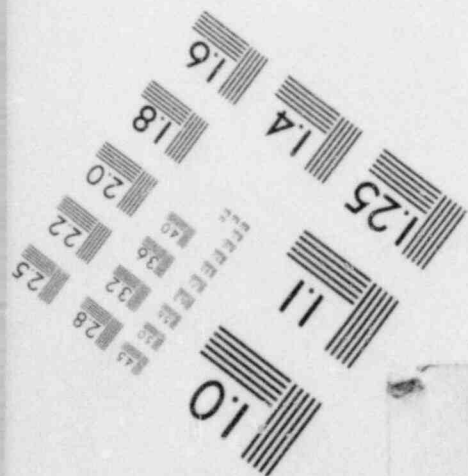




**IMAGE EVALUATION
TEST TARGET (MT-3)**



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1 neither cumulative nor uncontented.

2 MR. HAUSER: You are correct.

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1 CHAIRMAN RIGLER: So that if we agreed that Rule
2 Canon 5-9 governs, then the exception you would be referring
3 upon us would be that sentence in 5-10, which reads:

4 "In the exceptional situation where it will be
5 manifestly unfair to the client for the lawyer to
6 refuse employment or to withdraw when he will likely
7 be a witness on a contested issue, he may continue as
8 advocate even though he may be a witness."

9 MR. REYNOLDS: That would be one, yes, sir.

10 But, I do also direct the Board's attention to
11 Disciplinary Rule DR 5-101(4), which, I believe, if the Board
12 were deemed applicable, would also be relevant.

13 CHAIRMAN RIGLER: All right.

14 Because of the serious nature of the discipline --
15 did you have something to say, Mr. Goldberg?

16 MR. GOLDBERG: Yes.

17 Mr. Chairman, you quoted a sentence from DR 5-101
18 in the exceptional situation, and so forth. That's all right.
19 Footnote 12.

20 I would just like to direct your attention to
21 Footnote 12, which says that it is -- well, I will let
22 everyone read it for themselves. But I think Footnote 12 is
23 also relevant.

24 CHAIRMAN RIGLER: Since we don't have it in the
25 portion that was just photocopied, and distributed to all

1 parties, perhaps you could read it to us.

2 MR. GOLDBERG: Okay.

3 Footnote 12 of the sentence quoted by the
4 Chairman says:

5 "It is the general rule that a lawyer may not
6 testify in litigation in which he is an advocate,
7 unless circumstances arise which could not be antici-
8 pated and it is necessary to prevent a miscarriage
9 of justice. In those rare cases where the testimony
10 of an attorney is needed to protect his client's
11 interest, it is not only proper, but mandatory,
12 that it be forthcoming."

13 I believe that is relevant.

14 CHAIRMAN RIGLER: All right.

15 I think that the initial inclination of the Board
16 would be to entertain a written motion to disqualify
17 Mr. Hauser from an active attorney role in these proceedings.

18 We would want it in writing so that we could give
19 it full consideration. That indicates that the balance of the
20 argument right now tips towards the parties opposed to
21 the Applicants. We feel that a motion to disqualify would
22 be appropriate because if the election is held in having the
23 relevant and material testimony of a witness excluded, or
24 having an important, but nonetheless replaceable attorney,
25 replaced, I think that the Commission would favor having

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1 all available evidence and facts before us, and since the
2 power of our relief really would go now to disqualification,
3 I believe we are led down to the path of disqualification.

4 At the same time, although we indicate that the
5 balance of the argument right now swings to the opposition
6 parties, we see with reference to Canon 5-10, and disciplinary
7 Rule 5-101(b)(4), that in exceptional circumstances where there
8 would be a great hardship for substantial prejudice to the
9 client, we might permit the attorney to continue in an
10 active role and to participate as a witness.

11 We are not prepared to make that decision until
12 we receive a written motion. That means for this or similar
13 purposes, Mr. Hauser is free to continue with the case
14 that he sees the direction in which we are leaning.

15 In making that ruling we are determined to
16 advance these proceedings, and we also feel that it is in
17 substance to the point that the other parties might have
18 anticipated Mr. Hauser's active participation both from the
19 fact that he did make an opening statement and he has
20 posed objections earlier in these proceedings, so it would
21 be unfair to exclude Mr. Hauser at this point. We will permit
22 him to continue until we receive some motion and, I think, until
23 we receive the reply, if the reply is to rely on Ethical
24 Canon 5-10. We would wish an affidavit from an officer of
25 the company setting forth in detail, the nature of the

4] 1 hardship and the strength of the desire of the company to have
2 Mr. Hauser continue, even recognizing that that combination
3 might present a prejudice and we would have to continue to
4 balance the witness-advocate role of Mr. Hauser, and that might
5 affect the way we would consider argumentative questions just
6 during cross-examination.

7 Surely, as you have anticipated, Mr. Reynolds, it
8 would affect any arguments he might make where he would
9 in essence be getting a double shot at the argument.

10 All right.

11 When this all started, Mr. Hauser had just risen
12 to make objection to a question and he had moved that the
13 answer be stricken.

14 The question related, as I recall, to difficulties
15 experienced by the City under an interconnection agreement which
16 was in effect in 1971 and Mr. Hauser's objection was based
17 on the fact that that issue -- that issue relating to the
18 interconnection agreement particularly, had been discussed in
19 other forums and he argued for an estoppel.

20 That objection is overruled. There is no way for
21 the Board to know the nature of those proceedings, and the
22 mere fact it was contested elsewhere does not make it
23 irrelevant for purposes of these proceedings.

24 The answer will remain on record. You may proceed.

25 MR. REYNOLDS: I just want to make it clear, the

mm5 1 basis of your ruling is, you have no way of determining
2 what was contested in the FPC proceeding, that you are ruling
3 now that the objection is overruled as to collateral estoppel.

4 CHAIRMAN RIGLER: I didn't think it was well taken
5 for a variety of reasons. That is one.

6 The question was factual. It went to difficulties
7 with the interconnection agreement. That is appropriate and
8 material and the mere fact that you have argued it on the
9 Applicant has argued it in other proceedings, the effect
10 of sustaining that ruling would be to exclude the results of
11 those proceedings. But more than that, it would be to
12 exclude the facts.

13 I think the answer to the question is in part yes.
14 We have to have -- we should have, or the Staff should be
15 entitled to put those facts before us.

16 MR. REYNOLDS: Well, all right.

17 I understand the basis of your ruling, then.

18 I would like to ask if your ruling means that CWB
19 cannot renew its motion for collateral estoppel when it has
20 an opportunity to put on its case and demonstrate to the
21 Board that factual issues before the FPC identical to the
22 ones that seem to be aired here, were fully litigated before
23 the FPC and finally decided.

24 CHAIRMAN RIGLER: Well, I don't know.

25 I can't give you a ruling on that without seeing

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1 what is involved.

2 MR. REYNOLDS: That is what bothered me.

3 You have given them a ruling without saying what
4 is involved. I want to know if it precluded us at a later
5 date from re-raising the collateral estoppel arguments.

6 CHAIRMAN RIGLER: It does not prohibit you from
7 attacking the witness' answer.

8 The answer was, there were difficulties under the
9 interconnection agreement, which difficulties were commercial
10 in nature rather than engineering.

11 If you dispute that fact, you are perfectly free
12 to attack it.

13 I am not sure that the answer in some other forum
14 is necessarily dispositive. I don't know right now if the
15 question raised in the other forum would be identical to the
16 question being raised in this forum.

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MR. REYNOLDS: I appreciate that. What is why I was asking for clarification on the ruling.

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What I understood you to say -- you do not think that it is identical, but you are overruling the notion of collateral estoppel and the motion to strike.

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CHAIRMAN RIGLER: I am overruling the motion to strike. And I don't know what our ruling would be with respect to collateral estoppel if Applicants brought it up at some future stage.

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However, I have indicated we would want to concentrate on the facts with respect to the interventionist agreement and be guided by that.

