

Regulatory Docket File



NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING
CO.

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

and

CLEVELAND ELECTRIC ILLUMINATING
CO., et al,

(Perry Nuclear Power Plant,
Units 1 and 2)

Place - Silver Spring, Maryland

Date - Thursday, January 8, 1976

) Docket Nos.

) 50-346A

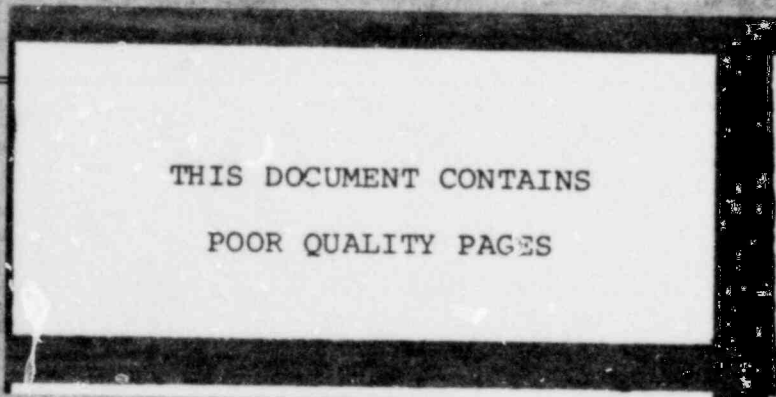
) 50-500A

) 50-501A

) 50-440A

) 50-441A

Pages 2991-3089



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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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In the matter of:)

TOLEDO EDISON COMPANY and) Docket Nos.

CLEVELAND ELECTRIC)

ILLUMINATING CO.) 50-346A

(Davis-Besse Nuclear Power) 50-500A

Station, Units 1, 2 and 3)) 50-501A

) 50-440A

 and) 50-441A

CLEVELAND ELECTRIC)

ILLUMINATING CO., et al,)

(Perry Nuclear Power Plant,)

Units 1 and 2))

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First Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland

Thursday, January 8, 1976

Hearing in the above-entitled matter was reconvened,
pursuant to adjournment, at 12:53 p.m.

BEFORE:

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

APPEARANCES:

(As heretofore noted.)

C O N T E N T S

2	<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	
3	(Staff)					
4	J. D. Guy	3011	3035	3073	3080	
5	- - - - -					
6	<u>EXHIBITS:</u>			<u>MARKED</u>	<u>RECEIVED</u>	
7	Applicant's No. 6-A (OE-PPO), three-page letter of transmittal				2993	2993
8	Staff No. 85, map				3010	3010
9	Staff No. 86, contract with Asherst				"	"
10	Staff No. 87, contract with Beach City				"	"
11	Staff No. 88, contract with Brewster				"	"
12	Staff No. 89, contract with Columbiana				"	"
13	Staff No. 90, contract with Cuyahoga Falls				"	"
15	Staff No. 91, contract with Galion				"	"
16	Staff No. 92, contract with Grafton				"	"
17	Staff No. 93, contract with Hubbard				"	"
18	Staff No. 94, contract with Hudson				"	"
19	Staff No. 95, contract with Iola				"	"
20	Staff No. 96, contract with Lucas				"	"
21	Staff No. 97, contract with Milan				"	"
22	Staff No. 98, contract with Monroeville				"	"
23	Staff No. 99, contract with Niles				"	"
24	Staff No. 100, contract with Oberlin				"	"
25	Staff No. 101, contract with Prospect				"	"

1	Staff No. 102, contract with Seville	"	"
2	Staff No. 103, contract with S. Vienna	"	"
3	Staff No. 104, contract with Wadsworth	"	"
4	Staff No. 105, contract with Wellington	"	"
5	Staff No. 106, contract with Ellwood City	"	"
6	Staff No. 107, contract with Grove City	"	"
7	Staff No. 108, contract with New Wilmington	"	"
8			
9	Staff No. 109, contract with Wampum	"	"
10	Staff No. 110, contract with Zelienople	"	"
11	Staff No. 111, contract with Bowling Green	"	"
12	Staff No. 112, contract with Bradner	"	"
13	Staff No. 113, contract with Bryan	"	"
14	Staff No. 114, contract with Custar	"	"
15	Staff No. 115, contract with Edgerton	"	"
16	Staff No. 116, contract with Elmcre	"	"
17	Staff No. 117, contract with Genoa	"	"
18	Staff No. 118, contract with Haskins	"	"
19	Staff No. 119, contract with Liberty Center	"	"
20			
21	Staff No. 120, contract with Montpelier	"	"
22	Staff No. 121, contract with Napoleon	"	"
23	Staff No. 122, contract with Oak Harbor	"	"
24	Staff No. 123, contract with Pemberville	"	"
25	Staff No. 124, contract with Pioneer	"	"

1	Staff No. 125, contract with Woodville	"	"
2	Staff No. 126, settlement agreement with attachments	"	"
3			
4	Staff No. 127, affidavit of Mr. Lewis	3010	3010
5	Staff No. 128, letter from Mr. Cummins to Mr. Reck	"	"
6	Staff No. 129, letter from Mr. Reck to Mr. Cummins	"	"
7			
8	Staff No. 130, letter from Mr. Dorsey to Mr. Cloer	"	"
9	Staff No. 131, letter from Mr. Cloer to Mr. Dorsey	"	"
10			
11	Staff No. 132, newspaper article	"	"
12	Staff No. 133, Dr. Guy's testimony	3032	3032
13	App. TE 35, contract between TE & Bowling Green	3067	
14	App. TE 36, contract between TE & Bryan	3067	
15			
16	App. TE 37, notice of cancellation to Liberty Center	"	
17	App. TE 38, agreement between TE & Montpelier	"	
18			
19	App. TE 39, agreement between TE & Napoleon	"	
20	App. TE 40, agreement between TE & Pemberville	"	
21			
22	App. TE 41, agreement between TE & Woodville	"	
23	App. TE 42, term & condition sheets	3088	3088
24	App. TE 35 thru 41, inclusive		3088
25			

P R O C E E D I N G S

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1 CHAIRMAN RIGLER: We will convene the hearing.

2 MR. ZAHNER: I have a housekeeping motion.

3
4 At the time that Applicant's Exhibit 6 (OE-PP)
5 was received into evidence, it was missing a letter of
6 transmittal. At this time I would like the three page
7 letter of transmittal marked as Applicant's 6-A (OE-PP)
8 and move that it be admitted into evidence.

9 (Applicant's Exhibit No.

10 6-A (OE-PP) was marked

11 for identification.)

12 MR. LESSEY: Staff has no objection.

13 CHAIRMAN RIGLER: In the absence of any objection,
14 Applicant's Exhibit 6-A will be admitted into
15 evidence.

16 (Applicant's Exhibit No.

17 6-A (OE-PP), previously

18 marked for identification,

19 was received in evidence.)

20 MR. LESSEY: Staff's next witness is Dr. Guy.

21 Before he takes the stand, we would like to identify and
22 move into evidence certain documents relating to his
23 testimony, along with the testimony itself. I would
24 like to do that in a sitting manner.

25 There are a number of documents involved.

Copies of the documents have been distributed to the parties.

1 We will do this as a group, and the matter has
2 been discussed with the parties and I think it will
3 facilitate the entry into evidence of these materials.

4 First of all, I would like to have marked for
5 identification the document which bears the Staff Document
6 No. 101. It will be marked as Staff Exhibit No. 85, and
7 it is a map.

8 Staff Exhibit No. 86 is a contract dated
9 August 29, 1973, the wholesale service of the municipality
10 of Amherst. It bears the Staff number of 102.

11 CHAIRMAN RICLER: Off the record.

12 (Discussion off the record.)

13 MR. LESSEY: Staff Exhibit No. 87 will be a
14 contract dated August 29, 1973, Ohio-Edison Company
15 wholesale service to the municipality of Beach City.
16 Staff document number 103.

17 Staff Exhibit 88 will be a document dated
18 August 29, 1973, wholesale service to the municipality
19 of Brewster. It bears the staff document number 104.

20 Staff Exhibit No. 89 is a contract dated
21 August 29, 1973, Ohio-Edison Company wholesale service
22 to the municipality of Columbiana. It bears the Staff
23 document number 105.

24 Staff Exhibit No. 90 is a contract dated
25 August 29, 1973, Ohio-Edison Company wholesale service

1 to the municipality of Cuyahoga Falls. It bears the Staff
2 document number 106.

3 Staff Exhibit No. 91 is a contract dated
4 August 29, 1973, Ohio-Edison Company wholesale service
5 to the municipality of Galion. It bears the Staff number
6 107.

7 Staff Exhibit No. 92 is a contract dated
8 August 29, 1973, contract between Ohio-Edison Company
9 providing for wholesale service to the municipality of
10 Grafton. It bears the staff number of 108.

11 Staff Exhibit No. 93 is a contract dated
12 August 29, 1973, Ohio-Edison Company wholesale service
13 to the municipality of Hubbard. It bears the Staff
14 number of 109.

15 Staff Exhibit No. 94 is dated August 29, 1973,
16 a contract between Ohio-Edison Company for wholesale
17 service to the municipality of Hudson. The staff number
18 is 110.

19 Staff Exhibit No. 95 is dated August 29, 1973
20 between Ohio-Edison Company providing wholesale service
21 to the municipality of Lodi, bearing the Staff number 111.

22 Staff Exhibit No. 96, also dated August 29,
23 1973 between Ohio Edison Company, providing wholesale
24 service to the municipality of Lucas, bearing the Staff
25 number 112.

1 Staff Exhibit No. 97, dated August 29, 1973,
2 contract between Ohio-Edison Company, providing wholesale
3 service to the municipality of Milan. It bears Staff
4 document number 113.

5 Staff Exhibit 98 is a contract dated August 29,
6 1973, of Ohio-Edison Company providing wholesale service
7 to the municipality of Monroeville. It bears the Staff
8 document number 114.

9 Staff Exhibit 99, dated August 29, 1973, contract
10 between Ohio-Edison Company which provides wholesale service
11 to the municipality of Niles. It bears the Staff number
12 115.

13 Staff Exhibit No. 100 is a contract dated
14 August 29, 1973, between Ohio-Edison Company providing
15 municipal service to the municipality of Oberlin.

16 Staff Exhibit No. 101 is dated August 29, 1973,
17 a contract between the Ohio-Edison Company providing
18 service to the municipality of Prospect, bearing the Staff
19 document number 117.

20 Staff Exhibit 102 is a contract dated August 29,
21 1973, Ohio-Edison Company providing wholesale service to
22 the municipality of Seville, bearing the Staff document
23 number 118.

24 Staff Exhibit No. 103 is contract dated
25 August 29, 1973 between the Ohio-Edison Company providing

1 wholesale service to the municipality of South Vienna.
2 It bears the Staff document number 119.

3 Staff Exhibit No. 104 is a contract dated
4 August 29, 1973 between Ohio-Edison Company and the
5 municipality of Wadsworth. This document has also been
6 identified and admitted into evidence as Applicant's
7 Exhibit 6.

8 MR. SMITH: It is the same document?

9 MR. LESSEY: It is the same document.

10 Staff Exhibit 105, a contract dated August 29,
11 1973 between the Ohio-Edison Company providing wholesale
12 service to the municipality of Wallington. It bears the
13 Staff document No. 121.

14 MR. REYNOLDS: Mr Chairman, as to Documents
15 Nos. 86 through 105, I would like to have the continuing
16 objection of all Applicants other than Ohio-Edison.

17 CHAIRMAN RIGLER: Overruled. They haven't
18 been moved into evidence yet, however.

19 MR. REYNOLDS: Since we are going to continue
20 through a string, the record may be clearer if I interject
21 that particular objection with respect to each batch of
22 documents it is applicable to.

23 CHAIRMAN RIGLER: I think that is a good procedure,
24 and prospectively the objection is overruled.

25 MR. LESSEY: Continuing with the marking for

1 identification. Staff document No. 106 is a contract
2 dated August 1, 1965 between the Borough of Millwood, New
3 Jersey and Pennsylvania Power Company. It bears the Staff number
4 of 122.

5 Staff Exhibit No. 107 is a contract that is dated
6 May 1, 1967 between Pennsylvania Power Company and the
7 Borough of Grove City, Pennsylvania. It bears the Staff
8 document number of 123.

9 Staff Exhibit 108 is a contract dated June
10 20, 1966 between the Borough of New Wilmington, Pennsylvania
11 and Pennsylvania Power. It bears the Staff document
12 number of 124.

13 Staff Exhibit No. 109 is a contract dated
14 June 6, 1966 between the Borough of Wampum, Pennsylvania
15 and Pennsylvania Power Company, which bears the Staff
16 document number 125.

