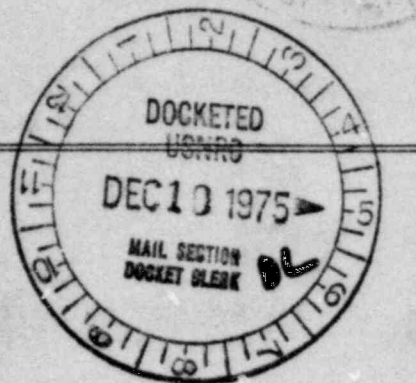


Regulatory Docket **FILE**



NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY AND
CLEVELAND ELECTRIC ILLUMINATING CO.

Docket Nos.

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

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

and

CLEVELAND ILLUMINATING CO.,
et. al.,

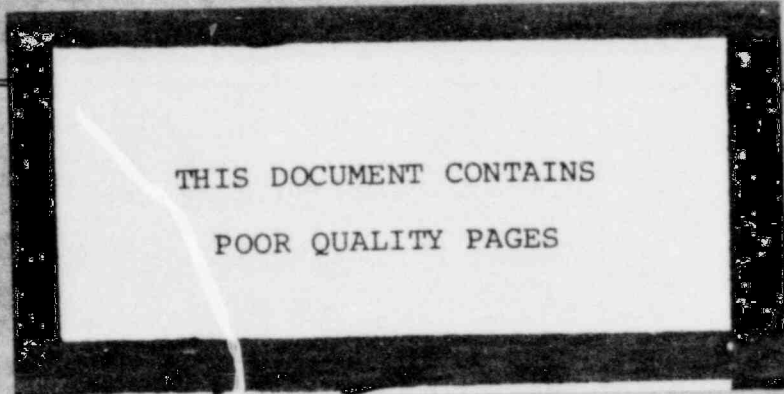
50-440A
50-441A

(Perry Nuclear Power Plant, Units
1 and 2)

Place - Silver Spring, Maryland

Date - 9 December 1975

Pages 1662 - 1812



Telephone:
(Code 202) 547-6222

ACE - FEDERAL REPORTERS, INC.

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

NATIONWIDE COVERAGE

8002 260 771 N

13774

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

-----X	
In the Matter of:	:
	:
TOLEDO EDISON COMPANY and	:
CLEVELAND ELECTRIC ILLUMINATING CO.	: Docket Nos.
	:
(Davis-Besse Nuclear Power Station,	: 50-346A
Units 1, 2 and 3)	: 50-300A
	: 50-501A
and	:
	:
CLEVELAND ELECTRIC ILLUMINATING CO.	: 50-440A
et. al.,	: 50-441A
(Perry Nuclear Power Plant, Units	:
1 and 2)	:
	:
-----X	

First Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland

Tuesday, 9 December 1975

Hearing in the above-entitled matter was convened,
pursuant to adjournment, at 9:45 a.m.,

BEFORE:

- MR. DOUGLAS RIGLER, Chairman
- MR. JOHN FRYSIAK, Member
- MR. IVAN SMITH, Member

APPEARANCES:

As heretofore noted with the addition of:

TERENCE PENNELL, Esquire, 40 Wall Street, New York,
New York, on behalf of Ohio Edison and Pennsylvania
Power Company.

eak

C O N T E N T S

<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>
Robert McCabe, Jr.		1719

<u>EXHIBITS:</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
NRC Staff Exhibit 25-- NRC Document No. 27	1698	1698
NRC Staff Exhibit 26 - NRC Document No. 28	1698	1698
NRC Staff Exhibit 27 - NRC Document No. 29	1699	1699
NRC Staff Exhibit 28 - NRC Document No. 30	1702	1702
NRC Staff Exhibit 29 - NRC Document No. 43	1706	
DJ Exhibit 1 -- DJ Document No. 116949	1733	1733
DJ Exhibit 2 -- DJ Document No. 105004	1735	1735
Applicants Exhibit 1 (DL)- Financial Survey of the Borough of Pitcairn	1774	
Applicants Exhibit 2 (DL) - Loftus Corporation letter to R. D. Evans dated March 16, 1959	1795	1808

P R O C E E D I N G S

CHAIRMAN RIGLER: On the record.

MR. LESSY: Mr. Chairman, at the beginning of the afternoon session staff reserved the right to make a motion with respect to the document identified for hearing as NRC Staff Document Number 12 which had the original stamp of NPC-40.

In light of the clear and overwhelming precedent at the NRC, Appeal Board, Licensing Board, Supreme Court and others with respect to hearsay evidence, we would like to present a short presentation with respect to the offering of that document into evidence.

CHAIRMAN RIGLER: How will you propose to offer it into evidence, Mr. Lessy?

MR. LESSY: We will do it two ways.

The first way is the way we originally sought, which is as a document produced by Duquesne on discovery, as a document which Mr. McCabe was able to identify as having received the body of it. And the second way would be as an unsponsored exhibit.

CHAIRMAN RIGLER: We have ruled against you on the first way in that Mr. McCabe conceded that the document sought to be introduced was not identical to the one he received.

As an unsponsored exhibit --

(The Board conferring.)

CHAIRMAN RIGLER: We will hear you, Mr. Lessy.

MR. LESSY: Mr. Goldberg will present the argument with respect to that document, Mr. Chairman.

MR. GOLDBERG: Mr. Chairman, I would like to make comments about the receipt of evidence in this proceeding in general and in particular about NRC Document Number 12.

This is not a criminal case. We are not even in a civil case in Federal District Court. This is an administrative agency. Accordingly, the strict rules of evidence should not be applied in this proceeding.

With respect to Document Number 12, I would like to point out a case which is directly on point. Lennox, Incorporated versus FTC.

In that case the FTC received documents from respondent's files. The FTC attempted to introduce those documents into evidence and the respondents claimed the FTC must authenticate the documents first.

The Commission held that the burden of proving they are not genuine was on the respondents.

That case was affirmed by the Second Circuit Court of Appeals.

CHAIRMAN RIGLER: Do you have a citation on that case, Mr. Goldberg?

MR. GOLDBERG: I have a citation to the Commercial Clearinghouse Trade Report 1969 Trade Cases

Paragraph 72,937, 417 F. 2nd 162.

Furthermore, the Administrative Procedure Act is applicable to this proceeding by virtue of the Atomic Energy Act of 1954.

The Administrative Procedure Act says "Any or all documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence."

This document is not irrelevant. It is not immaterial. And it is not unduly repetitious.

Under the provision of the Administrative Procedures Act, we submit the document should be received into evidence.

The NRC Rules of Practice parallel the words of the Administrative Procedures Act. Particularly Section 2.743(c) concerning relevant material and reliable evidence and providing that unduly repetitious evidence will not be received into evidence.

I will also direct your attention to the appendix to 10 CFR Part 2, Appendix AV(7) which talks about that provision.

CHAIRMAN RIGLER: What was that citation again?

MR. GOLDBERG: CFR 2.743 (c) Appendix A, V(7).

In addition, we have an Appeal Board decision that has talked about evidence before the Atomic Safety and

Licensing Board. That opinion is ALAB 226 found at RAI-74-9.

In that case the Board readily admitted hearsay evidence. There were objections to the admission of hearsay evidence. In the opinion the Appeal Board said there can be no doubt that administrative adjudicatory tribunals such as a Licensing Board is not bound to observe the exclusionary evidentiary rules governing a trial of a case before a jury. Citing Davis Administrative Law Treatise.

CHAIRMAN RIGLER: What proceeding was that?

MR. GOLDBERG: That was in the matter of Commonwealth Edison Company, Zion Station Units 1 and 2.

The Supreme Court of the United States has also talked about receipt of evidence before federal administrative agencies.

I quote now from *Opp Cotton Mills, Incorporated versus Administrator* found at 312, U.S. 126, page 155, 1941 case.

I quote the argument of the petitioners is that this class of evidence must be ignored because not competent in a court of law but it has long been settled that a technical rules or the exclusion of evidence applicable in various trials do not apply to proceedings before federal administrative agencies in the absence of statutory requirement that such rules are to be observed.

McCormacks Handbook of the Law of Evidence,

second edition, 1972, talks about the receipt of evidence before administrative tribunals. In particular it speaks about the Administrative Procedures Act. It says "None that the APA opens the door to any evidence which the Examiner admits and only suggests that insignificant and redundant evidence should be rejected given the agency's broad discretion. Moreover, the APA omits hearsay or other incompetent evidence from the list of evidence that should not be received. Thus the inclusion of otherwise illegal evidence from administrative hearing may be error. It is clear that the exclusion of relevant material and competent evidence by the trial examiner will be found for reversal if that refusal is prejudicial.

McCormack goes on to discuss Samuel H. Moss, Incorporated versus FTC, 148 F. 2nd 378 2nd Circuit 1945.

In that case the language of the court was in terms of admitting "all evidence which can conceivably throw any light upon the controversy."

I would also refer the Board to Kenneth Culp Davis Administrative Law Text, Third Edition, 1972, Section 1405 at pages 276.

I would like to say in conclusion that I think it is clear by the law, case law as well as the statutory law, that there must be made in this proceeding broad provisions for the inclusion of all relevant and

material evidence.

Staff Exhibit Number 12 which was marked internally as NRC Staff Exhibit 40 should be admitted into evidence in this proceeding based upon the foregoing comments which I have made.

To do so cannot be error. To exclude that document clearly is error under my previous comments.

Thank you very much.

If the Board has any questions, we would be glad to prepare a brief on this subject matter.

EAK 2mm1 1 MR. REYNOLDS: Mr. Chairman, I think Mr. Lerach should
2 address the specific document in question in response to those
3 remarks.

4 I would like to say just generally in response to
5 what Mr. Goldberg said, that while we recognize this is not
6 a trial, also it has got to be recognized, I think, that we
7 are not in a hearing here that is analogous to the Safety and
8 Environmental hearings that this Commission is more used to.

9 This is an adversary proceeding. We do have an
10 accusatory situation where the Applicants are, as the Appeal
11 Board in Kansas City said, in a very real sense, defendants.
12 I think that is an important factor in terms of trying to make
13 a decision as to what kind of evidence will be admitted, and
14 what weight will be attached to that evidence.

15 Now, I fully recognize that in the Administrative
16 context, the Boards are more lenient with what evidence comes
17 before the Board mainly because it is believed that the
18 Board is certainly equipped to make a judgment on reviewing
19 all of the evidence before them as to what weight should
20 attach to it.

21 I feel, and I feel strongly that as soon as we
22 start walking down the road in this case with unsponsored
23 exhibits, you are going to find that the Applicants are at
24 a severe disadvantage on cross-examination, for example.

25 You are also going to find --

mn2 1 CHAIRMAN RIGLER: How would you be at a disadvantage
2 with respect to a document which concededly came from one of
3 the Applicant's own files?

4 MR. REYNOLDS: I said at the outset I would like
5 Mr. Lerach to address the document specifically.

6 I think this is appropriate since this is the first
7 time the Board has focussed on the concept of unsponsored
8 concepts, to put forth a few general concepts that should be
9 kept in mind.

10 I can understand if there is a stipulation as to
11 authenticity and if the document comes from their files, that
12 there may be some difficulty on the matter of cross-examination.

13 I would point out, however, that when you introduce
14 an unsponsored document, you also have the -- you don't have
15 the knowledge as to what followups there might be in the
16 correspondence, or what other documents bear on the situation,
17 and what the result is as you turn the burden of proof around
18 and the defendants are given the burden of proving the negative
19 as opposed to the moving parties proving the affirmative.

20 CHAIRMAN RIGLER: Suppose the document came in
21 properly. That burden would rest with the defendants. It
22 wouldn't be the Staff's burden to ask the proper followup
23 questions, as far as the Applicants were concerned.

24 MR. REYNOLDS: But, your Honor, you see if you
25 have a witness on the stand and it is a sponsored document,

mm3 1 then you have the opportunity to cross-examine. You don't have
2 the ability at that point to stand up and if a document comes
3 in and there is only one part of correspondence by cross-
4 examination you can put the full record before the Board.

5 When you start having unsponsored documents coming
6 in, we have to wait for one full side of the case to come on
7 and then we are talking about the burden of proof being on
8 the Applicants to prove the negative without having an oppor-
9 tunity to cross-examine at the right time to tie up the
10 evidence as it comes in. It makes for a fuzzy, incomplete
11 record, a confusing record, and it seems to me it doesn't give
12 the proper opportunity for the party that is a defendant to
13 make the record that should be made on cross-examination with
14 respect to documentary evidence as it comes in.

15 I do think that you have got a serious situation
16 here where you are in an adversary proceeding, where you do
17 have serious accusations that have been made and where the
18 defendants, and they are defendants, should be given the
19 opportunity as the documentary evidence comes in, to cross-
20 examine on that evidence.

21 The problem that I see coming, and we have seen
22 it before, is that this Board is going to have put in their lap,
23 unsponsored documents of a tremendous volume. Then it is going
24 to be the Applicants' burden to sift through this material, and
25 on their affirmative case to come in with witnesses and to give

mm4 1 the Board the complete record by showing what the correspondence
2 is that was left out of this volume of documents, the followup
3 letters, what was said in response to what seems to be a very
4 damaging letter.

5 This is the pattern we have had in antitrust hearings
6 prior to this time. It seems to me we can well anticipate this
7 as being the same pattern in this case.

8 When you start having a procedure of that sort, it
9 clouds the record. It does not make a complete record and
10 it puts the Applicants in the unfair advantage of shifting
11 them -- shifting the burden to them to prove the negative
12 of a situation which shouldn't be.

13 It seems to me that the burden is on the other party
14 to prove their case. They ought to come in and prove it
15 with documentary evidence introduced in a proper manner to
16 give the opportunity to all Applicants to cross-examine on
17 that territory and to give the Board, as to the particular
18 documents, the full record it should have at that time with
19 respect to that particular correspondence, or that particular
20 documentation.

21 I think what I see down the road, and what I am
22 afraid is going to happen is that you are going to be handed
23 a batch of documents that is three times as thick as this.
24 They will be unsponsored documents, and then the case is going
25 to turn and it is now going to be the Applicants' burden to
go through and disprove on a document-by-document basis, that

mm5

1 mass of material, and in a record that will be terribly con-
2 fusing and terribly incomplete, and you will not have a feel
3 for what it is that this case is all about until we get
4 through the end of an awful long hearing.

5 I question seriously in this kind of context, where
6 you have an adversary proceeding and you have real defendants
7 and you have serious charges, whether that is the proper way
8 to approach the kinds of allegations that have been made here.

9 MR. SMITH: Mr. Reynolds, do you have any recommenda-
10 tions to the Board in how we may properly consider this information
11 on that Exhibit?

12 MR. REYNOLDS: Properly consider -- well, I guess if
13 we are going to have a proceeding where we are talking about
14 unsponsored documents, and they are going to come in on a
15 hearsay basis, and so on, I would suggest that the proper
16 way to do it is to have an offer of proof as to each document,
17 and to allow the Applicants to respond to that particular
18 document as it is being offered.

19 Now, I would suggest that Mr. Lerach can do that
20 with respect to this document. It seems to me -- I can
21 appreciate that there is -- that this Board may feel an
22 unsponsored document can come before it and it will attach
23 whatever weight it feels appropriate.

24 I am saying if we are going to proceed in that way,
25 we ought to do it in a manner which will give this Board a

mm6
1 very complete record as to the documents, and a very manageable
2 transcript and hearing in this case.

3 I think if that is the way we are going to proceed,
4 the best way to do it is to have an offer of proof as to the
5 documents, and give the Applicants an opportunity to respond
6 at that time.

7 CHAIRMAN RIGLER: Mr. Goldberg, we will hear you
8 after Mr. Lerach.

end 2
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CR6422
AK:bwl
3

MR. LERACH: If it please the Board: I took -- first of all, I must tell you I'm a product of my own experience, and I'm used to trying cases in federal court, and I do realize this is a somewhat different arrangement.

I'm aware there are more lenient rules applied here as to evidence. Even so, the rules of practice before this Agency and the section dealing on evidence, and I don't know the citation by heart, speaks specifically of receiving reliable evidence.

Reliable evidence to me has at least some part of the concepts of authenticity within it that have grown up over hundreds of year in trial practice in our common law courts.

So the Board will appreciate this, a great many documents were received in evidence yesterday that came from my company's files. I did not object to the authenticity of a single one of those, save Staff Exhibit Number 12.

As long as a document is dated, as long as a document is signed and as long as at least I have seen it before, I will not try to prevent the documents coming into evidence.

I will not make Mr. Lessy fly people in from all over the world to authenticate them. I did not object to the body of Staff Exhibit 2. It is dated and signed. If I may approach the Board, I want to demonstrate to you why I feel

bw2
the denotation on the bottom of this letter is called into some question. I would invite Mr. Leszy to come with me, since I only have one copy of what I want to show you. I want you to appreciate the basis for my concern.

Here we have Staff Exhibit 12 which has an unsigned, undated, typewritten notation at the bottom. Now, I don't think it was unreasonable for me to be somewhat concerned about the authenticity of that language, when I also have in my files other documents where people from the company have circulated correspondence among other officers of the company. But if you will, see in the other cases the name of the person doing the circulating or making the typewritten notation at the the bottom is typed below the notation.

It felt it was especially significant that the letter that Mr. Flegler circulated on January 30, 1968, was apparently signed by Mr. Flegler above the notation.

Now, Staff Exhibit 12 doesn't have that. I'm not saying Mr. Flegler didn't type it. I'm not saying Mr. Flegler didn't circulate. I don't think it is unreasonable for me to require some authentication of that beyond the fact that it "came from my files." How do we know a secretary didn't type it? This has implications, it seems to me, well beyond my client. While the statement itself is, on its face, innocuous and reflects a consensus to meet and talk with Pitcairn, perhaps Mr. Berger doesn't like that statement.