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MR. REYNOLDS: But we are not precluded at a later date, if we can make the showing, from coming in on a collateral estoppel basis with respect to factual matters that were fully litigated in another hearing?

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That is what I am asking.

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CHAIRMAN RIGLER: I don't know. We would have to address that when it came up. I don't know what our ruling would be.

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MR. REYNOLDS: All right. But at our next hearing at a later date.

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CHAIRMAN RIGLER: Yes.

BY MR. VOGLER:

Q Mr. Kinchee, in view of the length of time that has

1 passed I think I will rephrase and come back with the same
2 question that I asked before the luncheon break. There was
3 were there any operating problems with the 11 KV load
4 transfer arrangement between the City and the Illuminating
5 Company and, if so, would you please elaborate on it, explain
6 it?

7 A Yes. There were severe operating problems imposed
8 upon the City by the unwieldy and hard to work arrangement
9 of having 11 KV transfer points in a technology which is
10 developed rather broadly for techniques for energizing
11 systems and operating them in parallel.

12 These connections were required to be operated
13 without paralleling the two systems and with interlocking
14 whenever a switching operation took place, which inconvenienced
15 the City customers, whether the switching operation was for
16 the convenience of the private power company or the City, with
17 no difference. The net result was the general dissatisfaction
18 with this type of arrangement, and an unwieldy but the only
19 arrangement we could make at that time.

20 Q From an engineering point of view on the 11 KV bus,
21 for the interchange, would there have been a more efficient
22 mode of operation, to use those interchange points?

23 CHAIRMAN RIGLER: Mr. Reynolds?

24 MR. REYNOLDS: Applicants have a continuing objection
25 to this line of question as being repetitions of the nature

1 that were litigated before the FCC and the parties should be
2 estopped from litigating it here again.

3 CHAIRMAN RIGLER: Mr. Smith wants to know and you
4 that there is nothing before the Board that clearly
5 tells us there were any proceedings considering these issues
6 let alone that they are identical or that these questions
7 were raised or decided in those proceedings.

8 I am not sure that that would overcome an objection
9 but he raises that as a threshold issue.

10 MR. REYNOLDS: Well, I don't think that that alone
11 my belief that it is necessary for Applicants to raise the
12 objection. That may well be a reason to defer ruling on the
13 objection until some later date, but I think that the
14 Board can certainly take judicial notice of the matters that
15 were fully litigated in another hearing, and for that reason
16 it is appropriate it seems to me to make the objection that
17 I make.

18 CHAIRMAN RIGLER: All right. The objection will be
19 noted and overruled.

20 MR. STEVEN BERGER: May we just have a moment
21 your Honor?

22 CHAIRMAN RIGLER: Yes.

23 BY MR. VOGLER:

24 Q Did you respond to the question?

25 I believe we had a question.

1 CHAIRMAN RIGLER: They are confidentially kept cases.

2 MR. VOGLER: You want us wait?

3 CHAIRMAN RIGLER: Yes.

4 MR. VOGLER: Fine.

5 (Discussion off the record.)

6 MR. VOGLER: Do you want me to suspend or withdraw?

7 CHAIRMAN RIGLER: It is not necessary right now.

8 Eventually you may want to brief it.

9 MR. VOGLER: I would be glad to respond to it later
10 if you prefer.

11 MR. REYNOLDS: Mr. Chairman, in light of Mr. Vogler's
12 comment, Applicants are prepared at this time to submit to the
13 Board through documents that were a master of records in the
14 FPC proceeding the basis of the collateral estoppel objection.

15 We would point out this was discussed in the pre-
16 hearing brief that was filed and which, of course, is
17 before the Board.

18 I will proceed to put before the Board the FPC
19 orders and decisions now which reflect what was decided and
20 what was litigated in that proceeding, as the basis for
21 the collateral estoppel motion.

22 CHAIRMAN RIGLER: Mr. Berger?

23 MR. MELVIN BERGER: I believe that Mr. Reynolds is
24 trying to do here is trying to put his argument over my head
25 or at least his defense.

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1 I consider it highly improper. I think that what
 2 he can raise the issue and present his questions, but that he
 3 not at this time.

4 CHAIRMAN RIGLEN: He is doing it because of the
 5 question raised by the Board. He was taken up because of a
 6 concern expressed from the Board.

7 We will continue to permit this line of questioning
 8 subject to a motion to strike, and we will permit him to
 9 introduce those documents and then make such a motion as he
 10 wish.

11 You might want to do it at the end of his testimony,
 12 testimony, however.

13 You may have a continuing objection and you may make
 14 a motion to strike the entire line of questioning at the
 15 appropriate point.

16 MR. VOGLER: Mr. Reporter, I don't know whether I
 17 had a question pending or not. If I did, would you please
 18 read it?

19 (The reporter read from the record as requested.)

20 MR. PEYNOLDS: Could we rephrase that as to whether
 21 that we are asking more efficient than what? A more efficient
 22 what more efficient means on the basis of the fact that
 23 far?

24 MR. VOGLER: Does the witness understand the
 25 question? I am not talking about another type of interchange.

1 I am talking about some efficiency gained... of
2 the transfers, load transfers.

3 MR. REYNOLDS: Then what?

4 MR. VOGLER: That the way they were doing it was
5 by the Illuminating Company at the time he was with
6 of Light and Power.

7 THE WITNESSES: The answer to that is, it
8 certainly is a more efficient way because
9 administrative delays not necessitated by
10 of the system.

11 You could have accomplished any switching
12 with three- to five-second interruption without tying the
13 systems together. And in a number of places you could tie
14 the system together for purposes of switching without any
15 jeopardy to either system.

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1 BY MR. VOGLES:

2 Q As opposed to that, when you were Commissioner, you
3 experienced administrative delays?

4 A That's correct. Administrative delays on the part
5 of the power company, not on the part of the City. We were
6 only be in the role of observing the switching in most cases
7 and the people doing the operating, switching for the power
8 company, would be required to obtain clearances before
9 entering in the field and then make substantial changes in
10 operations, moving from one location to the other instead of
11 having two crews or coordinating the work as most switching
12 operations should be done.

13 Q Can you give us an example as to how long it took on
14 a specific occasion that you recall when you were
15 Commissioner and had requested service over the 11 KV

16 A On the 11 KV --

17 Q Yes, sir. The load transfer points is
18 what we are referring to.

19 A To the best of my recollection -- and I can't be
20 specific in that regard -- but I would be quite sure that it
21 took as long as 30 to 35 minutes, particularly when our
22 customers were out in cold weather, because I know it would be
23 very damaging to our relationship with our customers, in
24 the question of reliability of our system. Some of those
25 outages were brought about not by a failure of our system but

1 by a failure of the supplier's system.

2 Q In view of your description of the causes and
3 problems, administrative problems you encountered, did
4 the City continue to accept this type of transfer?

5 A We had no alternative. I was appalled at the
6 very first inspection of what we were working with, looking
7 at the points, as far as good engineering practice.

8 I read some of the documents relating to the
9 load transfer points and in one of those documents was a
10 letter from the power company saying that they would negotiate
11 in good faith and work with the City to establish a suitable
12 interconnection at a higher voltage.

13 One of the first things I did, standing in front of
14 City, was to ask for a meeting with the power company
15 engineers in order to determine what progress had been made
16 in this regard so that these tremendously unduly loaded
17 transfer points could be eliminated.

18 Q What was the result of that meeting, if you recall?

19 A Well, there really wasn't any result. They came
20 to -- the engineers came to the meeting and indicated to me that
21 there had not been any real engineering investigation carried
22 place, and did sketch for me on a yellow legal pad in front of me
23 a vague description of the system, the bus systems, and what
24 might possibly be done but that was the extent of the engineering
25 ing that had been done up to that point.