17 Staff Exhibit No. 110 is a contract dated
18 June 17, 1966 between the Borough of Salinasville, Pennsylvania
19 and Pennsylvania Power Company. It bears the Staff document
20 number 126.

21 MR. REYNOLDS: As to Staff Exhibits 106
22 through 110, I would like to make the continuing objection
23 as to all Applicants other than Pennsylvania Power.

24 CHAIRMAN RIGLER: The continuing objection
25 will be overruled.

1 MR. LESSEY: Continuing with the marking for
2 identification, Staff Exhibit No. 111 is a document
3 dated May 3, 1967 between Toledo-Edison Company and the
4 City of Bowling Green, Ohio.

5 MR. REYNOLDS: This document is already in
6 evidence. I'm looking for the number desperately. Does
7 anybody have it?

8 MR. LESSEY: This is NRC-45. We will not put
9 this into evidence again. We will save No. 111 for the
10 next.

11 CHAIRMAN RIGLER: You have already identified
12 it. It might be better to have it in twice just
13 for purposes of congruity since you are listing all the
14 municipal contracts in one place.

15 MR. SMITH: What is the other exhibit?

16 MR. LESSEY: 45.

17 Staff Exhibit No. 111, bearing the document
18 number 127, which is a contract dated May 3, 1967.

19 Staff Exhibit No. 112 is a contract dated
20 July 6, 1966 between Toledo-Edison and the Village of
21 Bradner, Ohio. It bears the Staff number 128.

22 Staff Exhibit No. 113 is a contract dated
23 June 22, 1964 between Toledo-Edison Company and the City
24 of Bryan, Ohio.

25 Staff Exhibit No. 114 is a contract Dated December

1 7, 1966 between Toledo-Edison Company and the Village of
2 Oustaw, bearing the Staff number of 130.

3 Staff Exhibit No. 118 is a contract dated
4 December 15, 1966 between the Toledo-Edison Company and
5 the Village of Edgerton, Ohio. It bears the Staff
6 number of 131.

7 Staff Exhibit No. 119 is a contract dated
8 August 11, 1966 between the Toledo-Edison Company and
9 the Village of Elmore, Ohio. It bears the Staff document
10 number 132.

11 I was identifying as Staff Exhibit 116 a
12 contract dated August 11, 1966 between Toledo-Edison and
13 the Village of Elmore, Ohio which bears the Staff number of
14 132.

15 Next document I would like to identify as
16 Staff Exhibit No. 117 is a contract dated January 5, 1967
17 between the Toledo-Edison Company and the Village of
18 Genca, Ohio bearing the Staff number of 133.

19 Staff Exhibit No. 118, contract dated May 16,
20 1966 between the Toledo-Edison Company and the Village of
21 Haskins, Ohio bearing the Staff number 134.

22 Staff Exhibit No. 119 is a contract dated April
23 19, 1966 between the Toledo-Edison Company and the Village
24 of Liberty Center, Ohio bearing the Staff number 135.

25 Staff Exhibit No. 120 is a contract dated March

1 22, 1967 between the Toledo-Edison Company and the
2 Village of Montpelier, Ohio. It bears the Staff number
3 of 136. Provision numbered 8 of this contract was not
4 red-lined. It should have been.

5 Staff Exhibit No. 121 is a contract dated
6 March 15, 1961 between the Toledo-Edison Company and the
7 City of Napoleon, Ohio bearing the Staff number of 137.

8 Staff Exhibit No. 122 is a contract dated
9 August 31, 1966 between the Toledo-Edison Company and
10 the Village of Oak Harbor, Ohio bearing the Staff number
11 of 138.

12 Staff Exhibit No. 123 is a contract dated
13 July 21, 1966 between the Toledo-Edison Company and the
14 Village of Pemberville, Ohio. It bears the Staff number
15 of 139. Provision numbered 6 of this contract was not red-
16 lined, but we would like to have it so indicated.

17 Staff Exhibit No. 124, contract dated November 30,
18 1966 between the Toledo-Edison Company and the Village of
19 Pioneer, Ohio bearing the Staff number of 140.

20 Staff Exhibit No. 125 is a document, contract
21 dated July 7, 1966 between the Toledo-Edison Company and
22 the Village of Woodville, Ohio bearing the Staff number of
23 141.

24 MR. REYNOLDS: Mr. Chairman, as to Staff Exhibits
25 Nos. 111 through 125, I will make the continuing objection.

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1 on behalf of all Applicants other than Toledo-Edison.

2 CHAIRMAN RIGLER: The objection will be overruled.

3 MR. LESSEY: Staff Exhibit No. 126 with attach-
4 ments thereto contains the settlement agreement dated
5 October 13, 1971 between the Borough of Pitcairn and
6 Duquesne Light. It contains a copy of the Borough of
7 Pitcairn Resolution No. 282 adopted August 13, 1971,
8 along with a cover memorandum from their H. W. Stans with
9 respect to these, and a letter from Mr. Thomas Munsell
10 to Mr. STANS.

11 The settlement agreement and certain parts of it
12 have previously been entered into evidence as Staff Exhibits
13 No. 21, 22, 23, 24.

14 The ordering of Staff Exhibits No. 21, 22,
15 23, 24, the settlement agreement, which is in essence
16 the contract of service between the Borough of Pitcairn
17 and Duquesne Light Company was different from the order
18 these documents appear in the Federal Power Commission.

19 The Staff intended Exhibit 126 contains these
20 in the more proper sequence. To have a more complete
21 record, we ask it be considered in this light, in addition.

22 CHAIRMAN RIGLER: Mr. Lessey, the Borough
23 resolution is illegible in the copies of all three of the
24 Board members. I see other attorneys nodding.

25 MR. LESSEY: Staff Exhibit 24, which is in

1 evidence, is the same resolution and is legible. We will
2 endeavor to substitute copies of 24 for all pages of Staff
3 Exhibit 126.

4 MR. REYNOLDS: Let me, on the record, because I
5 think it should be cleared up -- the problem we have is that
6 142 is an accurate exhibit of the settlement agreement,
7 and the attachments. Exhibits 21, 22, 23 -- in may be the
8 manner in which they were stapled or some other reason
9 which is probably inadvertent -- but there is a jumbling
10 of the pages so that some pages with respect to Exhibit 23
11 belong in Exhibit 22, and vice versa.

12 It is correct with respect to 142. I suggest
13 that perhaps we withdraw 21, 22, 23, 24, and substitute
14 142 for those exhibits. I think that the only modification
15 I would make of that is that since Exhibit 24 is a better
16 copy than the last page of 142, so we can substitute
17 the better copy.

18 We are talking about the same basic documents,
19 but if you look at them at a later date, there is a
20 shuffling or jumbling of papers that would not make
21 things apparent.

22 That is the confusion.

23 MR. LESSEY: It is the Board's preference.
24 The documents were identified by Mr. McCabe. Someone
25 that may not be that familiar with the record may have a

1 problem tracking Mr. McCabe's testimony.

2 Maybe we should indicate that the whole
3 complete package is Exhibit No. 126, which has all of the
4 attachments.

5 MR. REYNOLDS: I would be desirous of a re-
6 stapling of the exhibits that are already introduced in a
7 manner that conforms with Exhibit 126.

8 CHAIRMAN RIGLER: If we read Mr. McCabe's
9 testimony and he is referring to the previous exhibits by
10 number, we may be compounding the confusion.

11 MR. REYNOLDS: All I'm suggesting is that we
12 can leave the exhibits as numbered, but counsel will
13 undertake to correct the stapled 21, 22, 23, so that the
14 pages are in the proper order, and conform with 126.
15 I can see no objection to that.

16 CHAIRMAN RIGLER: Before you do that, Mr.
17 Lessey, read Mr. McCabe's transcript and make sure
18 he did not make page references that would be affected by
19 the restapling.

20 MR. REYNOLDS: I would like to make the particu-
21 lar objection with respect to Staff Exhibit 126 for all
22 Applicants other than Duquesne Light Company.

23 CHAIRMAN RIGLER: Overruled.

24 MR. LESSEY: Staff Exhibit No. 127 is the affi-
25 davit of William M. Lewis, Jr., under seal, dated January

1 19.

2 CHAIRMAN RICHNER: By seal, you mean notary seal.
3 This is not to be created as a sealed exhibit.

4 MR. LESSEY: Yes, sir. Under seal of notary
5 public, dated January 19, 1978, and signed by the affiant.
6 It bears the Staff number of 143.

7 Staff Exhibit No. 123 --

8 MR. SMITH: There is none to that document.

9 MR. LESSEY: There are attachments to that
10 document. Attachment A is a letter dated September 28,
11 1971 from John B. Cloer of the Toledo-Edison Company to
12 William M. Lewis.

13 Attachment B is a letter dated July 3, 1973
14 from Mr. W. M. Moran of the Toledo-Edison Company to
15 Messrs. Powers, Lewis, and Mr. J. Robert Hillwig. There
16 are two copies of that attachment.

17 Attachment C is a verification signed by Mr.
18 Robert A. Jablon, February 5, 1978, and that is also under
19 notary seal.

20 MR. SMITH: We have two, 127-B.

21 MR. LESSEY: Yes, sir.

22 MR. REYNOLDS: I thought -- I'm sorry, I thought
23 Mr. Smith's reference was to the fact that the first
24 page of the document had marked in the corner Appendix A.

25 MR. SMITH: My comment was that the affidavit

1 by Mr. Lewis was only part of the exhibit. I wanted
2 to be assured that I didn't have material here I shouldn't
3 have.

4 MR. LESSEY: Staff Exhibit No. 128 is a letter
5 and an attachment. The Xeroxing of that particular copy
6 was difficult to produce. A retyped copy has been attached
7 thereto.

8 It is a letter dated May 2, 1973 from Howard A.
9 Cummins, Executive Manager of Buckeye Power, Incorporated
10 to Mr. Marvin Keck, Chief, System Development Engineering,
11 Toledo-Edison Company.

12 Staff Exhibit No. 129, which has also been re-
13 typed for ease of reading, is a letter dated May 23, 1973,
14 addressed to Mr. Howard A. Cummins and it is also signed
15 by Mr. Marvin W. Keck of Toledo-Edison Company.

16 Staff Exhibit No. 130, which has been retyped,
17 is a letter dated July 16, 1973, signed by Mr. M. R.
18 Dorsey, manager of utilities, of the City of Napoleon
19 Ohio, and it is addressed to Mr. John Cloer of Toledo-
20 Edison Company. That is Document No. 146.

21 Staff Exhibit No. 131 is a letter which has been
22 retyped. It is addressed to Mr. M. R. Dorsey of the City
23 of Napoleon, Ohio. It is signed by Mr. John Cloer of
24 the Toledo-Edison Company. It is from Mr. John Cloer of
25 the Toledo-Edison Company.

1 Finally, Staff Exhibit No. 132 is a Xerox
2 copy of a newspaper article dated Saturday, December 1,
3 1973. Mr. Guy will in his testimony indicate that
4 the source of the article is the Toledo Blade.

5 The Staff would like to at this time move into
6 evidence the exhibits previously identified as Exhibits
7 35 up to and inclusive to Staff Exhibit 132.

8 MR. REYNOLDS: Could I have that read back?

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

11 MR. REYNOLDS: Mr. Chairman, I noted the con-
12 tinuing objection for nine other applicants when
13 applicable through the recitation by Mr. Lesney.

14 I would like to note that as to Staff Documents 125
15 through 132, I would like to make a continuing objection
16 on behalf of all Applicants other than the Toledo Edison
17 Company.

18 In addition to that, as to Staff Document
19 127, I will object on behalf of all of the Applicants to
20 this document being admitted into evidence, at least at
21 this time.

22 Mr. Lewis, William M. Lewis, who is the affiant,
23 is identified as a prospective witness on the fact witness
24 list of the Department of Justice, and until such time as
25 Applicants have an opportunity to cross-examine Mr. Lewis

1 with respect to testimony that he might have that would
2 be relevant for this Board to consider in this proceeding,
3 it is our position that it is inappropriate to allow a
4 document to come in, in this fashion, which represents
5 perhaps some portion of what might be his testimony.

6 I think we have already had a discussion on this
7 record with respect to deposition testimony. The Board
8 has indicated it is disinclined to permit the introduction
9 of depositions on the ground that the opportunity to
10 cross-examine, as I understand it, has not been afforded,
11 and that the witnesses who were deposed can be called, and
12 that that opportunity can be afforded at this proceeding.

13 I think that that would hold certainly in the
14 same measure and in greater measure with respect to Document
15 127, and I would say that I'm convinced that that is the
16 case in light of the fact that Mr. Lewis is going to be
17 before this Board, and the Board will have an opportunity
18 to hear his testimony live.