Perhaps he doesn't believe it's a consensus. Perhaps he doesn't believe discussions occurred.

How is Mr. Berger to cross-examine to protect his client's rights? We don't know who wrote it. Unless it is authenticating, all of the applicants are placed at a disadvantage. I'm willing to go forward with the hearing. I will not give Mr. Lessy or anyone from the government a hard time in putting signed and dated photo copies into evidence. We all have to do that to expedite the hearing, to get the facts before the Board. But I have to protect my clients' rights as to marginal notations or unauthenticated, unsponsored typewriting at the bottom of documents.

MR. SMITH: Who among us is better able to resolve any questions as to authenticity of that document?

MR. LERACH: I submit we are all in some difficulty on that, sir. Mr. Fieger doesn't work for the company any more. He is a director of the company. I don't feel I have any special call upon him that someone else wouldn't have.

MR. SMITH: As to your clients' records, who has the best resources to resolve this little mystery here?

MR. LERACH: If you are saying, do I have the ability --

MR. SMITH: I'm suggesting that, yes.

MR. LERACH: I can go back to the company easier than Mr. Lessy can and start interrogating nine or ten people

b7d

shown as getting copies. Certainly, I can do that. I think the question is, is that my burden? If it is going to be my burden, so be it; I will do it, but I don't think it is fair.

MR. SMITH: Look where we are. The Staff has come up with one version of this footnote and circulation. Justice has come up with two others showing circulation to other people. So three versions of this document have come from this file now. If this is not resolved against whome, if anybody, should any inferences be drawn. A strong case has been made to show that this exhibit has come from our files --

MR. LERACH: And I will not dispute that.

MR. SMITH: You have, if anybody does, the resources required to resolve any confusion about this document. If you fail, to do it, it seems to me you are risking an inference here you may not want.

MR. LERACH: If you want to put that burden on me, so be it, and I will meet the burden, as I have the other burdens in this case. Do you think the value of this evidence is different, if Mr. Flegler wrote this or Mr. Flegler's secretary, on her own, wrote it?

MR. SMITH: Isn't this weight now?

MR. LERACH: We are talking about weight. My particular question goes to weight. I'm not surrendering

the question of authenticity, until I know who typed it.

CHAIRMAN RIGLER: You just conceded it came from your company's files.

MR. LERACH: I think it did come from my company's files.

CHAIRMAN RIGLER: I thought yesterday evening you would check further with Mr. Gilfillin.

MR. LERACH: I'm checking.

CHAIRMAN RIGLER: He was here yesterday.

MR. LERACH: And he is here today.

CHAIRMAN RIGLER: What answer has he given you with respect to this document?

MR. LERACH: The belief is a substantially similar copy of the document, the Staff has, is in our files. Showing the copies in the parenthetical --

CHAIRMAN RIGLER: Bearing the footnote, this reply bears the consensus of the other CAPCO companies.

Mr. Lerach, in what respect is the copy from your company's files different from NRC-40?

MR. LERACH: It has initials on it, basically.

CHAIRMAN RIGLER: Whose initials were they?

MR. LERACH: I honestly can't tell you.

There are initials and a date.

joni

CHAIRMAN RIGLER: Once again we come to a problem where there is additional material within the control of your client.

If you have authenticity problems, wouldn't it be logical to go to that individual with the initials and start there to find out the origins of the document?

MR. LERACH: I don't disagree that I can track down the origin of the document. It is a question of burden. I don't think we ought to unreasonably delay the proceedings over this particular document. It is not a particularly important thing.

I realize Mr. Lessy was surprised by the strength of the objection. I only made it -- it was not this document as such. It came up at that time.

I felt we ought to get the authenticity issue before the Board to straighten it out.

If it will expedite the proceedings, I will let Mr. Lessy put this one in but can we have some understanding then in the future if there is going to be an attempt to put "unsponsored language", undated and unsigned language in, that we have to come to grips with that and come to some ruling on it.

To get the hearing moving along today, put this one in, it's fine.

CHAIRMAN RIGLER: It will be received into

evidence.

(NRC Staff Exhibit 12, previously marked for identification, was received into evidence.)

CHAIRMAN RIGLER: In order that the record be quite clear, the document we are receiving into evidence is the one designated NRC Staff for identification purposes and bearing internal NRC Staff 40, so that it is the copy of the document which does contain the copies to notation and the footnotes we have been discussing.

That will be received in evidence as Exhibit 12.

MR. MELVIN BERGER: I would like to take care of housekeeping chore if I may.

While Mr. Lerach was speaking before. He referred to Mr. Berger. I would like the record to show that it was Mr. Steven Berger.

I would like when people speak of Mr. Berger that they make a distinction to keep everything straight.

MR. REYNOLDS: I would like to note the other Applicant's continuing objection to the introduction of the last exhibit for the reasons already on the record.

CHAIRMAN RIGLER: The ruling will be the same as yesterday. It will be overruled.

MR. REYNOLDS: Mr. Steven Berger has a matter that

we would like to bring up. Can we go off the record?

CHAIRMAN RIGLER: Off the record.

(Discussion off the record.)

CHAIRMAN RIGLER: Back on the record.

MR. STEVEN BERGER: At the outset yesterday, Mr. Chairman, you indicated that you had reached decisions with reference to the Department's motion to amend their interrogatories to include the additional charge and with regard to Ohio Edison's motion for additional discovery and with regard to the procedural matters that Applicants have raised generally.

I understood that the opinion from the Board with regard to the procedural matters would not be coming forth until the Christmas break.

CHAIRMAN RIGLER: It may be earlier, Mr. Berger. It depends on how soon we can refine it and get it out.

MR. STEVEN BERGER: My inquiry was when the written opinion of the Board would be forthcoming in regard to the other decisions.

CHAIRMAN RIGLER: We are hoping to give you those this week.

For planning purposes, since you know the results, it doesn't pose a problem.

I indicated we would try to tell you the exact provisions of the grant of your pleadings for additional

discovery. I don't know if I can do that this afternoon or not but we will try.

MR. STEVEN BERGER: As soon as possible. I would appreciate it. Thank you.

Whereupon,

ROBERT McCABE, JR.

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

DIRECT EXAMINATION (Continued)

BY MR. LESSY:

Q Have you been contacted in your capacity as Solicitor of Pitcairn by a representative of Duquesne Light Company concerning the sale of electrical facilities of the Borough of Pitcairn to Duquesne?

A Yes, I have.

This matter frequently was under discussion. Specifically with respect to that I recall a meeting with Mr. Marrison very shortly after I became Solicitor for the Borough of Pitcairn he called on me in my law office. He suggested the appropriate action for the Borough would be to sell its electrical power system to the Duquesne Light Company.

MR. REYNOLDS: Mr. Rigler, can the continuing objection we made yesterday as to testimony which the other Applicants wish to raise, the Applicants other than Duquesne Light wish to raise, remain as a continuing objection on the

record? May that be renewed and continued?

CHAIRMAN RIGLER: It may. It won't be necessary to do that daily.

MR. REYNOLDS: It would depend on the testimony. That is why I am sensitive.

CHAIRMAN RIGLER: Then raise it in each case.

MR. REYNOLDS: Yes, sir.

BY MR. LESSY:

Q Mr. McCabe, are you aware of any other contacts regarding acquisition of the system between Duquesne and the Borough of Pitcairn?

A Each time that we met with Mr. Merriman -- this was often on an informal basis -- the subject generally came up and he generally made this request. In fact, Mr. Merriman had prepared a small brochure which he made available to me pointing out the advantages of selling the system to Duquesne Light.

I might even note that Mr. Merriman called to my attention the personal benefits to myself as Solicitor with respect to the size of the legal fees which I could charge in connection with such a transaction.

Q Which you could charge Pitcairn?

A That's correct.

Q Are you aware of any contacts -- do you have personal knowledge of any contacts by members of the

Duquesne Light Company staff to officials of Pitcairn other than yourself?

A Well, many times when -- let me explain this a little bit.

Doquesne Light, as part of its public relations policy, had Mr. Merriman and Mr. Heisley attend the Borough's association convention.

All members of the Pitcairn Borough Council normally attend that.

At that time there were frequently informal discussions with Mr. Merriman.

I am aware that this matter was suggested in an informal basis to various members of the Council at that time. I am also aware that contact was made of Mr. Joseph Grizzo shortly after he was elected to Council, I believe in early 1958 by Mr. Merriman.

These matters were discussed.

CHAIRMAN RIGLER: Do you know Mr. Merriman's title or position?

THE WITNESS: My understanding was that Mr. Merriman was their municipal representative, in charge of sales.

MR. SMITH: There was an exhibit which designates him as vice president for government sales.

THE WITNESS: If he were a vice president, I

was unaware of it. He had the title of Director, Governmental Sales Department.

MR. LERACH: For the Board's clarification, it is my understanding Mr. Merriman was not a vice president but was a representative for municipal sales.

MR. LESSY: Could we have clarification as to what municipal sales means in the title?

↳

1 MR. LERACH: I'm sorry.

2 CHAIRMAN RIGLER: Were you going to respond to
3 Mr. Lesby's inquiry? I don't know if you heard it, even.

4 MR. LERACH: I don't know if I heard it.

5 CHAIRMAN RIGLER: He asked for some clarification
6 of municipal sales.

7 MR. LERACH: If you want me to tell you what it is,
8 I will.

9 Duquesne Light sells power --

10 CHAIRMAN RIGLER: Mr. Lesby, do you want an answer
11 to your question?

12 Mr. Learch is willing to state it.

13 MR. LERACH: Duquesne Light sells power to
14 between 130 and 140 governmental units within its sales
15 area, for a variety of purposes, governmental purposes, street
16 lighting, water plants, et cetera.

17 These are customers that need to be supervised and
18 contacted as any other sales staff. This is one area of govern-
19 mental sales.

20 Mr. Merriman worked in that department.

21 MR. SMITH: Exhibit 18 demonstrates that he is the
22 director of governmental sales.

23 MR. LERACH: Could you give me the Staff document
24 number, six?

25 MR. SMITH: That is Document No. 45.

1 CHAIRMAN RIGLER: Let's proceed, Mr. Lessy.

2 MR. LERACH: The answer is, that is his title. I
3 don't want you to be under the misimpression he was chairman
4 or director of the company. He was a middle-level employee.
5 The director meant he supervised four or five people under
6 him.

7 BY MR. LESSY:

8 Q Mr. McCabe, do you have knowledge of any acquisition
9 by the Duquesne Light company during the last ten years?

10 A Yes.

11 I presume you mean acquisitions of municipal systems?

12 Q Yes.

13 A The Duquesne Light Company acquired the municipal
14 system in Aetna, in Sharpsburg and most recent acquisition was
15 the municipal system in Aspenwall, Pennsylvania.

16 All of these municipal systems had been isolated
17 generating systems by the respective boroughs and all of
18 those were acquired by the Duquesne Light Company.

19 MR. LERACH: Mr. Rigler, I can do this by requesting
20 for voir dire of Mr. McCabe, or another way.

21 We did acquire the systems. Mr. McCabe is wrong.
22 They are not in the last ten years. He was not the solicitor
23 for those boroughs. I don't think this is the witness to
24 give this evidence to the Board. His knowledge has to be
25 based on hearsay by definition.

mm3

1 I object to it.

2 CHAIRMAN RIGLER: We will permit it.

3 BY MR. LESSY:

4 Q As a consequence -- scratch that.

5 Is the Borough of Pitcairn the last remaining
6 municipal electric entity in the service area of the Duquesne
7 Light Company?

8 A That is correct.

9 Q When, to your knowledge, was the last contact by
10 officers who were employees of the Duquesne Light Company to
11 the Borough of Pitcairn concerning potential acquisition of
12 it?

13 A Prior to the filing of the antitrust suit in June
14 of 1968.

15 Q Mr. McCabe, the Duquesne Light Company has filed
16 with the Board a pleading entitled Prehearing Fact Brief of
17 the Duquesne Light Company.

18 For the next line of questions, I will read you
19 certain paragraphs therefrom, and ask you basically -- it
20 will be in the form of questions, if that statement is accurate
21 pursuant to your recollection.

22 CHAIRMAN RIGLER: Mr. Lerach?

23 MR. LERACH: I object to that form of questioning.
24 I have never seen anything like that. You hand a man a brief
25 and say, is it true or not true.

1 If he wants to ask Mr. McCabe questions about
2 Mr. McCabe's knowledge of things that occurred within
3 Mr. McCabe's ambit of experience, fine. But, I object his
4 putting a brief before the man and saying, do you agree with
5 this or not agree with that.

6 MR. REYNOLDS: I join in that objection.

7 MR. LESSY: It is not a brief.

8 It is a Plaintiff's narrative statement of facts.
9 It attempts to put in front of the Board, a statement and
10 interpretation of facts in a light that the Duquesne Light
11 Company desires.

12 I would read short paragraphs from it that
13 identify topics or areas, including one footnote, and ask a
14 question or two with respect to those.

15 The alternative course of questioning is -- would
16 be very much longer.

17 CHAIRMAN RIGLER: Mr. Lerach, I agree with you
18 that whether or not the witness agrees with something may not
19 be relevant.

20 However, to the extent that a factual statement is
21 put before him, we would have to hear the question that
22 followed it before we could hear your objection.

23 MR. LERACH: Could we delay the questioning so I
24 can get a copy of my brief, so I can follow the questioning?

25 (The Board conferring.)

1 CHAIRMAN RIGLER: Mr. Lessey, I want you to direct
2 yourself only to factual statements in that brief, and his
3 agreement or interpretation doesn't matter.

4 You question him only about facts, now.

5 MR. REYNOLDS: Mr. Rigler, I object to this.

6 That document is not a document in evidence. This
7 is -- I think if we are going to --

8 CHAIRMAN RIGLER: I agree it is not in evidence.

9 If there is a factual assertion contained therein
10 as to which the witness has knowledge, it is possible that a
11 question could be framed with respect to the accuracy of
12 that fact. We are just going to have to hear the question.

13 MR. REYNOLDS: I think that if -- I guess that we
14 have lawyers in this room and we are going to operate
15 under normal procedures. I don't understand why Mr. Lessey
16 can't ask a question and ask for an answer of the witness
17 as to whether it is in his knowledge as opposed to pulling
18 out the briefs filed before this Board, the same way Mr. Lessey
19 tried to pull out a complaint yesterday. I think that is
20 inexcusable.

21 MR. LESSY: Have you found a copy of your brief,
22 Mr. Lerach?

23 MR. LERACH: Proceed with your questioning, Mr. Lessey.

24 BY MR. LESSY:

25 Q On page 23, first paragraph, last sentence, of

1 Prehearing Fact Brief of Duquesne Light Company, filed with
2 the Board, the following statement is made:

3 "Duquesne therefore repeatedly offered to sell
4 Pitcairn Rate "M" power, but would not deviate
5 from its tariff in favor of this one customer."

6 Is that an accurate statement pursuant to your
7 recollection?

8 MR. LERACH: I object to that.

9 Number one, the statement says "Duquesne therefore."

10 Don't you think we ought to read what comes before
11 a sentence that says "therefore." What is the problem with
12 picking out one sentence.

13 MR. LESSY: I was trying to limit it to the
14 factual matters.

15 CHAIRMAN RIGLER: Wait a minute.

16 (The Board conferring.)

17 CHAIRMAN RIGLER: You are going to have to get it
18 to a direct questioning if you want it, Mr. Lessy.

19 MR. REMOLDS: Mr. Rigler, I would like to note
20 that that question has been asked and answered yesterday. If, I
21 think we can avoid repetition as much as possible in this
22 hearing, it would be helpful.

23 MR. LESSY: We are getting into a different matter.

24 We are getting into a matter of Duquesne's offers
25 with respect to Rate "M" and I think that it is a little bit

1 different from the March 12, 1968 document introduced in
2 evidence.

CHAIRMAN RIGLER: If it is approach it directly.

BY MR. LESSY:

3 Q Mr. McCabe, did Duquesne repeatedly offer to sell
4 Pitcairn Rate "M" power during the period of time before the
5 lawsuit was filed?

6 A To the best of my knowledge, Rate "M" was
7 available to the Borough of Pitcairn.

8 MR. REYNOLDS: I object to this line of questioning
9 having no relationship whatsoever to activities under the
10 license, and therefore, not a permissible line.

11 CHAIRMAN RIGLER: Overruled.

12 BY MR. LESSY:

13 Q In addition to your request to the individual
14 CEFCO companies for electric power, did you also make a
15 request of West Penn Company?

16 MR. LERACH: I object to the question. It has no
17 relevance to this proceeding. West Penn Power is not an
18 applicant.

19 MR. LESSY: I refer to footnote 10 of the Duquesne
20 Light Prehearing Fact Brief.

21 "It must be understood that Duquesne was not
22 Pitcairn's only potential source of bulk power or energy.
23 Pitcairn's consulting engineers in 1967 advised the
24
25

1 borough that West Penn Power, a nearby investor-owned
2 utility and part of the Allegheny Power System, was a
3 potential source of such power and that West Penn was
4 currently selling bulk power to two rural electric
5 cooperatives."

6 The footnote continues.

7 The inference of this argument is that Pitcairn
8 had other power supply operations. We want to explore that.

9 MR. LERACH: The fact I put something in my brief
10 doesn't necessarily mean it is relevant.

11 (Laughter.)

12 MR. LERACH: I had to attempt to anticipate what
13 kind of arguments they were going to make and what they were
14 going to get into evidence.

15 My objection to that man's testifying in relation
16 to West Penn stands. If the testimony comes in, then the
17 footnote is relevant.