1 MR. HAUSER: Clarification, please.

2 Whose engineers?

3 THE WITNESS: CEI's engineers.

4 BY MR. VOGLER:

5 Q Did the City have a 69 KV interconnection with the
6 Illuminating Company during your tenure as Commissioner?

7 A Yes, we did. After bringing the matter of inter-
8 connection before the Federal Power Commission we did receive
9 an order from the Federal Power Commission for a temporary
10 69 KV interconnection to be increased to 138 KV at a later
11 date.

12 MR. HAUSER: Mr. Reporter, would you please read
13 that answer back for me?

14 (The reporter read from the record as requested.)

15 BY MR. VOGLER:

16 Q Who initiated that, on behalf of the City, who
17 initiated the discussions with the Illuminating Company on
18 behalf of the 69 KV? Was that out of your office?

19 A Yes. That was out of my office, after my transfer
20 of office, that I initiated the discussions on the 69 KV.

21 Q Did the City -- could the City have obtained the
22 69 KV with CEI without action by the Federal Power
23 Commission?

24 A Not to my knowledge.

25 MR. REYNOLDS: I will object to that question.

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1 We have been very tolerant with counsel and there
2 is no foundation for the last question and I move to strike
3 the answer.

4 He can rephrase it or we can have a line of
5 questions leading up to it.

6 CHAIRMAN RIGLER: The motion to strike will be
7 granted.

8 BY MR. VOGLER:

9 Q How did you get the 69 KV interconnection with the
10 City -- for the City of Cleveland?

11 A After failing to interest the company in
12 negotiating a 69 KV and the company's refusal to have any
13 further meetings along that line, the City brought the matter
14 before the Federal Power Commission as a request for an
15 interconnection.

16 Q Was the 69 KV energized during your
17 tenure as Commissioner?

18 A Yes, it was.

19 Q Are you aware of the operation of the 69 KV inter-
20 connection with the Illuminating Company?

21 A Yes.

22 Q Were there any difficulties in obtaining operating
23 benefits from the 69 KV interconnection?

24 A Well, yes. The 69 KV interconnection was
25 constructed so that it would operate as a synchronous

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1 interconnection.

2 By synchronous, that means you parallel two
3 systems and operate them together or switch the systems as
4 you see fit without interrupting the service to either the
5 customers or the supplier or the person or the -- or the
6 system being supplied.

7 The federal order made the 69 KV interconnection
8 non-synchronous, which meant it was operated in the same
9 manner then as the load transfer points, even though it was
10 mechanically and electrically possible to interconnect, and
11 that kept it from being a true interconnection.

12 Then the company adopted the policy that all
13 transfer points of 11 KV would have to be energized before
14 they would give us service on the 69 KV, preventing any
15 flexibility in our system operations.

16 Q When you were Commissioner, could the City have
17 operated through the 69 KV interconnection in synchronous
18 or parallel as you describe it?

19 A Yes. As a matter of fact, we did on occasion.

20 Q I mean it was engineering-wise -- it was possible?

21 A That's correct.

22 Q Did you have in operating the 69 KV administrative
23 delay problems similar to those that you had with the 11 KV
24 feeder points?

25 A Well, they were actually much worse. The

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1 interconnection or connection at 69 KV was -- required
2 executive clearance on the part of CRI and would require
3 anywhere from half a day to twelve hours' notice before they
4 felt they could take any action on it, one way or the other.
5 It could not be used for emergencies at all.

6 Q Did you actually during your tenure as
7 Commissioner of Light and Power, did you actually experience
8 delays of the length you have just described?

9 A Yes.

10 Q I am talking about 69 now.

11 A Yes.

12 Q What would happen to your system?

13 A Well, during that period of time we were then in
14 a condition of marginal operation. We could reduce voltage or
15 we could have brownouts or blackouts, as the case might be,
16 until such time as we could establish the connection for back-
17 up power.

18 Q During your tenure, Mr. Hinchee, was there a 138 KV
19 interconnection? While you were there, between the City and
20 the Illuminating Company?

21 A To the best of my recollection, the 138 KV inter-
22 connection had been ordered by the WPC and the City's part of
23 this construction had been completed, but CRI's part of the
24 construction had not been completed.

25 Q In other words, there wasn't a working one during

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1 your tenure?

2 A Not a working 138 KV connection.

3 CHAIRMAN RIGLER: Did the FPC order provide any
4 time period in which the facilities were to be completed?

5 THE WITNESS: Not to my recollection. It was
6 with all due dispatch. I don't think that covered the time
7 frame very closely.

8 BY MR. VOGEL:

9 Q Mr. Hinchee, were you involved in the establish-
10 ment of an organization called American Municipal Power,
11 otherwise known as AMP/O?

12 A Yes, I was.

13 Q What was your role in establishment of AMP/O?

14 A I was one of a group of five people that met and
15 established and incorporated AMP/O as a nonprofit organization
16 active on the Board of Directors of AMP/O.

17 Q What was the purpose of AMP/O?

18 A To obtain for the municipals in the state of Ohio
19 an entry into the benefits of large-scale -- the economies
20 of large-scale generation and transmission.

21 Q Were you aware of the availability of PLSNY, PLSNY
22 Electric Power, possibilities thereof?

23 A Yes, we were.

24 Q Was AMP/O formed for PLSNY Power?

25 A No. PLSNY Power was incidental to the formation of

??

1 AMP/O. There had been much discussion over the years for
2 OMEA, electrical association people, about the fact that we
3 were as a group entitled to be 180 megawatts of hydro power
4 that we had been never able to obtain.

5 When AMP/O was formed for the purpose of
6 negotiating and purchasing for its members, some of the large-
7 scale -- position in some large-scale generation around the
8 state, PASNY still had 30 megawatts of power uncommitted to
9 which we were entitled and it was a good vehicle to get AMP/O
10 off the ground and operating as a real entity.

11 Q You mentioned OMEA. Was there a relationship between
12 AMP/O and OMEA?

13 A Yes. Ohio Municipal Electric Association is just
14 that, a trade association with all the municipals in the
15 state or most of them as members and it seeks a way to
16 benefit its membership, but it felt, or the Board of Directors
17 of OMEA felt that power supply was beyond the scope of OMEA
18 and that should be undertaken not as a committee of OMEA but
19 a separate committee altogether and members of OMEA then
20 grouped together and formed AMP/O.

21 Q When you were in Ohio and the AMP/O, were you
22 aware of an organization called Buckeye Power?

23 A Yes, I was quite well acquainted with Buckeye Power.
24 In fact, at one point the municipals had tried to enter into
25 the Buckeye Power group because that was a coalition of

jon

1 RECs and they dealt with the private power companies and
2 formed an entry for the RECs, and in the large-scale
3 generation. They bought a position in the Cardinal Power
4 Plant which was built by Ohio Power Company.

5 It is on the Ohio operation. It is a wide mouth
6 operation. Rather large operation. I am not sure of its
7 size, 500 megawatts now.

8 The members of Buckeye benefitted from the economies
9 of scale. The municipals were excluded by that agreement,
10 but felt that with a similar organization they could very
11 well be in a better negotiating position.

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1 MR. REYNOLDS: Mr. Chairman, I am going to object
2 to that answer as nonresponsive to the question.

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3 This witness has consistently given testimony beyond
4 the scope of the interrogation. I have no problem if
5 Counsel wishes to elicit this kind of testimony on the basis
6 of questions and answers, but if we are going to have a
7 rambling narrative by the Witness, I am going to object to
8 that, especially where it is not responsive to the question
9 and move to strike the nonresponsive portions.

10 MR. VOGLER: I feel it is responsive. If you
11 want to hold this for another three or four days and he
12 answers each question, yes or no, then we can do it that
13 way.

14 I feel he has been responsive to my question.

15 CHAIRMAN RIGLER: We will permit it, Mr. Vogler.

16 MR. VOGLER: Fine.

17 BY MR. VOGLER:

18 Q When you were on the board of AMP/O did you
19 consider -- did the Board consider seeking sources of nuclear
20 power from nuclear plants that were then being constructed
21 or planned in Ohio?