19 MR. SMITH: You are referring to Exhibit 127.
20 It is document 1437

21 MR. REYNOLDS: Yes, sir.

22 MR. LESSEY: Mr. Lewis is not a Staff witness.
23 His sequestration by the Department of Justice, in my
24 understanding, was very late in the game. The affidavit
25 is under seal. The objection goes to weight and not

1 admissibility.

2 Applicants also have the right, just as they
3 had the right with Mr. Thomas yesterday, to subpoena the
4 witness if the Department of Justice does not call them.

5 On that basis, I think the objection should be
6 overruled.

7 I should state with the verification statement
8 by Mr. Jablon, the affidavit under seal took place in
9 another federal proceeding, that of the Federal Power
10 Commission.

11 CHAIRMAN RIGLER: These facts may be important
12 and relevant, and since we may have the opportunity to hear
13 from Mr. Lewis in person in regard to these facts, we
14 will defer admitting it into evidence at this time.

15 If the Department does not call Mr. Lewis, you
16 have leave to renew your request. I will defer this and
17 see what happens later.

18 MR. LESSEY: Dr. Guy does refer to this. As
19 long as it is marked for identification, he can refer to it
20 in his testimony.

21 CHAIRMAN RIGLER: I'm aware that Dr. Guy refers
22 to this in his written direct testimony.

23 MR. REYNOLDS: Could I have that again?

24 CHAIRMAN RIGLER: We are not receiving Staff
25 Exhibit 127 into evidence at this time, but we are granting

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1 permission to renew the motion to receive it into evidence
2 at a later time, perhaps after Mr. Lewis had the
3 opportunity to appear.

4 MR. REYNOLDS: There was a subsequent colloquy.

5 CHAIRMAN RIGLER: Mr. Lessey noted that Dr. Guy
6 refers to this affidavit in his prepared written
7 testimony, and the Board acknowledged they were aware of that.

8 MR. REYNOLDS: All right.

9 Thank you.

10 CHAIRMAN RIGLER: Absent objection as to any
11 other document, with the exception of the so-called con-
12 tinuing objections, NRC Exhibits 95 through 126, and
13 128 through 132 will be admitted into evidence at this
14 time.

15 (Staff Exhibits Nos. 95
16 thru 132, inclusive, were
17 marked for identification;
18 and Staff Exhibits Nos. 95
19 through 126, and 128 through
20 132, were received in
21 evidence.)

22 MR. LESSEY: Next we are in a position to move
23 into evidence and have identified as Staff Exhibit No. 133
24 the prepared direct testimony of J. D. Guy, Ph.D., P.E.,
25 which was filed with the Board and the parties at the

1 appropriate date this fall.

2 CHAIRMAN REISLER: Why can't you call Mr. Guy,
3 and let's swear him and let him identify the testimony.

4 MR. LESSEY: Fine.

5 Mr. Guy.

6 Whereupon,

7 J. D. GUY

8 was called as a witness on behalf of the Regulatory Staff
9 and, having been first duly sworn, was examined and
10 testified as follows:

11 DIRECT EXAMINATION

12 BY MR. LESSEY:

13 Q Mr. Guy, I show you a document and ask if
14 you can identify it for us?

15 A Yes, I can.

16 Q Would you please identify it?

17 A It is the prepared direct testimony of myself.

18 Q Do you have any non-substantive typographical
19 changes at this time?

20 A I have a few changes, yes.

21 Primarily having to do with the reference to
22 exhibit numbers rather than document numbers in my testimony.

23 Q In your testimony you refer to exhibits, and
24 you would like to substitute the word "documents" when you
25 do?

1 A As far as NRC documents are concerned.

2 Q Any other changes?

3 A There are changes on page 27, footnote E. I
4 have reference to pages 412 and 413 under the source list.
5 It should be page 423 instead.

6 A On page 22, Exhibit DT-1, there is an additional
7 mistake. The totals of demand of Palmsville and Cleveland
8 should read 136,750.

9 Q Is that the first column?

10 A That is the first column of the table.

11 One further correction.

12 Q Yes, sir.

13 A On page 11, line 17, the last word of that
14 line should be "within" rather than "with."

15 Q The sentence would read, "If not response is
16 made within such period, consent shall be presumed given?"

17 A That is correct.

18 Q With respect to question 4 on page 4, the sources
19 of information you have used in preparing your testimony,
20 did you refer to an electric power dictionary at any time?

21 A Electrical World Directory of Public Utilities.

22 Q What date?

23 A 1974-75.

24 Q Would you like to add that to your answer?

25 A I would indeed.

1 Q Are there other typographical substantive
2 changes?

3 A No.

4 MR. LESSEY: I ask the prepared direct testimony
5 of J. D. Guy be received into evidence as Staff Exhibit
6 133.

7 MR. REYNOLDS: I did not hear a question asked
8 and answered as to whether the witness adopts his testimony.
9 That seems to me to be a question that should be asked
10 and answered before we have a motion to introduce it into
11 evidence.

12 MR. LESSEY: That is a formality. If the
13 Board prefers it, we can do that.

14 CHAIRMAN RIGLER: Go ahead and ask it.

15 BY MR. LESSEY:

16 Q Dr. Guy, do you adopt the testimony that has
17 been filed with the Board and identified as Staff Exhibit
18 133?

19 A With the corrections I made, yes, I do.

20 CHAIRMAN RIGLER: Mr. Reynolds?

21 MR. REYNOLDS: Mr. Chairman, I would like to
22 move to strike Mr. Guy's testimony in its entirety. Dr.
23 Guy is purportedly appearing here as an expert. I have
24 reviewed his testimony. I can find nothing in his testimony
25 that would warrant a conclusion that Dr. Guy has brought

1 to bear any expertise whatsoever on the matters that are
2 discussed in his testimony.

3 In large part, he has done no more than to read
4 into his testimony the referenced exhibits or recite what
5 could be found in PFC Form 1 or PFC Form 12.

6 I find particularly objectionable his testimony
7 that has reference to the affidavit of Mr. William Lewis,
8 and to the correspondence that is -- and the -- that is
9 referred to in the following questions and answers, and
10 which concerns Staff Exhibits 128, 129, 130, and 131,
11 and 132.

12 I don't see any basis whatsoever for testimony
13 by this witness on those matters. Certainly there is no
14 expertise that has been brought to bear on that testimony.
15 I move that Dr. Guy's testimony be stricken from the
16 record in its entirety.

17 MR. LESSEY: Staff would oppose the motion.
18 I think a clear reading of the testimony indicates that
19 Dr. Guy's expertise in the analysis of the various
20 contracts and the summaries of them and the relationships
21 between the contracts requires the expertise of an electrical
22 engineer who deals in contracts between electric utilities
23 as a matter of every-day parlance.

24 In addition to that, Mr. Reynolds has put his
25 finger upon an issue which we have isolated and inserted

1 into this proceeding for a very specific purpose.

2 That is that there are half a dozen questions
3 in the prepared filed testimony which relate to factual
4 materials.

5 Now the issue really is whether or not a Staff --
6 I will make certain assumptions for the purposes of
7 argument and not for the purposes of evidence -- whether
8 or not one of the Staff's engineers who has submitted
9 prepared direct testimony which contains certain facts
10 discovered during an investigation he conducted as part
11 of his duties for the Nuclear Regulatory Commission is
12 admissible.

13 MR. REYNOLDS: I'm sorry, but if we will be
14 making assumptions, would it be better if Dr. Guy leaves
15 the room for purposes of Mr. Lessey's presentation?

16 It may be he will touch on areas that if
17 my motion is not granted I will want to cross-examine Dr.
18 Guy on.

19 CHAIRMAN RIGLER: I can understand that.

20 We will excuse you momentarily.

21 (Witness temporarily
22 excused.)

23 MR. LESSEY: During the course of an investiga-
24 tion, the witness became aware of certain facts which we
25 feel it was his duty to bring to the attention of the

1 parties and the Board.

2 Mr. Goldberg is prepared at length to address
3 the question. I will turn it over to him. Except for
4 the following rationale. We are constantly seeking,
5 as is the Board, an opportunity to expedite the antitrust
6 hearing process.

7 One method we think has considerable merit,
8 and we would like the Board to rule on, and also subsequent
9 forums, is whether or not during the course of an investiga-
10 tion an expert can bring to the attention of the Board
11 factual matters that he uncovered in the course of his
12 investigations.

13 If he can in future antitrust hearings, we may
14 save to some limited extent the parade of factual witnesses
15 which is a necessity in all antitrust cases.

16 CHAIRMAN RIGLER: How do you grapple with the
17 question of the other parties' cross-examination rights?
18 If we permit an expert witness to testify as to facts,
19 suppose they are contested facts? Would the other parties
20 then have ample opportunity to try to neutralize those
21 facts or to overcome those facts if the expert is testifying
22 in sort of a second-hand status with respect to his
23 knowledge of the background of those facts?

24 MR. LESSEY: Mr. Goldberg has researched
25 this question. It is an important point. It is an isolated

1 issue. It is ripe for review. I think we can deal with it
2 at this time.

3 CHAIRMAN BIGLER: Before I hear from Mr.
4 Goldberg, it seems to me that Mr. Reynolds has posed two
5 different objections:

6 He has posed an overall objection relating,
7 as I see it, to the expertise of the witness or to the
8 application of the witness' expertise to the substantial
9 body of testimony contained in this exhibit.

10 There is a second and more specific objection
11 which relates to certain factual material. With respect
12 to the first objection, that of permitting a witness
13 with Dr. Guy's qualifications to testify with respect to
14 the wholesale power contracts and the other operating
15 indicia of the Applicant companies, the objection will be
16 overruled.

17 We will receive so much of Exhibit 138 as
18 relates to those areas.

19 Having made that ruling, we will now address
20 the more specific second objection with respect to certain
21 factual material.

22 Mr. Goldberg?

23 MR. GOLDBERG: Thank you.

24 Staff believes that the law is very clear with
25 respect to the question of whether or not an expert witness

ar27

1 is allowed to testify as to facts which he has discovered
2 during the course of an investigation.

3 I think that the law is clear, not only with
4 respect to case law, but with respect to a fair reading of
5 the Federal Rules of Evidence and recognized authorities
6 who deal with evidence.

7 I would like to refer first to the case of
8 Kanatxer vs. Chrysler Corporation, 199 Fed 2d, 601 at page
9 618, 10th Circuit, 1952:

10 "A witness is not barred from giving testimony
11 as to actual facts he has observed merely because he has
12 been qualified as an expert witness. His conclusions as
13 an expert may be based upon both personal observation and
14 hypothetical data."

15 CHAIRMAN RIGLER: Let me interrupt you at this
16 point.

17 As I look at the particular line of questioning
18 as to which the objection is made, which occurs on page
19 17 in relation to the Lewis affidavit, am I correct, Mr.
20 Reynolds?

21 MR. REYNOLDS: That's correct.

22 I think that the line of questions which
23 begins with question 36 -- and extends through question 48 --
24 I believe that's correct.

25 MR. GOLDBERG: Those are not --

1 MR. REYNOLDS: Questions and answers 36 through
2 48.

3 MR. GOLDBERG: Only certain of those relate
4 to the Lewis affidavit. The issue is broader than the
5 Lewis affidavit.

6 CHAIRMAN RIGLER: Wait a minute.

7 The question I have for you is what conclusions,
8 if any, does Dr. Guy draw with respect to the fact he
9 reports in answer to those questions.

10 In other words, you have cited to me a case
11 that says the expert may refer to the facts underlying
12 his opinion and testify as to those facts.

13 But here I'm not sure that he expresses
14 anything. The facts appear in a somewhat neutral context.

15 MR. GOLDBERG: I respectfully disagree with
16 your characterization of the language I quoted from the
17 case. There are two separate issues:

18 Can he testify as to facts he has learned
19 during an investigation?

20 The other issue is concerning disclosure of
21 facts which he uses in forming an opinion or arriving at
22 a conclusion.

23 I quoted two sentences. The first one simply
24 says that a witness is not barred from testifying as to facts
25 he learned simply because he has been qualified as an

1 expert witness.

2 CHAIRMAN RIGLER: Rule 703 supports you on
3 that.

4 MR. GOLDBERG: If Rule 705 is read, that
5 supports the Staff's position. There has frequently been
6 a question that has arisen in cases as to whether or not
7 a party can force disclosure of the fact that an expert
8 has used in arriving at an opinion or conclusion.

9 I think the federal rules and the comments under
10 the federal rules make it clear that the parties can force
11 disclosure of the facts, but beyond that, a judge has
12 the discretion to require the witness to disclose the
13 underlying facts, and there is nothing in the rules that
14 suggests that the party calling the expert witness cannot
15 disclose the facts.

16 CHAIRMAN RIGLER: 705 discusses disclosure of
17 facts underlying expert opinions. What is the underlying
18 opinion of Dr. Guy with respect to the questions identified
19 on page 17?

