

NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY AND
CLEVELAND ELECTRIC ILLUMINATING
CO.

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

Docket Nos.

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

and

CLEVELAND ELECTRIC ILLUMINATING
CO., et al.

50-440A
50-441A

(Perry Nuclear Power Plant, Units 1 & 2)

Place - Silver Spring, Maryland

Date - Wednesday, 18 February 1976

Pages 5109- 5245

Telephone:
(Code 202) 547-6222

ACE - FEDERAL REPORTERS, INC.

Official Reporters

18002260863

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

NATIONWIDE COVERAGE

1640

N

bw

1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3	-----X	:	Docket Nos.
4	In the Matter of	:	
5	TOLEDO EDISON COMPANY and	:	50-346A
6	CLEVELAND ELECTRIC ILLUMINATING CO.	:	50-500A
7	(Davis-Besse Nuclear Power Station,	:	50-501A
8	Units 1, 2 and 3)	:	
9	and	:	
10	CLEVELAND ELECTRIC ILLUMINATING CO.	:	50-440A
11	<u>et al.</u>	:	50-441A
12	(Perry Nuclear Power Plant,	:	
13	Units 1 and 2)	:	
14	-----X	:	

13 First Floor Hearing Room
14 7915 Eastern Avenue
15 Silver Spring, Maryland

16 Wednesday, 18 February 1976

17 Hearing in the above-entitled matter was reconvened,
18 pursuant to adjournment, at 9:30 a. m.,

19 BEFORE:

20 MR. DOUGLAS RIGLER, Chairman

21 MR. JOHN PRYSIAK, Member

22 MR. IVAN SMITH, Member

23 APPEARANCES:

24 As heretofore noted.
25

C O N T E N T S

WITNESS: DIRECT CROSS REDIRECT RECROSS

Thomas Darling 5183 5198

EXHIBITSFOR IDENTIFICATIONIN EVIDENCE

DJ Exhibits 199, 201
thru 255, 257 thru
262, and 264 thru
266

5142

DJ Exhibit 108A
(ltr. dated November
23, 1965 from John K. Davis,
to Dewey G. Ries.)

5218

5218

DJ Exhibit 108B
(ltr. dated Nov. 20, 1965,
from Dewey G. Ries to John D.
Davis.)

5218

5218

DJ Exhibit 108

5218

DJ Exhibit 16

5221

DJ 268 (DJ114874-76)

5244

DJ 269 (DJ114869-73)

5244

DJ 270 (DJ114866-68)

5244

DJ 271 (DJ114831-858)

5244

DJ 272 (DJ114815-830)

5244

DJ 273 (DJ114803-812)

5244

DJ 274 (DJ114794-802)

5244

eak

1

EXHIBITSFOR IDENTIFICATIONIN EVIDENCE

2

DJ275 (DJ114766)

3

DJ 276 (DJ119665-66)

4

DJ 277 (DJ114755-765)

5

DJ 278 (DJ00139164-65)

6

DJ 279 (DJ00136660-689)

7

DJ 280 (DJ00136762-766)

8

DJ 281 (DJ00136760-761)

9

DJ 282 (DJ100925-927)

10

DJ 283 (DJ00137054-066)

11

DJ 284 (DJ00136872-378)

12

DJ 285 (DJ00137130-153)

13

DJ 286 (DJ0010274)

5244

14

DJ 287 (DJ00010274)

15

DJ 288 (DJ00010280)

16

DJ 289 (DJ00010282)

17

DJ 290 (DJ00010285)

18

DJ 291 (DJ00014323-344)

19

DJ 292 (DJ00016826-27)

20

DJ 293 (DJ00016391-95)

21

DJ 294 (DJ00015601)

22

DJ 295 (DJ00016407-08)

23

DJ 296 (DJ00015576-78)

24

DJ 297 (DJ00015514-15)

25

DJ 298 (DJ00015574-75)

DJ 299 (DJ00016244-45)

#1

arl

P R O C E E D I N G S

1
2 MR. STEVEN BERGER: Your Honor, you asked me
3 to make available to the Board copies of the regulation
4 we referred to in Mr. Urian's cross-examination. I'm
5 doing so at this time.

6 MR. CHARNO: At this time the Department would
7 like to offer into evidence DJ Exhibits 197 through 266 --
8 I'm sorry -- 199 through 266.

9 MR. LERACH: Mr. Chairman, we have a few
10 objections to some of these documents. I think we will just
11 take them in order.

12 As to documents numbered -- or exhibits numbered
13 219, 222, 224, and 229, we have a similar problem, and we
14 will just state it once:

15 These are all letters to or from people other than
16 Duquesne Light Company that the Justice Department
17 takes a position were found in the files of Duquesne Light.

18 They all involve, one way or another, the Borough
19 of Pitcairn. We have stipulated with Justice that in
20 fact these documents were present in Duquesne Light's files;
21 so as long as there is an understanding that Duquesne
22 Light Company, subsequent to the date of these letters,
23 was engaged in litigation with the Borough of Pitcairn,
24 which litigation involved production of documents by
25 the Borough of Pitcairn.

1 I think the Board has to take that into
2 consideration to the extent it goes to the weight of the
3 evidence.

4 No. 243 is the next one.

5 CHAIRMAN RIGLER: That is a suggestion by
6 Duquesne as to how those documents got into their files.
7 Is that the significance of your statement?

8 MR. LERACH: The problem is Justice wants to
9 create some inference by finding these documents in
10 our files. I don't know what that is, and that will remain
11 for them to state.

12 My point is whatever inference they ask to be
13 drawn from the presence in the files, the Board should
14 keep in mind as Mr. McCabe testified, there was litigation
15 that involved document production by the Borough of
16 Pitcairn to the Duquesne Light Company.

17 No. 248 is a letter from Mr. John Merriman
18 of Duquesne Light Company to Mr. Joseph L. Rizzo, who was a
19 councilman of the Borough of Pitcairn.

20 The Justice Department's offer of proof on
21 this document was that it would tend to show the
22 utilization of interconnection negotiations by Duquesne
23 to promote acquisition of municipal systems.

24 And also to show that when Duquesne was asked to
25 sell emergency power, its response was to attempt to

1 acquire the requesting party.

2 I guess my first objection is that that is an
3 overly ambitious offer for this document, which doesn't
4 seem to be anything more than a letter to a councilman,
5 congratulating him on his election to the City Council
6 in Pitcairn, or the Borough Council, and sending him
7 some information about Duquesne Light Company and the
8 advantages that would exist if Pitcairn elected to become
9 part of the Duquesne Light System.

10 More importantly, to the extent that this is a
11 communication between Duquesne Light Company and a duly-
12 elected official of the Borough of Pitcairn, and to the
13 extent the document does attempt to influence his
14 judgments or attitudes or views in connection with his
15 official duties, it would appear to be protected under the
16 Noerr-Pennington doctrine, notwithstanding the Chairman's
17 prior comments on the applicability of that doctrine.

end 1

18

19

20

21

22

23

24

25

bwl

1 I do object to this document coming in claiming
2 Noerr-Pennington for it and with respect to the fact it does
3 not prove what it has been offered to prove.

4 CHAIRMAN RIGLER: If Justice contends that
5 Duquesne engaged in a pattern of acquisitions or in a
6 pattern or attempts to eliminate competitors within its
7 service area, then wouldn't this letter be relevant in that
8 it is addressed to a councilman and it is a councilman
9 alone who has the authority to enter into a contract on
10 behalf of the Borough of Pitcairn to sell the system?

11 In other words, there is no way, really, for that
12 sale to be accomplished, except by action of the City
13 Council.

14 MR. LERACH: I understand the Chairman's point.

15 I hope it is responsive to say I think that is
16 exactly why Noerr-Pennington exists. No one says that
17 activity subject to the Noerr-Pennington privilege is not
18 relevant to the accusations made, but it is protected
19 activity under the Constitution.

20 I'm not arguing that the document isn't relevant.
21 I'm arguing that it is privileged or protected.

22 I am arguing it is not relevant to the offer
23 as stated, though.

24 CHAIRMAN RIGLER: I understand that.

25 MR. SMITH: You distinguish between the activity

bw2

1 being immunized and the document being privileged in the sense
2 of evidence.

3 Do you make a distinction between those two
4 differences?

5 MR. LERACH: Do you mean, would I assert a similar
6 objection if someone testified to Mr. Merriman's personal
7 activity in going to the City Council, as opposed to a piece
8 of documentary evidence reflecting that activity?

9 MR. SMITH: I suggest there may be a difference
10 involved. One may be strictly an evidentiary consideration
11 of acts which are immune to antitrust action.

12 But the evidence is nevertheless privileged.

13 MR. LERACH: I understand your point.

14 MR. SMITH: There could be a distinction.

15 MR. LERACH: I understand your point. I would
16 not accept the distinction, but I understand it. I think
17 the activity is protected. It is constitutionally
18 protected activity.

19 It seems clear that evidence of that activity
20 would have a similar protection. Would be privileged and,
21 therefore, not worthy of consideration.

22 CHAIRMAN RIGLER: That is the point at which we
23 may differ. Although the activity may be privileged in that
24 whatever is done is not subject to attack under the anti-
25 trust laws, none the less, the fact of the negotiation may

bw3

1 be relevant, even in a neutral context.

2 MR. LERACH: I understand the Board's view
3 and I'm sure you understand mine.

4 MR. CHARNO: The Department would respond with
5 respect to the Noerr-Pennington objection.

6 In addition to the reasons cited by the Board in its
7 earlier order, it is clear that evidence of an activity
8 which is protected by Noerr-Pennington may be introduced
9 to show anti-competitive intent.

10 This document certainly isn't standing alone with
11 respect to the proposition embodied by the Department's
12 offer of proof. So that we would argue first that this is
13 relevant, if only to proving the intent of Duquesne Light.

14 Secondly, the approach that is made here is not
15 made -- made to the Councilman in a governmental capacity,
16 but to the Councilman in a proprietary capacity as the
17 owner of an electric utility system.

18 We feel that distinction is valid in the context
19 of this proceeding with respect to this document.

20 MR. STEVEN BERGER: Your Honor, may I inquire for
21 a moment?

22 I know the Board has made earlier statements with
23 regard to Noerr-Pennington and the Board is now obviously
24 involved in some discussion of it as well.

25 Mr. Charno referred to earlier orders of the

1 Board.

2 It was my impression that the Board has not
3 issued any order with regard to Noerr-Pennington and that the
4 parties at an appropriate time will be given opportunity
5 to speak to the question of Noerr-Pennington protection in this
6 proceeding.

7 CHAIRMAN RIGLER: That is correct.

8 I believe we did approach the Noerr-Pennington
9 problems in considerations at least twice.

10 One way in the Board's order relating to
11 objections to discovery requests. The other way about
12 three days ago in the transcript where we made remarks
13 indicating the trend of our thinking.

14 At the time of those remarks we indicated we would
15 give the parties the opportunity to argue the applicability
16 of the document.

17 MR. STEVEN BERGER: I'm not furthering the comment
18 to the substance of the applicability of Noerr-Pennington
19 on behalf of Ohio Edison, because I didn't think the Board
20 was opening it up for an open forum on the question.

21 I note I do have substantial disagreement with
22 the Department's most recent statements and also with the
23 earlier statements made by the Board.

24 MR. LERACH: Do you want me to move on?

25 CHAIRMAN RIGLER: We didn't rule on your first

1 group, although I don't think that was an objection.

2 MR. LERACH: That was more in the form of stating
3 a stipulation for the record.

4 CHAIRMAN RIGLER: I tend to agree with Mr. Lerach
5 tha' the Department's offer goes beyond what fairly
6 can be read into this document. Therefore, the Board will
7 consider it in a more limited basis than the offer of proof,
8 taking into account the comments of Mr. Lerach.

9 Subject to that consideration, however, the
10 objectio will be overruled.

11 MR. REYNOLDS: Mr. Chairman, I think it might be
12 easier for Mr. Lerach to go through what he has and then for
13 me to come back and go through my objections, because I
14 don't think they are going to dovetail document by document.

15 I just want to make sure I will have the
16 opportunity when he is through to bring to the Board's
17 attention my objections on behalf of Applicants other than
18 Duquesne Light in connection with this group of documents.

19 CHAIRMAN RIGLER: all right.

20 I will tell you what. For each document objected
21 to by Mr. Lerach, let me know if you have any objection,
22 other than the other Applicants continuing objection, as he
23 concludes his objection, and then we will be able to treat
24 them serially that way.
25

bw6

1 MR. REYNOLDS: All right.

2 Off the record for a minute.

3 (Discussion off the record.)

4 MR. REYNOLDS: I don't have an objection to that
5 document other than the continuing objection.

6 I understand from your comment that I don't
7 need to make that objection at this juncture.

8 The Board understands that that continuing objection
9 applies, unless in the instances where I may indicate at
10 some later point that I do not wish it to apply.

11 CHAIRMAN RIGLER: Right.

12 MR. LERACH: The next exhibit is Number 254. 254
13 is a letter from David Olds of Ree, Smith, Shaw and McClay
14 to Thomas J. Munsch of Duquesne Light Company dated
15 September 25, 1968 and the Department has red-lined the
16 entire -- just about the entire letter.

17 In that event it is within the three-page
18 exception.

ES2

19

20

21

22

23

24

25

arl

1 The document, it seems to me, should not be
2 admitted into evidence, and it is a combination -- my
3 objection is based on a combination of a Noerr-Pennington
4 consideration of the litigation process, as well as a
5 privileged communication, even though it has been produced.

6 It seems to me that parties are entitled to litigate
7 their affairs in Federal Court and a party is entitled to
8 have the frank and candid evaluation of his retained
9 counsel regarding that matter.

10 In that light, I would object to the document
11 being introduced into evidence.

12 CHAIRMAN RIGLER: The objection will be over-
13 ruled.

14 As you point out, privilege has to have been
15 waived if the document is produced.

16 MR. LERACH: I understand the Board's point on
17 that.

18 I also have the Noerr-Pennington objection
19 on the litigation process. Utilization of it.

20 CHAIRMAN RIGLER: That, too, will be overruled.

21 MR. LERACH: As to Exhibit No. 255, I make a
22 similar objection because this is a memorandum from Mr. Omann
23 to Mr. Gilfillin regarding the possible settlement of the
24 Pitcairn litigation with Duquesne Light Company.

25 CHAIRMAN RIGLER: Overruled.

ar2

1 MR. LERACH: To the extent it wasn't clear
2 on 255, I, of course, am not claiming any sort of attorney-
3 client privilege on that, but simply a Noerr-Pennington
4 objection on the litigation process.

5 CHAIRMAN RIGLER: I see no basis for shielding
6 facts of litigation based on the Noerr-Pennington
7 doctrine.

8 We obviously disagree on that point.

9 MR. LERACH: Exhibit 256 is a letter from Mr.
10 Olds to Mr. Munsch. I did not ask for an offer of proof
11 on this document yesterday. I request I be given an
12 opportunity to ask for an offer of proof from the Justice
13 Department at this time, if it please the Board to let me
14 do that.

15 They only red-lined a very small portion of
16 it, and I'm not certain what it is coming in for.

17 CHAIRMAN RIGLER: We will permit you to request
18 the offer.

19 MR. CHARNO: The Department would offer Exhibit
20 256 solely to demonstrate an awareness of Duquesne Light
21 through its counsel of the antitrust consequences of the
22 company's actions and policies, and the antitrust implica-
23 tions of those actions and policies.

24 MR. LERACH: I just really don't understand
25 the relevance to the case of whether or not the company

1 was aware of the antitrust laws and how it impacted.

2 Either you violate the law or you don't
3 violate the law, and I'm not aware that specific intent
4 is an issue in the case.

5 CHAIRMAN RIGLER: As I have understood the
6 statements of the issues, specific intent is very much in
7 issue in the case. Is that the Department's position
8 or not, Mr. Charno?

9 MR. CHARNO: As to certain of the allegations,
10 specific intent would be -- if we are unsuccessful in
11 proving monopolization and can prove only attempt to
12 monopolize, we would have to prove specific intent.

13 That is exactly what we briefed.

14 MR. SMITH: But your intent, or intent that
15 you allege, relates to achieving certain economic goals
16 and not necessarily to violate the antitrust laws -- whether
17 the actions violate the antitrust laws or not is not an
18 element of your case, is it?

19 MR. CHARNO: It is possible to infer the
20 specific intent required under Section 2 of the Sherman
21 Act from an achievement of the objection. One intends
22 to achieve what they did achieve.

23 On the other hand, if you have a statement of
24 specific intent, or in this case, an awareness of what
25 you are doing constitutes a violation of the

1 antitrust laws, and then going ahead and doing it, you don't
2 have to make the inference that would be otherwise required.

3 MR. SMITH: Would that go to the relief you would
4 recommend?

5 MR. CHARNO: It would.

6 MR. LERACH: I ask the Board to look at pages 6
7 and 7 of the letter and the portion of it that the Justice
8 Department as red-lined.