18 CHAIRMAN RIGLER: If you called it to the attention
19 of the Board, I think you thought it was relevant.

20 The objection is overruled.

21 MR. STEVEN BERGER: My objection, your Honor, is
22 based -- I object because there is no basis in fact that there
23 has been a request by the Borough of Pitcairn to Ohio Edison
24 or Pennsylvania Power for electric power, per se.

25 CHAIRMAN RIGLER: Do you want to rephrase that question,
 Mr. Lessy.

BY MR. LESSY:

Q On March 25, 1968, approximately, did you write, to your recollection, a letter to Mr. J. V. Soisson, S-o-i-s-s-o-n, vice president of marketing of the West Penn Power Company?

A Yes, I did.

Q Mr. McCabe, I show you a document, which would be NRC Staff Exhibit Number 25, dated March 25, 1968. It is identified in our listing as Exhibit Number 27.

CHAIRMAN RIGLER: It's NRC Staff -- the confusion the Board is having with the designations are that the Staff designations are in terms of Exhibit Numbers, and then we turn and then call it an exhibit number. We have two exhibit numbers. We would appreciate it if you would refer to the NRC designation, NRC Staff designation as a document number, so that this will then be Exhibit Number 25. It will be NRC Staff Document Number 27. That way the record will not be ambiguous, when you speak of an exhibit.

MR. LESSY: Thank you very much.

Was there a question?

BY MR. LESSY:

Q Is this document, Mr. McCabe, a copy of the letter you sent to Mr. Soisson?

A Yes, it is.

MR. LESSY: Staff moves for admission into evidence as Exhibit Number 25, the NRC Staff document which is numbered 27.

MR. LERACH: No objection from Duquesne Light.

CHAIRMAN RIGLER: Before you ask your question, to avoid any confusion, we want you to go back to yesterday's exhibits and on the NRC Staff delete the word exhibit and rewrite the word document.

MR. LESSY: The exhibits in possession of the parties now?

CHAIRMAN RIGLER: Exhibits in the possession of the reporter.

MR. LESSY: I would be happy to. I might add, when we get to the next witness the numbers jump to the 400 series. I think there is much less of a chance of confusion, but we will do that.

CHAIRMAN RIGLER: Consistently change the designation, internal designation from exhibit to document.

MR. STEVEN BERGER: As to the last proffer the document Ohio Edison and Pennsylvania Power object to the document as having no possible relevance to Ohio Edison and Pennsylvania Power Company.

CHAIRMAN RIGLER: Overruled. You might be right. The Board may attach no significance in terms of your client.

Exhibit 25 for identification becomes Exhibit 25

b73
C...
for identification in evidence.

(The document referred to
was marked NRC Staff Exhibit
Number 25 for identification
and was received in evidence.)

BY MR. LESSY:

Q Mr. McCabe, I direct your attention to a letter
dated April 1, 1968, from Mr. Soisson to yourself with NRC
Staff document number 28 on it.

Is this the response you received?

A Yes, it is.

MR. LESSY: Staff moves for admission into
evidence of Exhibit 26, this April 1, 1968, letter.

MR. STEVEN BERGER: I object to the admission
of this document as against Ohio Edison and Pennsylvania
Power, on the grounds previously stated, your Honor.

CHAIRMAN RIGLER: Overruled. Hearing no other
objection, it is admitted into evidence as Exhibit 26.

(The document referred to
was marked NRC Staff Exhibit
No. 26 for identification
and was received in evidence.)

BY MR. LESSY:

Q Mr. McCabe, did you subsequently write to Mr. Soisson
again with respect to the same subject?

A Yes, I did.

Q I show you a document dated April 9, 1968, with the NRC staff document number 29, from yourself to Mr. Soisson, and ask you if this is a copy of the letter you sent to Mr. Soisson?

CHAIRMAN RIGLER: Do you want that marked for identification as Exhibit 27?

(The document referred to was marked NRC Staff Exhibit Number 27 for identification.)

THE WITNESS: Yes.

BY MR. LESSY:

Q The first paragraph of that letter provides in part we have the Borough of Pitcairn are aware that the West Penn Power Company does not at the present time have authority to supply power in the Borough of Pitcairn. I wonder if you could explain that statement to us, sir.

A Well, the response to my first letter to West Penn Power was they had not authority to supply power to us. I acknowledged in this letter that I was aware that they had no franchise in this area, because Duquesne Light had the -- were located completely within Duquesne Light's franchise area. However, under the Pennsylvania utility law it is a matter of necessity and convenience and so this letter was to point out to West Penn Power that since Duquesne refused to provide the service, I felt that there should be no

1 difficulty in West Penn obtaining a certain amount of
2 necessity and convenience should the so desire to provide
3 us with power.

4 MR. LESSY: Staff moves for entrance into the
5 record of Exhibit Number 27.

6 MR. LERACH: No objection from Duquesne Light.

7 MR. REYNOLDS: Continuing objection from all of
8 the other Applicants.

9 CHAIRMAN RIGLER: Overruled. It will be received
10 as Exhibit 27 into evidence.

11 (Whereupon, the document
12 previously marked NRC Staff
13 Exhibit Number 27 for
14 identification, was received in
15 evidence.

16 BY MR. LESSY: 7

17 Q Are any of the facilities of the West Penn
18 Power Company near the Borough of Pitcairn?

19 A The West Penn Power Company has a high voltage
20 line located approximately two and a half to three miles
21 east of the Borough of Pitcairn.

22 Q Between the facilities -- electrical facilities
23 of the Borough of Pitcairn and the line that you have
24 just identified as West Penn Power Company are there any
25 other electrical facilities?

1 A There are other electrical lines in that area
2 which belong to the Duquesne Light Company.

3 Q How far are the electrical lines of the
4 Duquesne Light Company approximately from the lines of the
5 Borough of Pitcairn in the area where the West Penn lines
6 are?

7 MR. LERACH: Could I object to that, please, for
8 lack of specificity? What kind of lines are we talking
9 about, direction, transmission, what voltage?

10 MR. LESSY: I will go over that.

11 BY MR. LESSY:

12 Q To your knowledge, what types of lines of West
13 Penn Power are there located, as you mentioned, near the
14 Borough of Pitcairn?

15 A Unfortunately, all I know is there are high
16 voltage transmission lines. Those lines would CROSS
17 Duquesne Light's 23,000 kva line.

18 Q That 23,000 kva line is the line that serves
19 the Borough of Pitcairn?

20 A It's the line from which we presently take service,
21 yes.

22 Q Is the Borough of Pitcairn electrical facilities
23 physically surrounded by Duquesne, by the electrical
24 facilities of the Duquesne Light Company?

25 A The Duquesne Light Company serves all areas

1 surrounding the Borough of Pittcairn.

2 Q Thus, would any access to outside power sources
3 by Pittcairn require the cooperation of Duquesne in your
4 view?

5 MR. LERACH: I object to that as calling for a
6 conclusion on the part of this witness.

7 CHAIRMAN RIGLER: Sustained.

8 BY MR. LESSY:

9 Q Did the West Penn Power Company by Mr. Soisson
10 respond to your follow-up letter, identified as Exhibit
11 27?

12 A Yes, they did.

13 Q I show you a letter dated April 17, 1968, signed
14 by Mr. Soisson addressed to yourself, and ask you if that
15 is a copy of the response? This would be Exhibit Number
16 28, but is identified as Staff Document Number 30.

17 A That is a copy of the letter which I received.

18 (The document referred to was
19 marked NRC Staff Exhibit No. 28
20 for identification.)

21 BY MR. LESSY:

22 Q As a result of that letter, what was the final
23 position of West Penn Power Company with respect to your
24 request?

25 A West Penn indicated in the letter that they were

d
1 not interested.

2 Q Did they indicate that the fact that Duquesne
3 Light has intervened was the problem?

4 A They made no mention to Duquesne Light in their
5 response, no.

6 Q To your knowledge, do you know if West Penn
7 and Duquesne compete for wholesale municipal customers in
9 any way?

8 A I do not know. I do know --

10 MR. LERACH: I object. The Witness said he
11 did not know.

12 THE WITNESS: I do not know that they compete.
13 I know they have an agreement relative to servicing
14 customers on the boundary line between the two systems.

15
16
17
18
19
20
21
22
23
24
25

7

BY MR. LESSY:

Q Do you have any knowledge as to the provision of that agreement in general terms?

A I have a copy of it in my file.

Q Do you have a copy of it with you?

A Yes, I do.

MR. LESSY: This document is not included in the NRC Staff exhibits because we had just become aware of its existence.

Accordingly, pursuant to the Board's order we could only amend our document list for good cause. Our good cause is that we had not been aware of it until today.

MR. LERACH: I submit if that is the test of good cause, we are going to have a long, long hearing.

It seems to me that Mr. Lessy had a lot of discovery time.

I don't know what he is talking about. I have never seen the document and don't know what it is.

MR. LESSY: It is a Duquesne document.

MR. LERACH: It may well be. I am sorry, Mr. Lessy, that I do not know every single document in Duquesne Light Company's files. They are large files.

Mr. Lessy prepared this case for months and months, if not years. There were discovery proceedings. Mr. McCabe was in touch with the Justice Department in

September of 1972. I don't think we ought to have rabbits coming out of the hat during the hearing like this.

MR. LESSY: Let me respond to that if I may.

The reason this subject became of interest to the Staff is contained in a statement made in a letter dated January 26, 1969. It is marked as Staff Document Number 43. I refer to page number 2 at the bottom of that page.

MR. LERACH: Could Mr. Lessy hold on until we find the document?

MR. LESSY: It hasn't been offered into evidence. I will be happy to circulate copies. This is included in the Staff document list.

CHAIRMAN RIGLER: The Board doesn't have it either.

MR. LESSY: It wasn't included because --

MR. LERACH: What is the date of this document?

MR. LESSY: January 27, 1969.

MR. LERACH: May I have a request for ground rule on this argument?

I want it understood that I don't want the witness answering any questions that Mr. Lessy asks until I have had a chance to object to the questions and have a ruling made by the Board.

(The Board conferring.)

CHAIRMAN RIGLER: Mr. Lessy, in response to an

jon3

objection, you were to refer the Board to a particular paragraph --

MR. LESSY: I want to refer to two things.

Firstly, the document which Mr. McCabe has produced --

MR. REYNOLDS: I object to that. He has not produced a document. We have not seen anything.

MR. LERACH: No reading from that document to this Board. I object to it until we make a ruling as to whether or not he is permitted to add to his exhibit list. I don't want one word from the document read until the ruling is made.

CHAIRMAN RIGLER: We will sustain that temporarily.

MR. LESSY: With respect to the January 27, 1969 letter from Mr. Olds to the Duquesne Light Company --

CHAIRMAN RIGLER: I think you better mark that now so we have it in the record.

MR. LESSY: This would be Staff Exhibit Number 29, letter dated January 27, 1969. It is written by David McNeil Olds. It is addressed to the Duquesne Light Company, Attention Mr. W. F. Gilfillin, Jr., Vice President, Sales Division. It has the Staff Document Number 43 on it and it is included on page A3 of the pleading list of intended fact witness.

(The document referred to was marked NRC Staff Exhibit No. 29 for identification.)

CHAIRMAN RIGLER: What about the letter?

MR. LESSY: On page 3, looking at the bottom of the page, we look at small "a" in which the language is the discovery has established with reasonable certainty that Pitcairn has no facts to support its case which are not already apparent.

In parentheses with a caveat as to territorial location implications of the Duquesne-West Point relationships.

During the course of the preparation of the case we were intrigued by that language. Until today, however, we did not know of anything that would support that language and Mr. McCabe has indicated that this document does.

CHAIRMAN RIGLER: Did you make inquiry?

MR. LESSY: Yes, and at the time this was not locatable.

CHAIRMAN RIGLER: Was your discovery request addressed to Duquesne -- who was included in the territorial agreements?

MR. LESSY: Yes, it did.

CHAIRMAN RIGLER: Was the document produced in response thereto?

MR. LESSY: To our knowledge today was the first time we had seen this document. I can't state with certainty that it was not produced.

CHAIRMAN RIGLER: Address yourself to the

question of whether or not this document was produced.

MR. LERACH: As far as I know, every document that was requested by them was produced. At the last minute in this case there was a supplemental request for specific documents which they may have wanted. One was a speech that one of our people made.

We went back -- it may have been by Justice, but it was by the government. When they had specific documents and they wanted to know where they were and they asked for them and we went and dug them out.

There has never been allegation of territorial allocation against my client in this case. It is total surprise. It is prejudicial.

He had the January 27, 1969 letter now marked as Staff Exhibit 29 for Lord knows how much months. If he was so intrigued by it, he could have contacted Mr. McCabe, taken Mr. McCabe's deposition. He could have got to the Pennsylvania PUC. He could have pursued discovery techniques.

This is not the time to have this document surface literally only a few hours before I will cross-examine Mr. McCabe.

It is not a question of one document relating to Mr. McCabe. It is a question of opening a whole new area of the supposed case against Duquesne Light, an allegation

that we were never notified would be made against us.

MR. LESSY: I can say with reasonable certainty that this document was not produced on discovery and should have been and therefore we feel that is good cause for its entrance into evidence.

MR. LERACH: I want a recess so I can talk to my clients and lawyers in my office that worked on this.

That kind of accusation is made not against my client only, but against my firm also. I want time now to discuss this with the other lawyers.

CHAIRMAN REGLER: We will take it under advisement.

We want the specific discovery request the Staff contends would have obtained the territorial allocation agreement in controversy.

Upon designation of that I want Duquesne to tell us whether or not, one, they concur the request called for the document and, two, whether or not it was, and we will proceed from there.

MR. LERACH: I would like to point out one thing about the discovery and how it proceeded. It is my understanding that broad discovery requests were made that designated literally hundreds of thousands of documents.

My understanding is then representatives of one or more of the government parties came to my clients' offices and were taken into rooms and were told

jon?

"That file cabinet, that file cabinet," at others. Dozens of file cabinets. "Go through them and take what you want. Look at it."

How can we be certain that their people did their job and went through every single file of every single drawer of every single document or every single file cabinet we made available to them?

You see the problem I am trying to highlight?

CHAIRMAN RIGLER: I can see another problem.

How do we know the document was in one of those file cabinets?

MR. LERACH: I don't know.

CHAIRMAN LESSY: Let's answer the questions posed by the Board first.

MR. REYNOLDS: Is it possible we could see the document so we know what we are talking about and what we are looking for?

Mr. Lessy hasn't shown it to us. I have never seen the document. It may be that when Mr. Lerach sees it, it will jog something in his memory and we can say it was produced or wasn't.

If we are going to go through this exercise it would be helpful to have a copy of the document.

CHAIRMAN RIGLER: All right.

MR. LESSY: In terms of proceeding further with

respect to this line, our only desire is to introduce the document into evidence.

We have no questions of Mr. McCabe, further questions with respect to the document and, therefore, this matter can hang in the balance not affecting his testimony.

The only other document that would impact on this is the document which we just identified as the January 27, 1969 letter.

MR. REYNOLDS: Mr. Rigler, if I may, we have just been handed this document. It is an agreement dated November 1937. The document at the end says it continues in effect for five years and thereafter until terminated by 90 days' written notice.

It goes on to say it provided under other circumstances it can be extended.

It was filed with the FPC in 1937.

Now, we can pursue this further and we will, but I have some question on its face whether we are talking about a kind of document that was either called for in the document requests or anticipated under the broadest reading of those requests by this Board.

CHAIRMAN RIGLER: I already ruled that Mr. Lessy would tell us which discovery request he contended it was produceable under and you would have opportunity to respond

We obviously will not receive it today, so let's

go on.

MR. REYNOLDS: My point is not the particular request. We are talking about a 1917 document filed with the PFC in 1931. That is something different.

I would like explanation also as to why he feels that document, if he can find an appropriate request, comes within the time frame we are talking about in this case.

MR. LESBY: I would be happy to respond to that. I think the Board wants us to go on. The only thing is that Applicants have the only copy.

I wonder what procedure the Board will recommend so we can retain a copy for the witness for his files or anyone else.

CHAIRMAN RIGLER: Suppose over the lunch hour we make a xerox copy.

1 MR. LESSY: As long as we are back on the record,
2 there are two documents we would like to move for
3 admission. The first would be NRC Exhibit 28. It is the
4 letter dated April 17, 1968 from Mr. Soisson to Mr. McCabe
5 with the Staff Document No. 30.

6 We also move for admission of, as NRC No. 29,
7 the Staff Document -- the letter dated January 27, 1969, from
8 Mr. Olds to Mr. Gilfillin, that was identified as Staff
9 Document No. 43.

10 CHAIRMAN RIGLER: Mr. LERACH?

11 MR. LERACH: I have no objection to 28.

12 I object to 29. It has not been authenticated.
13 It hasn't been shown to anyone to say they got it or sent it.
14 I object to its relevance. It is premature to bring it
15 in. It seems to relate to this collateral point we have
16 yet to settle.

17 MR. LESSY: Will we have an authenticity problem
18 on this letter again. It was produced by Duquesne, signed
19 by Mr. Olds, designated in our document list.

20 MR. LERACH: I suppose if he wants to put it in, I
21 will not argue about it. It seems to me so disorderly to be
22 pulling documents out that the witness has never seen and say
23 I will put that into evidence. It can come in at the proper
24 time when it has a role to play in the case.

25 I am objecting to the disorderly nature of it.

MR. REYNOLDS: I would like to have a continuing objection to 28.

I would like to have an objection to 29 on a number of reasons. First, Mr. Lessey told us the only relevance of the document is in terms of how it relates to this collateral matter. If that is the case, then I think it is irrelevant to introduce it into evidence until we have resolved the collateral matter.

I question whether it would be appropriate at this time to introduce this document through Mr. McCabe. If we aren't going to get into an authenticity question and I understand we are not, and he wants to introduce it as an unsponsored document, let's hear an offer of proof on it, and we will proceed that way and that is the appropriate and orderly way for a lawyer to proceed.