22 A Yes. We did. The Board considered all sources
23 of power then being constructed that we knew of. Nuclear,
24 particularly, but coal-fired stations, as well.

25 Q Do you recall AMP/O seeking to obtain nuclear power

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1 from Ohio Utility, while you were on the Board?

2 A Yes.

3 Q Do you recall when? The name?

4 A AMP/O sought to establish a position for
5 nuclear power with all of the participants,
6 Cincinnati Gas and Electric for one. That was a plant
7 planned -- I have forgotten the name of it, as I recall,
8 down on the Ohio River, and another, Beaver Plant, and,
9 of course, the -- Beaver Valley Plant and, of course, the
10 plants under construction in the Cleveland area, which were
11 the plant and the Sandusky and the Perry.

12 Q I assume when you say the plant at Sandusky,
13 you mean the Davis-Besse?

14 A Davis-Besse, yes.

15 CHAIRMAN RIGLER: Mr. Hinchee, what years were
16 you on the Board of AMP/O?

17 THE WITNESS: From its organization date, which
18 I believe was in 1972, about the summer of 1973, until I
19 left the City of Cleveland in October of 1975.

20 BY MR. VOGLER:

21 Q Back to PASNY power --

22 CHAIRMAN RIGLER: Was Cleveland a member of
23 A.P/O during this period, the City of Cleveland?

24 THE WITNESS: Yes. I was Cleveland's representative,
25 as a member of AMP/O.

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1 BY MR. VOGLER:

2 Q Did AMP/O Ohio secure a commitment for
3 PASNY power for the City of Cleveland?

4 A Yes, it did.

5 MR. REYNOLDS: I will object to that.

6 CHAIRMAN RIGLER: What basis?

7 MR. REYNOLDS: On the basis, unless we have
8 some indication from the question from when and when, I
9 don't think that it is a proper question to ask.

10 CHAIRMAN RIGLER: That will be overruled.

11 BY MR. VOGLER:

12 Q Do you recall generally when you obtained that
13 commitment from PASNY power authority, the State of
14 New York, for the Cleveland commitment?

15 A I am not sure about the dates. We met with
16 PASNY on several different occasions and PASNY laid down
17 a number of requirements that AMP/O would have to meet and
18 we then complied with those requirements and sometime in
19 1973, I am not sure of the exact date, we did receive word
20 from AMP/O -- from PASNY that if AMP/O Company completed
21 its negotiations for wheeling that they would make the 30
22 megawatts of power available to us.

23 CHAIRMAN RIGLER: Mr. Hinchey, if you see Mr.
24 Reynolds or one of the lawyers come to his feet, after Mr.
25 Vogler asks a question, pause in your answer. I would like to

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1 give them a chance to get their objection on the record
2 before you speak. They can move to strike the answer, but I
3 think it might be preferable to let the objection come in
4 first. So look for someone rising after Mr. Vogler asks
5 his questions.

6 Go ahead, Mr. Reynolds.

7 MR. REYNOLDS: I am objecting to the question.
8 Mr. Vogler has now taken a couple of times in terms of
9 a commitment and asked the Witness to give a conclusion as
10 to that question. I think that is a legal term and calls for a
11 legal conclusion, and I will object to this witness testifying
12 to that sort of thing. I think that is improper.

13 If Mr. Vogler can rephrase his question, perhaps
14 we can get around the problems, but --

15 CHAIRMAN RIGLER: As to whether or not --

16 MR. REYNOLDS: If he asks about a commitment
17 unless we have some clarification on the record as to what
18 everybody means by commitment, I will have to object.

19 CHAIRMAN RIGLER: You can get into that as usual.
20 I think it is proper, so the objection is overruled.

21 BY MR. VOGLER:

22 Q What was the size of the commitment, if you
23 recall, of the PASMV power?

24 A 30 megawatts of power.

25 Q How about AMP/O Ohio's plan to deliver the PASMV

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1 to the City of Cleveland?

2 A. Through existing transmission lines, the PASNY
3 people had arranged or would have arranged for transmission
4 to the borders of New York State. Beyond that, it was up to
5 AMP/O to negotiate transmission with the intervening or inter-
6 connected electric power systems which I believe PENELEC was
7 one, and CEI was another.

8 Q You mentioned PENELEC. Did you reach an agreement
9 at least in principle with PENELEC for the power?

10 A AMP/O reached an agreement with Pennsylvania
11 Electric Company in that regard, yes.

12 Q In terms of geography, where would the PENELEC
13 lines end? I take it they would pick it up from the
14 New York people?

15 A As I recall they were the only intervening
16 power system between the New York people and the City of
17 Cleveland.

18 Q Did you ask the illuminating company to wheel the
19 PASNY power from the PENELEC lines to the City of Cleveland?

20 A Yes.

21 MR. HAUSER: Did who?

22 MR. VOGLER: Mr. Hinchey.

23 THE WITNESS: Yes, I did.

24 BY MR. VOGLER:

25 Q To your knowledge, when you were commissioner,

1 did anyone else?

2 MR. REYNOLDS: I would like -- we can save it
3 for cross, but Mr. Hinchee has indicated to the Board in
4 response to a question that he was wearing two hats at the
5 time. Can we have some clarification which hat he had on
6 when he made the request?

7 CHAIRMAN RIGLER: I think probably what is before
8 saved for cross. Let me make another comment here.

9 I know that you both, you and Mr. Houser, are
10 on your feet, objecting or participating in the argument.
11 Both, I think, on behalf of CEI. You will have to decide
12 one or the other. I am not going to let two lawyers from
13 the same company cross-examine a witness.

14 MR. VOGLER: Did we have a question pending?

15 CHAIRMAN RIGLER: He asked for clarification.
16 You might want to think about that.

17 MR. VOGLER: Do you recall what it was?

18 CHAIRMAN RIGLER: He ask which of two hats
19 Mr. Hinchee was wearing, when he made a request for hearing
20 by CEI.

21 BY MR. VOGLER:

22 Q Would you care to respond to that, if you can?

23 A At the time of my request of CEI, I was interested
24 in doing whatever I could do to open the door to delivery
25 of this power. I was speaking on behalf of the City of

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1 Cleveland.

2 Q To your knowledge, Mr. Hinchee, did anyone else other
3 than yourself request CEI to transmit the PASNY power to the
4 City over its existing transmission system?

5 A Yes. The president of AMP/O made that request and the
6 attorneys and the engineers for AMP/O made the request.

7 Q Would you recall the president of AMP/O at that
8 time?

9 A Yes. John Eagle.

10 MR. VOGLER: Your Honor, we have one exhibit
11 to put in at this time. NRC Exhibit 70, identified
12 as NRC Regulatory Commission Document Number 91.

13 BY MR. VOGLER:

14 Q Mr. Hinchee, referring to the exhibit that has
15 been marked for identification, it is addressed to
16 Mr. Wallace L. Duncan, Esquire.

17 Are you familiar with Mr. Duncan?

18 (The document referred to
19 to was marked NRC Exhibit 70,
20 for identification.)

21 THE WITNESS: Yes.

22 BY MR. VOGLER:

23 Q Would you describe him?

24 A Mr. Duncan was the attorney hired by AMP/O to
25 conduct the negotiations and represent us both with PASNY

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and the various power companies necessary to negotiate the transmission of power.

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1 Q Was this letter -- do you know, was this letter
2 brought to your attention when you were Commissioner of Light
3 and Power?

4 A Yes.

5 I saw it at that time.

6 MR. VOGLER: I move the admission of this
7 NRC Exhibit Number 70.

8 MR. HAUSER: No objection from CEI.

9 MR. REYNOLDS: Continuing objection on behalf
10 of the other Applicants.

11 CHAIRMAN RICLER: The continuing objection will be
12 overruled and NRC Exhibit Number 70 will be admitted into
13 evidence at this time.

14 (The document heretofore marked
15 NRC Staff Exhibit No. 70 for
16 identification, was received
17 in evidence.)