9 I don't think it goes to showing any
10 specific intent on the part of Duquesne Light Company. It
11 is a report from their attorney on the events at a meeting.

12 It states that the Justice Department will have
13 its hands full, and we may be fortunate enough to avoid a
14 government antitrust case over Pitcairn and he says
15 that other antitrust litigation does not include as many
16 problems as Pitcairn, and that the significance of a power
17 pool hasn't been raised.

18 I don't think it is probative of anything
19 except Dave Olds' views of what a group of investor-owned
20 utility lawyers had to say about the general situation of
21 the world at a meeting.

22 CHAIRMAN RIGLER: The exhibit will be rejected.
23 Unless Mr. Berger, who also red-lined the exhibit --

24 MR. STEVEN BERGER: I will not sponsor that
25 document. I intended it as a pink line and not a red line.

1 MR. LERACH: As to Exhibit No. 260, this is
2 a currently unsigned, handwritten memorandum bearing
3 the heading Pitcairn, 9-7-71.

4 First sentence, just so you are all with me, is,
5 concluded negotiations to serve P. No. 1, we are prepared
6 to stipulate with the Justice Department that the document
7 was written by William Gilfillin of the Duquesne Light
8 Company.

9 I raise again a Noerr-Pennington objection
10 to the receipt of this document into evidence as it
11 reflects settlement negotiations of ongoing Federal Court
12 litigation, as well as proceedings before the Federal Power
13 Commission.

14 CHAIRMAN RIGLER: It also contains subjective
15 facts relating to terms on which service would be extended
16 to Pitcairn.

17 The objection will be overruled.

18 MR. LERACH: Document -- or Exhibit 263, a hand-
19 written memorandum by Mr. Thomas J. Munsch of the
20 company, Duquesne Light, dated May 21, 1974.

21 As I understand the Department's offer on this
22 document -- this is entitled re: Nuclear License. It
23 was offered to show further communication between the
24 Applicants and a concertive action between them with
25 respect to the MELP request for Capco membership and
various benefits.

1 It is on page 5099 of the transcript.

2 My objection is that this memorandum reflects
3 settlement considerations of this very proceeding that
4 we are involved in. I think its receipt into evidence is
5 therefore inappropriate, especially as it purports to show
6 continuing concertive action because the parties, as the
7 Board has pointed out, are joint Applicants and have to
8 act together in terms of settling this matter.

9 Secondly, and less importantly, but I want
10 the record to be complete, I have a Noerr-Pennington
11 objection to it in terms of the fact that it reflects
12 settlement considerations in ongoing federal and
13 administrative proceedings.

14 But the basic thrust of my objection is the
15 first one. I feel it ought to be protected because it
16 occurred in the context of this very proceeding. Although
17 I don't want to argue the weight of the Justice Department
18 offer, because that is not a ground to exclude a document
19 necessarily, I suggest to you that the document shows
20 anything but a concertive action.

21 It shows a disconcertive action.

22 MR. CHARNO: The Department is of the
23 impression that this is one step in a series of steps
24 that resulted in a filing with the Board ultimately of
25 the series of policy commitments by which the Applicants

ar7

1 have stated they would be bound notwithstanding anything
2 else.

3 I think it is hardly appropriate to
4 nominate this as a restricted part of settlement negotia-
5 tions which shouldn't see the light of day in view of the
6 fact that the Applicants have aired these very things
7 to the light of day over everybody's else objection, and they
8 are in the record of the proceeding.

9 MR. LERACH: I have no objection to the
10 document seeing the light of day. I do have objection to
11 it being used to show a concertive action when we were
12 obviously Joint Applicants and had to act together to
13 propose a joint settlement proposal.

14 CHAIRMAN RIGLER: Has Mr. Lerach correctly
15 indicated the purpose and nature of the document?

16 MR. CHARNO: I think the paraphrase of the
17 offer, while not as comprehensive as the Department's, is
18 basically accurate. I have no problem with this indicating
19 a disconcert with respect to a specific thing, but I
20 think the reverse of that disconcert, that the policy
21 commitments cannot be treated as approved by all of the
22 companies, that approval by all of the companies of
23 policy commitment relating solely to the City of
24 Cleveland participation in the subject license, is
25 clearly inferable from the fact that at that point they

ar8

1 had not reached -- pardon me, they had not given that
2 approval.

3 CHAIRMAN RIGLER: What is troubling me is, as I
4 look at your offer of proof, it relates to the requests
5 by the City of Cleveland for participation in the units, and
6 in the Capco pool.

7 And Exhibit 263, standing alone, makes no
8 reference either to the City, nor to participation, nor
9 to the CAPCO pool.

10 MR. CHARNO: There are other exhibits that
11 deal with the policy commitment. I'm not sure exactly
12 what they are, that are contemporaneous in date.

13 We would certainly argue that the term "policy
14 commitments" as used herein was with the same definition
15 as used in contemporaneous documents, and that it did
16 reply to -- did apply to the request by the City of
17 Cleveland.

18 CHAIRMAN RIGLER: We are going to defer ruling
19 on this until you can point out the connecting links, if
20 any.

21 It is not clear to me whether policy commitment
22 would refer to all Applicants' access policy with respect
23 to Davis-Besse and Perry, or whether it goes specifically
24 to Cleveland's participation, and also to membership in
25 the CAPCO pool.

1 Until you can establish your connection more
2 definitely, we will defer receipt into evidence.

3 MR. LERACH: Document No. 264 is a memorandum
4 from -- letter from Tom Munsch of Duquesne Light
5 Company to John Duff, a lawyer at Reed, Smith, Shaw &
6 McClay.

7 This was offered by the Justice Department to
8 show a continuing orchestration and concertive action
9 with respect to the dealings of the companies with the
10 City of Cleveland.

11 That is page 5102 in the transcript.

12 I guess one point I would like to make is that
13 the City of Cleveland never requested membership in CAPCO
14 until some weeks after the date of this letter.
15 At least requested it of Duquesne.

16 That, I admit, may be a weight question.
17 There is a more serious problem with this document. If
18 you look at the last paragraph of this letter, it reads,
19 "It seems to me that the statement on page 10 of the
20 preliminary prospectus is adequate without change."

21 I suggest to you that this document, as well as
22 the letters that -- information that Mr. Munsch gathered
23 to enable himself to write the document were gathered in
24 connection with Duquesne Light Company's ongoing financing
25 activities which it needs to engage in to raise money for

1 construction.

2 A sister agency of the Justice Department
3 within the Federal Government places my client under
4 severe threats of liability if there is any misstatement
5 of material facts in the prospectus that my company files.

6 The company is under legal obligation to be
7 aware of risks to the company, potential litigation.

8 I think when a document such as this document
9 so obviously relates to my client's attempt to fulfill that
10 obligation owed to the investing public, based upon laws
11 and regulations of a sister agency to the Justice Depart-
12 ment within the federal government, that it should be
13 protected and this should not be taken into evidence to
14 show any evil intent and certainly not to show a
15 continuing orchestration and concertive action with respect
16 to the Cleveland request.

17 MR. CHARNO: I suppose that what counsel is
18 saying is that the only inference that can be drawn from
19 this document is that the two conversations referred to
20 in the document, or the facts ascertained from Mr. Greenslade
21 by Mr. Munsch were ascertained solely in order to make an
22 SEC filing, and that the documents which are attached to
23 this letter, which are correspondence between the City
24 of Cleveland and the Cleveland Electric Illuminating
25 Company, were obtained for that purpose solely.

We would dispute that inference.

1 CHAIRMAN RIGLER: Suppose they were; would that
2 shield it from being received in evidence in this agency?

3 MR. CHARNO: No, it wouldn't shield it from
4 being received in evidence, but it would certainly weaken
5 the Department's offer of proof.

6 I guess to the extent that counsel is
7 accurate in the inferences he draws, and the Department
8 is inaccurate in the inferences it would draw, it is a
9 question of weight which the Board will accord to the
10 document.

11 MR. LERACH: Excuse me.

12 MR. CHARNO: We would note that the Department's
13 inference would appear to be supported by the continuing
14 forwarding of correspondence and exchange of correspondence
15 and conversation on these matters prior to and subsequent to
16 this security filing, which don't appear to have any
17 relation to the filing of the prospectus.

18 MR. LERACH: Well, I don't want to testify.
19 Duquesne is continually in registration. They tap the
20 public market at least three times, and probably four
21 times, a year. It takes two or three months to do each
22 one. They are always in registration.

23 I would point out to the Board that I understand
24 that some interpretations of Noerr-Pennington would also
25 apply to activity undertaken to comply with administrative

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

regulations or federal law, and I think that you have to crank that into your thinking on this document.

I submit to you the document is self-authenticating in that respect.

CHAIRMAN RIGLER: You have a broad interpretation of Noerr-Pennington that seems to essentially immunize your clients from all activities because they file a lot of reports with government agencies.

Be that as it may, the objection will be overruled on this.

end 3

arl

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

MR. REYNOLDS: I don't believe that was the point he was making on Noerr-Pennington. I take exception to your characterization of what he was saying.

CHAIRMAN RIGLER: I was being somewhat facetious, but nonetheless, it seems to me the number of new wrinkles he has put on it lead even semi-seriously to the conclusion that almost any activity in which a company is reporting to the government may be excluded if we take that broad definition.

I'm not sure, however, that Mr. Lerach has gone that broad way. It is not germane to our decision on this document, anyway.

MR. LERACH: The final objection is to Justice Exhibit 265; this is a two-page exhibit. One is a transmittal letter from Mr. Munsch to Olds, transmitting the August 3, '73 letter.

I'm sorry, there were additional pages because there is a proposal attached. This is the one where there was some confusion on yesterday as to the offer of proof.

I have no objection to the letter to Mr. Rudolph dated August 3, and the attachment to that coming in. I don't think there was any clear offer made as to why the letter from Mr. Munsch to Mr. Olds comes in. I would ask that the document be excluded.

As the Board remembers -- if we want to go to

1 the offer in detail, I will dig it out of the transcript.

2 It more or less boiled down to an offer that
3 it proved the fact that the letter was sent.

4 5103, 5104.

5 MR. CHARNO: The Department has no objection
6 to striking the first page of that exhibit. I have no
7 objection to the remainder of the exhibit.

8 CHAIRMAN RIGLER: 114606 --

9 MR. RIESER: It is 14896.

10 CHAIRMAN RIGLER: We will receive Exhibit 265
11 into evidence, rejecting that page of the exhibit
12 bearing the Department document number 114896.

13 Mr. Smith reminds me that I said that we
14 would reject the page bearing Department document number
15 114896 when in fact it was withdrawn by the Department,
16 and to correctly characterize what happened, that page
17 has been withdrawn.

18 MR. CHARNO: That's correct.

19 MR. REYNOLDS: Mr. Chairman, the continuing
20 objection on behalf of all Applicants other than Duquesne
21 Light Company is made with respect to all of the
22 documents in this grouping, but for the following docu-
23 ments:

24 Document 209.

25 On Document 211 and 212, we will make the

1 continuing objection with respect to that portion
2 that appears below the signature of the author of the
3 letter.

4 CHAIRMAN RIGLER: You are making the continuing
5 objection with respect --

6 MR. REYNOLDS: With respect to the matter
7 that appears below --

8 CHAIRMAN RIGLER: With respect to the
9 parenthetical phrase, "This reply represents the
10 consensus of the members of the CAPCO companies"?

11 MR. REYNOLDS: Yes.

12 218, there is no continuing objection.

13 On 219 and 220, the continuing objection as
14 to the other Applicants except for CEI.

15 As to 221 and 223 -- as to 221, 222, 223,
16 the continuing objection for the other Applicants except
17 CEI and Duquesne Light Company.

18
19
20
21
22
23
24
25
end 4

S5

1 224 and 225, the continuing objection would
2 apply as to Applicants other than Ohio Edison and Duquesne
3 Light Company.

bwl

4 226, 227, 228, the continuing objection as to
5 Applicants other than Ohio Edison and Duquesne Light Company.

6 The same with respect to 229 and the same is true
7 with respect to 229 -- I'm sorry, 230, the continuing
8 objection for Applicants other than Ohio Edison and Duquesne
9 Light Company.

10 CHAIRMAN RIGLER: On 230 at the bottom, the carbon
11 copies with the notation not shown on original, followed
12 by a series of initials. Those people are people from other
13 Applicants than Ohio Edison, are they not?

14 MR. REYNOLDS: That is correct.

15 CHAIRMAN RIGLER: For example, "L.H." would be
16 Leslie Henry or would it be Howley, Lee HOWley?

17 MR. REYNOLDS: This is the document we had earlier,
18 and we indicated that when Mr. White gets on the stand
19 he can testify to it. I have no reluctances to giving the
20 Board my impression.

21 CHAIRMAN RIGLER: No, you have answered my
22 question.

23 MR. REYNOLDS: I will state they are initials,
24 at least some of them individuals who are associated with
25 Applicants other than Ohio Edison.

1 That seems to me to still warrant the continuing
2 objection.

3 CHAIRMAN RIGLER: We have a situation here in the
4 group of objections you just made where one Applicant
5 may be corresponding with Duquesne with respect to the
6 Pitcairn situation and yet is copying other Applicants and
7 yet another Applicant again corresponds with Duquesne and
8 copies the other Applicant.

9 So each Applicant is aware of what the other
10 Applicants are saying to Duquesne with respect to Pitcairn.

11 MR. REYNOLDS: That could well be, but in terms
12 of the objection it seems to me that the fact that somebody has
13 sent a copy is not a basis for introducing a document for
14 the truth of the matter that is asserted therein, as
15 against a company that receives a copy.

16 Whether that company subscribes or doesn't
17 subscribe to what is stated in a letter is a different
18 question.

19 Since we are operating on an unsponsored documents
20 basis, these documents insofar as they would come in, our
21 position is, would come in only against that Applicant who
22 authorized the letter or received the letter, depending on
23 that Applicant's position, but that it should not come in
24 without a connection up, as we have stated, as against
25 any of the other Applicants, just because they may have been

bw3

1 copied or sent copies of the correspondence.

2 MR. CHARNO: Before we leave 230, Counsel for
3 Duquesne has stipulated that TJM, Jr. is Thomas J. Munsch,
4 Jr., whose name also appears in the upper right-hand corner
5 of the document.

6 MR. REYNOLDS: It doesn't appear on my copy.

7 I don't have any problem with that sort of
8 stipulation. I thought that with respect to this document,
9 we had gone this route before and that the Board had
10 suggested it might well be appropriate to have these
11 identified through a witness, when he comes on the stand.

12 That is all I'm saying. If you would rather
13 go the stipulation route, I can do that.

14 CHAIRMAN RIGLER: The only point the Board
15 raised was whether it was conceded that these initials
16 were attorneys or employees of Applicant, other than
17 Ohio Edison and the answer is, yes, and that is all we
18 needed.

19 MR. REYNOLDS: I think most of them are. I'm not
20 sure they all are, but I think that certainly a number of
21 them are.

22 Some of the initials are internal, for purposes
23 of internal routing.

24 Documents 231 through 236, the continuing
25

bw4

1 objection with respect to all Applicants, except Toledo
2 Edison and Duquesne Light Company.

3 On 237, the continuing objection on behalf
4 of Ohio Edison and Pennsylvania Power Company.

5 262, continuing objection with respect to all
6 Applicants other than CEI and Duquesne Light Company.

7 Since the Board has deferred consideration
8 of 263 I will pass that for the moment with the
9 understanding --

10 CHAIRMAN RIGLER: I think it might be useful to make
11 whatever objection you have to the document, if it differs
12 from Mr. Lerach's objections.

13 MR. REYNOLDS: Well, I would join in Mr. Lerach's
14 objection to this document that was discussed earlier,
15 and I would also make the continuing objection on behalf
16 of all the Applicants, other than Duquesne Light Company.

17 CHAIRMAN RIGLER: Assuming that Mr. Lerach
18 does not prevail on his objection, are you making the
19 continuing objection on behalf of Ohio Edison?

20 MR. REYNOLDS: Yes, sir.

21 CHAIRMAN RIGLER: All right.

22 MR. REYNOLDS: As I understand it, this is a
23 document reflecting Mr. Munsch's recollections of a
24 telephone conversation which would be hearsay evidence, as
25 against anybody else that he may have been speaking to or

E5

S6

bws

1 with, and would, therefore, not be something that on the
2 basis of an unsponsored document would come in as against
3 any of the other Applicants. Clearly, as against anybody
4 other than Mr. Munsch.

ES6

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

a r 11

2 CHAIRMAN RIGLER: Mr. Sporento called and
3 told him he had no recollection, et cetera, that is hear-
4 say.

5 MR. REYNOLDS: That is Mr. Munsch's recollec-
6 tion. That is clearly hearsay.

7 CHAIRMAN RIGLER: I hear what you are saying.

8 MR. REYNOLDS: Hearsay.

9 MR. STEVEN BERGER: Your Honor, before we pass
10 that document, maybe I can ask if the Department is offer-
11 ing that document for the truth of the matters contained
12 therein, or for the facts of the conversations having
13 taken place.