To just pull out a document in the middle of a collateral decision and mark it as an exhibit, and then ask the Board to move it into evidence, seems to be inappropriate and is not the proper way to proceed in this hearing.

I caution the Board with a number of documents you will be seeing that I am scared as to what the transcript will look like if we don't put a manageable procedure on this.

CHAIRMAN RIGLER: Your objections to the prematurity and manner it is sought to be introduced into evidence are well taken.

1 Exhibit 29 will be rejected at this time.

2 Exhibit 29 will be admitted, and the objections of
3 Mr. Reynolds are overruled on that.

4 (The document referred to was
5 marked NRC Staff Exhibit No. 28
6 for identification, and received
7 in evidence.)

8 BY MR. LESSY:

9 Q Mr. McCabe, if the Board finds that a situation
10 inconsistent with the antitrust laws exists with respect to
11 the Applicants in this matter, the Board may then impose the
12 relief it deems appropriate to remedy the situation inconsistent
13 with the antitrust laws.

14 Toward that end, Staff has suggested certain license
15 conditions which it believes provides appropriate relief and
16 one of those conditions would require Applicants including the
17 Duquesne Light Company to afford the Borough of Pitcairn an
18 opportunity to participate in the ownership of, or purchase a
19 portion of the output from one of CAPCO nuclear units.

20 Would, in your view, the Borough of Pitcairn be currently
21 interested in access to bulk power from one of the CAPCO
22 nuclear plants?

23 MR. LERACH: I object to that question.

24 As much as Mr. McCabe knows about the Borough of
25 Pitcairn, the proper foundation for that kind of testimony

miss4 1 has not been laid as to his authority to speak on such matters.

2 Beyond that, it calls for a conclusion that it
3 seems is not terribly helpful to the Board at this time.

4 CHAIRMAN RIGLER: Mr. Reynolds?

5 MR. REYNOLDS: I will move to strike Mr. Lessy's
6 question.

7 I think it is inappropriate testimony by counsel to
8 have on this record.

9 MR. LESSY: Mr. Chairman, we saw and heard yesterday
10 that Mr. McCabe, on behalf of the Borough of Pittscairn, had
11 requested access to a CAPCO plant.

12 The question is, would the borough be currently
13 interested in access to bulk power from one of the CAPCO
14 nuclear units.

15 CHAIRMAN RIGLER: I will permit only that portion of
16 the question.

17 MR. LESSY: I will rephrase the question.

18 CHAIRMAN RIGLER: I liked it the way you just
19 asked it.

20 BY MR. LESSY:

21 Q Would, in your view, the Borough of Pittscairn,
22 be currently interested in access to bulk power from one of
23 the current CAPCO nuclear plants?

24 A Yes.

25 Q Have you requested access to the nuclear plants

mm5 1 other than the request you testified about yesterday?

2 MR. LERACH: I object to the question. It misleads
3 and misstates prior testimony.

4 MR. REYNOLDS: I join in that objection.

5 CHAIRMAN RIGLER: Rephrase that question, Mr. Lessey.
6 It is pointed out that yesterday Mr. McCabe indicated that his
7 request for access to Beaver Valley was not contingent on
8 the type of plant involved.

9 BY MR. LESSEY:

10 Q Mr. McCabe, have you requested access to any of
11 the CAPCO, current CAPCO nuclear plants other than the
12 request to the Beaver Valley unit of which you were not certain
13 whether or not it was nuclear or fossil that you testified
14 about yesterday.

15 MR. LERACH: I object to the question as being
16 incomprehensible in that form. He is trying to give an implica-
17 tion with his question.

18 MR. REYNOLDS: I join in that.

19 There is a proper way to ask the question and I
20 think Mr. Lessey should ask it in the proper way. Then he will
21 not have an objection.

22 CHAIRMAN RIGLER: I understood the question.

23 The Board did, too. We will permit it.

24 THE WITNESS: The answer is no.
25

mm6 1 BY MR. LESSY:

2 Q Can you tell me why, sir?

3 A The Borough of Pitcairn has been reluctant to
4 undertake additional extensive litigation which we have
5 felt would be necessary in order to acquire access to such
6 units.

7 Q Is the Borough interested in access to nuclear
8 generation?

9 A Yes.

10 Q If the Borough is interested, would they, in your
11 view as solicitor, have available financial resources to finance
12 participation?

13 A The Borough does have available financial capabilities
14 of borrowing money. I can't specifically say whether we have
15 sufficient funds without knowing all of the facts and details.

16 I would presume the Borough has sufficient funds
17 available to meet the amount of interest that the Borough would
18 desire in such a generating unit.

19 Q Finally, sir, in the recent past, say last four,
20 five, six months, say from April of '75, has anyone from the
21 Duquesne Light Company approached you or the Borough of Pitcairn
22 to your knowledge, suggesting that the Duquesne Light Company
23 has new policies or committed themselves to policies offering
24 access to nuclear plants?

25 A No such information has been made available to me

1 and to the best of my knowledge, no such information has been
2 made available to any of the officials of the Borough of
3 Pitcairn.

4 MR. LESBY: That concludes the direct examination
5 by Staff of Mr. McCabe.

6 CHAIRMAN RIGLER: Mr. Berger, does the Department
7 have any questions?

8 MR. MELVIN BERGER: We do.

9 CHAIRMAN RIGLER: I would like to take a long
10 lunch today, so we will go through until 11:30. We will
11 break from 11:30 to 1:30 today.

12 MR. MELVIN BERGER: That is the lunch break?

13 CHAIRMAN RIGLER: Yes.

14 CROSS-EXAMINATION

15 BY MR. MELVIN BERGER:

16 Q Mr. McCabe, in some of your testimony yesterday,
17 you used the term double contingency outage.

18 What do you mean by that term?

19 A The term, as I understand it, and I really am
20 getting out of my field, but double contingency outage means
21 you have to make an allowance for not just one contingency, one
22 generating unit out of service, but two.

23 The Borough of Pitcairn had five units. Any
24 prudent planning required us to consider what happened if the
25 two largest units were out of service at the same time.

1 Q I believe you also used the term dead out.

2 A Dead out means when there is no power whatsoever.

3 The Borough of Pitcairn had diesel generating
4 equipment. Most of the larger utilities using turbines do not
5 have the ability to start without any electrical power whatso-
6 ever. The Borough of Pitcairn did not have to have any electrical
7 power whatsoever in order to start its machines. They were
8 started with compressed air.

9 Q To your knowledge, is that an advantage?

10 A Well, if you remember the New York blackout a few
11 years ago, I would say that that is a definite advantage.

12 That was one of the big problems. They got their
13 generation off and couldn't get it back on the line.

14 end #9

15

16

17

18

19

20

21

22

23

24

25

9

Q You used the term parallel operation. What do you mean by parallel operation?

A Parallel operation, as I understand it, and using it, means that interconnection with a utility so you are providing your own power and taking power from them at the same time on the same circuits.

In other words, if our load at a particular time was 1500 kilowatts and we were buying 500 kilowatts from Duquesne Light, they would be feeding 500 kilowatts into our system and we would be feeding an additional 1000 kilowatts.

Q Is parallel operation a desirable feature?

A We felt in our planning that parallel operation was a desirable feature. The equipment that the Borough of Pitcairn had was equipment which was ideally usable for peaking because it could be easily started, easily put on line to pick up increased loads.

In addition, it is an advantage to be able to take demand fluctuations out of your purchase of power because most of the power contracts provide rate adjustment for demand and because it is the most logical way for them to supply power.

So what we were aiming at was to try to buy a base load which would be a constant load from Duquesne Light which we would buy from them seven days a week, 24 hours a day.

It would be the most economical way for them to supply power and the most economical way for us to take the

power and use our generating equipment to take care of the peaks.

Q I believe earlier today you used the term high voltage lines in reference to some of your testimony. Do you recall that?

A Yes.

Q What do you define as high voltage?

A I am really getting out of my field on it. My understanding of high voltage is something in excess of normal line distribution.

The Borough of Pitman was at the time the suit was instituted distributing at 2400. We are now distributing at 4160.

I am talking about voltages in excess of that. I am talking about transmission voltages.

The voltage which Dugessne Light brings to our substation is 23,000 KVL. The transmission lines are, some of them, greatly in excess of that.

I don't -- anything greatly in excess of those figures would be high voltage, in my opinion.

Q I would like to refer you now to Staff Exhibits 1 through 5. Do you have copies of those in front of you?

A I am aware of what they are. I don't have copies. Those are the letters of December 5, 1967, I believe.

MR. LESSY: Staff requests that the witness have

a copy before the line of questions proceeds.

BY MR. MELVIN BERGEN:

Q I believe yesterday you testified that you sent each of these five letters to the addressees listed?

A That's correct.

Q Do you recall if you sent copies of any of these letters to anyone but the addressees?

A I am sure I did not.

Q With regard to your other correspondence with each of the Applicants, do you ever recall sending copies of letters which you sent to one of the Applicants to any of the other Applicants?

A I did not.

Q I would like to refer you now to Staff Exhibits 6 through 10.

A I have them here.

Q You have them in front of you?

A Yes, I do.

Q When you received these, did you note anything in particular about them?

A Well, the letters were all short replies and all indicated that they felt that Pitcairn's membership in CAPCO was impractical.

Q After you received these responses, what did you do? Did you contact these companies again?

A Yes, I did.

Q How did you do that?

A I wrote to each of the companies. Yesterday my letter to Mr. Fieger of Duquesne Light was put in evidence. I sent similar letters to the other members of the CAPCO pool.

Q I would like to show you exhibit -- Staff Exhibit 11 and ask you if that is the letter you are just referring to.

A Yes, that is the letter to Mr. Fieger.

CHAIRMAN RIGLER: Did we understand that you sent identical letters to the --

THE WITNESS: I didn't say identical. I said similar.

CHAIRMAN RIGLER: Similar letters to the presidents of the other four CAPCO member companies?

THE WITNESS: Yes, I did.

BY MR. MELVIN BERGER:

Q Did you receive a response from each of those companies?

A I received a response from each of the companies. In each situation they suggested the person in their respective companies that I might contact to pursue the discussions similar to the responses I received from Duquesne Light.

Q Did you subsequently follow up on their

suggestion?

A To keep things in order I wrote to them and requested after that copies of the CAPCO agreement.

I also wrote to them and advised them what I was following the matter up first with Duquesne Light and then if I felt it would be useful for me to go to the various cities where the CAPCO members were located and talk with their representatives that I would advise them.

After I talked with Duquesne Light I did not feel that it would be a worthwhile procedure to make the trips to each one of the CAPCO cities.

Q Why was that, sir?

A I felt it would not avail me anything. I didn't feel I would accomplish anything. Duquesne's position was extremely adamant that they felt there was no advantage whatsoever and that they were not interested in Pitcairn being a member of the CAPCO pool.

It seemed to me it would be doing a useless effort to make those same inquiries of the other companies.

Q You just mentioned that you sent letters to each of the Applicants requesting a copy of the CAPCO agreement; is that correct?

A That's correct.

Q What response did you get?

A Well, each of the companies did respond to that

and each of the companies told me that the agreement was for some reason not available and could not be made available to me.

I believe that they indicated it was a tentative understanding and hadn't been properly signed and was not available to me.

Q . Have you ever any of the CAPCO agreements?

A Yes, I have. In the course of the antitrust litigation with Duquesne Light I was supplied by the law firm of Reed, Smith, Shaw & McCloy a copy of a CAPCO agreement which had been filed with the -- with a Senate Committee or Legislative Committee -- I am not sure whether it was a House or Senate Committee. That was quite some time later. That was, I believe, in 1969.

Q In 1969 was when you first saw the CAPCO agreement?

A That's correct.

Q Would you remember what time in 1969?

A Oh, I have it in my file here. I have the letter from Mr. Kramer of the Reed, Smith, Shaw & McCloy if you want me to check my files.

Q Perhaps you can refresh your recollection if it would only take a moment.

CHAIRMAN RIGLER: I think we will take our luncheon break right now. This seems to be an appropriate

time.

(Whereupon, at 11:30 a.m., hearing in the above-entitled matter was recessed, to resume at 1:45 p.m., this same day.)

hw2

1 A Pitcairn is interested in anything which will
2 improve the reliability and reduce the cost of its
3 electrical service. To that extent, Pitcairn would be
4 interested in considering possible membership in CAPCO
5 to determine if it would have the desired advantages for
6 the Borough.

7 Q Would Pitcairn be interested in participating
8 in nuclear units today?

9 A My answer for that is exactly the same. Pitcairn
10 is interested in exploring the possibility of reducing the
11 cost of power and if this would be possible through a
12 participating in nuclear units, I think, the Borough
13 of Pitcairn is interested.

14 Q Earlier today you indicated on behalf of
15 Pitcairn you made a request of West Penn Power asking
16 if they would be interested in selling power to Pitcairn;
17 is that correct?

18 A That is correct.

19 Q What was the result of your inquiry?

20 A They initially responded that they had not franchise
21 in the area.

22 I responded that I was aware they didn't have
23 a franchise. I'm not really sure in my own mind that they
24 needed a franchise. I indicated we would certainly cooperate
25 with them in obtaining a franchise.

bw3

1 They indicated at that time that they were not
2 interested.

3 Q I believe yesterday you had referred to a
4 November 20, 1967 letter which you wrote to Duquesne --

5 CHAIRMAN RIGLER: Mr. Berger, speak up.
6 They're having trouble hearing you in the back.

7 BY MR. MELVIN BERGER:

8 Q Yesterday you had indicated that you had sent
9 a letter to Duquesne on November 20, requesting an inter-
10 connection; is that correct?

11 A On November 20, 1967, pursuant to a phone
12 conversation with Mr. Heisley at Duquesne, I wrote to
13 Duquesne Light, requesting they make whatever evaluation
14 necessary to advise us under what terms and conditions
15 they would offer to us an emergency interconnection.

16 Q I would like to show you a document now.

17 MR. REYNOLDS: Mr. Chairman, since we have
18 another party interrogating the witness, and we are getting
19 into the line of questioning where the objection is
20 appropriate, I would like to renew the objection to the
21 testimony being introduced now, which under the Board's
22 anticipated ruling would be applicable against all
23 Applicants. We would object to that, the Applicants, other
24 than Duquesne would inter an objection as to that testimony
25 similar to the prior one.

ov4

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

CHAIRMAN RICLER: The objection is
noted and overruled.

ES11

mm12 1 MR. MELVIN BERGER: The document is a letter
2 dated November 20, 1967 from Robert McCabe to Duquesne Light.
3 It bears Department of Justice Document No. 118845.
4 It is marked for identification as DJ-1.

5 Have you ever seen that letter before?

6 THE WITNESS: With the exception of the notation
7 you referred to, this is a copy of the letter I sent to
8 Duquesne Light on November 20, 1967.

9 BY MR. MELVIN BERGER:

10 Q To keep the record complete, what response, if any,
11 was received?

12 A My recollection is that I received a formal response
13 to this letter, I believe it was in February of 1968, at which
14 time a letter from Mr. Merriman advised us as to what terms
15 and conditions they would sell us power under their emergency
16 Rate "M" and I believe that that letter was introduced into
17 evidence yesterday.

18 CHAIRMAN RIGLER: Mr. Reynolds?

19 MR. REYNOLDS: I think we are getting back into
20 the discussion of Rate "M" and emergency interconnections which
21 have nothing to do with activities under the nuclear license
22 at issue here, and I would object to this line of inquiry on
23 that basis, and the testimony in response to that.

24 MR. MELVIN BERGER: I would like to move DJ-1 be
25 admitted into evidence.

run2

1 MR. LEFACE: I have no objection.

2 MR. REYNOLDS: The continuing objection as to the
3 other Applicants.

4 CHAIRMAN REGLER: That objection will be overruled.

5 It will be received as DJ Exhibit I into evidence.

6 (The document referred to was
7 marked DJ Exhibit No. 1 for
8 identification, and received
9 in evidence.)

10 BY MR. MELVIN BERGER:

11 Q Mr. McCabe, I would like you to look at a document
12 I handed you earlier, which bears identification number 105004.
13 It is a four-page document, the first two pages of which
14 apparently are memos written by representatives of Duquesne
15 Light and the third and fourth pages of which is a letter
16 dated March 25, 1968 from you to W. F. Gilfillin, Sr.

17 Have you seen that letter portion of the document?

18 A I have seen the letter of March 25, 1968. What
19 is a letter I wrote to Mr. Gilfillin.

20 Q Why did you write that letter?

21 A This letter was in response to his letter of
22 March 19, 1968, which was previously put into evidence.

23 In his letter, he advised us they would not
24 interconnect with our system, and would not sell us power for
25 resale and would only offer us power under emergency Rate "H".

1 I was thanking him for meeting with us and requesting
2 they reconsider that position.

3 Q Did you ever -- who else did you send copies of this
4 letter to?

5 A I advised Mr. Gilfillin in the letter that I was
6 sending copies of the letter to the members of the Board of
7 Directors of the Duquesne Light Company since this apparently
8 was a policy decision and I felt that the ultimate authority
9 of the corporation should be aware of the policy decision which
10 was being made.

11 I did send copies of that letter to each of the
12 Directors.

13 Q Did you ever receive any answers from anyone?

14 A The only response which I received to this letter
15 was a response acknowledging receipt of the letter from a
16 H. Kent Cochran, who was one of the Directors of Duquesne
17 Light Company.

18 Q Were any other responses received?

19 A No, that was the only response.
20
21
22
23
24
25

joni

13

CHAIRMAN RIGLER: Mr. Berger, I don't believe you ever made this series of four documents an exhibit. Did you intend to designate this as DJ-2?