18 BY MR. VOGLER:

19 Q Mr. Hinchee, after the refusal of the illuminating
20 company to transmit the PASNY power, did the city consider
21 any alternatives to obtaining PASNY power?

22 In other words, was there an alternative --
23 answer the question, I'm sorry.

24 MR. HAUSER: First of all, can I have the question
25 read back?

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(The reporter read the record as requested.)

2

MR. HAUSER: Are you referring to the refusal

3

contained in the October 23rd, 1973 letter?

4

MR. VOGLER: Yes.

5

THE WITNESS: To the best of my recollection,

6

neither the City nor AMP/O had any alternatives for delivery

7

of that power at that particular time.

8

The City of Cleveland was the only one that

9

could reasonably accept the delivery of that power, and there

10

was a meeting with the Board and there was a decision to

11

continue to try to negotiate, even though this letter had

12

seemed to foreclose negotiations.

13

MR. REYNOLDS: I will object and move to strike

14

the answer as nonresponsive.

15

CHAIRMAN RIGLER: Let me hear the answer again.

16

(The reporter read the record as requested.)

17

CHAIRMAN RIGLER: I will strike the part relating

18

to the meeting and the continuing negotiations.

19

The first part of the answer, though, was responsive.

20

BY MR. VOGLER:

21

Q Did the City of Cleveland or AMP/O consider the

22

possibility of running its own transmission line from the

23

MELP system to the PENNESC interconnection?

24

A Well, we had considered during the first few

25

weeks of my office with the City of Cleveland, had considered

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1 trying to find a way to deliver transmission which would place
2 us in contact with one of the other power systems, other than
3 CEI.

4 Ohio Power Company had, in fact, told us that they
5 would sell us power if we could build such a transmission
6 line to a point of contact with their system. However, our
7 examination showed that we were completely surrounded by
8 high density residential areas and commercial areas, and that
9 the construction of transmission lines from Cleveland Municipal
10 System was not feasible, particularly in view of the fact
11 that it would duplicate existing facilities belonging to the
12 power company.

13 So the same factor still held good as far as building
14 a transmission line to reach PENNELEC.

15 Q To your knowledge?

16 A To the best of my knowledge.

17 Q To your knowledge, when you were Commissioner of
18 Light and Power, did the illuminating company ever offer the
19 use of their right of way for you to build transmission
20 facilities thereupon?

21 A No, sir.

22 CHAIRMAN RIGLER: Did you ever ask them to?

23 MR. VOGLER: That was going to be my next question.
24 Go ahead.

25 THE WITNESS: No, sir.

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1 BY MR. VOGLER:

2 Q As Commissioner of Light and Power, did you ever
3 personally investigate other opportunities for bulk power
4 supplies in addition to the PASNY power?

5 A Well, the only other bulk power supply we thought
6 could be delivered economically was the nuclear power, which
7 was being built at Davis-Besse and later the Perry plants.

8 We did investigate that, or tried to.

9 MR. REYNOLDS: What were the last three words of
10 the answer?

11 (The reporter read the record as requested.)

12 BY MR. VOGLER:

13 Q Mr. Hinchee, during the period of time you were
14 Commissioner of Light and Power, did the HEMP system lose any
15 customers to the illuminating company?

16 A No.

17 It had, in fact, a small gain during my tenure
18 of office. But prior to the time that I came there, there had
19 been a severe loss of customers

20 Q What was the reason for this customer loss just
21 prior to your arrival?

22 CHAIRMAN RIGLER: Mr. Reynolds?

23 MR. REYNOLDS: I will object to that, unless there
24 is some line of questions which would indicate some basis for
25 Mr. Hinchee having that kind of knowledge.

Q: I will rephrase it.

ELER:

Q: Now, you just testified that you lost
 your arrival.

Q: Now you made aware of this case of loss upon

Q: Had you known it before my arrival watching

Q: in the area and watching the activities in

Q: the City and C.E. And there is a position

Q: customers from the City by Cleveland

Q: , and there was a full district in the

Q: a house-to-house calls afterwards

Q: the other benefits given to certain men

Q: and I asked the questions at the

Q: this line of activities.

RIGLER: Mr. Sauson?

MR: Mr. Chairman, I would like to

Q: to strike it.

Q: all, upon the ground that not

Q: objection; and secondly, to amend that

Q: of competition in the City of Cleveland

Q: of Electric Illuminating Company and the

Q: which is not related in any way to

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1 issues with regard to licensing nuclear plants, in some cases,
2 and I think it is clearly beyond the scope of the issues
3 framed by the Board.

4 MR. VOGLER: These questions are designed to develop
5 the situation inconsistent with the antitrust laws that exist
6 in CEI's area at the time.

7 We are not interested in retail competition per se.
8 WE are trying to show the atmosphere and the climate that existed
9 in the City of Cleveland at that time, and we think it is
10 important.

11 The fact that a particular customer was lost or
12 gained insofar as the Staff is concerned is not as important
13 as what is coming in my following line of questions.

14 I think the question is relevant. We have asked
15 the gentleman, the witness, if he was aware of the customer
16 loss and how he was aware of the customer loss, and that is
17 basically where we are now.

18 I cannot see anything improper with the question.

19 CHAIRMAN RIGLER: So you are not focusing on
20 particular retail customers, but you are focusing on a broad
21 with respect to power sales?

22 MR. VOGLER: Yes, sir. Bill power.

23 CHAIRMAN RIGLER: Now, Mr. Ejelmpelt, did you
24 have a comment?

25 MR. EJELMPELT: Yes.

1 I don't think I need to address the question of
2 relevance, but I was going to simply note that CEI continues
3 to raise its objections by two separate counsel.

4 MR. HAUSER: On that occasion I believe I was the
5 only one who spoke.

6 CHAIRMAN RIGLER: Yes.

7 I want you to understand my ruling. Only one of
8 you gets to speak for CEI throughout this. It is not on each
9 individual question. It is one attorney for CEI for the
10 witness.

11 MR. REYNOLDS: Mr. Chairman, I appreciate that,
12 but in order to avoid five attorneys standing up, I have
13 stood up and made an objection on behalf of the other
14 Applicants. The fact that it goes to the questions and
15 answers that we have been hearing, would be as applicable as
16 far as my objection is concerned, to all the Applicants, and
17 just CEI.

18 The particular objection here is CEI's, and CEI
19 counsel did make it.

20 CHAIRMAN RIGLER: And when you have risen,
21 after I reminded you of the one-counsel rule, I have asked
22 you are speaking on behalf of the other Applicants?

23 MR. REYNOLDS: That is correct.

24 CHAIRMAN RIGLER: I am going to permit the answer
25 to that, Mr. Hauser.

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1 Mr. Vogler has indicated he intends to comment it
2 in a way that seems appropriate to me.

3 Also, you objected on the basis that the retail
4 market was not involved in any of the matters in controversy.

5 As I look at Matter in Controversy Number 3, Sub C,
6 it does appear to be encompassed within that.

7 MR. HAUSER: With the permission of the Chairman,
8 could I make just one additional point with regard to how
9 far this line of questioning will be permitted to extend,
10 particularly insofar as the Staff has stated in its Notice of
11 Mr. Hinchey's testimony that he would address matters relating
12 to the relationship that existed between Cleveland Municipal
13 Electric System, MELP, and the Cleveland Electric Illuminating
14 Company, CEI during his tenure as Commissioner of Light and
15 Power from November 1971 to November of 1973.

16 CHAIRMAN RIGLER: I am still inclined to permit
17 permit it. I don't see any substantial prejudice by this
18 line of questioning.

19 I will tell you, by the way, that with respect to
20 individual retail customers, the Board ultimately may find
21 that that has no substantial nexus to the matters in contro-
22 versy relating to the construction or operation of nuclear
23 plants. It is the trend with respect to competition that would
24 be of interest to us here.

end 11

25 You may proceed, Mr. Vogler.

MR. VOGLER: It has been a substantial period of time.

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BY MR. VOGLER:

Q Had you answered the question? Were you finished?