14 MR. CHARNO: The Department would offer Exhibit
15 263 for the truth as well as the communication.

16 CHAIRMAN RIGLER: All right.

17 MR. REYNOLDS: As to Exhibit 264, the
18 continuing objection on behalf of all Applicants except
19 Duquesne with regard to the first letter of that exhibit,
20 and the continuing objection on behalf of all Applicants
21 except Duquesne and CEI with respect to the attachments
22 to that exhibit.

23 On 265 and 266, the continuing objection on
24 behalf of all Applicants except Duquesne Light Company
25 with regard to the additional information below the
signature of Mr. Herbert Whiting on the first attachment

ar2 1 to 265.

2 I'm sorry, that might confuse the record. We
3 have withdrawn what was the cover letter. On the first
4 page of what is now Exhibit 265.

5 CHAIRMAN RIGLER: That is Department Document No.
6 114897?

7 MR. REYNOLDS: Yes, sir.

8 AS to 266, the continuing objection would
9 go to the added information as to circulation of blind
10 carbon copies appearing on the bottom right-hand portion
11 of the letter, first page of the letter, which is
12 internal document number 114889.

13 I am going to need about three minutes to
14 confer with counsel for a minute briefly if I can, with
15 respect to Exhibit 200 in this grouping.

16 CHAIRMAN RIGLER: All right. We will take
17 a break until 11:00 o'clock by this clock.

18 (Recess.)

19 MR. CHARNO: The Department, at the
20 request of Applicants' counsel, would ask the Board to
21 defer ruling upon Exhibit 200 at this time. We will not
22 offer it at this time.

23 CHAIRMAN RIGLER: Does that conclude your
24 objections, Mr. Reynolds?

25 MR. REYNOLDS: Yes, it does.

1 CHAIRMAN RIGLER: All right. We will admit
2 into evidence at this time -- we will overrule the continuing
3 objection and admit into evidence Department of Justice
4 Exhibits 199, 201, through 254.

5 255 was rejected.

6 We will admit 256 through 265 --

7 MR. CHARNO: Mr. Chairman, we believe that
8 it was 256 that was rejected, rather than 255.

9 CHAIRMAN RIGLER: All right. Then we will admit
10 201 through 255.

11 We will reject 256.

12 We will admit 257 through 266, with the
13 exception of the one page of Exhibit 265, document number
14 114896, which was withdrawn.

15 And with the exception of No. 263, as to which
16 ruling has been deferred.

17 We will defer ruling on 200.

18 (DJ Exhibits 199, 201 thru
19 255, 257 thru 262, 264
20 thru 266, previously marked
21 for identification, were
22 received in evidence.)

23 CHAIRMAN RIGLER: Off the record.

24 (Discussion off the record.)

25 CHAIRMAN RIGLER: At this time I would like to

1 announce on the record that my office had a call
2 from Mr. Reuben Goldberg yesterday, indicating that
3 Mr. Hjelmfelt would be tied up in Cleveland today, and
4 stating that the City had no objection to our proceeding
5 without Mr. Hjelmfelt in attendance.

end 7

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

bwl

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

MR. CHARNO: At this time we would like to enter into the record certain stipulations reached with Duquesne Light with respect to the exhibits that were just placed in evidence.

With respect to Exhibit 203, Duquesne Light will stipulate that the handwritten initials that appear thereon are those of Mr. Flegel.

With respect to 204, Duquesne will stipulate that the initials thereon are those of Mr. Munsch.

Duquesne makes no stipulation as to the authority of the changes that appear on that draft.

As to 205 through 207, Duquesne stipulates that the initials that appear thereon are those of Mr. Flegel and makes a similar stipulation with respect to 209 and 210.

With respect to 225 and 231, Duquesne stipulates that a copy of those exhibits came from -- may be found in Duquesne's files.

On exhibits 243 and 244, and 247, Duquesne stipulates that the initials appearing on those exhibits are those of Mr. Flegel.

The Department would like to withdraw Exhibit 267, since it was previously placed in evidence. It is in a slightly different form, but the variation in form is not probative of anything.

bw2

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

CHAIRMAN RIGLER: Exhibit 267 will be withdrawn.

The Department would offer as DJ-268 for identification, a three-page document bearing the numbers 114874 through 76.

The Department would offer as DJ-269 for identification, a five page document numbered 116869 through 73.

The Department would offer as --

MR. GREENSLADE: Could I have a statement of that again? Those numbers 114870 through --

MR. CHARNO: 869 through 873.

MR. GREENSLADE: Thank you.

MR. CHARNO: The Department would offer as DJ-270 for identification a three-page document numbered 114866 through 868.

MR. RIESER: Excuse me, Mr. Charno, on our copy of the second page of that exhibit, it looks like you were trying to red-line the second paragraph.

MR. CHARNO: That is immaterial under the Board's red-lining ruling, but that is the case.

The Department would offer as DJ-271, a multi-page document numbered 114831 through 858.

The Department would offer as DJ-272, a document bearing the numbers 114815 through 836.

MR. RIESER: Could we have an offer of proof on this, please?

bw3

1 MR. CHARNO: Certainly.

2 The Department would offer Exhibit 272 for
3 identification in support of the general fact of continuing
4 communication and concertive actions and, specifically, with
5 respect to the fact that a CAPCO meeting was scheduled to
6 consider an -- to consider the requests of the City of
7 Cleveland and to consider proposed license conditions.

8 We would also offer it to prove the fact that
9 these draft conditions perpetuate the terms and conditions
10 of the initial participation agreement and to the extent
11 that we establish problems involved with the initial
12 participation agreement, that these will be perpetuated
13 by the conditions.

14 We offer it in specific proof of the invitation
15 of comment contained in the cover letter for the license
16 conditions and for the restrictions contained in those
17 conditions, to the extent they are not previously in evidence.

18 MR. REYNOLDS: Mr. Chairman, I know we are not doing
19 objections now, and I appreciate that, but I would like to
20 raise a point with the Board.

21 I think it is important. Maybe we can just let
22 it sit until we do come around to objections, but it seems
23 to me that in the course of any litigation, whether it be
24 administrative or judicial, that there is an area that
25 deals with settlement matters that is recognized as outside

bw4

1 the scope of consideration by the tribunal with regard to
2 the issues or disposition of the issues that happen to be
3 before that tribunal.

4 This documentation on its face, clearly falls
5 into that category.

6 Now, I think taht one way that it could be
7 characterized is that that would go to the weight of the
8 matter.

9 On the other hand I'm disturbed that the Board
10 is being given now documents whcih obviously have been
11 circulated among all of the parties here for purposes
12 of settlement and have been discussed, admittedly, among
13 Applicants, as well as with the City and with the Department,
14 and with the Staff on different occasions, all of which go
15 directly to the matter of settlement in this case.

16 It concerns me that we are beginning to see , and
17 this is not the first document now, but we are beginning to see
18 unsponsored exhibits by the Department of Justice which
19 clearly relate to the settlement area, and it suggests that
20 the Board is going to be asked at least from the offers of
21 proff, to make determinations in this proceeding on the
22 allegations, based on discussions that were had in the
23 context of settlement.

ES8

24

25

arl 1 Now I do find that objectionable, and I will
2 reserve and raise it at a later time.

3 On the other hand, documents are now
4 being put before the Board, and the Board is obviously
5 looking at them as they go past them.

6 I am not trying to suggest that that is
7 influencing the Board one way or the other. I do think
8 the practice or technique, what-have-you, is offensive to
9 the rules as I understand them in litigation generally, and
10 it is something that it seems to me is totally inappropriate.

11 CHAIRMAN RIGLER: I think in a general sense
12 your point may have some merit, Mr. Reynolds. I don't see
13 that ordinarily settlement discussions and offers would be
14 probative with respect to establishing a situation
15 inconsistent with the antitrust laws.

16 It seems to me that ordinarily a settlement
17 offer might take the facts as they are, and then attempt
18 to resolve them.

19 I preface this by saying "generally." It seems
20 to me that if in the cover letters or in the exchanges that
21 there were a phrase -- I'm not suggesting there is,
22 but by way of illustration -- that said these commitments
23 will achieve our objective of keeping Cleveland in
24 isolation, something like that, that that indeed might be
25 probative, so that I don't know that we can make a general

ar2

1 rule.

2 We will reflect on this prior to receipt into
3 evidence, however, because the mere circulation of
4 proposed drafts that attempt to resolve issues being
5 litigated does not strike me in any way as probative of
6 any violation.

7 The other factor that I guess we would have
8 to consider is the extent to which proposed commitments
9 might afford appropriate relief, but I don't know that
10 draft commitments would necessarily be the appropriate
11 vehicle for that.

12 Applicants do have a proposal on the table, as
13 I understand things. They have made commitments they
14 state they are willing to adopt, irrespective of the
15 outcome of the proceeding.

16 The other parties protest the implementation
17 and validity of those commitments.

18 Nonetheless, Applicants are telling us that
19 they have an announced statement of policy.

20 We will perhaps continue to identify these
21 documents if you consider it necessary, Mr. Charno, but
22 you can see that the Board, at least initially, feels
23 that there is considerable merit to the potential objection
24 which has been raised at this time.

25 MR. CHARNO: If I might potentially reply.

1 Applicants have indicated that one of their
2 ongoing defenses is their good faith willingness to do
3 a number of things, and that this good faith willingness
4 has existed from prior to this proceeding up to the
5 present.

6 They have given specific examples of it.
7 They apparently intend to produce even more evidence of
8 the steps they have taken and a number of the steps they
9 have taken are directly concerned with what they now
10 characterize as settlement negotiations.

11 As I have indicated earlier, the privilege
12 which may attach to settlement negotiations has been
13 specifically waived as far as the Department is concerned,
14 by placing a document as to which there was no agreement
15 in the record, which was an outgrowth of such negotiations
16 as far as the Applicants were concerned.

17 The other parties objected, and they then
18 placed it in the record.

19 CHAIRMAN RIGLER: I don't mean to interrupt.

20 You indicate that the Applicants may raise good
21 faith settlement offers as a defense?

22 MR. CHARNO: Good faith attempts to provide the
23 benefits of coordinated operation and development, and
24 the vehicle for those attempts would be settlement offers.

25 CHAIRMAN RIGLER: If it comes in as a defense,

ar4

1 why wouldn't you, in any event, then save these
2 documents for rebuttal?

3 MR. CHARNO: I think their briefs have
4 indicated, briefs and pleadings have indicated this is
5 the way they are going to go.

6 We have a number of documents which are
7 perhaps in the nature of rebuttal, but since it is clear
8 they are going in a certain direction, there is no point
9 in saving them for rebuttal.

10 CHAIRMAN RIGLER: That makes sense,
11 except that they may limit their defense presentation.
12 Maybe you are anticipating too much with respect to the
13 scope of the documents you are seeking to admit at this
14 point.

15 MR. CHARNO: If I may make a further comment as
16 to whether the settlement proposal provides appropriate
17 relief; I think it is not only the Department's position
18 that it does not provide appropriate relief, but indeed
19 perpetuates, maintains and, in some ways exacerbates
20 the continuing situation inconsistent, and that it is a
21 vehicle to accomplish the very objectives that they
22 originally set out to accomplish.

23 In that context, it seems somewhat remote
24 from settlement negotiations, at least as I understand them.

25 CHAIRMAN RIGLER: The problem is that the Staff,

ar5

1 I think, maybe not in that exact language, but might
2 agree with you in principle that the Applicant's
3 proposed commitments are unsatisfactory for the reasons
4 you have stated, but the Staff attacked those commitments,
5 by putting on expert witnesses that described the
6 effect and the implementation of the commitment as
7 proposed.

8 I am not quite clear why going through the
9 various draft stages and the various negotiating steps
10 enhances your position vis-a-vis the Staff approach the
11 problem you have described.

12 Do you see what I'm saying?

13 I don't want to shut you off from your argument
14 that the proposed conditions, conditions proposed by
15 Applicant may be unsatisfactory, but I am wondering if in
16 order to reach that argument, you need to introduce
17 the background documents from your negotiations unless
18 those documents specifically disclose some anticompetitive
19 intent, which is an example I posed to Mr. Reynolds.

20 If they merely are cover letters, if they
21 merely are meeting agenda, I don't see how they assist
22 you in proving the point you say you want to make.

23 MR. CHARNO: I do see the Chairman's point.

24 One clarification:

25 The Department was not a party to the full

1 course of settlement negotiations and withdrew at a rather
2 early date when we reached a loggerhead that we felt
3 couldn't be resolved, and indeed never has been.

4 So that these documents were those obtained on
5 discovery, not through any other means. The Department
6 would offer as DJ 273 for identification a multi-page
7 document numbered 114803 through 812, and would note
8 that this is one of the documents that the Department
9 previously referred to that contains the nomenclature
10 "policy commitments."

11 That is when we were discussing exhibit for
12 identification 263.

13 The Department would offer as DJ 274 for
14 identification a document bearing the numbers 114794
15 through 802, and note that this document also refers
16 to policy commitments and the reference in the last
17 paragraph is comparable to that contained in Exhibit 263.

end 9

18
19
20
21
22
23
24
25

S10 1 MR. CHARNO: The Department would offer
bwl 2 for identification as DJ-275, a one-page document numbered
3 114766.

4 The Department would like to have identified
5 as DJ-276, a two-page document numbered 119665 through 666.

6 We are attempting to secure a better copy.
7 We will either type this one or substitute a better copy
8 prior to moving it into evidence.

9 CHAIRMAN RIGLER: Off the record.

10 (Discussion off the record.)

11 MR. RIESER: Mr. Charno, can you read this well
12 enough to be in a position to give us an offer of proof
13 on it, despite the fact we can't read it well enough?

14 MR. CHARNO: Yes, sir. We would offer this
15 for recognition by Duquesne Light Company of the economies
16 of scale that flow from large-scale nuclear generation, the
17 benefits of coordinated operation and development of such
18 generation and a recognition of the potential requirements
19 for municipal participation in nuclear units which would
20 flow from a subsequent amendment of the Atomic Energy Act.

21 CHAIRMAN RIGLER: It may not be necessary to get
22 a clearer copy of this particular document.

23 MR. RIESER: Mr. Chairman, if you would like, we
24 would be happy to make the objection now, and we could
25 resolve the question.

1 CHAIRMAN RIGLER: I think the Board has already
2 discussed this at the Bench, and would receive the objection
3 now.

4 MR. RIESER: On behalf of Duquesne Light, we would
5 like to object to this exhibit.

6 CHAIRMAN RIGLER: On what basis?

7 MR. RIESER: Under the basis that under the
8 doctrine of Noerr-Pennington that would be privileged
9 communication and irrelevant to this proceeding.

10 CHAIRMAN RIGLER: I disagree that it is
11 privileged or irrelevant to the proceeding.

12 Nonetheless, I think you may have a valid
13 Noerr-Pennington objection.

14 I see you looking puzzled, Mr. Reynolds.
15 I don't believe that Noerr-Pennington is founded either on
16 relevance or privilege.

17 MR. REYNOLDS: I was thinking only in terms of
18 a Noerr-Pennington privilege.

19 It may be a semantics problem more than anything
20 else.

21
22
23
24
25

bw2

#11

arl

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

CHAIRMAN RIGLER: If you are indicating that this represents a legislative activity and is thereby immunized from prosecution as a violation of the antitrust laws, we would agree with that, and on that basis we would object to the document.

Mr. Charno, I see you looking puzzled. Clearly a letter to Senator Pastore in his position as Chairman of the Joint Committee on Atomic Energy, bearing comments on the Atomic Energy Act, would fall within the purview of Noerr-Pennington.

MR. CHARNO: The Department is not suggesting that this is an unlawful activity. Merely the letter contains certain admissions which are relevant and probative in this proceeding.

CHAIRMAN RIGLER: I see your point, but we will sustain the objection.

MR. CHARNO: The Department would offer as DJ 277 for identification a multi-page document numbered 114755 through 765, and the Department would note that it has included the attachment solely to provide the complete document and if Applicants have no objection, we would offer the cover letter standing alone.

MR. REYNOLDS: Can we have an offer of proof on that?

MR. CHARNO: Generally this would go to the

ar2

1 Department's statements concerning communication and concert
2 of action and agreement at a time when it is argued that
3 obviously CEI was dealing with the City of Cleveland.

4 The existence of a consensual relationship.
5 Specifically here we have a document which is soliciting
6 from CAPCO members an explanation of reasons or exposition
7 of reasons why the City of Cleveland should be excluded
8 from participation when, if this is a matter solely of
9 interest to CEI and the City of Cleveland, which one would
10 think that refusal by the City of Cleveland would be, such
11 a solicitation would be immaterial and unnecessary.

12 MR. REYNOLDS: Not to be argumentive, but in
13 view of the fact that Mr. Charnoff's name is mentioned
14 here, I point out to the Department of Justice that
15 the specific inquiry that is addressed in this letter
16 is one that is contained in the discovery requests served
17 by the Department of Justice in this proceeding.