MR. MELVIN BERGER: I would like to designate this as DJ-2.

(The document referred to was marked Exhibit Number DJ-2 for identification.)

MR. MELVIN BERGER: I might note the first page of the letter to Mr. McCabe in copying the first page, the right-hand margin was cut off a little bit short of what it should be and there I believe two or three words that are missing.

Mr. Reynolds advised me of this before. I indicated I would like to substitute a more complete copy of that page at the first opportunity we have.

CHAIRMAN RIGLER: Right. Particularly with the reporter so the record copy is complete in all respects.

MR. MELVIN BERGER: Subject to that substitution, I would like to move DJ-2 be admitted into evidence.

CHAIRMAN RIGLER: Mr. Reynolds?

MR. REYNOLDS: Mr. Chairman, I would have my continuing objection with respect to these documents and I would further note that only one of the three documents that we have before us would seem to me appropriate to admit into evidence through this witness.

The other two, as near as I can determine, this witness probably has never seen before, although we could ask him if he has.

I question again whether we should put in through a witness documents which it would seem to me more appropriately should be offered on an unresponsive basis.

I don't want to make a obstructive objection on this. I am not really as far as these two cover memos are concerned trying to make a big point.

I think we ought to, for housekeeping purposes, if no other purposes, keep straight what it is that comes in as an exhibit through a witness on the stand and what it is that the other parties are trying to put in on other bases so the Board can take proper account and attach proper weight to the documents as they do come in.

MR. MELVIN BERGER: Mr. Chairman, I would like to say that the attached memos were included here for the purpose of giving a complete document. I am sure if that had not been done, we may have heard other objections to this document.

CHAIRMAN RIGLER: Mr. Reynolds has indicated he is not going to press his objection to having the two letters of April 1 and the memorandum of March 26 attached. He is going to maintain his continuing objection to their use with respect to Applicants other than Duquesne.

Duquesne has not objected.

We will receive it in evidence.

XXX

(Exhibit Number PS-2, previously marked for identification, was received into evidence.)

MR. REYNOLDS: The top two are unsponsored exhibits which the record should reflect. I think that is the point I am making.

nd13

BY MR. MELVIN BERGER:

L4

Q Mr. McCabe, I believe that in your prior testimony you had indicated that Pitcairn had on occasion had to curtail power use by its customers; is that correct?

A That's correct.

Q Do you have any particular instances of when that occurred?

A The particular instance was the instance I referred to before my testimony on November --

CHAIRMAN RIGLER: You needn't review it. We are familiar with it. I want to avoid repetition as much as possible.

Several of the recent questions have touched on things where I think his testimony was clear before.

BY MR. MELVIN BERGER:

Q Mr. McCabe, I believe you testified that presently Pitcairn is purchasing power at wholesale from

jon4

Duquesne Light; is that correct?

A That's correct.

Q I also believe you mentioned that Pittsford might be interested in CAPCO membership at the present time, is that also correct?

A Yes. Subject to the qualifications I placed on it, if it were to enhance the borough's electrical position, we would be interested.

Q How would Pittsford be better off, or under what circumstances would Pittsford be better off with CAPCO membership than with purchasing power at wholesale from Duquesne Light?

A As I envision, either purchasing membership in CAPCO or participation in a nuclear unit would involve Pittsford actually buying a portion of that unit and taking power from that unit at the production cost subject to certain wheeling charges.

I would anticipate those charges would be less than the price which we currently pay Duquesne Light for power supply. I therefore would envision an economic benefit.

Q MR. MELVIN BERGER: I think those are all the questions we have for Mr. McCabe.

CHAIRMAN RIGLER: Mr. Hjelmfelt?

MR. HJELMFELT: I have no questions.

CHAIRMAN RIGLER: Are you prepared to proceed,

Mr. Lerach?

MR. LERACH: Yes, sir, I am.

Perhaps before I begin with Mr. McCabe, there is the matter of this document which surfaced so suddenly this morning and the Board had asked me to determine I think -- actually Mr. Lassy was to determine what disciplinary request it would have been covered by, and I was to be prepared to respond.

I would like to hear from Mr. Lassy should it have been produced and, number two, can he tell us whether it was produced.

CHAIRMAN RIGLER: We will take that up later.

Mr. McCabe has a transportation problem.

MR. LERACH: If it could be let in at a later time, my cross-examination rights as to Mr. McCabe would continue.

I assume the government would bear the expense of bringing Mr. McCabe back to let me continue my cross.

CHAIRMAN RIGLER: Part of your objection was he wasn't qualified to speak about it anyway, about the territorial allocation.

MR. LERACH: My objection was far more fundamental than that. I want it understood, I don't want to delay Mr. McCabe. But if this document comes in through the sponsorship of Mr. McCabe and he has something to say about it

as it relates to West Penn or Duquesne, I want the right to cross-examine him and the government will bring it back.

CHAIRMAN RIGLER: If it came in through the sponsorship of Mr. McCabe, he would obviously be here.

MR. LERACH: You have solved it. Mr. McCabe would have to come back for the document to be put in.

CHAIRMAN RIGLER: I said if it came in through the sponsorship of Mr. McCabe. It may come in some other way. It may never come in.

THE WITNESS: If it would be helpful, I know very little about the document.

MR. LERACH: I do not want you to discuss it at this point.

BY MR. LERACH:

Q Mr. McCabe, since -- let me start this way -- did Duquesne Light Company interconnect with the Borough of Pitcairn in December of 1970 and begin to sell power for resale?

A In December of 1960 Duquesne Light took over supplying power to one of the Borough's loops or circuits. There was no direct interconnection between the two systems. The two systems continued to operate independently. Pitcairn continued to be an isolated generating system.

Q And were the systems permanently interconnected December 20, 1972?

A I would -- I am not sure of the date, but I would accept your suggestion of the date on that?

Q There is now, then, a permanent interconnection?

A Yes. But that is, so cast the record is clear, we take all demands of power that was not interconnected with the Pitcairn system. In other words, Duquesne Light supplies all energy demand for the Borough of Pitcairn. They were not interconnected with our generation.

Q Now, have you had any difficulty in dealing with Duquesne Light since the time Duquesne began to supply all of your power requirements?

A Our relationships with Duquesne Light with respect to them selling us power has always been cordial.

Q Any request for service, assistance and whatsoever have been met promptly and efficiently?

A To the best of my knowledge we have had no working difficulties with them.

Q Has Duquesne Light attempted to raise the base rate on that power since they began to supply it to you?

A The rate agreement which was contracted with between the Borough of Pitcairn and the Duquesne Light Company is subject to a fuel adjustment clause which has, of course, greatly increased in amount.

There has been no increase in the base rate.

Q Have you felt the need to seek the protection of

assistance of any governmental agency in your relations with Duquesne Light since the time Duquesne Light began to supply fuel requirements of power for Pitcairn?

A We have not.

Q Since 1971 has the Borough of Pitcairn undertaken or commissioned any study or survey to determine if there is available to it a more reliable source of power than is currently being provided by Duquesne Light Company?

A I would like you to clarify what you mean by a survey?

Q Have you hired any independent agency or entity such as an economic consultant, electrical consultant, to conduct a study to provide a more reliable system of power than Duquesne is presently providing?

MR. LESSY: The reliable is beyond the scope of direct. We went into desirability of access of large-scale generating units. That particular aspect was not gone into. We object.

MR. LEFACH: It was his direct testimony that he believed it was his duty to procure for the Borough of Pitcairn the cheapest and most reliable source of power possible. That was brought up in the context of entering CAPCO or through another arrangement.

CHAIRMAN RIGLER: We will allow the question.

THE WITNESS: The Borough of Pitcairn retains

William M. Lewis Associates as consulting engineering firm.

Mr. Lewis has continually reviewed the borough's electrical system within the time frame of your discussion and we have been in contact with the American Public Power Association, with the Pennsylvania Municipal Electrical Association and have continued to make whatever steps we felt appropriate to be well informed of any possibility of alternate power supplies.

BY MR. LERACE:

Q Has Mr. Lewis submitted a written report to the borough?

Answer that, please.

MR. LESSY: Since 1972 or at any time?

BY MR. LERACH:

Q Since 1971, a follow-up to my original question.

CHAIRMAN RIGLER: Mr. Lessy, will you rise when you have objection to make, and wait to be recognized.

MR. LESSY: Should I restate it?

CHAIRMAN RIGLER: No, that is all right.

THE WITNESS: We have -- I want to be as accurate as I can in this answer. We have received written reports from Mr. Lewis since 1971. Mr. Lewis did a rate survey I believe since 1971. I am not sure that we have received a written survey or report dealing with the specific subject of alternate power supplies since 1971.

§16 mal

1 BY MR. LERACH:

2 Q Is it possible that such a report could have been
3 submitted to the Borough without your knowledge?

4 A No.

5 Q Is it your testimony that you do not know of any
6 report by Mr. Lewis addressed to the possibility of procuring
7 for Pitcairn of a more reliable source of service than Duquesne
8 Light since 1971?

9 A I am trying to respond as accurately as I can.

10 Allowing for the frailties of my recollections, I
11 do not believe that we have had any reports specifically on
12 that subject since 1971. Although that subject could have
13 been mentioned in other correspondence, or even in that rate
14 study report which we had received.

15 Q Since 1971, has Mr. Lewis or any other entity been
16 retained by the Borough to conduct a study as to the possibilities
17 of the Borough obtaining cheaper sources of power other than
18 that which you currently received from Duquesne Light Company?

19 MR. LESSY: I object, that appears to be a repetitive
20 question.

21 CHAIRMAN RIGLER: No, his last question was on
22 reliability. This is on economy.

23 MR. LESSY: Economy?

24 CHAIRMAN RIGLER: Cheaper.

25 THE WITNESS: The Borough of Pitcairn retains

1 William M. Lewis Associates as consulting engineer. He has
2 not been commissioned since 1971 to specifically make a
3 study with respect to obtaining cheaper power.

4 It is anticipated and expected of him under his
5 consultant arrangement, that if he has any knowledge of the
6 possibility of less expensive power that he would advise us of
7 that.

8 To the best of my knowledge he has not advised us
9 of that. There have been -- in this area, so that I can give
10 you a full and accurate statement there have been various
11 things considered. There are --

12 BY MR. LERACH:

13 Q Mr. McCabe, I appreciate that you want to expand
14 and give us the narrative. I will ask you the questions.

15 Unless you feel it is necessary that you expand,
16 just answer the questions. You did answer the direct question
17 asked, sir, and I thank you for it.

18 A Go ahead.

19 Q Has the Borough of Pitcairn, since 1971, had
20 any study undertaken to determine the cost for it to participate
21 in the ownership of nuclear generating facilities?

22 A No.

23 Q Mr. McCabe, my notes from your testimony were ambigu-
24 ous on a point.

25 I thought that yesterday you testified that the

1 Borough of Pitcairn would be interested in participating in
2 ownership of generating capacity if the cost per kilowatt
3 of capacity was in the area of \$150 to \$175.

4 A That is not my recollection of my testimony.

5 My recollection of that testimony was that it was
6 my understanding in 1967 or 1968, when I was talking with,
7 particularly Duquesne Light relative to CAPCO membership, that
8 their projected costs for construction of power was in that
9 neighborhood. I would assume that the cost would be substan-
10 tially in excess of that at this time.

11 Q Are you in a position to give us a figure on what
12 the Borough's finances would permit it to pay in terms of
13 kilowatt costs for capacity?

14 A I am not.

15 Q I take it the Borough has made no study of that in
16 recent years?

17 A I believe I had answered that question before.

18 Q In case you haven't, is your answer yes?

19 I am not sure.

20 A We have not made a study in that respect.

21 Q What is the currently available indebtedness capa-
22 bility or level of the Borough of Pitcairn in round figures?

23 A The Borough of Pitcairn has general obligations
24 debt capacity, without approval of the electorate, of approxi-
25 mately \$300,000.

1 The Borough of Pitcairn also has available to it
2 under the Pennsylvania Municipal Borrowing Procedures, the
3 right to borrow money pledged on the revenues of a profit-making
4 operation such as the electrical plant and issue revenue bonds.

5 Q Let us set aside the revenue bonds, and we will
6 come back to them.

7 A Do I understand the county of the Borough of Pitcairn
8 could commit the Borough up to \$300,000 of additional debt?

9 A That is correct.

10 Q We have the authority to increase our indebtedness
11 for general obligation purposes in the approximate amount of an
12 additional \$300,000.

13 Q Would there be an additional amount that you could
14 incur debt if the voters approved of it in a referendum?

15 A There would be, yes.

16 Q Can you give me a general estimate of approximately
17 how much?

18 A I can only give you a general approximation without
19 having referred to the statute. It is based on a percentage
20 of prior year revenues. Our taxes -- our revenue base, borrowing
21 base is \$182,000, roughly, and I presume it would be
22 at least one additional times that borrowing base. It would
23 be at least an additional \$180,000.

24 Q So, exclusive of the revenue bond alternative, there
25 is approximately, assuming the voters would cooperate, the

1 possibility of Pittsain incurring about \$500,000 of additional
2 indebtedness?

3 A I would say that is probably a good approximation.

4 Q Now if that was done and if you will excuse my
5 slang phrase, you would be borrowed up?

6 A That would be the limit of our borrowing under the
7 particular act pledging the general obligations of the Borough.
8 That is correct.

9 We would still have some additional borrowing capacity.
10 We are permitted to borrow in anticipation of taxes in excess
11 of that borrowing.

12 Q But, of course, that is for tax purposes.

13 A No, that is for the general operating expenses.

14 Q But you would pledge the tax receipts?

15 A That is correct.

16 Q Now, if the Borough were to sell revenue bonds, do
17 you know, do the revenues produced by the facility financed by
18 the sale of the bonds have to be pledged to retire the
19 bonds?

20 A I believe that that is a requirement of the Act.

21 Q Therefore, if you were to construct electric
22 generation equipment by the use of revenue bonds, the Borough
23 would have to use the electric revenues to retire the bonds?
24 That would be the first call on the revenues?

25 A That is correct.

1 Q These bonds in your experience are traditionally
2 long-term bonds, extending over beyond 25 years?

3 A I don't think that I am really qualified to
4 testify generally as to revenue bonds.

5 I am familiar with the one revenue bond issue of
6 the Borough of Pitcairn. It would not lead me to respond to
7 that question the way it was worded.

8 Q The Borough of Pitcairn's current peak load, is it
9 approximately 2000 kilowatts?

10 A I would assume it is approximately 2000. I have
11 not been in close contact with that peak load figure in the
12 last couple of years, but I would anticipate that your
13 statement is approximately correct.

14 Q Would you anticipate that if Pitcairn were to
15 attempt to purchase part of a generating unit, that it would
16 purchase an amount of capacity, at least equal to its most
17 recent peak load?

18 A No, I would anticipate that if we attempted to
19 enter into such an arrangement, we would look at what was
20 available, consider all aspects of it, and then make a
21 determination as to what would be a reasonable size for purchase.

22 I don't think that any decision could be made on
23 that until the studies were made.

24

25

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

Q In other words, that would be something that the Borough would want to tailor to its own best interests and would have to be negotiated?

A That is correct. I feel the Borough would have to have the advice of its consulting engineering firm.

Q Incidentally, so the Board is clear on this, and we all understand when I say 2,000 kilowatts, how much megawatts would that be?

A Two. You now have exhausted my engineering knowledge.

Q Mine also, I'm afraid.

The solicitor for the Borough prior to you was a Mr. MacGinnis.

A That is correct.

Q Who was your partner and/or employer, depending on what time period we would be talking about?

A To be accurate, we were associated in the practice of law.

Q You shared an office with him?

A That is correct.

Q And that was from 1961, when you started the practice, and then you become solicitor, the first of 1967?

A That is correct, but to be more correct, I started to clerk in the office in 1958 and was frequently in the office from 1958; when I was graduated from law school in 1960, I was with the firm and was admitted in 1961.

lx2

1 Q Are you aware -- when Mr. Merriman contacted
2 you shortly after you became Borough solicitor to discuss
3 with you the possible sale of the system, did he make
4 any threats to you?

5 A No, sir, he did not.

6 Q He applied no pressure to you?

7 A No, sir, he did not. He did suggest, which I
8 thought was highly improper of him, that I could obtain
9 substantial fees by recommending to the Borough that they
10 sell the system to Duquesne Light.

11 Q First of all, would you, in fact, have received
12 fees if you had handled the transaction for the Borough?

13 A Yes, I would have.

14 Q Did you report him to the Duquesne Light Company?

15 A No, I did not.

16 Q It wasn't so improper that you thought to complain
17 to the Company?

18 A I was highly incensed. I didn't feel it
19 justified doing that. He also said he pointed out to me
20 that Lee Donaldson, Speaker of the Pennsylvania House of
21 Representatives, had been solicitor of the Borough of
22 Aspinwall. He said if Duquesne Power couldn't get them to
23 sell light to the Borough of Aspinwall, how do you expect
24 to get them to sell power to the Borough of Pitsairn.

25 Q ... Are you aware that Mr. McGinnis recommended to the
borough that they sell their system to Duquesne?

bw3

1 MR. LESSY: Did Counsel specify time?

2 BY MR. LERACH:

3 Q Prior to the period Mr. McCabe became
4 solicitor.

5 MR. LESSY: Early 1960 or later 50s or just prior.

6 BY MR. LERACH:

7 Q Prior to the time that Mr. McCabe became the
8 solicitor.

9 MR. LESSY: The question is vague. Mr. MacGinnis
10 was solicitor for the Borough, as I recall, for a number
11 of years. It is important to pin the time frame.

12 MR. LERACH: Mr. McCabe is supposed to testify
13 about the Pitcairn system from the year 1902.

14 MR. OLDS: Over objection, we permit Mr. McCabe
15 to go into the history of the system.

16

17

18

19

20

21

22

23

24

25

jeal.