20 MR. GOLDBERG: I would like to first state before
21 I answer that, that I don't think it necessarily
22 requires that an opinion or conclusion be based upon
23 facts in order for them to be introduced through an expert
24 witness.

25 The question of whether or not he also

1 bases an opinion or conclusion on facts is something else.

2 There is separate and distinct from that a
3 question of if he has participated in an ex parte
4 investigation during his preparation for testimony at a
5 trial is he allowed to disclose all of those facts, even
6 though some of them may not be used as a basis for a
7 conclusion. I think the answer is yes.

8 CHAIRMAN RIGLER: What is your authority for that?

9 MR. GOLDBERG: My authority is the case I just
10 cited, the first sentence of that quotation talks about
11 an expert disclosing facts he has learned.

12 It does not tie it to an opinion or conclusion.
13 That would be my first source of authority.

14 MR. REYNOLDS: Will you read the quotation?

15 MR. SMITH: That would be helpful to me, too.
16 That sentence you read to me didn't help.

17 MR. GOLDBERG: "A witness is not barred from
18 giving testimony as to actual facts he has
19 observed merely because he has been qualified as an
20 expert witness. His conclusions as an expert may be
21 based upon both personal observation and hypothetical
22 data."

23 CHAIRMAN RIGLER: Read that one more time.

24 MR. GOLDBERG: "A witness is not barred from
25 giving testimony as to actual facts he has observed

1 merely because he has been qualified as an expert witness."

2 This is the sentence I'm relying upon primarily.

3 The quote goes on, "His conclusions as an expert
4 may be based on both personal observation and hypothetical
5 data."

6 CHAIRMAN RIGLER: If you take that first
7 sentence in context with the second, it suggests that
8 the Court is saying he may rely on facts he has observed
9 in forming his conclusions or opinions.

10 MR. GOLDBERG: I think that conclusions are
11 obvious from Dr. Guy's testimony. I do disagree that
12 you must be able to tie the facts to a conclusion or
13 opinion. The conclusion is obvious about relations
14 between the testimony he gives in his prepared testimony
15 about the contracts and the other factual data in there
16 and the refusal to wheel and the entire rest of the case
17 that Staff is putting on in this proceeding.

18 I would like to refer to some other
19 authorities on this issue.

20 MR. SMITH: Before you leave that, what is there
21 about his expertise that lends weight to his -- more
22 weight to his testimony when he interprets that
23 affidavit than we would have if we read it for ourselves?

24 How does his expertise fit into that affidavit --
25 and it will be in evidence, presumably. Why do we need him

1 to tell us what that affidavit says?

2 MR. GOLDBERG: I think the affidavit itself,
3 as well as the other facts, relate to events subsequent
4 to the affidavit. Here we have an expert electrical
5 engineer who obviously has training and expertise in his
6 field, who goes out and examines and sifts facts made on
7 investigation.

8 He examines contracts. From those contracts he
9 relies on certain provisions relating to electrical
10 engineering. He focuses on the fact he has learned.

11 He relates and describes them in a way that is
12 intimately connected with his expertise.

13 MR. SMITH: It has to go some place.

14 MR. GOLDBERG: The relationship between the
15 fact he focuses on and the whole rest of Staff's case.

16 CHAIRMAN RIGLER: I'm on the same wave length
17 as Mr. Smith. What would be different if you took the
18 Lewis affidavit and then the letters referred to in answer
19 to question 45 or 44, and submitted the letters themselves
20 to the Board?

21 What has Dr. Guy done that the Board couldn't
22 do for itself, if it had those letters before it?

23 MR. GOLDBERG: He focuses on them as an
24 electrical engineer and in subsequent questions and answers
25 deals with those materials. He has spoken to the

1 principals of those letters subsequent to his testimony
2 here.

3 CHAIRMAN RIGLER: Okay.

4 Would you point out where he addresses
5 those principals, as you characterize them?

6 MR. GOLDBERG: Question and answers 46, 47, 48.

7 These are based on personal interviews that Dr. Guy has
8 conducted.

9 MR. REYNOLDS: Could I have that read back?

10 MR. GOLDBERG: I have more authorities which
11 I would like to --

12 CHAIRMAN RIGLER: Let Mr. Reynolds hear that
13 answer back, please.

14 (Whereupon, the reporter read from the record,
15 as requested.)

16 MR. GOLDBERG: 46, 47, 48.

17 CHAIRMAN RIGLER: Let her read back what you
18 said.

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

21 CHAIRMAN RIGLER: I would agree with you, that
22 Dr. Guy may be in a position to answer question 48, which
23 is apparently generated -- the answer was generated from
24 his own observations rather than an external source.

25 I don't think I would agree with you with respect

1 to 46 or 47.

2 MR. GOLDBERG: I think that that is a question
3 of cross-examination. 46 is a simple question and answer
4 put to Dr. Guy as to his knowledge and source, I think,
5 is a question for cross-examination.

6 Now I would like to also refer everyone to
7 Volume 5 of Wigmore on Evidence, Section 1335, which
8 talks about ex parte expert investigations. I think it is
9 made clear there that again an expert can testify as to
10 the facts that he has learned in ex parte expert investiga-
11 tions which is one of the titles of that section, during
12 the source of his investigation.

13 Because he is an expert does not mean he can't
14 testify to facts.

15 CHAIRMAN RIGLER: Don't the facts have to be
16 facts supporting his conclusion or opinion as an expert?
17 Otherwise you come to my first question which is can you
18 use an expert in a fashion which really avoids the other
19 parties' opportunity for cross-examination?

20 If you can just present an expert and he can
21 say, "Here are the facts" --

22 MR. GOLDBERG: They have opportunity to
23 cross-examine him on the facts, as to the source of facts.
24 The Board can give it whatever weight it likes, but I think
25 it is a matter for cross-examination.

1 MR. SMITH: Your point seems to be he is not
2 disqualified or prevented from testifying to the facts
3 solely because he is an expert. Could a lay witness testify
4 to these facts?

5 MR. GOLDBERG: I believe an expert has more
6 latitude in testifying to certain facts.

7 MR. SMITH: Because of his expertise. He
8 interprets facts for us, counts them for us, assimilates
9 them for us.

10 MR. GOLDBERG: Experts customarily rely on facts
11 in their every-day work. I think the authorities make
12 it clear when, for example, a physician walks into a
13 hospital and there is a patient there, he relies on facts
14 given by nurses, technicians. He relies on the facts and
15 is allowed to relate the facts in a trial in that
16 he customarily relies on this in the ordinary course of
17 business.

18 MR. SMITH: He could not testify outside his
19 field of expertise unless he was otherwise permitted
20 to as a lay witness.

21 MR. GOLDBERG: If an expert in an NRC proceeding
22 is not allowed to testify as to the facts he discovered
23 in his investigation, it will necessitate calling numerous
24 fact witnesses to testify as to the exact same facts.

25 We believe allowing an expert witness to testify

1 as to the facts he has learned on his investigation as
2 an expert will expedite the hearing, will provide for a
3 more orderly hearing than would be the case if such
4 testimony were not allowed.

5 The alternative is to call many, many witnesses
6 to testify to the same basic facts that this expert has
7 discovered himself during the course of his investigation.

8 CHAIRMAN RIGLER: Let's explore that.

9 Suppose you introduced the same letters that Dr.
10 Guy refers to in his answers to questions 43, 44, 45;
11 how would that prolong the hearings?

12 MR. GOLDBERG: We can do that, but I believe
13 the issue is broader. He has many more facts that simply
14 those.

15 I think we should deal with the broad issue.
16 I think if I am permitted to cite these authorities that
17 it becomes clear upon reading them --

18 CHAIRMAN RIGLER: You better continue with your
19 citation list.

20 MR. GOLDBERG: The Section 1385 of Wignons,
21 which I cited, supports our argument that an expert can
22 testify as to facts he has learned in ex parte investigation.

23 It suggests the opposing parties/^{are}not prejudiced
24 because they have a right to cross-examine with respect
25 to the source of knowledge for those facts.

1 Once again, that goes to a matter of weight,
2 the weight which the Board will accord the testimony
3 and not to the admissibility.

4 Wigmore, Section 673, states an expert can
5 testify from actual observation.

6 McCormick, Section 15, supports our position.

7 Jones on Evidence, Section 1420-21, the analysis
8 in the new Federal Rules of Evidence, Annotated, by the
9 Bureau of National Affairs, supports this position, and
10 gives examples about doctors.

11 Another example would be a policeman
12 testifying as to facts he has observed at an accident.

13 CHAIRMAN RIGLER: Point out to us the most
14 pertinent example, the one you contend to be most
15 analogous to the situation before the Board. This would
16 be from the annotations to the Federal Rules.

17 MR. GOLDBERG: Did you request an example?

18 CHAIRMAN RIGLER: I want you to read from the
19 annotation the example which you contend is most
20 analogous to the situation we have before us now.

21 MR. GOLDBERG: I do not have highlighted the
22 example. It may take time to find it.

23 MR. LESSEY: I think the line of theory we are
24 following here is the line which permits law enforcement
25 officers in state and federal proceedings to testify as to

1 matters they observed, and also to testify as to matters
2 that were related to them by others during the course of
3 the investigation.

4 For example, a policeman can testify as to
5 ballistics. He can testify as to the result of his
6 investigation, which is hearsay.

7 CHAIRMAN RIGLER: That is to lead to a conclu-
8 sion. In ballistics, it would be to support a conclusion
9 that a certain weapon fired a certain bullet.

10 MR. LESSEY: Isolating these half dozen questions,
11 we can ask Dr. Guy what his conclusion is.

12 CHAIRMAN RIGLER: Then you would violate the
13 purpose of the direct written testimony rule.

14 MR. LESSEY: Why is that?

15 CHAIRMAN RIGLER: Because you would be expanding
16 on it. We required experts to submit their written
17 testimony in advance in an effort to advance the proceedings
18 because all parties would then be prepared to move
19 immediately to cross-examination.

20 MR. LESSEY: That is true.

21 He doesn't state, "I concluded Toledo-Edison
22 violated the antitrust laws." He sets forth letters, and
23 the best evidence is the letter itself. He has subsequent
24 events also which go beyond the scope of the letters.

25 The theory was in presenting this, if you put

1 the letters in, and the result of the personal interviews,
2 you had a more complete package, it would require three
3 or four witnesses to get this same amount of material in.

4 I think the theory is --

5 CHAIRMAN RIGLER: I commend you for your efforts
6 to telescope the proceedings. I think that is commendable.
7 I think the Board does appreciate that type of effort,
8 even if we may rule against you in this circumstance.

9 It seems to me that just offering the actual
10 documents cited by Dr. Guy may serve the same purpose.

11 MR. LESSEY: What about the information that came
12 to his attention with respect to interviews beyond the
13 documents themselves?

14 CHAIRMAN RIGLER: That might be different.

15 Mr. Goldberg, do you have an example?

16 MR. GOLDBERG: I do not ¹right now.

17 CHAIRMAN RIGLER: I think we are prepared to
18 rule.

19 MR. HJEMFELT: Mr. Chairman, may I be heard on
20 this?

21 CHAIRMAN RIGLER: Let me think about it, Mr.
22 Hjemfelt.

23 Yes, we will hear you.

24 MR. HJEMFELT: I believe that Rule 702 of the
25 Federal Rules might be pertinent where it talks about in

1 the last sentence that an expert might testify in the
2 form of an opinion or otherwise.

3 I believe that that rule provides for an
4 expert who investigates and determines facts within the
5 field of his expert competence to provide fact testimony
6 rather than opinion testimony.

7 CHAIRMAN RIGLER: The Board is ready to rule.
8 We will sustain objections to the answers to questions
9 36, 37, 38, 39, 40, 41, 42, 43, 44, 45.

10 We will overrule the objections as to
11 question 46 on Mr. Lessey's representation that the
12 answer to this question was based on interviews conducted
13 by Dr. Guy.

14 The objection will be sustained as to question
15 47, and once again, based on Mr. Lessey's representation
16 as to Mr. Guy's personal interviews, we will overrule
17 the objection as to No. 48.

18 That means the answers to 46 and 48 float a little
19 bit in the absence of the underlying facts.

20 We anticipate the Staff would be seeking to
21 introduce the letters which would put the answers to
22 question 46 and 48 in some context.

23 MR. LESSEY: The letters were identified
24 this afternoon and moved into evidence.

25 CHAIRMAN RIGLER: Fine.

1 Then the answers to 46 and 48 make sense.

2 Those objections will be overruled.

3 MR. LESSEY: This was an insertion by us.

4 The Board understands the intent here.

5 CHAIRMAN RIGLER: We commend you for it. We
6 don't fault you for it, but we did feel the objection
7 was well taken.

8 Whereupon,

9 J. D. GUY

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

13 CHAIRMAN RIGLER: Subject to the rulings we have
14 made with respect to certain questions, the motion to
15 admit Exhibit 133 into evidence is granted.