18 Putting that aside for the time being, I feel if
19 we are going to have the document introduced, that we
20 would like to have the attachment also introduced.

21 MR. CHARNO: I'm at somewhat of a quandary on
22 the dates of discovery.

23 MR. REYNOLDS: July of '74.

24 MR. CHARNO: August 23?

25 I'm informed by co-counsel that our discovery

1 was August of '74, but I could easily be mistaken.

2 At this point, if it would be acceptable to
3 the Board, I would like to skip a group of documents
4 for the time being, and either withdraw them this afternoon
5 or request that they be numbered at that time.

6 CHAIRMAN RIGLER: Just one second.

7 You are going to skip at this point and go
8 to a new group of documents?

9 MR. CHARNO: That's correct. I make that
10 request in view of Mr. Reynolds' statement. I have no
11 positive recollection on it.

12 If it is correct, we would withdraw the
13 document we just introduced.

14 CHAIRMAN RIGLER: His statement as to what?

15 MR. CHARNO: As to the reason that these --
16 that there was a joint formulation of reasons why the
17 City of Cleveland should not be a participant in CAPCO.
18 I would like to consider the documents themselves.

19 CHAIRMAN RIGLER: State that again, Mr. Reynolds.

20 MR. REYNOLDS: I have advised Mr. Charno that
21 the Document Exhibit 277, which states that Mr. Charnoff
22 had initiated request for this material was generated
23 in response to a request by the Department of Justice
24 in discussions that we had at a time around the period
25 when the discovery requests were either being framed or

1 being exchanged.

2 CHAIRMAN RIGLER: I'm not sure I understand
3 completely.

4 Are you saying that this opinion, this draft
5 opinion, was prepared in response to a request by the
6 Department of Justice?

7 MR. REYNOLDS: Well, there was a request by
8 the Department of Justice in their discovery and the
9 substance of this opinion, if not -- I don't think it is
10 word for word -- but the substance of it is included in
11 that response to that discovery request.

12 Prior to the discovery request, there were
13 discussions among the parties, and at that time during
14 the course of those discussions we had indicated our
15 position in this regard to the Department, and had agreed
16 to furnish to the Department our view on that matter and
17 that --

18 CHAIRMAN RIGLER: What do you mean by "that
19 matter"?

20 MR. REYNOLDS: The matter with respect to the
21 Constitutional prohibition of joint ownership.

22 CHAIRMAN RIGLER: Are the Applicants -- is it
23 relevant to anything we are considering now as to whether
24 the Ohio constitution does impose barriers to joint
25 ownership of nuclear facilities?

1 MR. REYNOLDS: I think that in the broader
2 sense, it is relevant generally to the issues in this
3 proceeding.

4 In the narrower sense, in light of Mr.
5 Charno's offer of proof with respect to this document,
6 it is particularly -- the thing that is particularly
7 relevant is the background as to what initiated this
8 correspondence, and I was raising it at this time only
9 because the offer of proof seems to me to be inconsistent
10 with what my recollection is as to why this particular
11 document, DJ Exhibit 277, happened to be generated.

12 I do know for a fact the dates are one thing
13 that I'm not clear on. I know for a fact that the
14 Department did make a specific request in this area in
15 their discovery of the Applicants, and it was responded
16 to and my recollection is that prior to, or right around
17 the time of serving the discovery requests, we had a
18 discussion with the Justice Department concerning this
19 matter, and had agreed at that time to furnish them the
20 information that we had regarding the Constitutional
21 provision in the Ohio constitution.

end 11

22
23
24
25

S12

bwl

1 CHAIRMAN RIGLER: We are not called upon to
2 make any ruling at this time. However, in the course of
3 numbering this document, I turned to the page following
4 the last page of this document and in my notebook that is
5 Department Document Number 114753.

6 It is a July 18, 1974, letter from Mr. Hauser to
7 Mr. Henry, with copies to the addressees in the original
8 correspondence in Department Exhibit 277, and what the Board
9 noted is that the first sentence represents a vote that
10 Section 4 of the draft opinion not be included in the final
11 opinion.

12 Section 4 of the draft opinion begins, "It may
13 also be argued that Article VIII, Section 6, applies only
14 where money raised by taxation is involved."

15 Just by way of guidance, if the Applicants were
16 to argue the applicability of the Ohio constitutional
17 proceedings, as a relevant matter, then this series of
18 documents conceivably could become relevant, if it indicates
19 that Applicants' opinion should be tempered in some way,
20 or that certain considerations were removed from the opinion or
21 were not taken fully into account.

22 MR. REYNOLDS: I appreciate what the Chairman
23 is saying.

24 My only problem was trying to square what my
25 recollection was as to how this document came into being, with

bw2

1 the offer of proof that the Department had submitted with
2 respect to this document.

3 I'm not suggesting at this point that my
4 comments would be a basis for excluding this document from
5 evidence under some other offer of proof or for some other
6 reason.

7 I was merely addressing my comments to the offer
8 of proof based on what my recollection was, and I was trying
9 to indicate to Mr. Charno that that was my recollection,
10 in case it might refresh his recollection in this area.

11 I was not trying to argue with the Board or object
12 to the document for any other reason than what the offer
13 was.

14 CHAIRMAN RIGLER: At this point the present
15 state of the record does not require any ruling by the
16 Board.

17 You may proceed, Mr. Charno.

18 MR. CHARNO: We would offer as Exhibit DJ-278
19 for identification, a two-page document bearing the number
20 00139164 and 165.

21 MR. GREENSLADE: Could you identify that document,
22 please?

23 MR. CHARNO: It carries the caption CEI-DL-TE,
24 Addition of a Small Independent System.

25 CHAIRMAN RIGLER: Off the record.

bw3

1 (Discussion off the record.)

2 MR. CHARNO: The Department would offer as
3 DJ-279 for identification, a multi-page document bearing
4 the numbers 00136660 through 689.

5 The Department would offer as DJ-280 for
6 identification --

7 CHAIRMAN RIGLER: Wait a minute.

8 My exhibit doesn't end at 69. It appears to
9 continue -- 689.

10 MR. CHARNO: Yes, sir.

11 CHAIRMAN RIGLER: I'm sorry.

12 MR. CHARNO: We would request that on page 671
13 of that exhibit, that the red-lining be extended to include
14 the first two full paragraphs.

15 MR. ZASLER: Does that include the paragraph
16 that begins Davis?

17 MR. CHARNO: Yes.

18 MR. RIESER: Could we have an offer of proof on
19 this?

20 MR. CHARNO: The Department would offer this
21 memorandum of a meeting of the CAPCO chief executives
22 in support of the fact that there was an intention implicit
23 in the discussions that took place at this meeting to
24 exclude municipal utilities from the CAPCO pool.

25 We would further offer it for the fact that
both CBI and, as of this meeting, CAPCO, we are on notice

bw4

1 that the City of Cleveland desired coordinated development
2 and participation in nuclear units.

3 We would offer it for proof of disparity in
4 fuel costs between nuclear and fossil fuel.

5 We would offer it for the fact that the
6 CAPCO executives had considered the possibility of third
7 parties, other than municipal systems becoming members of
8 CAPCO.

Esl2

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

#13

arl

1

We would offer it for the fact that the

2

opinion was expressed that allocations would be frozen

3

at the time of the agreement between CAPCO members,

4

the agreement in this case being the memorandum of under-

5

standing.

6

And we would infer from that, that exclusion

7

from negotiating would constitute an exclusion from

8

equitable allocation of the reserve burdens and capacity

9

allocations.

10

And finally we would offer it for Mr. Henry's

11

characterization of the Buckeye agreement.

12

CHAIRMAN RIGLER: Where does that appear?

13

MR. CHARNO: Page 7.

14

The Department would offer as DJ 280 for

15

identification a five-page document bearing the internal

16

numbers 00136762 through 766.

17

The Department would offer as DJ 231 for identification

18

tion a two-page document bearing the numbers 00136760

19

through 761.

20

The Department would offer as DJ 282 for

21

identification a three-page document numbered 109925 through

22

927.

23

The Department would offer --

24

MR. RIESER: Could we have an offer on this?

25

MR. CHARNO: The Department would offer Exhibit

1 282 for identification as the interim letter agreement
2 under which CAPCO operated prior to the execution of
3 the basic operating agreement. And for the proposition
4 that the benefits of coordinated operation and development
5 were available to the CAPCO members, notwithstanding
6 the absence of the definitive basic operating agreement.

7 The Department would offer as DJ Exhibit 263
8 for identification a multi-page document numbered 00137054
9 through 066, and we will request that the charts which
10 follow the text of the document be red-lined.

11 MR. RIESER: What did you say with regard
12 to the charts at the end?

13 MR. CHARNO: That they be red-lined.

14 The Department would offer as DJ 284 for
15 identification a document bearing the numbers 00136872
16 through 878, and we would request that the entire
17 first page be red-lined.

18 CHAIRMAN RIGLER: What were the numbers again,
19 please?

20 MR. CHARNO: 136872 through 878.

21 The completion of the red-lining on 284
22 would result in the entire document being red-lined.

23 The Department would offer as DJ 285 a document
24 numbered 00137130 through 152.

25 I'm sorry, through 153.

ar3

1 The Department would offer as DJ 286 for
2 identification a document numbered 00010271.

3 The Department would offer as DJ 287 a one-
4 page document numbered 00010274.

5 The Department would offer as --

6 MR. RIESER: Could we ask -- I notice, looking
7 in advance, that many of these seem to be in evidence
8 already.

9 Could we ask your purpose for putting these in?

10 MR. CHARNO: With respect to Exhibit 286, we
11 would seek a stipulation from Cleveland Electric Illuminating
12 that these documents were taken from the files of Cleveland
13 Electric Illuminating or that copies of them can be found
14 in CEI files.

15 MR. RIESER: Off the record.

16 (Discussion off the record.)

17 CHAIRMAN RIGLER: We will come back at 1:30
18 on that clock.

19 (Whereupon, at 12:20 p.m., the hearing
20 was recessed, to reconvene at 1:30 p.m.,
21 this same day.)

22
23 - - - - -
24
25

AFTERNOON SESSION

(1:35 p.m.)

arl

1
2
3 CHAIRMAN RIGLER: Shall we proceed?

4 MR. CHARNO: The Department would propose to
5 call at this time Mr. Thomas Darling.

6 MR. BRILEY: Mr. Chairman, I would like to object
7 to the calling of Mr. Darling and move that he be reposed at
8 this time on the following basis:

9 Mr. Charno stated before the noon break that
10 his purpose for calling Mr. Darling would be to testify
11 with respect to an alleged understanding between the Toledo
12 Edison Company and Consumers Power of Michigan, with
13 respect to territorial allocation.

14 Mr. Charno also advised me yesterday evening
15 that in connection with Mr. Darling's testimony, he
16 intends to put into evidence two documents, both of which
17 are field activity reports prepared by Mr. Darling in 1966,
18 and relate to meetings that he had -- that Mr. Darling
19 had with Toledo Edison Company officials.

20 This issue, the issue of the alleged understanding
21 between Toledo Edison Company and Consumers was fully
22 litigated in the Consumers case, and the Department was
23 given more than adequate opportunity at that time to
24 develop their case on that issue before this very same
25 Commission.

1 They did so. They included the same two
2 pieces of evidence as part of the Butz affidavit, which
3 was Department of Justice Exhibit 128 in the Consumers case.

4 That exhibit is a rather large compilation of
5 materials. It does include the two documents that Mr.
6 Charno proposes to reintroduce today through this witness.

7 The Board considered the issue. They considered
8 the evidence, and they entered a finding that there was no
9 situation inconsistent with the antitrust laws in that
10 case.

11 On that basis, we feel that the Department is
12 now collaterally estopped from representing this argument
13 at this time.

end 14 14

15

16

17

18

19

20

21

22

23

24

25

S15

owl

1 I would like to stress the fact that this was
2 before the same agency. It involved the same issues.

3 It involved exactly the same evidence, and it
4 involved the Department of Justice, the same party, and
5 the ruling was there was no situation inconsistent.

6 Reading, if I might, just briefly from the
7 findings of fact of the Board in the Consumers case on page
8 159, the Board said there was also hearsay evidence,
9 Exhibits DJ-128 -- which I previously referred to -- have an
10 "understanding" between Applicant and Toledo Edison and the
11 **cite** is from the transcript page 5480.

12 The Board then continues to find for the sake
13 of conciseness, we shall refer to the above-described oral and
14 written agreement as "boundary agreement." We find no
15 substantial evidence of a situation inconsistent with the
16 antitrust laws arising out of boundary agreements.

17 On that basis I would move that the witness
18 be **deposed** at this time.

19 CHAIRMAN RIGLER: Was that finding made only as to
20 the activities under the license of Consumers or did it
21 include any findings with respect to activities of Toledo
22 Edison?

23 MR. BRILEY: The evidence was considered with
24 respect to the alleged understanding between Consumers and
25 Toledo Edison. The finding obviously was limited to Consumers

1 since Toledo Edison was not a party to that proceeding.

2 It was the same alleged agreement or understanding,
3 obviously, that the Department is taking the position that
4 Toledo Edison and Consumers entered into together.

5 MR. SMITH: The language you quote, as I understand
6 it, does not find that there were no boundary agreements.
7 It finds that there is no situation inconsistent.

8 CHAIRMAN RICLER: What was the relevant market
9 for purpose of the Consumers hearing? The relevant
10 geographic market?

11 MR. BRILEY: I would assume it would have been
12 limited to the Consumers service area.

13 CHAIRMAN RICLER: It was not co-extensive with the
14 relevant geographic market affecting the parties in these
15 proceedings?

16 MR. BRILEY: No. The same issue was raised there
17 that they are attempting to re-litigate here, based on
18 precisely the same evidence.

19 MR. CHARNO: I would make a few additions to the
20 discussion of Consumers.

21 Number one, the Consumers board at 149
22 characterized the situations it described subsequently which
23 include the situation learned Counsel has set forward as those
24 not within the matter of controversy in that proceeding
25 and went on to make certain ruling notwithstanding.

7 bw3

1 the fact that the issues were not in controversy in the
2 proceeding.

3 At 158 it characterizes this and a number of
4 other situations as "conspiracies to limit retail
5 **competition.**"

6 We indicate the Department allegation in this
7 proceeding is to limit wholesale competition. We have
8 taken no position, I believe, with respect to retail, though
9 that is not of **overwhelming significance**, certainly.

10 The only reference to evidence concerning the
11 alleged agreement in the Consumers proceeding is
12 the sentence that was read by Counsel for Toledo Edison.

13 The Board at 162 found that the boundary
14 agreements were not inconsistent or held that boundary
15 agreements were not inconsistency with antitrust laws and
16 assuming that there was a situation inconsistent which the
17 boundary agreements created, that there was no connection
18 between such a **situation** and the relevant matters in
19 controversy and, finally, they held that "there is no evidence
20 of an anticompetitive scheme or conspiracy, having as a
21 material element and significant factor the misuse of
22 **activities under the license**, which would maintain or
23 create such a situation.

24 We conclude as a matter of law that there is no
25 nexus between the activities under the license and the said

bw4

1 assumed situation.

2 This again described a number of situations.

3 I think the most briefly described of which is the one to
4 which Toledo Edison refers.

5 First, I would like to note that it is -- that
6 the doctrine of res judicata and included therein the
7 doctrine of collateral estoppel are not favored within
8 administrative agencies which require the flexibility to --
9 which require flexibility to effectively make law.

10 In Maxwell Company v. NLRB, 414 F. 2d 477 through
11 479, Sixth Circuit, 1969, the Court of Appeals held that
12 a decision by the NLRB regional director, that a proposed
13 unit for collective bargaining was inappropriate, a decision
14 from which no appeal was take, was not a bar to an opposice
15 decision by the Board in the later unfair labor practice
16 proceeding involving the same facts and the same parties.

17 And there at page 484, the Court of Appeals stated
18 the right to make such **changes** is essential. Without it,
19 agency law could never be improved as a result of experience,
20 but would be burdened forever with its encrusted errors.

Es15

21

22

23

24

25

#16

arl 1

2 We would also note that only a final decision
3 on the matter can be res judicata or collateral estoppel,
4 and that the decision in the Consumers proceeding is on
5 appeal.

6 The Department has specifically excepted our
7 Exception 51 to any finding that would be inconsistent with
8 an allegation of a territorial allocation agreement
9 between Toledo Edison and Consumers Power.

10 Specifically, our Exception 51 reads:

11 "The Board erroneously concluded that
12 Applicant has never had an oral or written agreement
13 prohibiting wholesale sales beyond its present service
14 area."

15 I think the phrasing of that exception is through
16 an abundance of caution, because as I indicated from
17 reading the Consumers opinion, it is very difficult to
18 determine whether the Board did in fact reach that conclu-
19 sion.

20 With respect to the identity of the parties,
21 counsel has not set forward the argument employed by Toledo
22 Edison in this prehearing fact brief which I would quote
23 from, page 12 :

24 "While Toledo Edison was not a party to
25 the Consumers proceeding under the long-recognized doctrine
of Bernhart vs. Back of America, Toledo Edison may make
definitive use of the decision in Consumers to collaterally

1 estop the government" -- in the present proceeding,
2 the Department of Justice and the NRC Staff -- "from
3 relitigating the issue before the Licensing Board."