A I am not sure what the question was.

MR. VOGLER: I am ad libbing here, Mr. Chairman.
I am not leading the witness.

Was there a question pending?

CHAIRMAN RIGLER: No. There was a notion to strike.
The question related to the foundation of customer loss
prior to his going there.

I believe he said he observed a trend and it showed
a decline in the number of retail customers in Cleveland.

BY MR. VOGLER:

Q Is that correct?

A That's correct.

Q Based upon your review of the situation, upon
becoming Commissioner of Light and Power, what was the reason
for this customer loss?

MR. HAUSER: I object, Mr. Chairman. Clearly this
is outside --

MR. VOGLER: I am back to the question, your Honor,
where I was ten minutes ago and trying to lay the proper
foundation.

CHAIRMAN RIGLER: How is he going to know this,
Mr. Vogler?

MR. VOGLER: He became Commissioner of Light and

1 Power.

2 CHAIRMAN RIGLER: And he conducted an investigation
3 and he observed a trend line.

4 MR. VOGLER: And based on it, what was the reason
5 for the loss of customers. Based upon the review of the
6 situation after you became Commissioner, do you know what the
7 reason was for this loss of customers just prior to your
8 arrival?

9 MR. HAUSER: Mr. Chairman --

10 CHAIRMAN RIGLER: Just a moment. We are going to
11 permit it, Mr. Hauswer. We may give consideration to the
12 weight the answer will be afforded. You are concerned that
13 he may lack personal knowledge of the event. Is that correct?

14 MR. HAUSER: It is clear, unmitigated hearsay.
15 Secondly, it goes beyond the scope of the testimony as
16 expressed in the Staff's submission, to which this witness
17 would testify.

18 MR. VOGLER: Let's strike that question.

19 BY MR. VOGLER:

20 Q After you became Commissioner of Light and Power,
21 and after you had reviewed the situation, did you do anything
22 to personally observe firsthand the loss of customers from
23 the City's system to the Illuminating Company?

24 A Yes, I did.

25 MR. HAUSER: Mr. Chairman, I understood the witness

1 to testify previously that during his tenure in office there
2 was in fact a net gain rather than a loss in customers.

3 CHAIRMAN RYGLER: All right. He testified that
4 he reversed the trend. But let's see what happened when he
5 first came on board.

6 I think I will permit that question as clearly
7 within his sphere of confidence if he can answer it.

8 THE WITNESS: Do you want a description of what
9 actually took place?

10 BY MR. VOGLER:

11 Q I would like you to advise us what you observed
12 firsthand.

13 A The system was under attack both in the press and
14 publicly and privately, at its weakest point, which was
15 reliability and immediately after one of our service
16 interruptions Phil Matthews, who was then the chief electrical
17 engineer, came to my office and said "I want you to check
18 what is going on in the field."

19 We went out in the field and we actually saw
20 representatives of CEI going door-to-door knocking on doors
21 and soliciting our customers on the basis of our lack of
22 reliability.

23 We checked with some of the customers after the
24 people left --

25 MR. HAUSER: Mr. Chairman, again I must object.

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This is clearly into the day-to-day retail competition which admittedly exists between the two systems, and goes into the area, as I understand, that possibly the Board would exclude from evidence, with regard to that in this proceeding.

I think it clearly goes into the day-to-day competition, retail competition which assuredly exists in the City of Cleveland. We do not deny that. There has been competition over the years. That is a fact.

I submit that we need not for that reason also go into lengthy testimony on individual competitive activities of either party.

We are quite willing to state for this record that there is competition in the City of Cleveland every day.

CHAIRMAN RIGLER: That may be. But I believe counsel was exploring the nature of the competition and without going into individual situations it seems to me that if reliability was an important factor, a competitive factor, that is relevant and we will permit it.

Thus far he has not testified with respect to any individual retail transaction.

MR. HAUSER: I thought he testified that he was observing CEI personnel going door-to-door, was it, and contacting customers. That seems to me --

CHAIRMAN RIGLER: All right. We are going to permit

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12

1 it. Let's move on.

2 BY MR. VOGLER:

3 Q Did you personally see the salesman going from
4 door-to-door?

5 A Yes, I did.

6 Q Did you follow up in any manner? Did you go to
7 the door of the house to satisfy yourself at your own first-
8 hand knowledge?

9 A No. I had people who worked for me do that at a
10 later date as a follow-up.

11 Q You mentioned a gentleman by the name of
12 Matthews. Phil Matthews. Where is he now?

13 A Phil Matthews is deceased.

14 Q What did you do, Mr. Hinchey, as Commissioner of
15 Light and Power, about the loss of customers?

16 A I established a group to counteract the
17 activities that I had seen. Also gained possession of a
18 document, a memorandum internal to the CEE Company which
19 outlined a five-year program for weakening and taking over
20 the municipal power system and we took the necessary steps
21 to combat that.

22 MR. REYNOLDS: Can I have that read back, please?

23 (The reporter read from the record as requested.)

24 MR. HAUSER: Certainly I object to the latter part
25 of the answer, and ask for a motion to strike because it is

1 not responsive to the question.

2 I would also --

3 CHAIRMAN RIGLER: The question was what did you do
4 to combat the loss of customers and he said he obtained a
5 document and I suppose he was about to tell us what steps he
6 took.

7 He indicated that, after the document came into
8 his possession, he took affirmative steps to stop the customer
9 loss.

10 That is directly responsive, Mr. Hauser.

11 MR. HAUSER: I will accept that ruling. I would
12 also renew an objection that the matter of the so-called
13 Bridges memorandum which has not been referred to by name
14 but which is the one that Mr. Hinchey is referring to, I am
15 sure was fully before the Federal Power Commission and was
16 specifically ruled on in its various orders.

17 CHAIRMAN RIGLER: There is I suppose a motion to
18 strike pending which will be overruled.

19 Did you want to say something, Mr. Reynolds?

20 MR. REYNOLDS: I also was going to make a motion
21 to strike as to the latter portion of the answer, but I will
22 hold that until I see whether counsel does explore it to
23 confirm the supposition of the chairman, that it is going to
24 be found to be responsive after further questions. If not,
25 then I will make a motion to strike.

1 BY MR. VOGLER:

2 Q Were you finished, Mr. Minchae, with your efforts
3 to stem the loss of customers?

4 I hate to characterize it.

5 A I was going to add, after obtaining that information,
6 we then placed the responsibility for contacting all of our
7 customers after each outage within the customer's department to
8 explain the outage to them and then to solicit and contact
9 new accounts and I moved people who had not been doing this
10 work in to do that work so we had people responsible for
11 that.

12 Q Does that complete your answer?

13 A That is it.

14 Q In your opinion, Mr. Minchae, when you were
15 Commissioner of Light and Power, was this effort by the
16 Illuminating Company to take away the City's customers and in
17 connection or in any way in the manner in which CHI updated
18 the load transfer points, the 11 KV load transfer points?
19 Was that -- was there any connection between the two or was it
20 just an ongoing competitive situation?

21 MR. REYNOLDS: I will object to counsel's
22 characterization of the testimony. I think at the moment
23 all we have been told by the witness is he observed some
24 CEI personnel knocking on doors of some customers of
25 NELP. I think counsel has drawn a conclusion from that

1 that constituted an attempt to take away NIEP customers.

2 I objected to that characterization. I haven't
3 heard that testimony.

4 CHAIRMAN RICLER: I don't like this practice of
5 having counsel summarize testimony but I thought he said he
6 directed his employees to interview the same people and that
7 they reported that the CEI representatives were asking for a
8 switch over of electric service based on the asserted lack
9 of reliability of NIEP.

10 Is that right?

11 MR. VOGLER: That is my understanding.

12 MR. REYNOLDS: I don't believe there is any
13 testimony to that effect by this witness.

14 MR. VOGLER: I believe there is.

15 MR. REYNOLDS: If he does, I think he can elicit
16 it from the counsel. He talked about knocking on doors and he
17 was asked how did he counteract it and he testified about
18 that, and, as I understand the activity that we have heard of
19 far, and sole activity, constitutes personal observation of
20 somebody knocking on doors and then his direction to his
21 people to follow up on that.