16 (Staff Exhibit No. 133
17 was marked for identifica-
18 tion, and was received
19 in evidence.)

20 CHAIRMAN RIGLER: Dr. Guy, in your absence, the
21 Board has ruled that with respect to your answers to
22 questions 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, and 47,
23 that we would sustain objections to those answers,
24 although the documents to which you refer have been admitted
25 into evidence.

1 Your answers to questions 46 and 48 have been
2 allowed to stand.

3 The rest of your prepared testimony has been
4 admitted into evidence.

5 Mr. Berger, do you have cross-examination?

6 MR. LESSEY: I have one further clarifying
7 question.

8 DIRECT EXAMINATION (Continued)

9 BY MR. LESSEY:

10 Q Dr. Gay, with respect to exhibits which
11 were moved into evidence today, which were all of the
12 contracts between each of the Applicant companies and
13 the electric entities, are you aware of any of those
14 contracts which are not presently in effect?

15 A Yes.

16 According to the term of some of the
17 contracts, they have expired under their own terms.

18 Q Can you identify for us which ones have expired,
19 to your knowledge?

20 A Yes, I believe I can.

21 MR. REYNOLDS: I object to this, Your Honor.
22 It is an area that can be explored on cross-examination
23 at the appropriate time.

24 MR. LESSEY: There are only a very few. It
25 would be clearer if we can have it in front of us, the ones

1 that have expired. It is only a handful.

2 MR. REYNOLDS: I intend to go into that.

3 CHAIRMAN RIGLER: I think the better
4 procedure would be to let the witness indicate which
5 contracts are no longer in effect.

6 MR. REYNOLDS: I intended to go into that.

7 CHAIRMAN RIGLER: Mr. Lessey's offer of a time-
8 saving device may have merit here.

9 What would you want to go
10 into other than the fact that they have expired?

11 MR. REYNOLDS: I would like to show him the
12 existing contracts which I think I am entitled to do on
13 cross-examination. I don't mind if we do it this way. If
14 we want to do it this way, we can go through them now,
15 and I will go through them later. That is all right.

16 CHAIRMAN RIGLER: It is your option, Mr. Lessey.
17 We will go through it either way.

18 MR. LESSEY: There are a few that have
19 expired, and I would like him to list them.

20 THE WITNESS: Those which have expired are
21 with the following cities:

22 Bowling Green -- these are all in Ohio --
23 Bryan; Montpelier; Napoleon; Pemberville; and Woodville.

24 In addition, the contract with the City of
25 Village Center no longer applies since Napoleon purchased

1 that system in the last two years, I guess.

2 . MR. REYNOLDS: Village Center?

3 THE WITNESS: Liberty Center.

4 BY MR. LEMSEY:

5 Q Are all these contracts with one particular
6 Applicant?

7 A Yes. The Toledo-Edison.

8 Q All of the contracts are with the Toledo-
9 Edison Company?

10 A That's correct.

11 CHAIRMAN RIGLER: Mr. Berger?

12 MR. MELVIN BERGER: I have no questions.

13 MR. EJEEMBLT: I have no questions.

14 CROSS-EXAMINATION

15 BY MR. REYNOLDS:

16 Q Dr. Guy, could you advise me as to what
17 experience you have had with interconnection agreements?

18 A Interconnection agreements?

19 Q Between, let's say, private utilities and
20 municipal systems?

21 A I would not characterize, first of all, those
22 agreements as interconnection agreements. I would
23 characterize them as wholesale agreements.

24 Q Let me ask you a question again, what your
25 experience has been with regard to wholesale agreements

1 between municipal systems and private utilities?

2 A Just as I have gotten with the Commission working
3 on the basis of this case primarily, reading the various
4 contracts between the Applicants and their various entities
5 in the area.

6 Q Would you please give me what your ideas of a
7 wholesale agreement are? Why do you characterize it that
8 way?

9 A I characterize it that way because it is
10 specifically for the sale of power for resale by another
11 entity.

12 Q And is it your understanding that there are no
13 interconnection agreements between municipal systems
14 and private utilities?

15 A You mean in any context, or any location?

16 Q Pardon me?

17 A You mean anywhere?

18 Q Let's take in the state of Ohio.

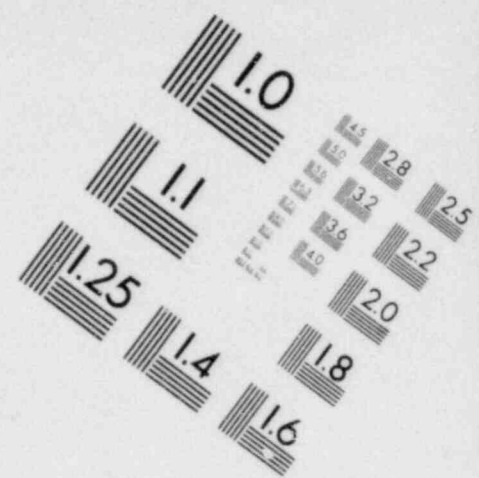
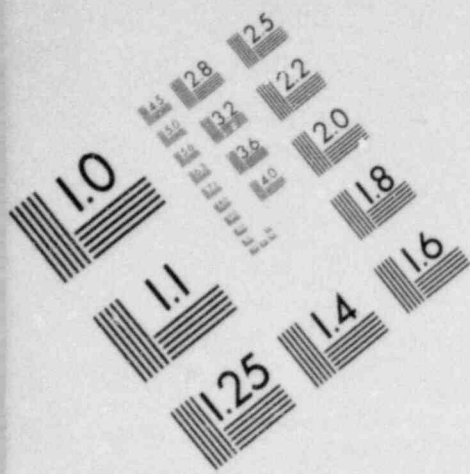
19 A That is not my understanding.

20 Q Is it your understanding that there are
21 interconnection agreements?

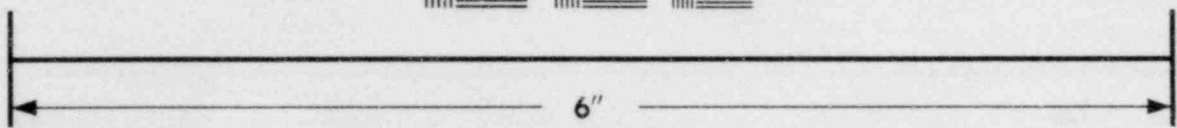
22 A Yes.

23 Q And what experience have you had with those
24 sorts of interconnection agreements?

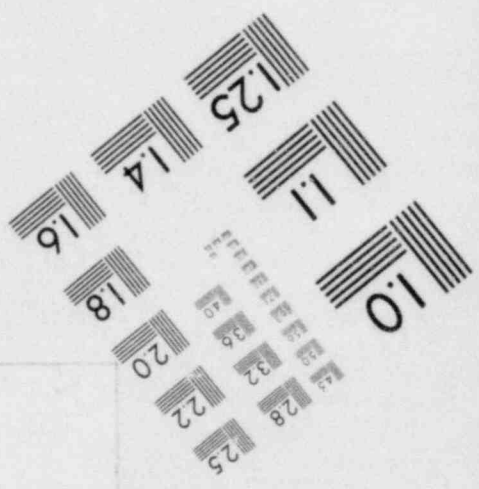
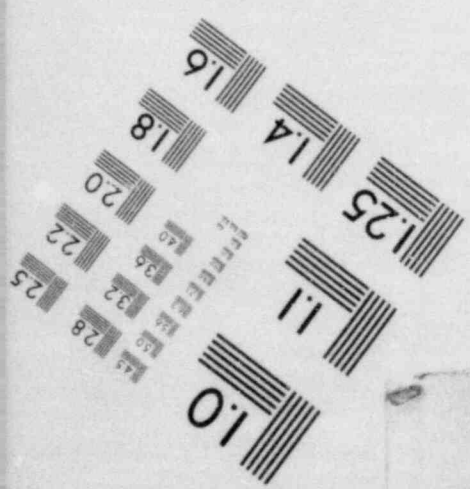
25 A I have read some.

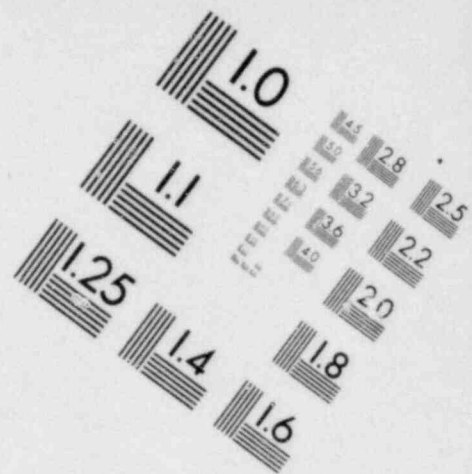
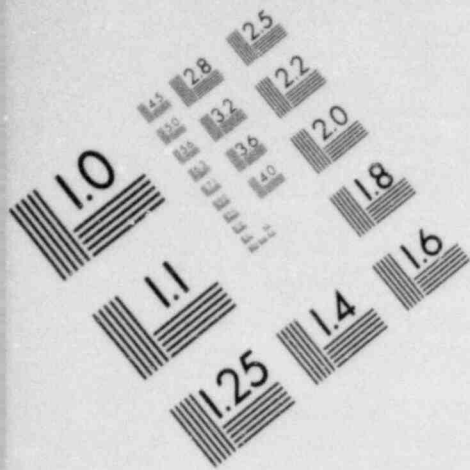


**IMAGE EVALUATION
TEST TARGET (MT-3)**

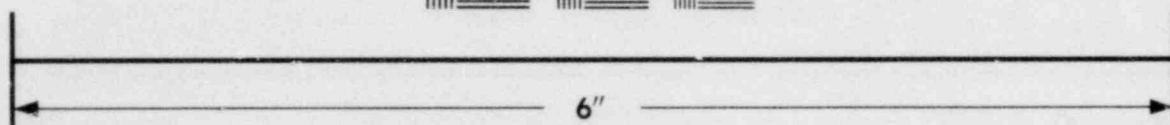
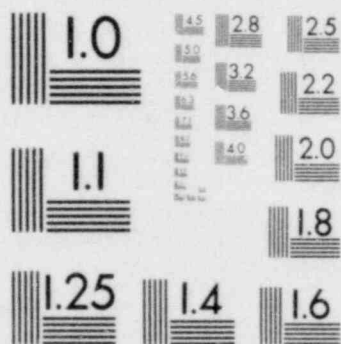


MICROCOPY RESOLUTION TEST CHART

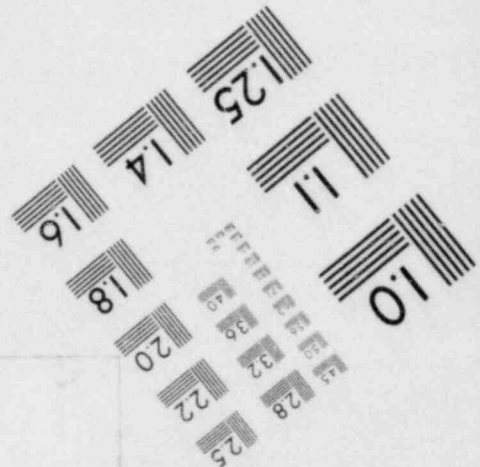
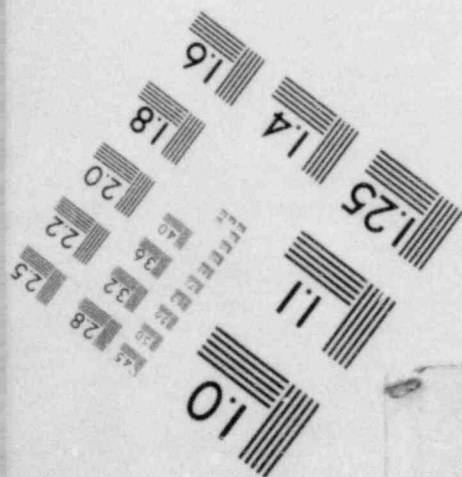




**IMAGE EVALUATION
TEST TARGET (MT-3)**



MICROCOPY RESOLUTION TEST CHART



1 Q Have you read some in connection with the
2 preparation of your testimony for this particular proceed-
3 ing?

4 A Not specifically for that purpose.

5 Q Have you read some that would be -- that would
6 involve as one of the parties, one of the Applicants in
7 this proceeding?

8 A I'm sorry; I didn't get that question.

9 Q Some of the ones you have read, have they been
10 interconnection agreements which involve one of the
11 Applicants and a municipal system, one of the Applicants
12 to this proceeding?