17

MR. LESSY: For purposes of clarification of the question, did Mr. McGinnis make a recommendation, I want to be more specific as to the time frame.

CHAIRMAN RUGLER: The witness is aware of the time frame, I am sure.

THE WITNESS: I am not aware that Mr. McGinnis' made recommendation to the borough that they call their light system to Duquesne Light.

I would be surprised if he gave that advice ever.

I know during the period of time I was associated with him in the practice of law that he was active in efforts to secure the purchase of power from Duquesne Light.

BY MR. LERACH:

Q Do you have any knowledge that when Mr. Morrison talked to Mr. Rizzo, the councilman, in 1968, that there was pressure applied to Mr. Rizzo or any attempt to influence his views?

A It was my understanding that the contacts of Mr. Rizzo came through his employer which was Calgon and came in such a way that I felt that they would apply indirect pressure to Mr. Rizzo.

Q Were you present when Mr. Rizzo's deposition was taken during the Pitcairn antitrust proceeding?

A Yes, I was.

Q Do you recall --

MR. LESSY: Before counsel goes on, I don't want us to get too deeply into a deposition relating to another proceeding.

We have had trouble introducing documents related to that procedure on direct examination. I hope counsel won't go too deeply into the deposition or documents with respect thereto.

MR. LERACH: I believe I am entitled to impeach the witness' testimony and/or refresh his recollection. I would like to attempt to do that with an answer given at the deposition.

BY MR. LERACH:

Q Do you remember that Mr. Rizzo stated that he felt he was under any pressure?

MR. LESSY: That's unspecific.

MR. LERACH: I will rephrase the question.

CHAIRMAN RIGLER: I will not permit the question.

BY MR. LERACH:

Q Do you recall Mr. Rizzo stating under oath as a result of that visit from Merriman he felt under no pressure at all to be influenced one way or the other?

MR. LESSY: That's presumably during the deposition.

MR. LERACH: The answer is during the deposition.

THE WITNESS: I believe that Mr. Rizzo's deposition was that he did not feel he was under any

pressure. His opinion as to what might subject him to pressure and my opinion as to what might subject him to pressure could well be different, and I think were in this case.

BY MR. LERACH:

Q Mr. McCabe, did the Pennsylvania Economy League do a fiscal study of the Pitcairn Borough in 1957?

A Yes, they did.

Q Are you familiar with that study?

A Only in a very general sort of way.

CHAIRMAN RIGLER: What year was that, please?

THE WITNESS: '57.

MR. LERACH: 1957.

Mr. Rigler, I would like to ask you a question here on how to proceed with our exhibits. Do I understand you want a Duquesne Light document number on it and Duquesne Light exhibit number on it?

CHAIRMAN RIGLER: Have you supplied other parties with a list of Duquesne Light documents upon which you will rely?

MR. LERACH: I have submitted a list of proposed exhibits.

CHAIRMAN RIGLER: Does that list have document numbers on it?

MR. LERACH: I think, fortunately for me, it does

not.

MR. LESSY: I would like to state we have not received any documents, however.

MR. LERACH: I have a copy for Mr. Lessy and I will have someone distribute them.

I am just trying to get the mechanics straightened out.

Is it sufficient for your purposes if the document is identified and merely marked Duquesne Light Exhibit Number 1?

CHAIRMAN RICLER: That is sufficient.

Will you be distributing documents now?

MR. LERACH: Yes, sir. Why don't we take five minutes?

CHAIRMAN RICLER: All right. We will recess.

(Recess.)

1 CHAIRMAN RIGLER: Mr. Reynolds?

2 MR. REYNOLDS: Mr. Chairman, just to clear
3 something up, because it came up just before the break.

4 You had asked a question about whether the
5 document that Duquesne Light was ready to refer to, was
6 on the document list. So we don't get confused with
7 different lists, our document lists were addressed to
8 our affirmative case and not to cross-examination.

9 It may well be that very few, if any, of the
10 documents are on that list. It would probably be easier
11 for everybody concerned if we can wait for the Applicants'
12 direct cases before we refer to the applicants' document
13 lists. Otherwise, we will get numbers very confused.

14 MR. HJELMFELT: I'm surprised to hear that. As
15 I recall, when we were arguing about what should be put on
16 the document list and whether we should file document lists,
17 counsel for the Applicants were arguing not only should
18 we list the documents we were intending to use in direct,
19 but any we would expect to use in cross or rebuttal or any
20 other fashion.

21 CHAIRMAN RIGLER: What did we rule?

22 MR. HJELMFELT: You ruled we should put in any
23 document we expected to use, and we could use other documents,
24 if we could show good cause.

25 MR. REYNOLDS: I have not recollection of ever

bw2

1 making a statement like that. I advise the Board we
2 prepared our document list on the basis of what our affirma-
3 tive case would be. We had no way to do otherwise. We did
4 not put on our document lists those documents that we thought
5 were relevant to cross-examination. I frankly don't recall
6 making the statement. If there is something in the transcript
7 or filing that could refresh my recollection, I could be
8 corrected, but I have no recollection of making a statement
9 like that.

10 CHAIRMAN RIGLER: We will see if any problem
11 results. Why don't you proceed, Mr. Lerach.

12 MR. CHARNO: Before the examination proceeds, is
13 the marking of this document to be an exception from the
14 rule that you previously announced that Applicants' Exhibits
15 would be numbered Applicant's Exhibit 1, Applicant's Exhibit
16 27

17 CHAIRMAN RIGLER: It should be
18 marked Applicant's.

19 MR. LERACH: I think it has to be Applicant's
20 with Duquesne Light designation.

21 MR. REYNOLDS: Are we talking about Applicant's
22 1, and now we are going to -- the problem we will have with
23 a number of Applicants cross-examining before we get to
24 direct and back and forth, unless we have a designation, as
25 to which Applicant we are talking about, it will be difficult
to sort out who introduced the document or what it relates

1 to. I have no problem saying Applicant's Exhibit 1, if
2 we can put some indication either after the number or
3 in parentheses between the number and Applicant's to
4 indicate it is Duquesne or CEI, Ohio Edison, so we know
5 which applicant it is.

6 CHAIRMAN RICLER: I think the Board will adhere
7 to its earlier ruling, Mr. Reynolds. I suggest you use
8 the column with the "A" in it as you keep your own list
9 and indicate whatever internal identification you wish to
10 make with respect to individual applicants.

11 . . . Is the transcript not going to
12 reflect this? The transcript will reflect which attorney
13 sought to have the document placed into evidence. I
14 don't see the problem in that. I can see a way in which
15 the problem you described in terms of your working
16 relationship among the Applicants can be solved with your
17 keeping score in the column marked "A" by the Exhibit number.

18 MR. REYNOLDS: My overall problem is having Duquesne
19 Light introduce on cross-examination documents relevant for
20 Duquesne Light's cross-examination and having no bearing
21 at all on anybody else's cross-examination. While I
22 appreciate this Board has made a ruling, I'm not convinced
23 that ruling will withstand appeal and further rulings higher
24 up.

25 If that is the case, it seems to me this record

1 should be done, if it can be done, without prejudicing or
2 disadvantaging anybody, it should be made in a way, so if
3 we do have another look at that ruling higher up that someone
4 can work then with the record in a manageable way.

5 I don't think I will request anything that will
6 impose greater burden on anybody, including the reporter,
7 if we can start on it at the outset and give some
8 designation.

9
10 CHAIRMAN RIGLER: What happens when you, for
11 example, put in a document that doesn't come from any partic-
12 ular Applicant?

13 MR. REYNOLDS: Then it will come in as "Applicants'
14 Document." That would be the clearest way to do it. That is
15 why we are talking about this problem. If we have
16 "Applicants' Document 1 (Duquesne Light)" and "Applicant's
17 Document 50" and no paren "Duquesne Light," and "Applicants
18 Document 50" and no paren, you have your answer before you
19 in the column of documents.

20 CHAIRMAN RIGLER: Mr. Berger -- Mr. "Oldie
21 Edison" Berger?

22 MR. STEVEN BERGER: I think the reporter is
23 reflecting "Mr. Steven Berger," when you do it that way.

24 A couple of problems. It was our understanding
25 that with the preliminary ruling that the Board made in
regard to procedural matters raised by the Shaw, Pittman

1 firms as to matters that would be coming into evidence
2 against the Applicants, or to say, that that didn't address
3 the question of the separate designation of documents that
4 each of the Applicants have submitted here.

5 We have now the additional problem of
6 coordinating the sponsorship of documents. Now the first
7 document introduced by Mr. Lerach, I haven't seen before.
8 I don't know if I want to sponsor that document. It may
9 very well be that I do, but the basic problem is still there,
10 that I have documents as well that I have marked now
11 OE-PPI, 2, 3, 4, 5, that I anticipate to be putting in
12 during my cross-examination of Mr. McCabe. You have got, I
13 think a real problem of running a manageable hearing and
14 of identification, as well.

15 I don't see how, even assuming what your ruling
16 will be, it should matter that the parties, just as the
17 NRC Staff, the Justice Department and the City of Cleveland
18 have separate designations that each of the Applicants have
19 separate designations. I don't see how that should matter.

20 I think it will simplify the hearing for the
21 Board and for the parties, rather than just to have a
22 seriatim listing of Applicants' 1 through 5,000 and
23 not know who put it in and for what purpose.
24
25

aml #19

1 CHAIRMAN RIGLER: Mr. Charno, you raised the point.
2 Does Mr. Steven BERGER's suggestion make any sense
3 to you or not?

4 MR. CHARNO: I don't see the necessity for it,
5 Mr. Chairman. It seems the Board has previously ruled that
6 we would proceed on serial listing of Applicants documents.
7 You have provided a means by which they can maintain their
8 internal consistency. There seems to be no necessity for
9 labeling each document individually.

10 CHAIRMAN RIGLER: I don't want to prolong this.
11 Do you, any of you, have an important final comment?

12 MR. STEVEN BERGER: Two things.

13 One, I think Mr. REYNOLDS' point with regard to
14 the fact that especially with expert testimony we will have
15 Applicants Exhibits sponsored by all of the parties, but you
16 are involving a real substantive problem, as I see it.
17 It is one thing which we have taken objection to say that
18 evidence is going to be admitted against all of the parties.

19 Now, what you are saying is that the evidence submitted
20 by the individual Applicants is being submitted by all of these
21 parties without giving those parties any right with regard to
22 whether or not they want to sponsor documents.

23 It seems to me it is --

24 CHAIRMAN RIGLER: I suppose we could give you the
25 opportunity to stand up and object to Mr. Lerach's offering of

mm2 1 the document.

2 MR. REYNOLDS: That is the type of situation we
3 are walking into.

4 I really question what value there is to this
5 proceeding or to this Board or to anybody else to go through
6 that. I do think we are going to make a valiant effort to
7 caucus to the extent we can, and funnel our objections
8 through one counsel where it is appropriate. But, I really
9 think when we are talking about cross-examination and we are
10 talking about counsel who are going to have to prepare for
11 cross-examination and just necessarily we can't have the kind
12 of coordination we might like to have, that we are going to run
13 into the problem of each of the counsel having to stand
14 up and make a separate objection probably for different reasons
15 and also we are going to have to have some time to go through
16 all of the documents that Duquesne is going to talk about before
17 it does to see if we are going to make an objection or not
18 make an objection.

19 CHAIRMAN RIGLER: How would our designation ruling
20 change that one bit?

21 MR. REYNOLDS: If Duquesne is sponsoring a
22 document on cross-examination, it is entitled to do that. The
23 other Applicants will have their time on cross-examination to
24 do what they are going to do.

25 We don't need to stop Duquesne's cross-examination

mm3 1 of this witness for us to look at the documents to make a
2 determination as to whether or not we want to object or not
3 object to its coming into evidence.

4 CHAIRMAN A. BER: Why not?

5 Mr. BERger has suggested he might want to object to
6 it. You are telling me that we can defer that ruling some way
7 by letting Mr. Lerach conduct his cross-examination.

8 MR. REYNOLDS: I think that the difference is the
9 way you have it structured it is not Mr. Lerach that is
10 putting that document into evidence, it Mr. Lerach, Mr. Berger,
11 Mr. Hauser, and Mr. Briley. You have that document coming in
12 with all of them sponsoring it.

13 Before they can say they want to sponsor that
14 document, they will have to stop everything and look at it
15 to see if they want to do that.

16 It seems that is the type of delay there is no need
17 for. If Mr. Lerach wants to sponsor the document, he can
18 sponsor it. But they are not in a position to say they are
19 sponsoring that particular document.

20 I guess my problem is I don't see what prejudice
21 it is to anybody else in the hearing.

22 MR. HJELMFELT: Mr. Chairman, I understood that counsel
23 for the Applicants were to cross-examine through a single
24 counsel, which it seems to me that that policy indeed, is going
25 to be followed as Applicants have agreed that that eliminates

mm4

1 much of the problem in that there will be one counsel who
2 has to be familiar with the document that is going to be
3 introduced on cross-examination.

4 CHAIRMAN FIGLER: Mr. Reynolds?

5 MR. REYNOLDS: I guess that I am not clear where
6 Mr. Hjelmfelt has come up with the conclusion that cross-
7 examination is through one counsel.

8 The Applicant intended, and we made it clear at the
9 last prehearing conference, that Applicants intend to conduct
10 cross-examination on behalf of each of the individual
11 Applicants through their separate counsel, avoiding to the
12 fullest extent possible, duplication.

13 What we are getting into is, and now we are being
14 required to defend jointly. It seems to me this Board neither
15 has that authority, nor does the law require we do that.

16 If the Board wants to make a ruling as to how the
17 evidence is going to come in and how they are going to consider
18 it, we may have to take that up.

19 In terms of how we are forced to defend, each
20 company has a right to defend themselves against the charges
21 made on an individual basis. I think it is inappropriate and
22 improper for this Board or any of the parties to suggest, or
23 the Board to order that we have to defend jointly in this type
24 of a case.

25 I think the law does not permit that and that there

mm5

1 is no authority that this Board has to do it. I think that is
 2 really what we are getting into now. I do object to what. I
 3 have a hard time proceeding with it -- proceeding any further
 4 if we are in that position. I don't think that these individual
 5 Applicants should be required to do that.

6 MR. EJMELFELT: The agreement I am referring to, of
 7 course, is the March 29, 1974 agreements of counsel, with
 8 respect to the Board's NRC Rules of Procedure here.

9 As I recall, they do provide that they would not
 10 treat certain parties as consolidating their case for
 11 presentation of evidence.

12 CHAIRMAN RIGLER: How do you avoid the effect of your
 13 own March 29 agreement?

14 MR. REYNOLDS: We have answered that a number of
 15 times. March 29 was at a time when Applicants viewed this
 16 case as the latest filing by the City, fully comprehended as
 17 a case between CEI and City of Cleveland. It was before the
 18 issues were framed by the Board in Prehearing Conference 2.
 19 That was in July of 1974 and not in March. The agreement was
 20 in March.

21 CHAIRMAN RIGLER: Mr. Hjelmfelt has responded by
 22 saying if you are willing to enter into that broad an agreement
 23 before the issues were framed, why are you complaining now that
 24 the issues have been narrowed?

end 19

25

MR. REYNOLDS: Mr. Bigler, the issues have not been narrowed by any stretch. The issues have been broadened considerably. We have had additional advice letters, additional allegations that were never heard of until September 5.

We had the September 2 issues that were broad for discovery that are about as broad as anything that you could have -- that has ever been framed in an antitrust proceeding either in court or in this proceeding.

When we started out Applicants had consistently indicated to this Board their view of what the nature of this case was.

On that basis, a basis of the between GMK and the City of Cleveland, we represented that we were available to handle the case through one counsel.

This case has mushroomed to a considerably larger case with larger dimensions.

We have a number of clients who are entitled to defend themselves each one as it sees fit independently and they will be represented here by their individual counsel.

I don't think there is any agreement back in March 1974 that cuts against that or undercuts that.

We have made it clear to the Board that that is the way we are going to proceed and that is the way we are going to proceed.

CHAIRMAN RIGLER: That has little undertones of threats in it, Mr. Reynolds. You will proceed the way the Board orders you to proceed.

We have in mind how you want to proceed. Thus far you have been able to do that.

MR. REYNOLDS: I had no intention of threatening the Board. I would not do that and did not mean to do that.

I want to impress on the Board we have a serious consideration.

CHAIRMAN RIGLER: That is all that needs to be said now. Thank you.

MR. HJELMFELT: I merely point out that for months and months we heard Applicants did not know what this case is about. Now they are telling us when they made the agreement to operate by one counsel they did in fact know what the case was about.

In my recently filed pleading I demonstrated clearly --

CHAIRMAN RIGLER: We are familiar with that, too.

(The Board conferring.)

CHAIRMAN RIGLER: The Board will continue to require Applicants to list all Applicants' documents serially. Solely as an accommodation to counsel we will permit them after each serial number to write in the initials of the counsel for the company who sponsored it. That is the

sponsoring company.

MR. STEVEN BERGER: I object to that procedural ruling, your Honor, and I want it noted for the record.

MR. LERACH: I join on behalf of Eugenesco although it is not my problem. I do join -- yes, it is.

MR. HAUSER: I join on behalf of the CBT.

MR. BRILEY: I join on behalf of the Toledo Edison Company.

CHAIRMAN RIGLER: You may proceed.

Are you intending to offer the financial survey of the Borough of Pitcairn here as Applicant's Number 1 for identification?

MR. LERACH: I would like it marked as Applicant's Exhibit 1 (WSE).

CHAIRMAN RIGLER: I didn't mean your personal initials, but your client's initials.

Was there confusion on that?

MR. LERACH: There was, but I still object.