4 We take issue with this legal interpretation,
5 specifically in the case of Markoff vs. New York Life
6 Insurance Company, 369 F Sup 308.

7 The Court there held that a judgment which is not
8 conclusive as to fact and law against a party to a lawsuit
9 shall not be so considered as to its adversary.

10 In writing at that point Kirby vs. Pennsylvania
11 Railroad Company, 188 F 2d 793, 797, Third Circuit
12 1951.

13 It would be the Department's position that
14 the decision in Consumers was not conclusive with respect
15 to Toledo Edison and they should not be able to make
16 "definitive use" of it in this proceeding.

17 We would also cite U.S. vs. Coraso, 355 Fed.
18 Supp., 126, Middle District of Pennsylvania, 1973, which
19 was a wiretap case where wiretap evidence was suppressed
20 against an initial defendant.

21 The government did not appeal that suppression
22 of evidence.

23 Then a second defendant tried to use collateral
24 estoppel against the government, and the Court held because
25 the moving defendants in this case were not defendants in

1 the Lota case, the government is not estopped from now
2 asserting that the May 1973 wiretap was legal ...when it
3 was not bound by a decision, may not claim its benefits.

4 We point out that the Consumers Board's
5 characterization of the evidence as hearsay would not be
6 applicable in this proceeding where a witness is going
7 to be presented who will not be stating hearsay.

8 The documents do not state hearsay, but the
9 admissions of a party in this proceeding.

10 Finally, we question whether the requisite identity
11 of issues is present in this proceeding by virtue of the
12 fact that Consumers directed its decision to the
13 existence of a retail territorial allocation agreement
14 as opposed to a wholesale territorial allocation agreement.

15 MR. BRILEY: I would like to address Mr.
16 Charno's comments in reverse order, if you will.

17 With respect to the present appellate nature of
18 the Consumers case, I would like to note two things:

19 Primarily, that the order of the Licensing
20 Board was a final order, although exceptions were taken to
21 the Commission, and in that regard I would like to cite
22 from Prof. Moore's Treatise on Federal Practice, Volume
23 1-A, page 2252, wherein he says the federal rule is that
24 the pendency of appeal does not suspend the operation of
25 an otherwise final judgment of res judicata or collateral

ar 4

1 estoppel unless the appeal removes the entire case to the
2 appellate level and constitutes a proceeding de novo.

3 The Consumers appeal is not being taken for a
4 proceeding de novo. This is the precise protection that is
5 afforded certainly in Federal Court.

6 CHAIRMAN RIGLER: What citations does Moore
7 include on that?

8 MR. BRILEY: He cites Yatan
9 vs. United States, which is a very old case.

10 He also cites Huron Holding vs. Lincoln
11 Mine Operation, Coal Metal Process Company vs. E.W.
12 Plys Coal, Delaware 1937, 21 Fed Sup 509.

13 Reid vs. Allen, 286 U.S. 191.

14 There is a long list of citations here.

15 CHAIRMAN RIGLER: What is the latest case?

16 MR. BRILEY: I don't have the supplement, and
17 it is possible there are some in the supplement.

18 Could we be permitted to make this available
19 to the Board at a later time?

20 I would like to take a look at the supplement
21 and see what the more recent cases are.

22 Coming to the second point, I don't think at all
23 that this rule is limited to judicial proceedings and does
24 not apply to administrative proceedings, and in that
25 regard I would like to quote the opinion from the United

1 States Supreme Court in U.S. vs. Utah Construction and
2 Mining Company, 384 U.S. 394, wherein the Court said, and
3 I quote:

4 "When an administrative agency is acting in a
5 judicial capacity and resolves disputed issues of fact
6 properly before it which the parties had an adequate
7 opportunity to litigate, the Courts have not hesitated
8 to apply res judicata to enforce repose. On the concept of
9 adequate opportunity" --

10 CHAIRMAN RIGLER: Is that the end of your
11 quote?

12 MR. BRILEY: Yes.

13 CHAIRMAN RIGLER: Wait a minute.

14 Does the Court suggest that the agency is
15 required to apply the concept of res judicata or merely
16 announced that in some cases it has not hesitated to do
17 so?

18 MR. BRILEY: I can't answer your question. The
19 quote from the cases, it hasn't hesitated to apply. I don't
20 see here any absolute requirement.

21 CHAIRMAN RIGLER: That may be less than a binding
22 rule.

23 MR. BRILEY: It is the United States Supreme
24 Court. Whether or not it would be binding is up to the
25 Board.

ar6 1 CHAIRMAN RIGLER: It could be taken to read that
2 the agency has discretion.

3 MR. BRILEY: Also I would like to make one
4 additional point, if I could, Mr. Rigler.

5 On the concept of opportunity to litigate,
6 Mr. Charno made reference to the hearsay nature of the
7 documents submitted in the Consumers case, and I would
8 submit that the Department of Justice had more than adequate
9 opportunity in that case to present the witnesses as well
10 as the documentary evidence.

11 MR. CHARNO: If I may reply very briefly.

12 CHAIRMAN RIGLER: All right.

13 MR. REYNOLDS: Could we wait a minute?

14 He is not finished yet.

15 MR. BRILEY: Mr. Rigler, one final point.

16 Then I will give you your chance, Mr. Charno.

end 16

17

18

19

20

21

22

23

24

25

1 With respect to the bifurcated aspect of wholesale
2 versus retail, the only statement I would like to make is,
3 that which was raised in Consumers is what was raised here,
4 precisely.

5 There was a restrictive agreement between
6 Consumers and TE, based on exactly the same evidence.

7 That is the same that is here.

8 CHAIRMAN RIGLER: Ordinarily it will be movant's
9 response, movant's reply and that is it on a motion response.

10 This is an exception.

11 MR. CHARNO: I feel I have perhaps misstated
12 myself. I did not mean to imply that there is no place in
13 administrative law for collateral estoppel. If I said that,
14 I misstated.

15 It is not favored, and it is not rigidly applied,
16 I did mean to state.

17 I would like to quote briefly from Davis
18 Administrative Law, 1972 Edition in which he states at
19 page 364, "The orthodox view in the judicial system, however,
20 is that a decision may be final, even though it is subject
21 to appeal."

22 He cites the re-statement for that proposition.
23 "Even though under Section 557 of the APA an initial decision
24 of an examiner may become final in absence of either appeal
25 to the agency or review upon the agency's own motion, giving

S17

owl

1
2 res judicata effect to such an initial decision that may later
3 be reversed by an agency, seems clearly undesirable, for it
4 would compel a lack of uniformity, might produce gross
5 injustice and would cause gross confusion."

6 CHAIRMAN RIGLER: I will give you the last word,
7 Mr. Briley, you being the moving party.

8 MR. BRILEY: Chairman Rigler, I don't have a
9 lot to add, other than what I have already said. I feel the
10 issue was fully raised and fully litigated in the Consumers
11 case.

12 I feel this is a classic example of collateral
13 estoppel and I'm asking for it to procedurally protect
14 the rights of my client.

15 Beyond that I have nothing further to add.

16 CHAIRMAN RIGLER: All right. The Board has had
17 opportunity to discuss this matter with reference to
18 Applicants' briefs.

19 Referring to the prehearing legal brief on behalf
20 of the Applicants, page 195, in which the collateral estoppel
21 doctrine is discussed and continuing over to page 196, the
22 test set forth by Applicants in order for the doctrine to
23 apply is that first there must be an identity of parties.

24 We do not believe there is an identity of parties
25 in this particular circumstance.

1 Secondly, there must be an identity of issues.
2 And, although we appreciate the argument that the same agreement
3 may have been involved, we are not convinced that the issues
4 are identical. We can see substantial differences between
5 the issues in controversy in Consumers and the issues in
6 controversy in this proceeding, particularly with respect
7 to the geographic market and, secondly, with respect to the view
8 of nexus which was adopted by the Board in Consumers.

9 Thirdly, a valid and final judgment. With respect
10 to that it was our preliminary opinion that no valid or final
11 judgment existed in Consumers.

12 However, based on the citations being made, we will
13 review that point.

14 That would be an alternate ground, because our
15 holding also would be based on the first two grounds.

16 Another point that I think is very important is that
17 even in Consumers, the quote made by Toledo Edison on page
18 159 was that the Board found no substantial evidence and there
19 is a significant difference between no evidence and no
20 substantial evidence, because what may not have been
21 substantial within the context of the issues being litigated
22 in Consumers perhaps could be substantial within the context
23 of different issues being litigated in this proceeding.

24 So for all of the above reasons the motion will
25 be denied.

#18

arl 1 MS. URBAN: The Department of Justice would
2 like to call Mr. Thomas Darling.

3 Whereupon,

4 THOMAS DARLING

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

8 DIRECT EXAMINATION

9 BY MS. URBAN:

10 Q Will you please state your full name.

11 A Incidentally, I have never been a witness
12 before, and let me know about the microphone. Can you
13 hear me all right?

14 Q I think we can.

15 A My name is Thomas Darling, Jr.

16 Q What is your address?

17 A 5008 Larno, L-a-r-n-o, Drive, Alexandria,
18 Virginia.

19 Q Would you briefly describe your education after
20 high school?

21 A After high school I entered Yale University
22 in the Class of 1925, obtaining a BA degree.

23 At the end of that time I joined the Pennsylvania
24 Power & Light Company, taking a student training course
25 with them, and at the same time took an electrical engineering

1 course by correspondence with the ICS, International
2 Correspondence School of Scranton, getting an EE degree in
3 1927.

4 Q What is your present occupation?

5 A I'm retired as of June 30, 1973.

6 Q By whom were you employed before you were retired?

7 A Rural Electrification Administration of the
8 Department of Agriculture.

9 Q How long did you work there?

10 A For 27 years.

11 Q What was your business address while employed
12 by the REA?

13 A 14th and Independence Southwest, in Washington,
14 D.C.

15 Q What positions did you hold while employed by the
16 REA?

17 A Varying positions, but my specialty was the
18 field of power supply and power planning, including whole-
19 sale rates and power contracts.

20 Q Would you describe what those positions entailed?

21 A The positions entailed largely obtaining the
22 lowest cost power sources for our borrowers, as we called
23 them.

24 Those cooperatives to whom we lent money.
25 obtaining the lowest cost power source which in our opinion

1 could be obtained.

2 Q By cooperatives, did you mean rural
3 electric cooperatives?

4 A That's correct, yes.

5 Q What is a rural electric cooperative?

6 A Rural electric cooperatives were formed about
7 the time of the New Deal, when the power companies, many of
8 them, took no interest in extending power into the
9 farm areas, and the rural people formed their own business
10 organizations, private organization, borrowing money from
11 the REA at low rates of interest at that time.

12 They had their own manager and staff. In that way
13 they had a small entity in which they were able to
14 obtain electric power for the rural areas.

15 Q Is a rural electric cooperative a profit-
16 making organization?

17 A It is not. It is a nonprofit organization.

18 Q What position did you hold with the REA in 1966?

19 A At that time I was power procurement engineer
20 in the power division.

21 Q Would you describe your duties while in the
22 power division?

23 A My duties were very similar to what I described
24 earlier; in other words, making sure that the rural electric
25 cooperatives obtained the lowest possible power source that

1 was obtainable, whether it was a power plant, because in some
2 cases they used the money we loaned them to build their
3 own power plant.

4 In some cases, it was a G&T cooperative,
5 generating and transmission cooperative.

6 At other times they purchased from the power
7 companies at the most reasonable rates we could advise
8 they obtain.

9 Q While in the power division, were you concerned
10 with REA throughout the entire U.S. or only in a
11 specific geographical area?

12 A I was assigned to a specific geographical
13 area. First the North east and later the Southeast.

14 Q What geographical area were you concerned
15 with in 1966?

16 A In 1966 I was concerned with the Northeast area.

17 Q Does this area include Ohio and Michigan?

18 A Yes, it does.

19 Q During your employment with the REA, did you make
20 many trips into the field?

21 A Not really very many. I would say during my
22 entire stay with the REA, I made perhaps between 15 and 20
23 trips.

24 Q Were you required to file a report describing
25 your activities every time you made a trip on official

ar5

1 business?

2 A Yes, very definitely.

3 Q Was it a regulation of the REA that every
4 employee file such a report after every trip on official
5 business?

6 A There was such a regulation. I must say, before
7 you got paid, you had to submit such a report.

8 Q Was there an official name for this required
9 report?

10 A Field activities report.

11 Q What did a field activities report consist of?

12 A Field activities report could be summarized
13 by saying in the first place, the purpose of the trip was
14 indicated in summary form. What was accomplished during
15 the trip, and lastly the recommendations as to what should
16 be done in the future.

17 Q Did you make any trips into the field in 1966?

18 A Yes, I did. I made a number of trips in 1966.

19 Q Did you make any trips to the Michigan-Northern
20 Ohio area in 1966?

21 A Yes. There were two. One in mid-February, and
22 one in mid-September of that year.

23 Q On behalf of what cooperative did you make
24 these trips?

25 A The Southeastern Michigan Electric Cooperative

1 was the only cooperative in the February trip.

2 In the September trip, that again was the
3 cooperative concerned, and from there I continued with the
4 field engineer into Indiana to visit some cooperatives
5 there.

6 Q Was the Southeast Michigan Rural Electric
7 Cooperative known by any other name within the REA?

8 A Yes. It had a designation, as they all do,
9 a numerical designation, Michigan 5 Lonnawee.

10 Q In what state is the Southeast Michigan REC
11 located?

12 A In the extreme southeastern part of Michigan.

13 Q Is any portion of the cooperative located
14 within the State of Ohio?

15 A To the best of my recollection, there was a spill-
16 over into Ohio and I believe that Toledo Edison supplied
17 that. I'm not 100 percent positive at this late date.
18 I think that is the way it was arranged.

19 Q What occasioned this February trip on the behalf
20 of the Southeast Michigan REC?

21 A Repeat.

22 Q What occasioned this February trip on the behalf
23 of the Southeast Michigan REC?

24 A The cooperative requested us to come and advise
25 them as to what might be the lowest possible power source

1 for that particular cooperative.

2 CHAIRMAN RIGLER: When you say the lowest
3 possible power source, do you mean lowest cost?

4 THE WITNESS: Lowest cost, I should say, yes,
5 sir, because the companies had different rates and we knew
6 that the Toledo Edison had the lowest rate, and we were
7 hopeful we could obtain a source from Toledo Edison.

8 I might say that the Consumers Power Company
9 at that time had just delivered notice that they were
10 terminating their contract and intended to file a higher
11 rate for the cooperative.

12 BY MS. URBAN:

13 Q Did the Consumers Power Company supply power
14 to the entire cooperative or only to a portion of the
15 cooperative?

16 A I'm not 100 percent sure, but I believe that
17 the Consumers Power Company at that time supplied the
18 Michigan portion of the load, and Toledo Edison supplied
19 the Ohio portion.

20 Q Would you recall then whether the Southeast
21 Michigan Co-op was running two isolated systems or one
22 integrated system?

23 A If, as I think is correct, there was a
24 portion in Ohio and a portion in Michigan, there very
25 definitely were two isolated systems, one in Ohio and one

1 in Michigan.

2 Q Focusing again on the first trip that you
3 made on behalf of Southeast Michigan Co-op, did you meet
4 anyone from the REA upon your arrival in the Michigan area?

5 A Yes. I was met by the manager of the
6 cooperative -- he was not REA -- but also by the field
7 engineer, Mr. Robert Badner.

8 Q Do you know what the duties of a field engineer
9 are?

10 A The field engineer is a position wherein an REA
11 employee is assigned to headquarters in an area. He travels
12 from one electric cooperative to another, and advises them
13 in engineering matters of all kinds upon their request.

14 Q Was a field engineer required to file a field
15 activities report after each trip on official business?

16 A Exactly so. Just as I was.

17 Q During this first trip, did you and Mr. Badner
18 visit the Toledo Edison Company?

19 A Yes, we did.

20 Q Why did you visit the Toledo Edison Company?

21 A We visited the Toledo Edison Company because we
22 were fully cognizant of the fact that their rates were
23 lower than the Consumers Power Company and we had hoped
24 that we would be able to obtain some of this lower-cost
25 power and transmit it across the state line into the State

1 of Michigan and obtain possibly the entire requirements
2 of the cooperative from the Toledo Edison source.

end 18

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

S19

1 Q How did you know that Toledo Edison rates were
2 lower?

bwl

3 A We have a purchased energy report which we issue
4 in REA and all those facts and figures are quite well known
5 to us.

6 That is a yearly report, and we keep in very close
7 contact with that.

8 Q Did you meet with any representatives of the Toledo
9 Edison Company?

10 A Yes, we did.

11 Q Do you recall the names of those representatives?

12 A Yes, a Mr. Schwalbert, S-c-h-a-l-b-~~e~~-r-t, was
13 the assistant to the general manager and with him was a
14 Mr. Keck, who was the system development engineer.