13 A That's correct.

14 Q Have you had occasion to read interconnection
15 agreements involving private utilities other than any of
16 these Applicants and some municipal system?

17 A I don't think I have with regard to my testimony
18 in this case. I have read some on other applications,
19 but not in this case. I can't recall now. I'm not sure.

20 Q Do you recall that you may have read some in
21 some other connection?

22 A That's correct.

23 Q Is your experience with those kinds of
24 contracts limited to your reading of them?

25 A That's correct.

1 Q In response to question 3 of your prepared
2 testimony, which begins on page 3 and carries over to page
3 4, I believe you have outlined what is the scope of your
4 testimony.

5 Would you tell me what your assignment was
6 in this case?

7 A As well as I can. I was asked by counsel for
8 NRC Staff to investigate the relationships between the
9 utilities applying for the nuclear license here and those
10 entities within their respective service areas with regard
11 to the contractual relationships existing between those
12 utilities and those respective entities in their service
13 areas.

14 I was also asked to evaluate and analyze the
15 physical characteristics of the Applicants with regard
16 to their size in terms of capacity, transmission,
17 availabilities.

18 I think that encompasses pretty much what the
19 assignment was.

20 Q How did you go about carrying out that
21 assignment?

22 A I -- part of the investigation involved a
23 number of trips to the various Applicants' areas talking
24 to a number of small municipalities with regard to the
25 relationships they have had with their companies serving

1 them. I have read the contracts between the entity and
2 the companies. I analyzed data of the FPC in regard to
3 the company size and also the entity sizes that was
4 available.

5 I analyzed other data received on discovery
6 in regard to the various sizes of the systems. I'm not
7 sure but I think that was the primary basis at least for
8 the testimony, those kinds of investigations.

9 Q Did you prepare any reports or memos that set
10 forth the analyses which was the basis for this testimony?

11 A No.

12 Q You indicated in your answer to question 3 that
13 your intent is to describe the physical and
14 electrical characteristics of each of Applicant systems.

15 Can you explain to me what you mean by the
16 electrical characteristics?

17 A I mean the capacity, the generation, and
18 the transmission mileage amounts.

19 Q Was your intent to limit your description of
20 electrical characteristics to those items?

21 A That's correct.

22 Q Is it your understanding that that would
23 embrace all of the electrical characteristics of the
24 Applicants?

25 A No.

1 Q Why did you pick the capacity, generation and
2 transmission characteristics and isolate your testimony
3 to those?

4 A I felt those gave the best measure of the
5 bulk power supply capabilities of the Applicants.

6 Q Did you also consider the physical and
7 electrical characteristics of the municipal systems
8 and rural electric cooperatives referenced in your
9 testimony?

10 A I think the testimony indicates that.

11 Q Would you be referring to the exhibits that are
12 attached to your testimony?

13 A That's correct.

14 Q Was your consideration in this regard any
15 more than obtaining the information that you have reflected
16 on those exhibits in the manner in which the exhibits
17 indicate you obtained it?

18 MR. LESSEY: What regard?

19 BY MR. REYNOLDS:

20 Q In regard to the physical characteristics
21 of the municipal systems and rural cooperatives?

22 A It is clearly written in the record. I put
23 the things down which I found to be factual in regard to
24 these entities.

25 Q Let me ask you if you would refer for a moment

1 to your exhibit -- let's take Exhibit 4, JDC-4.

2 A 4-A?

3 Q Right, 4-A. We might look at JDC-2-A.

4 For the record, these are exhibits that are
5 attached to and part of Dr. Guy's testimony.

6 Would you explain for us what it is you have
7 reflected with respect to the distribution cooperatives
8 on those two exhibits?

9 A Yes, I would be happy to. I was unable to
10 determine that they had any either capacity, generation
11 or transmission.

12 I found they only had a certain load. That
13 is what is reflected there.

14 Q And is the load that is reflected there an
15 aggregate load?

16 Let's take Exhibit JDC-2-A. You have listed
17 maximum electrical demand, kilowatts, beside the name
18 Holmes-Wayne Distribution Cooperatives, 76,000.

19 A That should be the aggregate of all of the
20 cooperatives.

21 Q Would your answer be the same with respect
22 to the figure 10,400 kilowatts on Exhibit JDC-4-A
23 in column 1?

24 A 10,400 is the aggregate of the first three
25 cooperatives. The 31,560 is the aggregate of the last two.

1 Q Is it your understanding, Dr. Guy, that the
2 distribution cooperatives listed on those two exhibits
3 have no generating capacity?

4 A That's correct.

5 Q Do you know where those cooperatives get their
6 power?

7 A I believe they buy it from Buckeye Power,
8 Incorporated.

9 Q Is Buckeye Power, Incorporated a private
10 utility, investor-owned utility?

11 A It is a G&T cooperative, to my understanding.

12 Q Do you know who owns that cooperative?

13 A No, I do not.

14 Q If I told you that that cooperative was jointly
15 owned -- that Buckeye, Inc. was jointly owned by the
16 distribution cooperatives, would that alter your response
17 with respect to the generation capacity?

18 A I don't believe so. I would still not
19 characterize that as having capacity within the service
20 areas of the Applicants.

21 It is still purchase of power as I understand it.
22 As I understand it, it is not an allocated portion of the
23 units assigned to each of the requirements. They buy
24 full requirements from Buckeye Power, Incorporated. That
25 is my understanding of the arrangement.

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1 Q If I could ask you to refer to Staff Exhibit 85,
2 which is NRC Document No. 101, at page 5 of your testimony,
3 on that map, and I have a copy, so I believe that your
4 reference to red dividing lines would be blue dividing lines?

5 A It would be the darker color, that's correct.

6 Q You have indicated that those darker colored
7 lines designate the borders of each of the Applicants in
8 this proceeding.

9 Would you explain what you mean by borders?

10 A Yes. I would be happy to do that. The map I
11 used is a map supplied on the face of it from Capco. I
12 highlighted the lines that were already on the map, which
13 was indicated on the map as being territorial boundaries.

14 I called them borders instead. The lines were
15 already there on the original map. I just highlighted them.

16 Q When you say "territorial boundaries," I am
17 not sure I understand what you mean.

18 A It is on the face of the map. In the legend
19 you see a reference to territorial boundaries. Those are
20 the lines I highlighted.

21 Q What is your understanding of what the
22 territorial boundaries represent?

23 A The areas in which these Applicants serve
24 retail-wholesale customers.

25 Q What is the basis for that understanding?

1 A It just seems clear that that is what it means.
2 I have no other basis for it.

3 Q Did you make any independent effort to verify
4 whether the boundaries as depicted or the borders as
5 depicted on this map are indeed accurate?

6 A No, I trusted the Applicants to verify that
7 it was correct.

8 Q Do you know for what purpose this map was
9 prepared by Applicants?

10 A I'm sure for the purpose stated, to show
11 the facilities of Capco.

12 Q Could you explain for me what -- there appears
13 to be an area that has been carved out in the Ohio-
14 Edison area near Prospect. Do you see that?

15 A Yes, I do see that.

16 Q Do you know what that represents?

17 A Our best efforts to find out were not
18 very successful. But we believe from correspondence that
19 Ohio Power serves that area.

20 Q Did you add the dots to the map?

21 A I did.

22 CHAIRMAN RIGLER: Which dots do you mean, Mr.
23 Reynolds?

24 MR. REYNOLDS: The dots -- the dots which you
25 have referred to as colored dots in your testimony

1 indicating approximate geographic location of each of
2 the non-Applicant municipal utilities. They are dark
3 blue, solid colored dots.

4 MR. SMITH: They make Pittsairn look bigger
5 than Pittsburgh.

6 MR. REYNOLDS: You are anticipating me.

7 BY MR. REYNOLDS:

8 Q Did you add those?

9 A I did that, yes.

10 CHAIRMAN RIGLER: Do you want us to take
11 notice that the size of the dot does not represent the
12 size of the electrical load in the area of the dot?

13 MR. REYNOLDS: I was going to ask the witness
14 whether he had made any effort to represent on this map
15 the size of the area served by the municipality.

16 BY MR. REYNOLDS:

17 Q Did you believe that that might be important
18 or was not important -- do you believe that was not
19 important in connection with the use that you were making
20 of this particular exhibit?

21 A That's right.

22 Q Why is that?

23 A I thought the sizes were indicated on my exhibits,
24 anyway, how big they were in terms of load.

25 Q Is it your understanding that Ohio-Edison

1 serves retail customers in all of the municipal areas
2 indicated on your map?

3 A I missed that question. Would you repeat it,
4 please?

5 Q Is it your understanding that Ohio-Edison
6 serves retail customers in all of the municipal areas
7 designated by a dot on your map within that border?

8 A No, that is not my understanding. They serve
9 in the dotted areas.

10 Q Did you not think it was relevant if you were
11 going to use a map to indicate territorial borders that
12 that map reflect areas within the outer borders that
13 were not served by the private utility?

14 A Within the outer borders?

15 Q You have indicated to me that there are areas
16 within the -- that there are municipalities in which
17 Ohio-Edison does not serve. I understood you to say
18 you have not indicated those areas not served by Ohio-
19 Edison in the same scale on this map. Is that correct?

20 A You mean the areas -- geographic scale?

21 Q Geographic areas not served within the outer
22 border by Ohio-Edison?

23 A Do I understand you to say that I should have
24 inscribed the area rather than putting the dot?

25 Q I'm not trying to suggest what you should have

1 done. I'm trying to determine what it is that you are
2 representing by this outer border. I understood you to
3 testify that that was to represent the area in which the
4 respective private utilities serve.

5 Now I also have understood you to testify
6 that there are municipal areas within those outer borders
7 in which the utilities, private utilities do not serve.

8 I'm asking whether that would not have been
9 relevant to demonstrate on this map?

10 A I thought it was so demonstrated on this map.

11 Q How is it demonstrated?

12 A I thought the dot indicated that Ohio-Edison
13 did not serve in that area.

14 Q Is it your intent, then, for us to read this map
15 as reflecting that Ohio-Edison does not serve in any of
16 the dots that are indicated in its area and similarly
17 as to Toledo-Edison and the Pennsylvania Power Company,
18 CEI and Duquesne Light Company, that they do not serve in
19 those dotted areas?

20 A I'm not suggesting that Ohio-Edison does not
21 serve some customers in some of those areas. I simply
22 indicate that Grove City does serve its own system within
23 part of that blue dot indication. It may be that Duquesne
24 Power serves in that area as well.

25 Q Do you know?

1 A I do not know.

2 Q Then maybe you better tell us what is it the
3 dots represent in your mind?

4 A Location of the municipal electric systems.

5 Q They do not indicate the relative geographical
6 size - the area served by the municipal systems?

7 A That's correct.

8 Q You have made no effort on this map
9 to show those areas within the outer borders of each of the
10 Applicants that may not be served at all by the Applicants?

11 A That's right.

12 Q You have indicated that the rural electric
13 cooperative entities have not been shown because they have
14 individually dispersed over a relatively large area at
15 many points of delivery service.

16 Q Could you tell us what the relatively large
17 area is or could you describe it to us by reference to your
18 exhibit?

19 A The exhibit would not show that.

20 Q If we all look at the exhibit, could you
21 indicate to us what that relatively large area might be,
22 or could you indicate what portion of the total area
23 shown would be in the area served by these rural electric
24 cooperatives?

25 A I cannot identify specifically all the

1 entities served in an area.

2 MR. LESSEY: The map was put in yesterday,
3 and the copy to the Board indicates all of that information.

4 MR. REYNOLDS: Dr. Guy is an expert. That map
5 is a different scale than the one we have here. I would
6 like him to indicate to us on the basis of his knowledge
7 in connection with his testimony what areas on this map
8 are the large areas that represents the rural
9 electric cooperatives systems.

10 THE WITNESS: I cannot specifically locate
11 where any particular cooperative serves in any of these
12 areas. I do know they serve a large part of the rural
13 area in Toledo-Edison and Ohio-Edison's territories.

14 BY MR. REYNOLDS:

15 Q Do you know what porportion of the total
16 area in the Ohio-Edison territory would be representative
17 of the area served by the rural electric cooperatives?

18 A My recollection of the Buckeye map, I would have
19 to be conjectural on my part to suggest how much of it
20 they may or may not serve.

21 Q Do you know whether Ohio-Edison serves
22 customers in the area served by the rural electric
23 cooperatives?

24 A I'm sure they do. I have no first hand knowledge
25 of that, however.

1 Q What would be the basis of your surmise?

2 A From looking at the delivery points in
3 Ohio-Edison areas, they are somewhat dispersed. From that
4 knowledge, it is clear that they can't serve all of the
5 areas. It is not large enough to serve everything within
6 their immediate area. So Edison must serve some of the
7 customers in the same area.