MR. LESSY: With respect to Applicant's Exhibit 1, (DL), I notice that is presented by the --

CHAIRMAN RIGLER: We are not in the voir dire stage yet.

MR. REYNOLDS: I would like to move to certify that question. Would you like it in writing?

CHAIRMAN RIGLER: What question?

MR. REYNOLDS: The procedural ruling you just made.

CHAIRMAN RIGLER: That you could attach the initials of the company afterwards as an accommodation to counsel?

MR. REYNOLDS: The exhibit to be introduced will be sponsored by the Applicant and as an accommodation to us you indicated we could parenthetically put in the initials of the company.

If that is the ruling, I would like to certify it.

CHAIRMAN RIGLER: Apparently you misunderstood the ruling. I said Applicant's Exhibit would come in serially. That is the next time Mr. Berger, Mr. Hauser wants to put in an exhibit, you do, there will be one serial list covering all Applicants.

As an accommodation for Applicant counsel for the bookkeeping purposes you describe we are permitting you to attach after each serial number the name of the company that sponsors it.

I thought that was the relief you are requesting.

MR. REYNOLDS: The companies whose initials follow is the sponsoring company.

CHAIRMAN RIGLER: I don't know if we are talking the same language when you say sponsoring company.

MR. REYNOLDS: My trouble is, and my problem --

and I don't want to belabor it, but the difficulty is that Ohio Edison and Pennsylvania Power do not want to sponsor a Duquesne Light document necessarily, and BEI does not want to sponsor a Duquesne Light document necessarily, and Toledo Edison does not want to sponsor a Duquesne Light document necessarily, but Duquesne Light would like to sponsor it.

CHAIRMAN RIGLER: I don't understand why the counsel for Duquesne Light cannot say, "I am introducing this on behalf of Duquesne Light."

MR. REYNOLDS: The Board's ruling is not intended to indicate that it is being sponsored by all Applicants.

CHAIRMAN RIGLER: We are not intending to deprive counsel for another Applicant of challenging a document sponsored by one of the other Applicants.

MR. REYNOLDS: So the initials afterwards will indicate who sponsors the document?

CHAIRMAN RIGLER: Who the originating counsel was, which company his client was.

MR. REYNOLDS: And that he is sponsoring the document.

Are we saying the originating counsel whose initials are at the end of it are sponsoring the document or are we saying Applicant are sponsoring the document?

That is the question I am concerned with.

CHAIRMAN RIGLER: Having told you counsel for

jon6

other Applicant may challenge the document. I don't see you need further relief.

I am not clear as to what you mean by sponsoring. Since we have afforded you the opportunity to have counsel for another Applicant to challenge that document, I don't see what more you need.

MR. STEVEN BERGER: Am I to understand from what you are saying, if a document comes in and Ohio Edison and Pennsylvania Power don't specifically object to a document put in by Mr. Lerach on behalf of Duquesne Light that the Board is receiving that document as if it was sponsored by all of the Applicants, including Ohio Edison and Pennsylvania Power?

CHAIRMAN RIGLER: If there was evidence contained in that document we may consider that evidence as it affects a situation inconsistent with the antitrust laws.

MR. STEVEN BERGER: The kind of coordination I think would be required in order for your Honor to be receiving documents in this case on behalf of all of the Applicants, unless the Applicants otherwise object to the receipt or introduction of the document on behalf of Applicant is something we would have to take a recess for three months and all of us sit and determine what will go into this case.

You cannot receive evidence that way.

CHAIRMAN RIGLER: We will not try five or six separate antitrust cases.

jon7

MR. STEVEN BERGER: That is what is presented to you by the Staff and Justice Department. That is what is presented by the September 5 filings. If you believe otherwise I would like to know.

CHAIRMAN RIGLER: Let's proceed. I have heard enough of this argument. You have the ruling as to how the documents may come in which is in essence the relief you are asked for.

MR. REYNOLDS: Could you explain to me when you say in essence what part of the relief I asked for does the Board feel it is not giving me?

CHAIRMAN RIGLER: No, I can't, Mr. Reynolds.

MR. REYNOLDS: All right. I would like to move to certify the ruling.

We will take it up and argue it before the Appeal Board.

end20

1 CHAIRMAN RIGLER: Motion to certify is denied.

2 You may proceed, Mr. Lerach.

3 BY MR. LERACH:

4 Q Mr. McCabe, do you have in front of you a document
5 entitled Financial Survey Borough of Pitcairn, bearing the
6 date March 1957?

7 A Yes, I do.

8 MR. LESSY: Excuse me, may I enter my objection now
9 to the use of this document?

10 Is this appropriate?

11 CHAIRMAN RIGLER: You want that marked as Applicant's
12 Exhibit No. 1?

13 MR. LERACH: Paren DL close paren. Yes, sir, I do.

14 (The document referred to was
15 marked Applicant's Exhibit

16 No. 1 (DL) for identification.)

17 MR. LESSY: In reviewing this in the last discussion
18 between the Board and the Applicants, the study has, one, no
19 author, except that it says it is prepared by the Pennsylvania
20 Economy League, Inc. There is no name, individual or
21 writers with which we can pursue additional questions.

22 The Applicants Exhibit 1 (DL) we don't know -- it
23 is not in any way signed except that it says it is prepared
24 by. We don't have any information as to whether or not this
25 entity exists today.

XXX

21 mal

mm2

1 We note with respect thereto, that the date is a
2 month of March 1957. We don't know, the corporate form,
3 although it indicates the corporation by E-N-C. Who owns the
4 entity, who controls the entity? It contains a letter on
5 page 2 thereof which is undated and unsigned.

6 We have never seen this document before.

7 Begging the question as to whether or not a document
8 used for impeachment purposes, for cross-examination purposes,
9 need be included in the listing, we would object to this document
10 for the reasons -- the use of this document for the reasons
11 stated.

12 MR. LERACH: The reason Mr. Lenny doesn't have the
13 information he asks for is because he interrupted my examination
14 before I had an opportunity to ask the witness a series of
15 questions to develop that information.

16 CHAIRMAN RICLER: Let me ask the fundamental
17 question that occurs to the Board, that is one of timeliness.

18 The document is dated March 1957. How could that
19 affect the situation in 1965 and subsequent thereto?

20 In other words, to the extent that the document is
21 what it purports to be a financial survey, wouldn't the informa-
22 tion necessarily be dated?

23 MR. LERACH: First of all Mr. McCabe has been permitted
24 to testify as to the history of the Pitcairn electric system
25 and of Pitcairn Borough. The history of that Borough and its

1 electric system is obviously relevant to Duquesne Light's
2 activities in the mid '60s, which have come under criticism,
3 apparently, from the Staff.

4 It is sort of surprising to hear the Board now
5 make what I consider to be a nexus objection to my exhibit.
6 I feel that financial condition of the Borough of Pitcairn,
7 the manner in which its finances were structured, the manner
8 in which its electric fund and electric plant were financed
9 and operated are all terribly relevant to my client's good
10 faith and reasonable business justification for being unwilling
11 to enter into some of the transactions suggested to it by the
12 Borough of Pitcairn.

13 I intend to submit evidence to that effect. This
14 is one piece of evidence, and there will be others.

15 MR. LESSY: I suggest in response thereto, Mr. Chairman
16 that the type of evidence that could be introduced has to be
17 competent evidence and the questions I raised with respect to
18 this particular document, I think fails to go into that.

19 I am not objecting to the relevancy of financial
20 surveys of the Borough or any of the other questions Mr. Lerach
21 mentioned, but that this study could be used for that purpose
22 knowing what little we do about it, that is my question.

23 (The Board conferring.)

24 CHAIRMAN RIGLER: You may proceed temporarily,
25 Mr. Lerach.

mm4

1 MR. HJELMFELT: Mr. Chairman, might we have some
2 indication what portions of this document will be considered
3 relevant?

4 I don't find margin marks in mine.

5 CHAIRMAN RIGLER: There are in ours.

6 MR. LERACH: The Board requested that the copies of
7 the documents provided to the Board be underlined in red in
8 those areas that we think are essentially to be useful.

9 MR. LESSY: That is just the Board.

10 Counsel copies are not marked.

11 CHAIRMAN RIGLER: I think we will have to have you mark
12 it in red for all parties. We will have to change that rule.

13 If something is emphasized to the Board's attention,
14 it should be emphasized to the counsels'.

15 MR. LERACH: Do you want me to suspend Mr. McCabe's
16 testimony to take 15 minutes or so to mark the other copies
17 at this time, Mr. Chairman?

18 CHAIRMAN RIGLER: Yes.

19 (Recess.)

end #21

20

21

22

23

24

25

EAK:bwl

CHAIRMAN RIGLER: Mr. Charno?

922

MR. CHARNO: Would it be possible to have an evening session this evening? It doesn't appear as if the Witness is going to be finished tomorrow from the conversation I have heard. If it is possible to expedite his travel plans, I'm willing to come in this evening to represent the Department.

MR. LESSY: Can we go off the record?

(Discussion off the record.)

CHAIRMAN RIGLER: Let's move ahead now.

MR. LERACH: Unfortunately, before we do that, I must get another housekeeping detail taken care of that has come up.

CHAIRMAN RIGLER: On or off the record?

MR. LERACH: I want it on the record. During the Board's absence, I asked Mr. McCabe to speak with me. He is willing to do so. I asked him to speak with me alone. A person from Staff was there. I asked the person to go away. Mr. Lessy informed me, because Mr. McCabe is under subpoena to him, I'm not permitted to talk to Mr. McCabe unless someone from Staff is present.

I do not intend to have Mr. Lessy tell me that and obey it. I think Mr. McCabe is willing to talk with me. It is interesting to note after Mr. Lessy refused to permit me to talk to Mr. McCabe, I saw him at the witness table

bv2 with Mr. McCabe going over the document currently marked Applicant's Exhibit No. 1 (DL). I am unaware of any rule for any tribunal that says that Counsel is not permitted to meet with a witness alone, merely because that person is under subpoena to another party. It is a preposterous position and fundamentally unfair.

CHAIRMAN RIGLER: All right. Fine.

Do you have a citation or a rule you want to invoke, Mr. Lessy?

MR. LESSY: I will have to restate the facts, I'm afraid. There was a conversation informally where Mr. Goldberg and I were talking with Mr. McCabe and Mr. Lerach. Mr. Lerach then sought to take Mr. McCabe away and talk to him in private. We advised that the Witness was under subpoena to us. We requested that Mr. Goldberg be in attendance during the conversation. It concerns the precedential value of the fact that Mr. McCabe is an attorney. We have a number of fact witnesses who are not. Our understanding was the best understanding would be any communications take place on the record and if not be on the record, then the parties be present. That was the purpose of our request.

MR. LERACH: Did Mr. Lessy invite me to be present at the meeting he had with Mr. McCabe in Pittsburgh last week?

bw3

CHAIRMAN RIGLER: There is no need to answer that. There is no rule that forbids a party to talk with the witness, a nonparty witness, except in the absence of the subpoenaing counsel. In other words, as long as Mr. McCabe is willing to talk with Mr. Lerach, I don't think there is anything you can do about it.

MR. LESSY: To make the record clear, we requested our attendance at the conversation and our attendance was denied.

CHAIRMAN RIGLER: Proceed please.

MR. MR. LERACH:

Q Mr. McCabe, do you have in front of you a document marked Applicant's Exhibit Number 1 (DL), entitled Financial Survey of the Borough of Pitcairn, dated March 1957?

A I do.

Q Are you aware that in 1957 at the request of the Borough of Pitcairn an organization known as the Pennsylvania Economy League undertook a survey of the financial condition of the Borough of Pitcairn, and submitted a written report?

A I am.

Q Is Applicant's Exhibit No. 1 (DL) a copy of the report submitted?

A I cannot say that. As a matter of fact, it appears to be.

Q To the best of your present recollection, it appears to be?

bw4

A I have a copy of the report in my briefcase.

Q Of the original, or one that you know to be authentic?

A One that I know to be authentic.

Q Would you like to take a moment to compare the copy in front of you with the one you know to be authentic?

A I presume you have done that. I will accept your representation.

Q Mr. McCabe, the Borough's finances, Borough of Pitcairn's, as I understand it, consisted essentially of a number of different, what you call "funds," is that right? Out of which you would pay bills and so forth.

MR. LESSY: At what time, and is this question related to the document?

BY MR. LERACH:

Q Let's say at the time the report was prepared.

A To the best of my knowledge that is correct.

Q The borough has something known as an electric fund; is that right?

A That is correct.

Q That was true, both at the time of the report and it's true now?

A That is correct.

JW5

Q And the electric fund is funded by receipts from the sale of electricity?

A Let me just for the sake of understanding -- the Borough keeps separate books of account for its electric fund, has a separate checking account. These are for matters of internal account procedure. It also has separate funds for such things as revenue sharing, monies and they are budgeted on separate budgets.

Q The Borough also has what is known as a general fund?

A That is correct.

Q That would be true for the entire time period of your association?

A That is correct.

Q And the general fund is used, if you will, for general purposes, general operating expenses of the Borough?

A That is correct. I might say I have a general knowledge of their accounting system. I'm not an accountant. I have not had occasion to work with the exact details of the accounting system. I'm generally familiar with it, and what you are saying reflects my understanding of the operation.

Q Fine. I will try not to ask you questions that would require detailed knowledge. Has it been your experience

and is it your knowledge that over the period of years that you have been associated with the Borough that the Borough has customarily transferred funds from the electric fund into the general fund?

A There have been no transfers as such during the period of time I have been solicitor.

Q That would be since 1967?

A That is correct.

Q Are you aware that prior to 1967 there were transfers?

A I believe that prior to 1963 there were transfers.

Q And were those transfers made for the purpose of making up a deficit in the operation of the general fund?

A You could use that language, although I think that that language is extremely misleading. What was done prior to 1963, the general fund budget would budget certain revenues from the light plant operation, just as they budgeted revenues from real estate taxes.

Those funds were then transferred. They weren't really to make up a deficit. They were in compliance with the budgeted figures anticipated to be received from the light plant operation.

Q Absent the transfers from the electric fund, there would not have been sufficient monies in the

general fund to meet the expenses coming out of that fund?

A That is correct. Absent any of the budgeted receipts in the general fund budget, there would not have been sufficient funds to meet the budgeted expenses.

423 Q The Bureau planned each year on taking a certain amount of money out of electric revenues and putting them into the general fund?

A That's correct.

Q Was the accounting of the borough electric system subject to regulation by any state or federal body?

A The borough is required to have its books audited by elected auditors. The borough also has the prerogative of hiring independent certified public accountants.

The Borough of Pitcairn has used elected auditors to audit their books.

Q Perhaps I was too general in my question. The Pennsylvania Public Utility Commission does not regulate the accounting practices of Pitcairn's electric fund or electric system?

A That's correct.

Q Is it true that during the 1950s and early 1960s the borough electric fund did not maintain a reserve for depreciation in its accounting?

A That is a detailed accounting question that I do not have specific knowledge of.

Q Would you be kind enough to look at page 22 of the exhibit in front of you and read the paragraph, the substantial portion of which is marked in red under the title

jon2

"Operating Surplus"?

A I have read the paragraph.

Q Does that refresh your recollection that the borough electric system did not maintain a reserve for depreciation?

A It doesn't reflect -- it has nothing to do with my recollection. I do not have that knowledge. It cannot be refreshed by referring to a statement prepared by someone who may or may not have known the facts.

Q Was it true in the 1950s and early 1960s that the Borough of Pitcairn believed itself able to maintain a lower real estate tax rate for its residents because it could utilize the revenues from the electric fund for its operating purposes?

MR. CHARNO: Could I have that question back, please?

(The reporter read from the record as requested.)

THE WITNESS: I cannot testify as to what the borough believed. I can testify that had there not been revenues from the electric fund there would have had to have been revenues from some other source in order to meet the expenditures which the borough budgeted. Presumably they would have come from some tax source.

BY MR. LERACH:

Q Are you aware that certain elected borough

officials during the 1960s justified the continuation of the borough electric operation on the basis that it permitted the borough to maintain a lower real estate tax rate?

MR. LESSY: Objection. That question assumes facts not in evidence.

If he wants to ask a hypothetical question, he can. The fact he referred to has not been established. If there is any proof of that I think that must have to come first before that type of question can be answered.

MR. LERACH: It is cross-examination.

CHAIRMAN RIGLER: I am beginning to be troubled by the relevance of the entire line of cross-examination if it is in fact proper cross.

I think you are far afield of anything the witness testified to on direct.

MR. LERACH: It is my understanding that the witness testified on direct he was a lifelong resident and worked from 1958 on in the law office of the Solicitor.

He has been permitted to give his version of the history of the electric system of the borough and it seems to me completely consistent to that to cross-examination as to the fiscal condition of the borough in the time period covered by this report as well as the subsequent time periods.

No one has objected.

CHAIRMAN RIGLER: No one has yet. The Board may

foreclose inquiry in this area. Be advised.

MR. LESSY: I have one objection. It assumes facts not in evidence prior to the asking of the question and it was not framed as a hypothetical question.

CHAIRMAN RIGLER: Do you want to rephrase the question?

BY MR. LERACH:

Q Did elected borough officials from time to time justify the continuation of the operation of the Pitcairn electric plant and system on the grounds that the revenues gained from the sale of electricity permitted the borough to maintain a lower real estate tax rate?

A Yes.

MR. LESSY: Off the record.

(Discussion off the record.)

MR. LERACH: I would offer into evidence Applicant's Exhibit Number 1 (DL) and request that it be remarked Applicant's Exhibit Number 1 (DL-1).

MR. LESSY: I object, Mr. Chairman. The study, as we mentioned previously, is not signed. We do not know who the entity who wrote it is. We do not know who the individuals are. We are not in position to cross-examine anyone with respect to this.