15 MR. REYNOLDS: Mr. Chairman, I will make the
16 continuing objection on behalf of Applicants other than
17 Toledo Edison Company, to the testimony of this witness.

18 CHAIRMAN RIGLER: The objection will be overruled.

19 BY MS. URBAN:

20 Q At this meeting did Mr. Schwalbert or Mr. Keck
21 make any statements concerning Toledo Edison's willingness
22 to serve the entire co-op?

23 A Mr. Schwalbert was the spokesman. He stated
24 very definitely that his company could not serve across
25 the state boundary lines for three reasons, which he gave
us at the time.

bw2

1 It turned out later that the first two were
2 not as important as the third. But at the time the three
3 reasons were, in the first place that they were hopeful of
4 staying beyond the jurisdiction of the Federal Power
5 Commission and, if they had strictly intrastate service,
6 that would be the case.

7 If they didn't serve across the state boundary,
8 then they would not come under FPC jurisdiction.

9 That is one of the reasons he didn't want to
10 go across the state boundary.

11 The second reason involved the Buckeye Electric
12 Cooperative was a formative G and T cooperative, generating
13 and transmission cooperative of which Southeastern Michigan
14 was the only non-Ohio member. But it did involve some
15 complications that he would prefer for that reason not getting
16 involved, but the third and most important reason that he
17 didn't want to go across the state boundary was the fact that
18 they had a territorial agreement or understanding with the
19 Consumers Power Company that neither would cross the state
20 boundary and serve the other company's customers.

21 Q Did you take notes at the meeting?

22 A Yes, I did.

23 Q Did you prepare a field activities report which
24 contained a description of the meeting with Toledo Edison?

25 A Yes, I did.

bw3

bw

1 Q How soon after the meeting did you prepare
2 your field activities report?

3 A Probably within a week.

4 Q Did you utilize your notes to prepare your field
5 activities report?

6 A Oh, yes, I did.

7 Q Do you still have these notes?

8 A No, I do not.

9 Q Did you and Mr. Badner prepare your reports in
10 conjunction?

11 A No, we went our separate ways after the meeting,
12 and I made my field report in Washington, and he made his
13 at his headquarters in Michigan.

14 Q I show you a document which Mr. Charno will
15 hand you, which is part of a group of documents which has
16 been marked for identification as DJ Exhibit 108.

17 This document is entitled Field Activity
18 Report and bears the date February 14 to 16, 1966.

19 Is that your signature in the top right-hand
20 corner of the document?

21 A That is correct.

22 Q Would you look over this document and tell me if it
23 is a field activities report concerning the trip we have
24 been discussing?

25 A It is.

#20

arl

1 Q Does this document contain a true and accurate
2 transcription of the meeting with Mr. Schwalbert and Mr.
3 Keck?

4 A Yes, it does.

5 Q Mr. Darling, you testified earlier that you
6 made two trips on behalf of the Southeast Michigan Co-op
7 in 1966.

8 I would like to focus now on the second trip.
9 Could you again tell me when you made the second trip?

10 A The second trip was roughly mid-September 1966.

11 Q What was the purpose of the second trip?

12 A The purpose of the second trip was to again
13 visit the Toledo Edison Company and see whether they
14 might have had a change in heart about this crossing over
15 the state line, and then during the first trip we had gone
16 to see the Detroit Edison Company about a possible source
17 of power.

18 After we had left Toledo Edison and on the
19 second trip, we again were to contact the Toledo Edison
20 Company because we had set the stage. We had done some
21 spade work with the officials of the Detroit Edison
22 Company, and at least the Detroit Edison delivering power
23 to one point of delivery, I believe Tecumseh, and we wanted
24 to see in the second trip whether we could firm up the
25 plans that had been tentatively set during the February

1 trip.

2 Q Did you again meet with any representatives of
3 Toledo Edison?

4 A Yes, we did. We went back to Mr. Schwalbert
5 on the second trip.

6 Q Did anyone from the REA go with you to this
7 meeting?

8 A Again Mr. Badner, the field engineer, went
9 with me to that meeting.

10 Q What did Mr. Schwalbert tell you about the
11 possibility of Toledo Edison supplying power for the
12 Michigan portion of the co-op?

13 A In the second trip in September, Mr. Schwalbert
14 modified his stand of the February meeting to the extent
15 that he indicated that the first two points, namely the
16 FPC jurisdiction was not too important, since he
17 anticipated that they would be under FPC jurisdiction,
18 anyway, in a year or so; and also the Buckeye impact
19 infringement, because he thought that could be arranged to
20 meet with their approval.

21 But the third point was still very definitely -- he
22 was adamant on the third point of the territorial
23 agreement which they had with the Consumers Power Company.

24 For that reason, he was adamant in refusing to
25 allow his company to serve the southeastern electric

1 cooperative in the State of Michigan.

2 Q Did you take notes at that meeting?

3 A Yes, I did.

4 Q At the time of this trip, were employees of
5 the REA required to file a field activities report after
6 each trip on official business?

7 A Yes, they were.

8 Q Did you file a field activities report which
9 contained a description of the meeting with Toledo Edison?

10 A Yes, I did.

11 Q How soon after the meeting did you prepare your
12 field activities report?

13 A Probably within a week.

14 Q Did you utilize your notes to prepare your
15 field activities report?

16 A Yes, I followed them closely.

17 Q Do you still have your notes?

18 A I do not.

19 Q Did you and Mr. Badner prepare your reports
20 in conjunction?

21 A No, we did not. We did them separately.

22 Q Mr. Darling, I show you a document which is also
23 a part of a group of documents which has been marked for
24 identification as DJ Exhibit 108. This document is
25 entitled field activities report, and bears the date

ar4

1 September 13 through 14, 1966.

2 Would you look over this document, focusing
3 particularly on the second paragraph of the first page,
4 and tell me if it is the field activities report
5 concerning your second trip on behalf of Southeastern
6 Michigan Rural Electric Cooperative?

7 A Yes, that is exactly the way I reported it.

8 Q Does this document contain a true and accurate
9 report of your meeting with Mr. Schwalbart?

10 A Yes, it does.

11 Q At the time you left the REA, were employees
12 of the REA still required to file a field activities
13 report after each trip on official business?

14 A That has always been the custom.

15 MS. URBAN: We have no further questions.

16 MR. BRILEY: Mr. Rigler, can we have five or
17 10 minutes?

18 (Recess.)

19 CROSS-EXAMINATION

20 BY MR. BRILEY:

21 Q Mr. Darling, you were very specific with
22 respect to your recollection of events that occurred
23 back in 1966.

24 Did you refer to anything prior to your testimony
25 today to refresh your recollection with respect to your

1 testimony?

2 A Can you repeat that, please?

3 (Whereupon, the reporter read the
4 pending question, as requested.)

5 THE WITNESS: Not any more than referring to
6 my field reports, of which I have copies.

7 BY MR. BRILEY:

8 Q You did reread your field reports prior to your
9 testimony today to refresh your recollection?

10 A Yes, I did.

11 I might say I threw away my original reports,
12 but I obtained photocopies of the same.

13 Q I believe you testified, Mr. Darling, that
14 subsequent to your second visit to Toledo Edison in
15 September of 1966, that you went up and talked to people
16 at Detroit Edison; is that correct?

17 A That's right.

18 Q Was that the same day that you talked to the
19 people at Toledo Edison?

20 A I'm quite sure it was the following day, because
21 we wouldn't have had time to go the same day. It was in the
22 afternoon, I believe, that we saw Mr. Schwalbert.

23 In any event, I am sure it was a following day
24 that we went to Detroit.

25 Q When you went to Detroit and talked to the

ar6

1 officials of Detroit Edison, did you inquire of them
2 about their knowledge, if any, of the understanding between
3 Consumers and Toledo Edison with respect to service within
4 each other's area?

5 A Yes. We laid our cards on the table. They are
6 cognizant of that fact.

7 Q When you say they were cognizant of that
8 fact, what fact are you referring to?

9 A Before we left, we told them that we would like
10 to make arrangements to obtain power from the Toledo
11 Edison Company because the Toledo Edison rate, I think
12 everybody agreed, was the lowest cost power that was
13 obtainable in that area at that time.

14 We said we probably wouldn't have come to see
15 them if we could have made the arrangement with Toledo
16 Edison, but we had reason to believe that Detroit could
17 undercut the Consumers rate, and for that reason we made
18 the trip to the Detroit office.

19 Q My question was, did you ask Detroit Edison
20 if they knew anything about an understanding between
21 Toledo Edison and Consumers Power Company?

22 A No, we did not.

23 Q Why did you not ask them about that?

24 A Because we told them that we understood that
25 there was such a territorial agreement.

1 Q I presume from your testimony, then, that
2 they didn't know anything about that?

3 A They might or might not have. I wouldn't
4 venture to say.

5 Q You have no recollection as to whether they knew
6 anything about it or not?

7 A No, but I think that was general knowledge,
8 if I'm not mistaken. I'm just guessing. I don't know.

9 MR. BRILEY: I would like to move to strike
10 the last response with respect to general knowledge
11 after he said he didn't have any specific knowledge.

12 CHAIRMAN RIGLER: Granted.

13 BY MR. BRILEY:

14 Q Mr. Darling, you testified that on two
15 occasions in, I believe, February and subsequently in
16 September, you met with officials of the Toledo Edison
17 Company, including Mr. Schwalbert and you testified that
18 several reasons were given to you for their not being
19 interested, as you put it, in providing service to Southeastern
20 Michigan and Michigan.

21 You said that one of those reasons tendered by
22 Mr. Schwalbert to you was some understanding with
23 Consumers Power. Did Mr. Schwalbert explain to you the
24 nature of that understanding?

25 A My recollection is that it was a territorial

1 agreement of some kind. I don't recall his saying whether
2 it was written or verbal. The exact nature of it, I'm
3 not sure.

4 Q I believe, Mr. Darling, you testified that Mr.
5 Keck was present at those meetings; is that correct?

6 A Not quite correct. He was present at the first
7 meeting, but he was not present at the second. I'm
8 sure, according to my report, and that followed my notes,
9 that Mr. Schwalbert and Mr. Keck were at the February
10 meeting, but Mr. Schwalbert alone was at the second meeting.

11 Mr. Schwalbert in both cases acted as spokesman.

12 Q Did Mr. Keck say anything to you in the
13 February meeting or if he was present at the second meeting --
14 I understand your recollection isn't complete -- at any
15 time did he make a statement to you with respect to this
16 understanding?

17 MS. URBAN: I object. I believe Mr. Darling
18 said -- I believe that the characterization of Mr.
19 Darling's testimony is incorrect as to whether Mr. Keck
20 was present at the second meeting.

21 MR. BRILEY: Perhaps we can clear this up by
22 letting me ask the witness which meeting Mr. Keck was present
23 at.

24 THE WITNESS: Mr. Keck was present at the first
25 meeting very definitely, according to my notes; and I'm

1 sure that in the second meeting, and I also have checked
2 Mr. Badner's field report --if you read Mr. Badner's field
3 report in September, you will find Mr. Keck's name is
4 missing from the September report, and I'm quite sure we did
5 did see Mr. Keck at the September meeting.

6 BY MR. BRILEY:

7 Q With respect to the first meeting, which would
8 have been in February, did Mr. Keck make any statements
9 to you with respect to this understanding with Consumers?

10 A My recollection is that Mr. Keck spoke very
11 little, if at all, and that Mr. Schwalbert was the
12 spokesman and Mr. Schwalbert was the one who was adamant
13 about this territorial agreement precluding any possibility
14 of power being delivered for Southeastern Michigan across
15 state lines.

16 Q Are you saying, Mr. Darling, that Mr. Keck did
17 not make any such statements, or that you don't recall
18 whether Mr. Keck did or did not?

19 A I do not recall.

20 CHAIRMAN RIGLER: Was Mr. Keck present when
21 Mr. Schwalbert made his statement?

22 THE WITNESS: In the first meeting?

23 CHAIRMAN RIGLER: Yes.

24 THE WITNESS: Yes, sir. Yes, he was. My
25 recollection is that Mr. Schwalbert did practically all of

1 the conversing and talking.

2 BY MR. BRILEY:

3 Q Mr. Darling, at the time of your second visit
4 to Toledo Edison in September, was it your understanding
5 at that time that Toledo Edison was serving Michigan --
6 points in the State of Michigan?

7 A That Toledo Edison was serving in Michigan?

end 20

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

S21

1 Q Yes.

w1

2 A No, I understood that they did not.

3 Q Do you know when Toledo Edison first commenced
4 providing service into the State of Michigan?

5 A To my knowledge, up to the time
6 that I retired, they never had served in the state of
7 Michigan, because of that Consumers power agreement.

8 Q And what was the date of your retirement, sir?

9 A June 30, 1973, about two and a half years ago.
10 I might say that the aftermath of our visit to Detroit,
11 according to my understanding since then or even at the time
12 I left, that the Detroit Edison did serve one point of
13 delivery, which was terminated with Consumers.

14 Q Mr. Darling, is it your independent knowledge
15 that Toledo Edison did not serve into the state of Michigan
16 after 1966, because of an understanding with Consumers? That
17 was the reason. Is that your knowledge?

18 A You say "serve in the state of Michigan" in
19 general or just as far as this cooperative?

20 Q Serve in the State of Michigan up until 1973.

21 A That would be my understanding, although we were
22 just talking about the Southeastern Electric Cooperative.
23 But anyplace according to Mr. Schwalbort's statement to
24 us, regardless of whether it was Southeastern Michigan
25 or not, he was very adamant that, because of this agreement,

bw2

1 wherever Consumers' territory was involved, that Toledo
2 Edison could not and would not serve, because of this
3 understanding or territorial agreement.

4 Q Mr. Darling, I am asking you in your official
5 capacity up until the time you retired in 1973, you said
6 it was your understanding that Toledo Edison did not serve
7 any points in the State of Michigan prior to your retirement.

8 CHAIRMAN RIGLER: Ms. Urban?

9 MS. URBAN: Objection. There has been no
10 foundation laid that his official capacity concerned whether
11 or not Toledo Edison would serve within the entire state
12 of Michigan or that he had anything to do with Michigan
13 other than this Co-op.

14 MR. BRILEY: Mr. Rigler, he stated with respect
15 to the State of Michigan and Toledo Edison service in the
16 State of Michigan, and he also testified he had this knowledge
17 up until 1973, when he retired.

18 I'm trying to find out whether he is basing
19 this statement on something he knows personally or whether it
20 based on something Mr. Schwalbort told him in 1966.

21 CHAIRMAN RIGLER: I will permit that line, however,
22 Ms. Urban's objection with respect to the characterization
23 of gaining his knowledge in an official capacity, I think
24 is well-taken.

25 With that amendment, you may pursue that line.

bw3

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

BY MR. BRILEY:

Q Mr. Darling, how did you gain your knowledge that Toledo Edison did not serve any point in Michigan until 1973, when you retired?

A The answer is definitely that it is supposition. I do not know.

MR. BRILEY: I would like to move to strike the Witness' testimony that Toledo Edison did not serve in the state of Michigan until 1973, because of an agreement or understanding with Consumers Power.

MS. URBAN: One moment.

Mr. Chairman, I believe that the only testimony that should be stricken would be the portion that said up to 1973, which came at the end of an answer.

CHAIRMAN RIGLER: Well, rather than digging it all out, let me summarize the Board's view of the present state of the evidence which would be that as of the termination of Mr. Darling's second visit to Toledo Edison in 1966, he was under the impression on information he had received from an official of Toledo Edison that Toledo Edison had a policy not to serve in Michigan, as a result of an agreement with Consumers Power, and I see nothing in the evidence that indicates he has any ongoing knowledge with respect to any service that extended or any revisions or abrogation of an agreement with Consumers Power that could have occurred

bw4

1 at any time subsequent to the second meeting.

2 Does that comport with your view of the evidence?

3 MS. URBAN: Yes, it does.

4 ME. BRILEY: I'm not sure whether it does or
5 no, Mr. Rigler.

6 The point I'm trying to make is that I understand
7 the Witness' position with respect to 1966 and the time
8 he made his visits.

9 What I'm opposed to is his characterization of
10 nonservice in the state of Michigan subsequent to 1966
11 and prior to 1973, when he retired, as being based on
12 that same understanding that he believed to exist.

13 CHAIRMAN RIGLER: I think if you have an
14 opportunity to review my statement which the reporter may
15 read back, that your concerns will be answered.

16 We agree with you.

17 (The reporter read the record as requested.)

ES21

18

19

20

21

22

23

24

25

arl 1

BY MR. BRILEY:

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 Mr. Darling, after your meetings in 1966, did you ever make any additional inquiry into the continuation of any agreement or understanding between Toledo Edison and Consumers Power with respect to service in the State of Michigan by Toledo Edison?

A No, I was transferred to the southeast area shortly after that, and the only thing I recall following up on at all was whether they ever had obtained power from the Detroit Edison at this Tecumseh point of delivery, which I was interested in because we set the spade work for it. That was what I was interested in.