22 I believe that is the extent of the testimony. I
23 have no --

24 CHAIRMAN RICLER: The recollection of the Board is
25 otherwise. The recollection of the Board is that the NIEP

1 representatives or, rather, the CEI representatives were
2 knocking on these doors after outages and the reliability
3 was mentioned, and all three members of the Board have that
4 recollection.

5 We are going to help out in this one instance.

6 Mr. Hinchee, would you refresh our recollection as
7 to whether reliability was a part of the presentation of the
8 CEI employees who called upon customers of NSEP in the
9 circumstances you described?

10 THE WITNESS: That is correct, and my reaction to
11 that was to appoint specific people within our organization
12 and make it their duty to follow up behind any outage we
13 had had, and contact our customers to offset this activity,
14 as we considered it, by the CEI people.

15 MR. REYNOLDS: I believe that is different than
16 what we heard thus far, but I will accept that testimony.

17 CHAIRMAN RIGLER: Mr. Hauser?

18 MR. HAUSER: I would add that the last question
19 of Mr. Vogler was not directed towards eliciting of fact or
20 facts, but was directed towards an opinion from Mr. Hinchee
21 and I would object to it on the grounds there was no basis
22 laid for asking an opinion and, secondly, he is asking for an
23 opinion as to a conclusion which I think is the province of
24 this Board.

25 CHAIRMAN RIGLER: May I hear the question again.

1 please?

2 (The reporter read from the record as requested.)

3 CHAIRMAN RIGLER: I think that question could be
4 articulated a little more clearly.

5 MR. VOGLER: Does the Board's objection -- and this
6 is for clarification -- extend to the fact that I am asking him
7 for his opinion?

8 CHAIRMAN RIGLER: No.

9 MR. VOGLER: Which he derived as Commissioner of
10 Light and Power?

11 CHAIRMAN RIGLER: Rule 701 clearly permits us to
12 accept opinion testimony where that opinion testimony is
13 rationally based upon the perception of the witness and subject
14 to a clear understanding of the issues and under those
15 circumstances and in accordance with Rule 701 we will permit
16 opinion testimony.

17 BY MR. VOGLER:

18 Q Mr. Hinchee, in your opinion, during your term
19 as Commissioner of Light and Power, was the Illuminating
20 Company's attack on the reliability of the City's electric
21 system used in connection or in any way in which CEE operated
22 the 11 KV transfer points?

23 A Yes, it was.

24 Q Would you elaborate on that for me, please?

25 MR. HAUSER: Mr. Chairman, I submit that this is

1 again a request for an opinion which is clearly outside the
2 scope of the rule that you just announced.

3 In addition, it is asking for an opinion with
4 regard to CEI.

5 I don't think in any way this witness is qualified
6 or has any basis for expressing an opinion with regard to
7 CEI.

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CHAIRMAN RIGLER: Well, the Board will hold that
2 the opinion may be rationally based upon the perception of the
3 witness and we will permit the answer.

4 BY MR. VOGLER:

5 Q Would you please elaborate so that we can explain?

6 A Can I have the question again?

7 (The reporter read the record as requested.)

8 THE WITNESS: Well, I think, and it is my opinion,
9 that the program as outlined in the Bridges memorandum, set
10 the stage for the interruptions and the slowdown of work that
11 would create long delays in switching operations where
12 city services were involved, and this was a part of the attack
13 on the City's reliability and it was deliberately planned that
14 way.

15 BY MR. VOGLER:

16 Q Mr. Hinchee, did the City make a request of C&N
17 to participate in the Davis-Besse Nuclear Unit when you were
18 Commissioner?

19 A Yes, we did.

20 Q Did you make that request?

21 A Yes.

22 Q Did anyone else in addition to you make a request,
23 to your knowledge?

24 A Yes.

25 The Director of Utilities wrote a letter in that

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1 regard.

2 Q Did the City make a study before making the request
3 for participation?

4 A Well, it was immediately apparent upon my taking
5 office as Commissioner of Light and Power, that not only were
6 the short-term requirements of the City revolving around
7 this power supply, but also the long-term requirements. And
8 long-term requirements did not include any further construction
9 on the lakefront, and I initiated a request to participate
10 in the recently then -- then recently announced construction
11 and licensing of the Davis-Besse plant, and I requested 300
12 megawatts of that power.

13 CHAIRMAN RIGLER: Of whom was the request made?

14 THE WITNESS: To CEI.

15 CHAIRMAN RIGLER: And to any of the other Applicants?

16 THE WITNESS: Not at that particular time. What
17 was an initial request.

18 BY MR. VOGLER:

19 Q You made your request to CEI?

20 A That is correct.

21 Q Was it in writing, sir?

22 A Mine was verbally and the Director's request was
23 in writing.

24 Q Do you recall the response to your requests,
25 your personal requests?

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1 A Well, the response was negative.

2 Q Why did you request 200 megawatts, which is a
3 rather substantial portion?

4 A Well, our plant capacity was around a little over
5 200 megawatts and based on the timeframe in which the
6 nuclear construction would take place, it appeared that 200
7 megawatts of power would supply some replacement for our
8 existing facilities and also take care of some growth that we
9 might experience during the summer period.

10 CHAIRMAN RIGLER: Was any reason given with respect
11 to why you were turned down on your initial request?

12 THE WITNESS: I don't think so.

13 I don't recall that there were any real reasons
14 given for a turndown. There were vague statements made that
15 took the position of the City lightly, that that would cost
16 \$50 million and where would the City -- you know -- come up
17 with \$50 million.

18 So the attitude on the part of CEI was that this
19 was not a serious request.

20 CHAIRMAN RIGLER: Was there any reference made to
21 any consultation between CEI and any of the other Applicants
22 with respect to the City's requests?

23 THE WITNESS: Not at the initial request, but in
24 later requests there were references made to consultation.

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1 BY MR. VOGLER:

2 Q Mr. Hinchee, at the time you made your requests
3 to CEI --

4 CHAIRMAN RIGLER: Which requests?

5 He has testified there were initial requests and --

6 MR. VOGLER: Your question, your Honor, is what I
7 am now trying to get clear, unless I misunderstood your
8 question.

9 CHAIRMAN RIGLER: I am confused about the number
10 of requests.

11 He testified he made an oral request. He testified
12 the City made a written request --

13 MR. VOGLER: To CEI.

14 CHAIRMAN RIGLER: And he has indicated there may
15 yet be additional requests beyond those.

16 I don't think you have testified those, do you know,
17 Mr. Vogler? It would be helpful to the Board if you did.

18 MR. VOGLER: Okay.

19 Fine.

20 BY MR. VOGLER:

21 Q Let me clarify something in my own mind, first.

22 Your request went to CEI?

23 A That is correct.

24 Q That was followed by a written request from the
25 Director of Utilities, who would be who?

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1 A At that time it was Gaskill.

2 Q Mr. Gaskill.

3 Do you know where his request went?

4 A To CEI.

5 CHAIRMAN RIGLER: When were those two requests
6 made?

7 THE WITNESS: Early in 1971, early in my tenure of
8 office, that is.

9 CHAIRMAN RIGLER: You joined the City of Cleveland
10 in March of '71, and it was shortly thereafter that you made
11 your oral request, and that the City Director of Utilities
12 made his written request?

13 THE WITNESS: That is correct.

14 CHAIRMAN RIGLER: When was the next request made?

15 THE WITNESS: The next request was made after the
16 announcement of plans for construction of an additional
17 nuclear plant at Perry, Perry No. 1, which was also in the
18 Cleveland vicinity.

19 At the time we made the original request for 200
20 megawatts, we did not know of any additional plans for
21 additional nuclear plant construction. And when we heard of
22 it, we renewed the request.