There has been no offer of proof to fulfill those requirements. We do not know if the entity exists today. We

jon5

do not know who owns or controls the entity. The letter on the front is undated and unsigned.

For all these reasons we object to its offer.

CHAIRMAN RIGLER: The witness has indicated he is not familiar with or disagrees with the facts contained therein. I see no basis for admitting it. It will be rejected.

BY MR. LERACH:

Q Mr. McCabe, did you testify this was a copy to the best of your knowledge of the survey of the Borough of Pitcairn's finances made by the Pennsylvania Economy League?

A Yes.

Q You have a copy of the original in your briefcase?

A I have a copy --

Q Of one you know to be authentic?

A Of one I know to be authentic in my briefcase, I do.

Q Is the Pennsylvania Economy League still --

MR. LESSY: Is this questioning to be permitted?

CHAIRMAN RIGLER: No, it won't be. We have made our ruling. Continue with your examination.

MR. LERACH: May I ask the basis for the Board's ruling for exclusion of this document? Is it authenticity or relevance?

CHAIRMAN RIGLER: Relevance. It may be

authenticity, too. But the primary basis is you have not connected it with anything within the knowledge of this particular witness other than the fact he happens to have a copy of it.

We will not re-argue these objections all day long. Let's proceed.

MR. LERACH: I would like to move to strike all of Mr. McCabe's testimony as to anything prior to the year 1957 he gave in direct.

CHAIRMAN RIGLER: That will be denied.

MR. LERACH: I may not ask further questions of the witness to demonstrate the relevance of the document?

CHAIRMAN RIGLER: That's correct.

Mr. Lerach, I want you to understand that our ruling does not apply to an attempt to bring it in with respect to some other witness in which case we will have another ball game. You have failed with respect to this witness to show any relevance, let alone any knowledge of the contents on his part.

Let's not argue it. Let's proceed.

MR. LERACH: I need to understand the basis of the ruling, so I know how to proceed in the future.

Is it the Board's ruling that the document must be relevant to the witness as opposed to the borough or opposed to the situation supposedly inconsistent?

I don't understand. The man was the Solicitor of the borough. He says the survey was made. It relates to the borough electric fund and the borough. What more can be shown to show it is relevant to the borough's financial condition in relationship to the borough's electric fund?

CHAIRMAN RIGLER: We are not going to rely on the facts contained therein. The witness doesn't know if the facts are true or false.

Let's go on.

BY MR. LERACH:

Q Mr. McCabe, are you aware that in 1959 the Peter F. Loftus Corporation was requested to undertake and did in fact undertake a survey of the borough electrical system?

MR. CHARNO: Objection on grounds of relevancy. I think we are going back down the same road.

CHAIRMAN RIGLER: I will give you a chance to lay a foundation.

24 mm1

1 MR. LERACH: Does that mean the witness may answer
2 the question I asked?

3 THE WITNESS: I am aware that Peter Loftus Company
4 made a survey for the Borough of Pittsiana.

5 BY MR. LERACH:

6 Q Would you tell us what the survey related to?

7 A I think that I have told you everything that I can
8 presently recall when I told you that I was aware that the
9 Loftus Company made a survey. I have not had the opportunity
10 to review that survey recently, and I do not recall independently
11 what it had dealt with.

12 Q Do you have a copy of the survey with you?

13 A No, I do not.

14 Q Can you procure a copy?

15 A It is possible that a copy would be with the
16 Borough records. I cannot guarantee that.

17 I am aware that a copy -- that they did make some
18 type of survey at that time. To be perfectly candid, I am not
19 sure whether I have ever seen that Loftus survey.

20 MR. LERACH: Chairman Rigler, there is an
21 unresolved matter on the floor. The question of the amended,
22 the designation on the rejected document to DL-1.

23 CHAIRMAN RIGLER: That will be denied.

24 MR. LERACH: We are having a document distributed.

25

mm2 1

BY MR. LERACH:

2 Q Mr. McCabe, because the photocopy of this document
3 is not of the highest quality, perhaps we can impose on you to
4 read it into the record.

5 MR. LESSY: I object.

6 Firstly, there are no red marks. I assume there
7 being no red marks, that all of it is relevant.

8 Secondly, I think that counsel and the Board should
9 have opportunity to read the document first before we go
10 forward with either reading it into the record by Mr. McCabe,
11 or anything else.

12 CHAIRMAN RIGLER: Moreover, it hasn't been identified,
13 and moreover the quality of this copy is perfectly clear.

14 MR. LERACH: Fine.

15 MR. LESSY: Can we assume that all of it is relevant
16 to your examination?

17 MR. LERACH: You may so assume.

18 In any event, I did not interpret this to fall
19 within the lengthy document aspect of the Board's rule. This
20 entire document is relevant.

21 BY MR. LERACH:

22 Q Mr. McCabe, I take it you have had a chance to --

23 MR. LESSY: Counsel is just on the first page, sir.

24 THE WITNESS: Mr. Lerach, do you have a question of

25 me?

1 MR. LERACH: I have to wait until Mr. Leszy is
2 finished reading it.

3 CHAIRMAN RIGLER: Do you want to proceed, Mr. Lerach,
4 please?

5 Do you want to identify the document?

6 MR. LERACH: The document bears a printed number in
7 the upper right-hand corner of 4538. It is a letter from
8 Peter F. Loftus Corporation to the Borough of Pitcairn dated
9 March 16, 1959.

10 I would like it marked for identification as
11 Applicants' Exhibit 2 (DL).

12 (The document referred to was
13 marked Applicants Exhibit
14 No. 1 (DL) for identification.)

15 BY MR. LERACH:

16 Q Was Mr. R. D. Evans the Chairman of the Power and
17 Light Committee, the Borough of Pitcairn, in 1959?

18 A I know Mr. R. D. Evans was a member of the
19 counsel in 1959. I cannot testify independently of this
20 letter that he was Chairman of the Power and Light Committee.
21 I assume since he was so identified in the letter, he is, in
22 fact.

23 Q During the litigation that you had with Duquesne
24 Light Company, were a great number of documents produced by
25 the Borough of Pitcairn to Duquesne Light Company?

mm:4

1 A We cooperated with Duquesne Light discovery
2 procedure in all respects.

3 Q Documents were produced out of the Pittsain's
4 files? That is the point I am interested in.

5 A I quite candidly again don't recall request for
6 production of documents.

7 I do recall requests for extensive interrogatories.
8 We may have produced them in accordance with the interrogatories.

9 Q Have you ever seen a copy of this letter before?

10 A I have no independent recollection of having seen a
11 copy of this letter before, although it is possible I have seen
12 it before.

13 Q Mr. McCabe, you represented the Borough of Pittsain
14 in a lengthy antitrust proceeding against Duquesne Light in
15 the late '60s.

16 A That is correct.

17 Q You were part of counsel, or one of the counsel
18 that represented them in a Federal Power Commission proceeding
19 before Duquesne Light in the early '70s?

20 MR. LESSY: That question is beyond the scope of
21 direct examination. There was no direct examination with
22 respect to Federal Power Commission proceedings.

23 CHAIRMAN RIGLER: That may be correct, but I will
24 permit it at this stage.

25 THE WITNESS: I don't know that my appearance was

mra5

1 entered before the Federal Power Commission.

2 I did take part in some of our proceedings.

3 BY MR. LERACH:

4 Q For a considerable number of years you advised the
5 Borough in regard to their electric system and how they could
6 try to get bulk power?

7 A That is incorrect.

8 Q Now, in order to do that adequately, I assume that
9 you undertook to acquaint yourself with the condition of
10 the electric system and its capabilities?

11 A Yes, I did.

12 Q Now, in so doing did you not review the Loftus
13 Report of 1959?

14 A I reviewed every document which was made available
15 to me by the Borough in connection with the electrical system.

16 I don't have any independent recollection of this
17 particular piece of paper. It is quite possible that I reviewed
18 it. At this time, to be truthful and candid, I cannot tell
19 you that I have any independent recollection of this particular
20 report.

21 I did recall that there was a Loftus Report. I may
22 have seen it. I don't doubt the authenticity of your copy.
23 It appears to be in order.

24 MR. LERACH: If I may have a moment to confer with
25 counsel.

mm6

1 I would like to offer Applicant's Exhibit No. 2
2 into evidence.

3 MR. LESSY: Staff would object, Mr. Chairman, on
4 the ground that the witness has testified that he has no
5 independent recollection of the document, and therefore cannot
6 testify as to the truth or untruth of the matters asserted
7 therein, and we would object to the entrance of that on those
8 grounds.

9 MR. CHARNO: Department would also object on the
10 ground of relevance.

11 MR. LERACH: Just to take care of one matter.

12 It is not required that a witness, who authenticates
13 a document, be required to testify as to the truth or untruth
14 of what is asserted therein. That is not part of the authentication
15 process.

16 We have here a document that was produced from the
17 files of Duquesne Light Company bearing Duquesne production
18 No. 4538 and it has been in the possession of the Department
19 of Justice and Staff for many, many months. It has been listed
20 on our exhibit lists and they knew we intended to use it.

21 Now, it seems to me that in the earlier examination
22 of Mr. McCabe, this Board was taking the position that when
23 materials came out of the companies' files and had been identified
24 as potential exhibits, the burden for cutting against the
25 authenticity or proving the unauthenticity of the document now

mm7

shifts to the people who oppose its admission.

I embrace that principle as to this document. If it is to be applied against me, I want it applied for me.

CHAIRMAN RIGLER: Do you embrace the principle selectively?

MR. LERACH: I have not been asked to embrace it generally. I want it applied as to my document at this time.

MR. LESSY: We are not raising -- the Staff is not raising its objection on the basis of authenticity of this document.

We are objecting to entering this into evidence because the witness has testified he has no independent recollection of the document. He has also testified -- has also testified that he is not certain as to the authenticity of it, but he doesn't doubt it comes from the files. That is well and good.

I am not saying the document can't be put in evidence. Our objection goes to the fact it is being used in connection with Mr. McCabe.

MR. LERACH: Does that remove the objection or not?

CHAIRMAN RIGLER: The Board, I don't believe, is troubled with respect to its authenticity.

The question is, are you asking us to accept it as to the truth of the matters contained in the document?

What is the purpose of introducing it into evidence?

mm8

What is it from the document that you want the Board
to consider as evidence?

end 24

What facts are established by the document, if any?

A

MR. LERACH: Perhaps we have a misunderstanding as to how cases are built.

I am trying to put in evidence before the Board so a full record will be present for the Board to make an evaluation of the facts relevant to the proceeding.

If you want offer of proof as to this document, I will be glad to tell you what I think it comes in to prove. I will be glad to do that.

CHAIRMAN RIGLER: All right. Do it.

MR. LERACH: Well, I think if you review the document it expresses the statement based upon a review of the Pitcairn system in 1959, just a few years before the requests were made to CAPCO and Duquesne Light that the system capability of the Pitcairn system was not in proportion to the rate of load growth.

It says that the physical distribution system contains many hazardous situations, demonstrates that the physical generation system contains a hazardous situation which could shut down the entire plant.

The record goes on to emphasize that the present physical condition of the overall electrical system is such that a major outage at certain crucial points could occur.

Present demands on the equipment exceed the equipment rating and capabilities.

CHAIRMAN RIGLER: Are you asking us to accept

those assertions as fact?

MR. LERACH: Absolutely. Of course I am. The Board has told me that this Board takes hearsay for its truth. This is the argument we had this morning.

CHAIRMAN RIGLER: Wait a minute. Would you point out one place in the record -- I direct you to do that as soon as you have the transcript of this morning's proceeding -- where this Board told you they take hearsay as truth?

MR. LERACH: I will explain to you what I meant. I did not mean to insult you, Chairman Rigler.

I am trying to represent my clients. The Board has made it clear that it takes hearsay evidence into this case. I thought that was clearly understood this morning.

CHAIRMAN RIGLER: That is a substantial refinement from what you just said which was that we take hearsay evidence as truth.

Do you want to stick with that statement?

MR. LERACH: I want to continue, if I might.

CHAIRMAN RIGLER: I want you to answer my question. Do you want to stick with the statement that this Board takes hearsay evidence as truth?

MR. LERACH: The Board did not make a distinction when it said the hearsay could come in as to what purpose it would be used for. That may be a significant distinction.

CHAIRMAN RIGLER: When you have the transcript

jon3

available of today's proceedings, I direct you to show the Board the specific transcript reference to which you refer to the effect that the Board takes hearsay evidence as truth.

MR. LERACH: I said I refined the statement as to my understanding. I don't think it is useful. If I have insulted you, I apologize for it.

We are talking about the evidence that comes in.

CHAIRMAN RIGLER: It has nothing to do with insulting the Board or any member of the Board. I believe that is the direct misrepresentation of this Board's rulings, Mr. Lerach.

MR. LERACH: Chairman Rigler, I am not involved in making misrepresentations or representations. I am trying to represent a client. I am dealing with two or three other attorneys.

If you believe I misspoke myself, I apologize.

I don't want to have confrontations with you. I want to move along.

It seems to me discouraging that this morning I received a lengthy presentation from the Staff and there was a lot of discussion about how liberal the Board would be about receipt of evidence.

Now I find myself with a number of objections to evidence I am trying to put in.

Is the Board interested in facts? Well, we have

documents that recite facts. Put them into evidence and let the Board attach whatever weight it wants to them.

endA

B mml

MR. CHARNO: I believe counsel has stated and offered proof that -- and prior argument that these statements would be offered for the truth and correctness of them, and that this would have an impact on the good faith reasons that Duquesne received, and I submit that with the seven-year gap in between and no basis established with this witness, that the situation in 1959 was similar to that in 1966, that this document is totally irrelevant.

MR. LESSY: In addition, I think the proper place to introduce a document like this into the record is during the Duquesne Light's affirmative case either as a sponsored or unsponsored exhibit.

Mr. McCabe is not the vehicle through which to introduce this document, of which he testified he has no independent recollection.

We are not objecting to the use, but of the timing of your use of the document at this time.

MR. SMITH: Mr. Lessy, wasn't your position just the reverse in relation to the footnote on your Exhibit No. 12?

It seems to me you were taking the opposite position.

MR. LESSY: During the presentation of our affirmative case, to have Mr. McCabe on cross-examination be the vehicle through which this document goes in, is distinguishable.

If the witness on the stand were a Duquesne Light witness; Mr. Merriman, for example, who may have been involved

10m2

in a matter like this and he was asked the types of questions that we asked of Mr. McCabe, I think that would be entirely a different situation.

On cross-examination when the witness has testified that he has no independent recollection of the document or contents, this isn't the proper vehicle to bring this evidence in. The proper time is during the case in chief of Duquesne Light either through sponsored or unsponsored exhibit, or a witness who may be familiar with this study. But Mr. McCabe has testified that he is not.

This document contains statements that need that support. If not, it should be an unsponsored exhibit.

CHAIRMAN RIGLER: Mr. Lerach, should we take as fact that properly engineered and executed proposal by Pitcairn over a period of time could provide the Borough with a reliable electrical system capable of expanding as load conditions warrant?

MR. LERACH: Yes, sir, you may.

CHAIRMAN RIGLER: Do you have any information, or do you intend to introduce any information with respect to whether any of the improvements suggested in this document were made?

MR. LERACH: I intend to introduce evidence as to the evolution of the Pitcairn situation subsequent to 1959.

CHAIRMAN RIGLER: I don't think that is directly responsive.

mm3

MR. LERACH: As to whether the precise improvements were made.

We have additional studies made at a later time that we will put into evidence also. I don't know if every one of the improvements was made.

MR. LESSY: He can ask the witness if he agrees or disagrees with a certain statement, or if he feels that this statement is true according to his recollection.

He has just asked the witness if he knows the document. The answer is, the witness doesn't recall it. He said, no.

If he wants to extract certain sections and ask the witness if it is true or false according to his recollection or knowledge, that is one thing. But, to put the document in now is not the proper way to proceed.

It is not relevant as the witness is not qualified.

end B

jcnl

MR. REYNOLDS: I was going to state that I believe the arguments we are hearing go to the matter of weight rather than introduction of the documents, and they are similar to the arguments we believe thrashed over to some extent this morning.

I don't think it would be appropriate for me to comment on how the rulings may have gone on prior discussions of this sort.

We are talking about a matter of weight that should be attached to the document.

On that basis I am not sure I understand the objection to having it admitted into evidence and have the Board make its mind up as to what weight it would attach.

(The Board conferring.)

MR. LESSY: I add Staff's objection is without prejudice to further introduction of this at a more appropriate time or as an unsponsored exhibit.

CHAIRMAN RIGLER: Okay. Subject to the comments with respect to the weight which might be accorded this document, we will admit it into evidence.

It will be Exhibit 2 for evidentiary purposes.

(Applicant's Exhibit Number 2 (DL), previously marked for identification, was received into evidence.)

MR. LERACH: Given the hour of the day, do you want

on2
me to continue. I thought you indicated you wanted to quit at 4:45.

CHAIRMAN RIGLER: Let's go another two or three minutes.

BY MR. LERACH:

Q Did the Borough of Pitcairn purchase a generating engine, I think is the correct term, from Fairbanks Morris in 1963?

A Yes, it did.

Q Did the borough experience difficulty in operating that engine subsequently?

A That engine operated from 1963 until the time we ceased to generate power. It was subject to regular maintenance and repairs as any mechanical device.

Q Do you recall that the Borough of Pitcairn had not paid for the engine until sometime late in 1966 due to its faulty operation?

A I believe that there were certain adjustments to be made and there were certain adjustments with Fairbanks Morris made even later than 1966 in connection with certain overhauls.

I do know that the engine did operate and provide power for the borough.

Q Do you know why the borough did not pay Fairbanks Morris for some three years after the unit was