I never did raise the question or follow up on inquire as to whether following that visit, Toledo Edison ever did make power available to anybody on the Michigan side of the line.

Q Am I correct, Mr. Darling, in assuming based on your testimony in answer to my previous question that you didn't have any present knowledge today as to whether Toledo Edison has an agreement today to serve Southeastern Michigan?

A No, I do not.

MR. BRILEY: Thank you. I have no further questions.

CHAIRMAN RIGLER: Mr. Reynolds.

1 MR. REYNOLDS: I have no questions on behalf
2 of Applicants.

3 MS. URBAN: The Department has no further
4 questions.

5 CHAIRMAN RIGLER: Thank you very much, Mr.
6 Darling.

7 THE WITNESS: Thank you.

8 (Witness excused.)

9 MR. REYNOLDS: On behalf of all of the
10 Applicants, I move to strike the entire testimony of
11 Mr. Darling.

12 It seems clear on the basis of his testimony
13 and the limited preparation that he used with respect
14 to the documents that it clearly is collaterally estopped
15 by the Consumers ruling. It has been litigated that the
16 parties here are privy to using collateral estoppel for
17 defense purposes, and that the Consumers decision is a final
18 decision.

19 CHAIRMAN RIGLER: Denied.

20 MR. REYNOLDS: I would like to make a motion
21 with respect to this testimony under Rule 105 of the
22 Rules of Evidence, which is the similar motion I made
23 with respect to other testimony earlier in the proceeding.

24 CHAIRMAN RIGLER: We have deferred our ruling
25 with respect to your 105 motion in other instances, and will

1 do so in this case.

2 MR. CHARNO: The Department would like to move
3 Exhibit DJ 108 for identification into evidence.

4 MR. REYNOLDS: Mr. Chairman, if by that
5 the Department is intending to move into evidence the
6 entire Exhibit 106, I will object. It seems to me
7 that those portions of Exhibit 108 which relate to the
8 testimony we have heard here today and concerning Mr.
9 Darling's field activities reports may well be an
10 appropriate matter to have moved in.

11 The remaining portions I would have my same
12 objection that I have indicated earlier, in addition to
13 which I have my collateral estoppel objection.

14 It does seem to me that anything more than the
15 reports that have been referred to in the testimony of
16 the prior witness would not be appropriate matters at
17 this time to consider.

18 MR. CHARNO: If I may, briefly, reply: In
19 addition to the two documents which are the last two
20 documents which come from REA files, and are either
21 addressed to or sent by the Toledo Edison, I don't think
22 that counsel's objection applies.

23 As I recall counsel's other objection, he
24 stated that there was no evidence of record that this was
25 the type of report referred to in the Rules of Evidence,

1 and there was no authority for the proposition that this
2 type of report had to be made during the course of the
3 official duties.

4 I submit with Mr. Darling's testimony in
5 the record, there is such evidence of record with respect
6 to field activities reports of both Mr. Badner and Mr.
7 Darling.

8 MR. REYNOLDS: I didn't catch the first part about
9 the letters. Did you say my objection would not be
10 applicable to those?

11 MR. CHARNO: Your prior objections, as I under-
12 stand it, were based upon the --

13 MR. REYNOLDS: I understand that, but what about
14 the letters? Are you saying that that objection does
15 or does not apply to it?

16 MR. CHARNO: I don't believe your objection
17 does apply to those.

18 MR. REYNOLDS: I had an objection as to
19 bringing the letters in, in this form as certainly not
20 being field activities reports in any sense.

21 MR. CHARNO: That is true.

22 MR. REYNOLDS: Therefore not being subject to
23 the same kind of an argument against the hearsay rule that
24 is being made with respect to field activities reports.

25 So, yes, my objection would go to everything

1 in DJ Exhibit 108, other than the report by Mr. Darling
2 and as to those I would have the continuing objection
3 on behalf of the other Applicants and the objection I
4 have mentioned as to collateral estoppel, but the remaining
5 portion of Exhibit 108, it seems to me, it is inappropriate
6 at this time to consider.

7 Certainly from the testimony of Mr. Darling,
8 it is clear that he did not prepare with Mr. Badner, Mr.
9 Badner's reports, and that the two went their separate
10 ways and did it separately.

11 I do not have any basis now to assume that the
12 testimony Mr. Badner might give would be the same as
13 Mr. Darling gave.

14 Since he is listed as a witness, the appropriate
15 thing, it seems to me, is to let Mr. Badner take the stand
16 and to ascertain whether he followed the same course that
17 Mr. Darling followed.

18 MR. CHARNO: Mr. Badner is on our witness list.
19 The Department feels at this point his testimony would be
20 cumulative and redundant.

21 CHAIRMAN RIGLER: The Board agrees that
22 substantial support has been placed in the record for
23 accepting the Badner reports as routine official reports
24 within the Department of Agriculture.

25 His testimony strikes us as potentially

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

cumulative and repetitious.

We see no need to call him merely to verify what this witness has testified to.

MR. REYNOLDS: I would state if the Board's view is it is merely cumulative and redundant, I object to introducing unsponsored exhibits in this record for the effect of creating a cumulative and redundant record.

end22

S23

bwl

1 CHAIRMAN RIGLER: Let me direct your attention
2 to the fifth document listed in the Butz affidavit which is
3 page one of the Department Exhibit 108, and raise with you
4 the possibility, Mr. Charno, that nothing in Mr. Darling's
5 testimony laid a foundation for the introduction of this
6 particular document.

7 MR. REYNOLDS: While he is looking at that, before
8 you rule, I would like a chance for another word, . . .
9 since I understand after you have ruled, that takes care of
10 my comments. If I could.

11 CHAIRMAN RIGLER: It does, and we will give you the
12 other chance.

13 Do you have any basis to believe, Mr. Reynolds,
14 that Mr. Badner would testify other than that his
15 field activities reports were filed routinely in the
16 course of his employment?

17 MR. REYNOLDS: Well, I guess the problem I have
18 is more than that --

19 CHAIRMAN RIGLER: **Answer that** question before
20 you tell me about your problem.

21 MR. REYNOLDS: I would not have a reason now
22 to doubt that he would testify that that is other than a
23 field activity report in the same manner that Mr. Darling
24 has.

25 The problem I do have is that by . . .

bw2
bw2

1 allowing this field activity report to come in now as merely
2 cumulative evidence without Mr. Badner being brought in,
3 I don't have the opportunity to test his recollection or
4 his understanding of the "understanding" that Mr. Schwalbort
5 may have talked, or did talk to, and that Mr. Keck might have
6 commented on, because he is not now being brought in, but
7 rather the field report is being put in as cumulative
8 evidence.

9 Mr. Darling's testimony indicates that he was
10 testifying on the basis of his recollection after
11 reviewing these reports.

12 I don't know whether Mr. Badner has independent
13 recollection or can illuminate the situation for us or cannot.

14 I'm being deprived of an opportunity to test that
15 by allowing his reports to come in on the basis of
16 Mr. Darling's testimony and allowing the government to remove
17 him from their list as a designated witness, which means
18 that the only way I can now talk to him is to call him
19 myself.

20 I do have a serious problem with that. It
21 seems to me the government has a burden. If they are going to
22 put in evidence of a particular report by a witness, that the
23 other side should have an opportunity to have that witness
24 on cross-examination, rather than direct examination.

25 That is the difficulty I have. I'm not

bw3

1 quarreling with the Board about the business record
2 nature of this report. What I'm saying is that once I say,
3 yes, to that, then I have gone much further down the
4 road than just the question of whether I personally
5 think it is or isn't a business record.

6 I'm being foreclosed from the opportunity of
7 probing Mr. Badner's recollection on this matter which may well
8 be better than Mr. Darlings.

9 It may not be. But I'm giving up that opportunity.
10 When the Department or Board tells me it is cumulative, it
11 may be that you are both right, but what I'm saying is that
12 I don't want to throw away or give up the opportunity of
13 testing the Witness' recollection to ascertain whether it is
14 indeed cumulative.

15 That is all I'm suggesting. That is why I have
16 made the point that I am making.

17 CHAIRMAN RIGLER: If you considered it that vital
18 to your interest, I'm sure the Board would sign a subpoena.

19 MR. CHARNO: In response to your question, I
20 would agree that that does not fall within item number 5,
21 does not fall within rule 803(a) of the federal rules.

22 That being the basis upon which we are moving
23 all but the last two into evidence.

24 The Department, in addition to the
25 field activity reports contained in Exhibit for identification

bw4

1 DJ-108, would move into evidence as DJ-108A, a November 23,
2 1965, letter from John K. Davis, to Mr. Dewey G. Ries,
3 R-i-e-s.

4 And as 108B, a November 20, 1965, letter from
5 Dewey G. Ries to John D. Davis, President, Toledo Edison
6 Company.

7 In addition, the Department would like to withdraw
8 that portion of DJ-108, which is denominated on the first
9 page after arabic numeral 5 and described as a July 12, 1968
10 memorandum to the Assistant Administrator regarding a
11 fully-executed wholesale power contract between Southeastern
12 Rural Electric Cooperative, Inc., and Consumer Power
13 Company from Mr. H. B. Lee of REA.

14 (The documents referred to
15 were marked Exhibits
16 DJ-108A and DJ-108B for
17 identification.)

18 CHAIRMAN RIGLER: Subject to the withdrawal
19 stated by the Department, we will admit into evidence
20 Department Exhibit 108, 108A and 108B.

21 (The documents heretofore marked
22 Exhibits DJ-108, 108A and 108B
23 for identification, were
24 received in evidence.)
25

bw5

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

MR. REYNOLDS: Continuing objection on behalf
of all Applicants other than Toledo Edison Company.

CHAIRMAN RIGLER: Continuing objection is
overruled.

ES23

arl 1

MR. CHARNO: The Department would move
2 into evidence at this time DJ 16, which was deferred
3 until such time as the Department had more substantial
4 evidence of record concerning our allegation of an agree-
5 ment between Consumers Power and Toledo Edison.

6 MR. REYNOLDS: I would like an offer of proof.

7 MR. CHARNO: The Department would like to amend
8 its offer to include reference to paragraph 8 in support
9 of the statements previously made, as well as paragraph 1,
10 which we cited at transcript page 4484.

11 Both portions are red-lined in the exhibit.

12 MR. REYNOLDS: The question, I guess, clearly
13 is whether Mr. Darling's testimony lays any kind of
14 foundation for this document, and it seems to me that Mr.
15 Darling's testimony would not provide any basis for it.

16 He has testified to a statement made by a
17 Mr. Schwalbert of Toledo Edison as to an understanding
18 that he had no knowledge of the details of or the duration
19 of or whether if in fact it did exist, it would have
20 existed in 1967, which is the date of this particular
21 contract.

22 I think there are, as we said before, in response
23 to the offer of proof, a number of reasons why the provisions
24 that are red-lined in this are in there.

25 I don't see anything that Mr. Darling has said

ar2

1 this afternoon that would begin to suggest that there
2 is a basis for introducing the Consumers contract with its
3 customers, that doesn't relate at all to Toledo Edison.

4 CHAIRMAN RIGLER: I think the offer of proof was
5 well-stated with respect to this document, and that
6 objection will be overruled.

7 We will receive DJ 16 into evidence at this
8 time.

9 (DJ Exhibit 16, previously
10 marked for identifica-
11 tion, was received in
12 evidence.)

13 MR. REYNOLDS: If I haven't noted it, I have a
14 continuing objection on behalf of other Applicants.

15 Mr. Rigler, a point of clarification:

16 Am I to understand now that this document,
17 Exhibit 16, has been introduced for purposes of proving
18 that which is stated in the transcript by Mr. Charno as
19 the offer of proof, that he gave a couple of days ago?

20 CHAIRMAN RIGLER: Mr. Charno can answer that,
21 but I thought not only do we have the reference to the
22 earlier transcript, but that he amended his offer a
23 minute ago.

24 MR. CHARNO: Yes, I did.

25 MR. REYNOLDS: But it includes the earlier?

MR. CHARNO: It does.

1 MR. REYNOLDS: It now becomes necessary,
2 clearly, to amend our list of witnesses, and whatever
3 other respects notwithstanding this respect to get into
4 the Consumers situation, and call people in this proceeding
5 relating to Consumers Power Company and their agreements
6 and understandings and provisions in their agreements,
7 and why they included them.

8 I asked since that goes to the original and
9 supplement -- I wanted to make sure we were still
10 including the original offer of proof, because that will
11 affect and extension in the case of Toledo Edison, if
12 not everyone else.

13 MR. CHARNO: I would like to question counsel's
14 statement as to the expansion of the case. The offer of
15 proof was in support of allegation of territorial agreement
16 between Consumers and Toledo Edison, and that is an
17 allegation of which Applicants were aware at the time
18 they filed their list of witnesses and statement of the
19 case.

20 MR. REYNOLDS: I was not aware you were going
21 to bring in a Consumers agreement or series of agreements
22 with their customers and interpret certain provisions in a
23 way that would support a supposed territorial agreement
24 between Toledo Edison and Consumers.

25 Since you have taken that course, it is necessary

1 for me to call the Consumers people so they can explain
2 the whys and wherefors of various contracts and provisions.
3 That is all I'm saying.

4 MR. CHARNO: Well --

5 MR. STEVEN BERGER: Could I have a moment?

6 CHAIRMAN RIGLER: Let's take a three-minute
7 break.

8 (Recess.)

9 MR. CHARNO: At this time the Department would
10 like to withdraw the Exhibits 286 and 287, which we
11 offered earlier.

12 We would like to discard the documents
13 00010275, 76, 77, 78, and 79.

14 The Department would like to note the following
15 stipulations in the record which have been reached with
16 Mr. Greenslade, on behalf of Cleveland Electric
17 Illuminating Company:

18 A copy of NRC 3 appears in the files of CEI.

19 A copy of NRC 8 appears in the files of CEI.

20 A copy of the December 18 attachment to DJ 109
21 appears in the files of CEI.

22 A copy of DJ 232 appears in the files of CEI.

23 A copy of the attachment to DJ 226 appears in the
24 files of CEI.

25 A copy of DJ 125 appears in the files of CEI.

ar5

1 At this time we would like to offer for
2 identification as DJ 288 a one-page document numbered
3 00010280.

4 CHAIRMAN RIGLER: My document generally is
5 clear, the date is a little obscure. Is that 1968?

6 MR. CHARNO: Yes, it is.

7 Is anybody else's copy more accurate?

8 MR. GREENSLADE: I have a clear copy, and
9 it says '68, yes.

10 MR. CHARNO: The Department would like to
11 discard document numbered 00010281, and note the stipulation
12 that a copy of DJ 116 appears in the files of Cleveland
13 Electric Illuminating Company.

14 The Department would offer as DJ 289 for
15 identification a one-page document numbered 00010282.

16 The Department would discard the next two
17 pages 00010283 and 84, and note the following two
18 stipulations:

19 A copy of the only attachment to DJ 234 is found
20 in the files of CEI, and a copy of the only attachment
21 to DJ 228 is found in the files of CEI.

22 The Department would offer as DJ 290 for
23 identification a one-page document numbered 00010285.

24 The Department would discard documents numbered
25 00010286 and 87, and note the following stipulations:

1 A copy of DJ 235 and a copy of DJ 236 appear
2 in the files of the Cleveland Electric Illuminating
3 Company.

4 I'm sorry, I misspoke. The attachments
5 to DJ 235 and 236.

6 The Department would offer for identification
7 as DJ 291 a multi-page document numbered 00014323 through
8 344.

9 CHAIRMAN RIGLER: Shouldn't it be 291 for the
10 exhibit number?

11 MR. CHARNO: Yes, it should be. I'm sorry.

12 MR. GREENSLADE: Would you repeat the pages?

13 MR. CHARNO: We would offer for identification
14 as Exhibit 291 a document bearing the identification
15 numbers 00014323 through 344.

16 MR. GREENSLADE: Could I have an offer of proof
17 on that, please?

18 MR. CHARNO: While we are waiting, if I could
19 indicate additional red-lining for this document.

20 We would ask that all of pages 14332 through
21 14342 be red-lined to the extent that they are not
22 already so marked.

23 MR. GREENSLADE: I will withdraw the
24 request for an offer of proof, Mr. Chairman.

25 MR. CHARNO: The Department would discard

ar7

1 document identified as 00014009.

2 The Department would offer as DJ 292 for
3 identification a two-page document numbered 00016826 through
4 27.

5 CHAIRMAN RIGLER: That is 292?

6 MR. CHARNO: Yes, sir.

7 The Department would offer as DJ 293 for
8 identification a multi-page document numbered 00016391
9 through 95.

10 We would offer as DJ 294 for identification a
11 one-page document numbered 00015601.

12 Returning for a moment to 293, the entire
13 document should be red-lined, since it is more than three
14 pages.

15 MR. REYNOLDS: Can we get an offer of proof
16 on 293?

17 MR. CHARNO: I would like, if possible, to make a
18 collective offer of proof on a number of these, specifically
19 the Applicants have maintained on brief and in some of
20 the documentary exhibits contained therein, for example,
21 Department of Justice Document No. 16447, which we will
22 be introducing later that they have always been willing
23 to interconnect with the City of Cleveland and that the
24 City of Cleveland has not been willing to interconnect
25 with them, and it is the purpose of this series of

correspondence from 1962 through 1966 to demonstrate that CEI has -- that each and every offer by CEI to interconnect in '62, '63, '65, and '66 was conditioned upon the City setting its rates at a level equal to those of CEI.