23 CHAIRMAN RIGLER: Do you have a timeframe on that?

24 THE WITNESS: I would say that was in 1972, about the
25 middle of the year.

1 CHAIRMAN RIGLER: To whom was that request
2 made and by whom?

3 THE WITNESS: We went on the second request on
4 a little more formal basis; than we had on the first request.
5 We had initiated discussion with CEY again, and we hired
6 an engineering firm to give us sort of a feasibility report
7 on our participation in these various nuclear projects, rather
8 than taking an in-house study.

9 CHAIRMAN RIGLER: But to whom? To whom were
10 the requests addressed?

11 THE WITNESS: To all CAPCO members.

12 CHAIRMAN RIGLER: This was in 1972?

13 THE WITNESS: Yes.

14 CHAIRMAN RIGLER: Was this again a request for
15 Davis-Besse power or Perry power or either?

16 THE WITNESS: No. We had found out during the
17 interim time of the plan for additional units, and we did not
18 need the 200 megawatts of power all in one allocation, so we
19 spaced out the needs of the City.

20 I think we asked for some power at Denver Valley
21 Plant and some in Perry 1 and 2 and some in Davis-Besse,
22 and we split that request for 200 megawatts up between those
23 four units, four or five units.

24 CHAIRMAN RIGLER: This was a written request of the
25 members of the CAPCO Board?

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1 THE WITNESS: That is correct.

2 CHAIRMAN RIGLER: Were there any other requests
3 after the 1972 request?

4 THE WITNESS: To the best of my recollection,
5 that action carried on through -- it was the question
6 whether or not we could participate, carried on through
7 to the activities of the AMP/P group, and we didn't get that
8 matter resolved when I left there. I had not had a
9 resolution on that request.

10 BY MR. VOGLER:

11 Q Mr. Kinchee, when you were commissioner of
12 light and power, did you or your staff consider the
13 possibility of the City building a nuclear unit?

14 A We will very slightly. The size of the nuclear
15 unit also and the practicality of building a nuclear unit
16 for just the City of Cleveland was not a feasible operation
17 at that point, and it still involved -- had such a unit
18 been contemplated, still involved cooperation of the
19 CAPCO pool member to transmit the power, so we felt we
20 could afford a partial participation in the units then
21 planned or under construction.

22 We did not realistically consider construction
23 of additional units.

24 Q Mr. Kinchee, in view of your experience as
25 commissioner of light and power for the City of Cleveland,

1 would it be possible for the City to survive as a viable
2 electric entity without a synchronous interconnection with
3 the Cleveland Electric Illuminating Company?

4 A No. The premise has been proved over and over
5 by the operating record of all the operating utilities in
6 this country, that interconnection is absolutely necessary.

7 Q Even with such an interconnection, would you still
8 require some form of access to nuclear power?

9 A Certainly.

10 Q Could you elaborate on that?

11 A The interconnection simply provides a vehicle
12 for improving your system reliability, but it also provides
13 a vehicle for obtaining power from other sources and it would
14 not be feasible to consider, you know, a nuclear plant or
15 even a large plant of any kind to be constructed right in
16 the City of Cleveland.

17 We would require that interconnection for delivery
18 of any power where we owned a part of the plant, in any
19 remote location.

20 So it was vital to the operation, both as
21 standby or emergency or base load or any of the other
22 situations that could occur.

23 Q Even with the full synchronous interconnection as
24 just described, even with full access to nuclear, in your
25 opinion when you were commissioner of light and power, would

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the City require wheeling in order to be a viable electric unit?

A Yes. It would.

Q Would you elaborate on that for a minute, as to why?

A Well, it would --

MR. HAUSER: Mr. Chairman, perhaps before we start based upon our experience, through long course of depositions, we could have wheeling, as this witness understands it, defined.

BY MR. VOGLER:

Q Mr. Rinchee, what does wheeling mean to you?

A Wheeling means the delivery of bulk power from a source to a point of supply over existing transmission lines.

MR. HAUSER: If this is the witness' definition of wheeling.

THE WITNESS: Is there any other?

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BY MR. VOGLER:

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Q Let me see if I can make it more clear. What

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does third-party wheeling mean to you?

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A Well, third-party wheeling means that the third

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party simply owns interspersed transmission and that they are

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really not a party to the contract other than providing

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transmission services.

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The power supplier is a second entity and the person

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purchasing the power would be a first entity.

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The third party, wheeling, would be just that,

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transmitting the power for these two people, who had a

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contract.

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MR. VOGLER: I had one final question in this

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section which we dropped in order to clarify. That was why

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wheeling would be necessary for the City of Cleveland. Third-

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party wheeling, as you have described it. I will rephrase it.

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BY MR. VOGLER:

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Q Even with the full synchronous interconnection we

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have just described, and even with access to the nuclear

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power that we have just discussed, in your opinion, when you

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were Commissioner of Light and Power, did NELEP still require

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third-party wheeling in order to be a viable electric entity?

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A Yes, in my opinion they would require wheeling.

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Q In addition to the other?

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A In addition to the other.

1 A In addition to the other.

2 MR. VOGLER: I can go on and I am at a logical
3 break.

4 CHAIRMAN RIGLER: This is a good point to break.

5 MR. VOGLER: Or I can finish.

6 CHAIRMAN RIGLER: How much more time would you need?

7 MR. VOGLER: To an extent, that depends on my friend
8 over here on the right. I have ten minutes.

9 CHAIRMAN RIGLER: I think maybe we will start
10 tomorrow.

11 MR. SMITH: Before we adjourn, your answer to
12 Mr. Vogler's question, you used the word simply wheeling
13 would be necessary. Mr. Vogler's question was third-party
14 wheeling.

15 Now, do you believe that third-party wheeling as you
16 have defined it is essential to the survival of MESA?

17 THE WITNESS: Yes.

18 CHAIRMAN RIGLER: You might ask him why, or to
19 elaborate as you have been asking on that, when we resume in
20 the morning.

21 MR. REYNOLDS: I can take it up in the morning.

22 Mr. Smith's question was something different
23 from what Mr. Vogler's was.

24 MR. SMITH: That is the way I asked it.

25 MR. REYNOLDS: I appreciate that. You concluded

1 your question with the survival of MELP. Mr. Vogler talked
2 in terms of viable competitor.

3 MR. SMITH: I intended to ask the same question
4 Mr. Vogler did.

5 MR. REYNOLDS: That is what I anticipated. I just
6 wanted to clear it up.

7 CHAIRMAN RIGLER: I want to go back to a subject
8 we discussed earlier, namely the degree of Mr. Hauser's
9 participation.

10 I mentioned in the course of giving the Board's
11 preliminary thoughts the problem of credibility. And I want
12 to make clear exactly what I meant with respect to
13 Mr. Hauser's credibility.

14 I was referring to that portion of Canon 5-9. It
15 says an advocate who becomes a witness is in the unseemly
16 and ineffective position of arguing his own credibility.
17 That was my reference in terms of his participation in cross-
18 examination.

19 I want to make that clear.

20 As a matter of fact, the rest of that canon is
21 instructive. The roles of an advocate and a witness are
22 inconsistent. The function of an advocate is to advance or
23 argue the facts of another while that of a witness is to state
24 facts objectively.

25 As you consider this and as the other parties

1 consider whether or not they are going to make a motion
2 to disqualify, we couldn't help but note that the WRC
3 Exhibit 70, which is a letter from Mr. Hauser relating to
4 wheeling and transmission agreement which is written to the
5 counsel for AMP/O, again, raising the question in our minds,
6 and we encourage you to consider it further overnight.

7 The Board will do what it considers it has to do, but
8 I think you have a serious problem and I wish you would
9 consider it.

10 Tomorrow morning we will begin at 10:30.
11 That will conclude today. Let's go off the record.

12 (Whereupon, at 4:30 p.m., hearing in the above-
13 entitled matter was adjourned, to reconvene at 10:30 a.m.,
14 Tuesday, 6 January 1976.)

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