8 I don't know the extent of the service of either
9 of them, however.

10 Q Who is not large enough? The cooperative?

11 A The delivery points are somewhat dispersed,
12 as I have indicated previously. From that knowledge, it is
13 clear that Edison must serve some of the customers in the
14 same general area as the coops do serve.

15 Q Do you know if there are Ohio-Edison customers
16 in that area?

17 A I have no specific knowledge of that.

18 Q Now maybe you could just summarize for me in
19 light of this discussion what it is that you intended this
20 map to show us?

21 A It was designed to show the respective service
22 areas of the Applicants, and those municipal entities in
23 the same areas. That was the sole intent of the map.

24 Q When you say the service area of Applicants,
25 would you explain to me what you mean?

1 A As defined by the territorial boundaries of
2 the Applicants.

3 Q Are you telling me that the Applicants serve
4 within the borders, and that the outer extremities of
5 their service are defined by the borders, but that in
6 terms of within those borders, they don't serve throughout
7 the area?

8 Is that a fair statement?

9 A It is my understanding that that is substantially
10 true.

11 Q Do you know whether Applicants serve outside
12 of those borders?

13 A You mean serve retail or any kind of electrical
14 service?

15 Q Or wholesale. Do you know either way?

16 A I do not know.

17 Q And you did not indicate, did you -- or correct
18 me if I am wrong -- my understanding is you have testified
19 this map does not accurately depict municipal service areas?

20 A Not in terms of geographical extent.

21 Q In response to question 6, on page 5 of your
22 testimony, you make reference in connection with the
23 Cleveland Electric Illuminating Company bulk power system
24 to JDG-5. Could you turn to that for a minute, please?

25 A Yes.

1 Q Would you explain to me what you meant by the
2 heading structural data?

3 A I think that was a term that I put forth to
4 describe the electrical system from the standpoint of
5 size. There is nothing meant more than that.

6 Q What does the reference to others mean, the
7 repeated reference in the far right-hand column?

8 A The footnote indicates that.

9 Q I'm sorry, the far left-hand column.

10 A Left-hand column, the reference with footnote
11 D. It references JDG-1 through 4 and 1 through 4 contains
12 those so indicated.

13 Q I guess my question is, are we to derive
14 something from the fact that you have CSI and others? Is
15 that to be related to the prior exhibit, the map?

16 A It is related to JDG-1, the others.

17 Q So the others then are the electric entities
18 located within the geographical area of the respective
19 applicants?

20 A That is my intent.

21 Q I see.

22 Is it your intent with others to include only
23 municipalities and co-ops located in those geographical areas?

24 A Those are all that I was aware of that were in
25 the areas. Therefore, that would be my intent.

1 Q With respect to the net generation column,
2 then, for example, under others, did you include any
3 self-generation by industrials?

4 A I did not.

5 Q Why was that?

6 A I did not consider them to be the -- to be
7 applicable to this kind of analysis.

8 Q This kind of analysis, what do you mean by that?

9 A I was trying to compare those entities which
10 serve retail in these respective areas.

11 Q Will you explain to me what the reference
12 means at the top of the second to the last column on
13 the right-hand side to pole miles?

14 A You want to know what that term means?

15 Q Yes.

16 A Pole miles is a term in the FPC form indicating
17 number of pole miles of transmission. Pole mile is a
18 length of line one mile long with a pole on it.

19 Q Is it your understanding that the figures
20 listed there include transmission lines in the Duquesne
21 Light area that might be on poles other than those that
22 belong to Duquesne Light?

23 A I do not believe it includes those. It may or
24 may not. I don't know specifically.

25 Q Do you know that with respect to any of the

1 other Applicants?

2 A I do not.

3 Q Do you know if that information is reflected
4 in Form 1?

5 A I don't recall it being reflected from my
6 reading of the form.

7 Q In terms of the transmission information that
8 you have listed there, does the 632 pole miles that
9 you have for CEI include CEI 138 line in Ohio-Edison's
10 geographic area?

11 A It includes any lines they listed as belonging
12 to them wherever they were. I cannot tell you which ones
13 they may have excluded or included.

14 Q The structural data doesn't conform to
15 geographical area?

16 A It conforms to ownership of the lines as I
17 understand the data submitted.

18 Q What is the percentage then that you have
19 listed at the end, 96.8 percent vs. 3.2 percent?

20 A The ownership of those lines and the total lines
21 in the area.

22 Q Which area?

23 A CEI territorial boundaries.

24 Q Well, I thought you just indicated to me that 632
25 included the transmission lines of CEI that are outside

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1 its area?

2 A I didn't say that.

3 Q Do you know whether it does?

4 A I do not know.

5 Q If it did include that, then that would alter
6 the percentage?

7 A It would make it higher, yes.

8 Q It would make --

9 A CEI percentage higher. If you included more
10 lines in there.

11 Q If 632 includes transmission line mileage
12 outside of CEI area?

13 A It is already there.

14 Q If that were removed, it would lower the
15 percentage?

16 A It would probably lessen it somewhat.

17 Q Is it true with respect to the transmission
18 information that you have listed for the other Applicants
19 that you are not in a position to testify as to whether
20 that does or does not include transmission lines that they
21 may own outside of their geographic areas?

22 A It may or may not.

23 Q You don't know?

24 A I do not know.

25 Q Let me ask one other question on that.

1 Looking at the others, the figure you have for
2 transmission lines does not include, as I understand what
3 you have said, transmission lines that may be owned by,
4 let's take the second grouping, CE and others. If there are
5 transmission lines owned by CEI in the CE area, that wouldn't
6 be reflected in the percentage?

7 A That's correct.

8 Q That would alter the percentage, too?

9 A That would change the percentage.

10 Q At page 7, of your direct testimony, in response
11 to question 12, you have made reference to five municipal
12 systems which are served at "full requirements wholesale
13 by Ohio Edison."

14 I'm sorry. All but five are served at
15 full requirements by Ohio-Edison.

16 A That's correct.

17 Q Will you explain or describe for me or define
18 for me what you mean by full requirements wholesale?

19 A They purchase, all of their power is purchased
20 from Ohio-Edison.

21 Q Is that whatever power they need?

22 A That is my understanding, yes.

23 Q Would that include demand for new power
24 in the event they picked up a new customer?

25 A I would assume that would mean that also.

1 Q Would you then think that those municipalities
2 would have any surplus power?

3 A I think surplus would not be applicable to a
4 full requirement customer.

5 Q Would it be applicable to a partial requirement
6 customer?

7 A They may have surplus generation on another
8 part of the system of their own. They are not buying
9 full requirements. They have generation of their own to
10 some extent.

(Recess.)

11 Q Dr. Guy, let me ask one or two real quick
12 questions that will clarify or I hope will clarify something
13 we got into a little earlier.

14 In your response to question 12, you indicated
15 that the rural cooperatives, according to your understanding,
16 purchased their full requirement from Buckeye Power. Then
17 I believe you indicated that that was why you had not
18 included any figures under the net dependable capacity
19 for cooperatives on JDG-2-A and JDG-4-A?

20 A That's right.

21 Q I asked you a question whether if the co-ops
22 jointly owned Buckeye Power, Inc., that would alter your
23 exhibit with respect to that?

24 A I said no.

25 Q Could you explain to me again why that is?

1 A The basis?

2 Q Why that is.

3 A My basis is that because of the cooperatives
4 are not allocated capacity on an individual ownership
5 basis and only purchase their requirement as they need
6 them, I do not consider that capacity available in the
7 area for general purposes. Only wholesale power that any
8 other entity would sell to them. My interpretation of
9 how it operates is the basis for that conclusion.

10 Q Was it your understanding that the -- were you
11 stating that the Buckeye capacity is not dependable capacity
12 for that reason?

13 A No, I didn't say that. I said it is not
14 allocated to each of the member cooperatives. That is my
15 understanding.

16 Q With respect to JDG-5, with respect to the net
17 dependable capacity that you have for CBI, Ohio-Edison,
18 Toledo-Edison and Duquesne Light, do you know whether
19 those figures include capacity that the Applicants have
20 purchased under a firm power contract?

21 A They do not.

22 MR. SMITH: What was the answer?

23 THE WITNESS: They do not.

24 MR. SMITH: The figures do not?

25 THE WITNESS: They do not; that's correct.

1 BY MR. REYNOLDS:

2 Q Do you know if it includes capacity which
3 the Applicants take from a plant that is jointly owned?

4 A If the figures reflect that in the FPC Form 12,
5 it would include those.

6 Q Do you know if that is true or not?

7 A I believe that it does.

8 Q All right.

9 Let me refer you generally to your exhibits,
10 NRC -- Staff Document Nos. 85 -- Staff Exhibit Nos. 86
11 through 121, which in your testimony are referenced
12 in NRC-102 through 121.

13 I will not ask you to go through those
14 documents, but I do want to ask you whether to your
15 knowledge those contracts are subject to the jurisdiction
16 of the Federal Power Commission?

17 A I believe that's correct.

18 CHAIRMAN RIGLER: Mr. Reynolds, I would like a
19 little clarification on that.

20 When you say subject to the jurisdiction, do
21 you mean they must be filed with the FPC or they may be
22 passed upon and approved by the FPC?

23 BY MR. REYNOLDS:

24 Q Do you know if they must be filed with the FPC?

25 A I couldn't comment on the legal requirements.

1 It is my understanding that they are filed, however.
2 Whether it is required they be filed, I don't know.

3 Q Do you know whether all disputes that would
4 arise under the terms and provisions of that contract
5 are subject to FPC jurisdiction?

6 A I do not know if that is true or not.

7 MR. SMITH: Let me interpose here on the
8 series of contracts with Ohio-Edison Company, they are all
9 dated the same date, August 29, and the first have
10 pages filed in compliance with an order with the Federal
11 Power Commission, suggesting that there was a specific filing
12 in compliance with a specific order.

13 Would that be the case?

14 THE WITNESS: It is my understanding that that
15 is the case. That there was a filing made with the FPC
16 in 1972 and it was finally negotiated and this was
17 the result after the order was issued, these contracts.

18 CHAIRMAN RIGLER: There may be a difference
19 between the FPC permitting negotiated contracts to become
20 effective, and between the FPC making an affirmative
21 finding with respect to the necessity for validity of the
22 contracts and fairness of the rates contained therein.

23 Perhaps one of the parties will wish to address
24 that question if it is pertinent to our consideration, at
25 some later point in this hearing.

1 MR. LESSEY: May we state for purposes of
2 possible clarification that Mr. Lyren discussed a joint
3 rate case settlement at or about that time.

4 CHAIRMAN RIGLER: Is the thrust of my interest
5 clear? There is a difference between a contract which is
6 dormant in the FPC and in which no finding of public
7 interest is ever made, and one where they approve the
8 contract and hold it in the public interest.

9 MR. REYNOLDS: That is correct. I was asking
10 the witness if he had knowledge.

11 CHAIRMAN RIGLER: I'm not suggesting this
12 witness would be the appropriate witness to address the
13 question. I'm asking if it is important.

14 BY MR. REYNOLDS:

15 Q If we can turn to page 8 and your response
16 to question 15, you make reference there to December 30,
17 '65 date with respect to Exhibit 86, and you then, in the
18 following question and answer, indicate that the contracts
19 that you are discussing specify different dates.

20 A That's correct.

21 Q What is your understanding of the dates of the
22 contract?

23 A That which is included in the body of the contract,
24 not on the order on the front page. They are all dated
25 in the body of it.

1 Q So the date you are referring to when you say
2 different dates and the date you have referred to in the
3 answer to 15 is the ones set forth on the second page of the
4 contracts in the initial paragraph. Is that your understanding?

5 A That's correct, yes.

6 Q I believe just for a quick clarification,
7 there may be a typographical error on the second to the
8 last line in your answer to 15. I think you meant to say
9 adjustment of billing rates rather than dates. Is that
10 correct?

11 A Yes.

12 Just a moment.

13 I may have meant dates. One moment, please.

14 I think you are right.

15 CHAIRMAN RICLER: That is on line 23 of page 8
16 in the answer to question 15?

17 MR. REYNOLDS: Correct.

18 BY MR. REYNOLDS:

19 Q Let me direct your attention to the answer to
20 question 22, page 10, carrying over to page 11.

21 If you will look at line 2 in the middle of
22 the page -- line 2 at the top of page 11, would you just
23 educate me as to what you had in mind by proper phase
24 balancing by customers of municipal systems?

25 A Yes. Most systems have free phase power. Each

1 phase -- that is for economics in generation and transmis-
2 sion. You have the optimum use of economics, you need to
3 have each phase carry the same amount of load on it.
4 This is proper phase balancing it. Balancing the load
5 among the free phases of the system.