That is conditioned upon agreeing to affix rates.

end 24

S25

bwl

1 These documents further demonstrate that the
2 City was interested in interconnection, but not in the
3 precondition which I have just outlined and some of them
4 specifically demonstrate that CEI opposed coordinated
5 operation and development between municipal systems,
6 including the City of Cleveland and in 1965 offered
7 to buy the city system.

8 The documents also indicate that, or demonstrate
9 that CEI opposed expansion of the capability of the City
10 system which would have been a competitive threat to CEI.

11 CHAIRMAN RIGLER: It goes even beyond that
12 offer and as I make these remarks I'm mindful of the
13 discussion I had with Mr. Lerach with respect to his
14 objection yesterday to the Board commenting upon the offer
15 of proof made by one of the parties.

16 In reflecting further on that, we direct
17 everyone's attention to Rule 103 of the Federal Rules
18 relating to offers of proof which states that the Court
19 may add any other further statement which shows the
20 character of the evidence, the form in which it was
21 offered, the objection made and the ruling thereon.

22 The Court may direct the making of an offer in
23 question and answer form.

24 I responded also to Mr. Lerach yesterday
25 that when a document has a direct and immediate impact

bw2

1 of probative value with respect to one of the issues
2 in controversy, that we would be in disregard of our
3 obligation to ignore the content of the document just
4 because the offer of proof as made did not include that
5 objective fact.

6 With those preliminary remarks, as I look at this
7 document the last page, Department Document 00016395,
8 paragraph 7 appears to be a proposal by CEI that MELP
9 fix its rates.

10 And that was included within the offer of proof,
11 I believe, but the final paragraph was not.

12 It says details of such arrangement between
13 the Illuminating Company and the Municipal Light Plant
14 can be readily worked out, since the Illuminating Company
15 has similar arrangements with other utilities with which it is
16 interconnected.

17 At least initially subject to some explanation
18 that suggest that not only was the City -- not only was CEI
19 attempting to fix prices with MELP, but that it may have been
20 engaged in similar arrangement with other utilities.

21 CHAIRMAN RIGLER: Would that be included within your
22 offer of proof, Mr. Charno?

23 MR. CHARNO: That would, Mr. Chairman.

24 MR. REYNOLDS: I'm sorry, you said that would?

25 MR. CHARNO: That would.

bw3

1 The Department would offer as DJ-295 --

2 MR. GREENSLADE: Could I have an offer of
3 proof on 294?

4 MR. REYNOLDS: Before we go to 294, I would like to
5 ask a question, if I might, addressed to the remarks you
6 just made regarding another possible basis for the offer
7 of proof.

8 My understanding of the case at this juncture
9 is that there is no issue in this case regarding
10 price fixing among the Applicants and other utilities.

11 I am not altogether sure what your suggested
12 offer of proof is going to there, in view of the scope
13 of the proceedings and the issues and matters in
14 controversy that the September 5 filings that have been
15 guiding the party up to this point, as to what is or is not an
16 issue for litigation.

17 CHAIRMAN RIGLER: It is not the Board's offer of
18 proof, notwithstanding the Board suggesting that a particular
19 reading may be given to the document.

20 The Board assumes no obligation; in fact it is
21 not the Board's duty to make a case or defend for any
22 party.

23 We are concerned solely with the development
24 of an accurate, truthful and factual record.

25 Certainly, we are not attempting to assist any party

bw4

1 and will not do so.

2 Even though the Board commented upon the offer
3 of proof, it was not done in the context of the Board
4 making the offer.

5 The Board obviously has no burden.

6 MR. REYNOLDS: I wasn't trying to suggest
7 otherwise, but Mr. Charno leaped at the opportunity and
8 adopted it as part of his offer of proof. It does
9 strike me on reflection that this would open up another
10 whole area that to my knowledge has not thus far been
11 suggested in this proceeding.

12 MR. CHARNO: It saeems that this datum, if
13 proved apart from whatever it might contribute to a situation
14 inconsistent with the **antitrust** laws would certainly go
15 to the structure of the markets that the Department has
16 defined and the fact that we have stated that there is an
17 absence of competition -- pardon me -- we -- Dr. Wein
18 has stated in his prepared testimony that was filed in
19 this proceeding that there is an absence of certain types
20 of competition.

21 He utilized that absence of competition to
22 delineate his -- to make some of his market definitions.

23 It would seem to me that the absence -- absence
24 of price differential would inferentially support lack of
25 or absence of competition.

CHAIRMAN RIGLER: Say that again? The last

bw5

1
part.

2
MR. CHARNO: That the absence of price differential
3
which is alluded to by Dr. Wein would support the
4
inference -- I misspoke.
5

ES25

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

#26

arl

CHAIRMAN RIGLER: We are not talking about the absence of a price differential here. If we focus on the last part of this document about a price-fixing agreement as such.

Mr. Reynolds' question is how does that relate back to the issues in controversy.

MR. CHARNO: With respect to the markets that are defined as to the service areas of the individual CAPCO companies --

CHAIRMAN RIGLER: You might want to refer to the issues in controversy as set forth in the prehearing conference order No. 2.

MR. STEVEN BERGER: Your Honor, while Mr. Charno is doing that, could we have clarification on points of references when matters such as this arise?

What I'm referring to is that sometimes we refer back to the matters in controversy set forth in prehearing order number 2.

At other times we refer to the September 5 filings.

Is it your view that if something is not contained in the September 5 filing, but is nonetheless within the broad, what I would characterize as the broad issues set forth in prehearing order number 2, that it is nonetheless appropriate for evidence of those matters to come in

at this time?

CHAIRMAN RIGLER: I don't know how the Board would respond on a general basis to that, because it was our intent in directing other parties to make their September 5 filing as to the statement of the nature of the case that those be related to the issues in controversy and we were satisfied by and large that they did so.

That is an argument that has occurred before this Board on several occasions now.

Plainly, however, the issues in controversy are our basic guidelines. Let's say they establish the broad framework of these proceedings.

Now, the September 5 filing was an attempt to specify the evidence that would support those allegations. It might be appropriate to ask Mr. Charno to develop the offer of proof not only to the issues in controversy, but to the September 5 filing as well.

MR. STEVEN BERGER: I thought that the September 5 filings had the **additional** purpose of not only setting forth those charges to come within prehearing order number 2, but also to put the parties on notice of the charges that they were being required to meet in these proceedings, the specific charges.

CHAIRMAN RIGLER: That's correct, and the Board ruled that absent good cause shown, we would restrict the

ar3

evidence in this case to the broad outlines contained in those September 5 filings.

Was that your understanding?

MR. STEVEN BERGER: Yes, sir.

It is my understanding. You know, I have my own problems with those September 5 filings that we have talked about a number of times.

CHAIRMAN RIGLER: It may be that if we discovered an areawide price-fixing scheme, even at this late date, that might constitute good cause for amending those September 5 filings; but we are a long, long way from that point with only one document dated 1962.

MR. STEVEN BERGER: The other problem I have -- but Ohio Edison documents are coming up in a moment, and to the extent it will arise there, when the Board comments upon an offer of proof as to a specific unsponsored document and comments on it in a way that directs parties to other portions of the document that they believe may have probative value in some way in this proceeding, are we to construe that in terms of -- we, the Applicants -- to construe that it means that unless the Applicants in some way respond in their cases to those matters which are set forth, that the Board is commenting upon, that the Board may well be making findings and conclusions on the basis of the matters they are commenting upon?

I'm trying to state this as generally as possible.

CHAIRMAN RIGLER: Whatever our rule is on offer of proof, it is a two-way street. It would not apply to Applicants and not other parties. Any party put on notice with respect to the boundaries of the offer of proof, and they didn't meet the probative assertions within the boundaries might very well do so at the peril of finding at some later point a finding of fact based on those documents and those offers.

MR. STEVEN BERGER: When an offer of proof is made by the Department of Justice and nothing further is said about that offer of proof, I take it that if at some subsequent time a proposed finding is made to prove other than is set forth in the offer of proof by the Department of Justice, that the Board would not accept that; is that correct?

CHAIRMAN RIGLER: Say that again.

MR. STEVEN BERGER: I don't mean to cross-examine the Board.

I'm saying if the offer of proof says it proves one thing, and then at some time in the future the Department comes back and says it proves another thing, notwithstanding the fact that they have red-lined the appropriate portions of it, the Board is not about to

ar5

accept the fact that it proves something else?

CHAIRMAN RIGLER: No.

I would think that for unsponsored documents, their probative value would be confined to the boundaries of the offer of proof. Which is why we have raised questions that come to our mind in regard to particularly salient facts.

I'm not going to require you to respond to Mr. Reynolds' inquiry right now. I will require you to respond to it, however.

I think you should respond not only in terms of the issues in controversy, but in terms of your September 5 filing also.

We take note you have gone a little way down that road by relating the CEI offers to interconnect to a corresponding consideration that the City raise its rates to a level that would be the equivalent of the CEI rates.

However, if you want to go beyond that, I think you should relate it even to the issues in controversy or to the September 5 statement by the Department.

MR. CHARNO: I think the initial offer might be characterized in the nature of anticipatory rebuttal, but I'm not sure how much we are anticipating since the statement has been made a number of times.

ar6

The Department would offer Exhibit 294 for identification for the initial portion of the general offer we made and indicate the reiteration of the offer contained in DJ 293 for identification which specifies an offer to interconnect, and what is referred to in the documents as "rate equalization."

Here described specifically as "the municipal plan would raise rates of its private customers to the level of Illuminating Company rates."

The Department would offer as DJ 295 for identification a two-page document numbered 00016407 and 08.

The Department would offer as DJ 296 for identification a document numbered 00015576 through 78.

The Department would offer for identification as DJ 297 a two-page document numbered 00015514 through 15.

end 26
26 cont

The Department would offer as DJ 298 for identification a two-page document numbered 00015574 through 75.

The Department would offer as DJ 299 for identification a two-page document numbered 00016244 through 45.

This is the final document subject to the general offer of proof.

MR. REYNOLDS: Could I, before we leave that group of documents, return to 294 for just a second and ask the Department if it would include in its offer of proof the basis for authenticity or what it is that it intends to base its claim of authenticity on with respect to that document?

MR. CHARNO: The Department presumes from the question that this is one of the documents as to which Applicants will not stipulate as to authenticity.

MR. REYNOLDS: That's correct. As to which Applicants cannot stipulate as to authenticity and will not.

CHAIRMAN RIGLER: Is there any question that it came out of CEI files?

MR. REYNOLDS: There definitely is.

CHAIRMAN RIGLER: There is?

MR. REYNOLDS: Yes, sir.

MR. CHARNO: To the best of the Department's knowledge, it did come out of the company's files. We would have had no other source for the document. I can't imagine it coming from one of the other Applicant's files and not CEI's files.

It certainly did not come from the City of Cleveland.

CHAIRMAN RIGLER: You are representing that this

is one of the documents produced by Applicants pursuant to discovery?

MR. CHARNO: We are. We will have to check the production in Davis-Besse 2 and 3, because that is what this would have been produced in.

As you can see from the date the discovery limits on Davis-Besse 2 and 3 went back further than in the Perry proceeding.

MR. REYNOLDS: Only in a limited area, and with respect to specific documents requested and not with respect to this particular area.

MR. CHARNO: I'm sorry. I didn't hear the last part of your statement.

MR. REYNOLDS: It was with respect to specifically identified items that were in the request.

MR. CHARNO: As I believe I recall the request, it went to offers of interconnection and documents relating thereto, and this would seem to fall within the discovery requests as framed by the Department, but I will have to verify that and have to go get all of the originals.

MR. REYNOLDS: I raise it, Mr. Chairman, because there has been a coordinated effort to stipulate to the extent that we can as to authenticity. This is one document which the company at this particular point in time is not in

a position to enter into any kind of stipulation as to authenticity.

I have no reservation or reluctance at all to go back once again to try to ascertain where this came from, but it is not clear to me, or to the company, at this juncture that this is ^a document which is in our files or a copy of which is in our files, which would warrant authentication or stipulation as to the authenticity of the document.

That is the reason I raise the issue.

CHAIRMAN RIGLER: At the same time you have the Department's representation that they had no other source for this document?

MR. REYNOLDS: I do have that.

end 26

S27

bwl

1 I'm not sure though in this particular case whether
2 I would be willing to enter into a stipulation on that basis.

3 I think we have made an effort to work this
4 out, but there are some places that I'm not sure I can go
5 that route.

6 Let me make it clear I'm not suggesting that
7 the Department is saying something that is inaccurate
8 in their view of things.

9 The problem I have and I have had all along with
10 the whole document production program is that there have been
11 an awful lot of papers that have been exchanged back and
12 forth and copies made and I'm just not clear at this
13 juncture where specific pages might have come from.

14 Now, as to this particular document, I don't
15 know whether it found its way into the City's files and
16 found its way that way to the Department of whether it was
17 in CEI files and went from there to the Department.

18 That is why I ask. I continue to probe it
19 and to the extent we can do it, we will authenticate
20 documents.

21 **MR. CHARNO:** We would point out that
22 the City of Cleveland did not have access to the Davis-
23 Besse 2 and 3 discovery and that this was -- the Department
24 was requested not to give the City access to these documents,
25 so that there was no interflow of these as being placed
in a general area where they could have been confused with

bw2

1 anybody else's.

2 MR. REYNOLDS: Let me add something, Mr. Berger
3 and Mr. Greenslade and I have conferred, which goes directly
4 to what we were talking about.

5 While we are still at a loss as to the source
6 of this document, the additional point to be made, that
7 should be made is that a stipulation of authenticity might
8 not be forthcoming, even if it were determined that this
9 is a document that was located in CEI files.

10 I think a stipulation, if it could be
11 determined that **this was a document** in CEI files, that the
12 stipulation to that effect could be entered into, but that
13 plainly is something different from a stipulation as to
14 authenticity with respect to an unsigned document.

15 I want it made clear what the position is and what
16 we are saying.

17 If we can ascertain that this came from our
18 files, this particular document, then we would enter into
19 a stipulation to that effect, if we can ascertain
20 in addition to that who the author of the document
21 was, assuming it came from our files, then I think there would
22 be a much greater likelihood of stipulatio as to authenticity.

23 CHAIRMAN RIGLER: Is it possible for you to compare
24 the typewriter print in 194 with that of 1937

25 I'm lookin at Mr. Lindsth's letter of
September 17 and that is followed by another document dated

bw3

1 September 17, and then the September looks remarkably
2 similar in all three of those pages.

3 That would be Document 00016391, 00016393 and
4 00015601.

5 MR. REYNOLDS: They look similar to me
6 too, but it is the first time I have been forced into this
7 kind of exercise.

8 I'm not fighting you on it.

9 If we can find it, it came from our files in
10 any way, including that way, I have no problem with a
11 stipulation that it came from CBI files.

12 If we can determine by comparing type or what have
13 you, who the author was there may be a possibility of
14 stipulation as to authenticity.

15 Right now, I'm not at either point, and I was
16 asking the Department what its basis was for
17 asserting authenticity of this document, if any, given the
18 fact it was coming in independently as an unsponsored
19 document.

20 CHAIRMAN RIGLER: Are you going to a new group
21 of documents now, Mr. Charno?

22 MR. CHARNO: Yes, we are.

23 (The documents referred to
24 were marked Exhibits DJ-268
25 through 299 for identification.)

bw4

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

CHAIRMAN RIGLER: I would like to go off
the record.

(Discussion off the record.)

CHAIRMAN RIGLER: We will start at 9:30 tomorrow.

(Whereupon, at 4:35 p.m., the hearing was
adjourned, to be reconvened at 9:30 a. m., on Thursday,
February 19, 1976.)

Es27

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

bw

-----X	
In the Matter of:	:
	: Docket Nos.
TOLEDO EDISON COMPANY and	:
CLEVELAND ELECTRIC ILLUMINATING CO.	: 50-346A
	: 50-500A
(Davis-Besse Nuclear Power Station,	: 50-501A
Units 1, 2 and 3)	:
	:
and	:
	:
CLEVELAND ELECTRIC ILLUMINATING CO.	: 50-440A
<u>et al.</u>	: 50-441A
	:
(Perry Nuclear Power Plant,	:
Units 1 and 2)	:
	:
-----X	

First Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland

Wednesday, 11 February 1976

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

BEFORE:

MR. DOUGLAS RIGLER, Chairman

MR. JOHN FRYSIK, Member

MR. IVAN SMITH, Member

APPEARANCES:

As heretofore noted.