6 Is that not clear?

7 Q The balancing was with respect to the three
8 respective phases on each of the systems?

9 A Each electrical system, that's correct.

10 Q On JDG-3, Exhibit JDG-3, one other point of
11 clarification.

12 You have set forth there what your testimony
13 indicates are electrical characteristics of five municipal
14 entities served by Pennsylvania Power.

15 In the far right-hand column under transmission
16 mileage, what is the intent of NA?

17 A Not available. Information was not available to
18 me. It was not available to me. I was not able to
19 determine that.

20 Q If we could move to the discussion of the
21 contracts with municipal electric systems of Toledo-Edison
22 area, I believe you earlier stated that some of the
23 contracts that are referred to in your testimony are no
24 longer in effect and listed those contracts.

25 A Yes.

1 Q One of those contracts that is no longer
2 effective pertains to the Village of Woodville, does it not?

3 A I can only say that what I have is they are all
4 in effect. I am not sure what applies to any of them now.

5 Q Your discussion with respect to the Woodville
6 contract as being a typical contract that was in the
7 context of a contract which you have now indicated is no
8 longer in effect, is that right?

9 A That's right.

10 Q When did you learn of that?

11 A I guess it was two months ago that I discovered
12 that.

13 Q How did you come to discover that?

14 A When I saw that there was a nine-year
15 term rather than a 10-year term in the contract. Most
16 of them are 10-year terms. This one had a nine-year term.
17 It was an oversight on my part of picking Woodville.

18 Q Would that be similarly true with respect to
19 the other contracts you indicated this morning?

20 A I knew they were expired on the basis of the
21 date and the terms of the contract.

22 Q If they had expired, what did you mean by indicating
23 that the Woodville contract was typical?

24 A It was typical of the contracts that I had
25 available to me to study, available in the FPC from

1 discovery regarding Toledo-Edison and their wholesale
2 customers.

3 Q It is now your understanding that the Woodville
4 contract is not typical of contracts that are in effect at
5 the present time?

6 A I'm not sure what is in effect at this time.

7 Q Let me show you a series of contracts now.
8 I will distribute them, marking for identification --
9 these are contracts between Toledo-Edison and the muni-
10 cipalities you mentioned earlier. The first contract
11 will be marked for identification as Applicant's Exhibit
12 35 (TE).

13 It is a contract dated July 23, 1973
14 between the Toledo-Edison Company and the City of Bowling
15 Green.

16 The second contract marked for identification
17 is Applicant's Exhibit 36 (TE).

18 CHAIRMAN RIGLER: Should we identify them in
19 terms of the contract itself or will you put a party's
20 identification on them?

21 MR. REYNOLDS: I don't have a document
22 identification number to give you. If we want to come
23 up with one, I'm agreeable to it. I don't have an
24 internal document identification number for those contracts.

25 CHAIRMAN RIGLER: If I turn to Applicant's

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1 Exhibit No. 17, that is the first TE number I see. For
2 some reason the internal document identification number
3 on that is TOCE-31, which indicates that Toledo-Edison
4 may be employing some different system than its fellow
5 Applicants.

6 Applicant's Exhibit 35 (TE) is an agreement of
7 July 23, 1973 between TE and Bowling Green.

8 Applicant's Exhibit 36 (TE) is an agreement
9 of 26 April 1974 between TE and Bryan.

10 MR. HJEMFELT: Who is the contract with?

11 CHAIRMAN RIGLER: The City of Bryan, Ohio.

12 No. 37 is designated by the Applicant --
13 it is 37 (TE). It is a notice of cancellation to the
14 Village of Liberty Center. Signed by Paul H. Smart of
15 Toledo-Edison. It is undated.

16 Applicant's Exhibit 38 (TE) is a July 23, 1973
17 agreement between Toledo-Edison and the Village of
18 Montpelier.

19 Applicant's Exhibit 39, (TE) is a June 10,
20 1975 agreement between the Toledo-Edison and the
21 City of Napoleon.

22 Applicant's Exhibit 40 (TE) is a February 19,
23 1975 agreement between TE and the Village of Pomeroyville.

24 Applicant's 41 (TE) is a May 19, 1975 agreement
25 between TE and the Village of Woodville.

1 (Applicant's Exhibits
2 35 (TE) through 41 (TE),
3 inclusive, were marked
4 for identification.)

5 CHAIRMAN RIGLER: Proceed, Mr. Reynolds.

6 MR. REYNOLDS: I would like to move
7 Applicant's Exhibits 35 through 41 into evidence.

8 MR. MELVIN BERGER: I have a question here as
9 to whether or not these were actually filed with the
10 Federal Power Commission.

11 I'm willing to accept Applicant's counsel's
12 representation that they were.

13 I also have a question with regard to the first
14 page of each of which which refers to various rate sheets
15 as to whether these are part of the contracts and should
16 have been appended to them.

17 I'm not sure what that means. I would like
18 clarification on that as well.

19 MR. REYNOLDS: The answer to the first question
20 is yes, each of those was filed.

21 The answer to the second question is that the
22 rate sheets are part of the contract and part of the
23 document that has been handed out.

24 MR. LESSEY: I would indicate since there has
25 been no red lining of any of the documents, Staff assumes

1 the whole document is applicable.

2 MR. REYNOLDS: That's correct.

3 MR. SMITH: How does that happen that the
4 documents purport to be dated in July of '73, but they have
5 appended to them documents carrying the date of 1975?

6 MR. REYNOLDS: If your reference to the '75
7 date is the one on the rate sheets, Mr. Smith, if you look
8 at the continuation in the first paragraph on the
9 front sheet after the break, the contract provides that the
10 rate sheets may be amended or superseded by appropriate
11 filings.

12 That is what has occurred. The '75 is the amended
13 rate sheet.

14 MR. MELVIN BERGER: Mr. Chairman, I see the
15 rate sheets Mr. Reynolds referred to. I do not see
16 terms and conditions sheets No. 17, 18, and 19, for
17 example, on the Bowling Green contract. It is referred to
18 on the first page.

19 MR. REYNOLDS: The point is well taken, Mr.
20 Berger. I have been advised in copying these, they did
21 not get included. They will provide them and insert them.

22 CHAIRMAN RIGLER: We will defer receiving these
23 exhibits into evidence until the applicable terms and
24 conditions sheets can be supplied.

25 Referring back to my earlier inquiry about the

1 effect of filing with the FPC, I notice that in Applicant's
2 Exhibit 35, for example, the Bowling Green service
3 agreement, the rate sheets which are filed with the FPC
4 apparently are subject to approval or acceptance by the
Commission.

6 That leads to a further question which is, does
7 the Commission approve only the rate sheets and the terms
8 and conditions; or does it approve the contract as a
9 whole?

10 My reference there would be to some of the
11 red lined portions, that is the Staff's red lined portions
12 as to whether the FPC specifically considers those
13 contract provisions and passes on them, or whether the
14 FPC merely concerns themselves with the rate sheets.

15 MR. LESSEY: We would like to note this considera-
16 tion gets into the area of if substantive language is
17 considered in any context, what factors are considered,
18 and what factors will the FPC not consider.

19 CHAIRMAN RIGLER: That is a very important
20 consideration. That is why I earlier asked about the
21 statutory standard which may be employed at the FPC. I
22 believe this came up in connection with a question on
23 collateral estoppel.

24 MR. HJEMFELT: Are you asking the parties to
25 eventually put this in briefs or be thinking about it,

1 or do you want evidence on it?

2 CHAIRMAN RIGLER: The current state of the record,
3 Mr. Hjemfelt, is that a lot of contracts which everybody
4 filed with the FPC have been put before us.

5 As I understand the opposition parties'
6 position, they are contending that certain provisions of
7 the contracts are anti-competitive in nature. A suggested
8 response from the Applicants in their cross-examination
9 appears to be that the FPC, a government agency, may
10 approve these contracts and may have applied some standard
11 relating to the public interest to them, and nonetheless
12 found that they were acceptable.

13 MR. HJEMFELT: I understand that.

14 CHAIRMAN RIGLER: If you want us to draw any
15 conclusion one way or the other, you better address that
16 problem. We would like the parties to tell us what
17 conclusions they draw from these contracts. Otherwise,
18 they drift before us.

19 MR. HJEMFELT: Okay, I understand now.

20 BY MR. REYNOLDS:

21 Q DE. Guy, let me refer you to page 15, your answer
22 to question 33 and page 19, your response to question 48.

23 As I read your testimony, it appears to be an
24 inconsistency. In 33, you indicate Napolena takes partial
25 requirement service from Toledo-Edison.

1 In 48, you indicate they have chosen to purchase
2 full requirement service from Toledo-Edison.

3 Could you clarify that?

4 A The question on 33 was based on the year 1973.
5 This later development happened after 1973. That is why
6 there is a difference in the two answers.

7 Q Was the testimony with respect to question 33
8 directed to the contract that you have referenced in your
9 testimony as Exhibit 137? You state '73. I want to get
10 it clear.

11 We have handed out a contract bearing a '73
12 date pertaining to Napoleon. When you are talking about
13 partial requirements, you were testifying to the
14 understanding of the contract that was referenced in
15 your direct testimony?

16 A That's right.

17 Q You say in 48 that it is your understanding
18 Napoleon has chosen to purchase their full requirements
19 from Toledo-Edison.

20 What is your understanding of the basis for that?

21 A Mr. Dorsey, the manager of Napoleon Utilities,
22 told me so.

23 Q Do you know whether they can choose to be a partial
24 requirement customer of Toledo-Edison at the present time?

25 A If they can choose to be?

1 Q Right.

2 A I do not know.

3 Q In response to question 50, you have indicated
4 that the Borough of Pitcairn operates an electric system
5 within the area. Could you explain to me in a little more
6 detail what you have in mind, or what you mean by the
7 term "electric system," especially in light of your answer
8 to question 54?

9 A 54 was done because there was only one entity.
10 I didn't think that wanted an exhibit for one entity.

11 In regard to question 50, any facilities that
12 Pitcairn might own for the sale of power fall within my
13 definition of electric system.

14 Q What facilities does Pitcairn own, do you know?

15 A I understand it is the distribution equipment
16 only.

17 MR. REYNOLDS: Thank you, Dr. Guy.

18 I don't have anything further.

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1 CHAIRMAN RIGLER: Any redirect?

2 MR. LESSY: Yes, sir.

3 REDIRECT EXAMINATION

4 BY MR. LESSY:

5 Q Dr. Guy, with respect to NRC Exhibit 101, the map,
6 entitled, "Principal Facilities of CAPCO as of October 31,
7 1969," what was the source of you obtaining a copy of this
8 map before you added the additions that you added to it?

9 A It was supplied, I believe, by CEI as part of their
10 response to the 20 questions required in the applications
11 for a nuclear plant.

12 Q It is dated as of October 31, 1969. Why are
13 you using the 1969 map?

14 A It was the only map we had available to us.

15 Q Did you request an updated map?

16 A Yes.

17 Q From whom did you request an updated map?

18 A The first time we requested it it was from
19 CEI in our initial screening of discovery documents in January
20 of '75. We requested it again from the Duquesne Light Company
21 in the same instance, in the discovery screening process.

22 Q When was the last time a request to your
23 knowledge was made to Duquesne Light to provide an updated
24 map?

25 A I believe it was last August '75.

eak2 1 Q Do you know what the response was at that time?

2 A It was still being prepared and was not available
3 at that time.

4 Q Did they indicate to you how long it had been in
5 preparation?

6 A At least since January.

7 Q Of what year?

8 A '75.

9 CHAIRMAN RIGLER: Is it available yet, Mr. Reynolds?

10 MR. REYNOLDS: No, it is not. I have asked for the
11 map on a number of occasions and I personally have asked
12 for it but at the present time it has not been completed.
13 As soon as it is, we will make it available to the Board and
14 to all parties.

15 CHAIRMAN RIGLER: Are there differences between
16 the revised map which apparently comes out in '76 and the
17 1969 map which is NRC Exhibit 357

18 MR. REYNOLDS: There are differences. The map
19 that is in process would show the additional transmission
20 facilities that have been added in the interim period and
21 any generation facilities.

22 CHAIRMAN RIGLER: Have there been any changes
23 in what might be designated the service areas of the various
24 Applicants between the 1969 map and the new map under
25 preparation?

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MR. REYNOLDS: Between territorial boundaries?

2

CHAIRMAN RIGLER: Yes.

3

MR. REYNOLDS: I really don't know. The map, as I say, is in the works. I have not seen it.

4

5

I have no way of knowing whether that map would or would not have that depiction on it or would intend to.

6

7

CHAIRMAN RIGLER: I suppose the burden would be on the Applicants to point out in what respects, if any, this map was inaccurate for purposes of these proceedings then. By this map, I mean the 1969 map.

10

11

MR. REYNOLDS: Inaccurate? I didn't follow what you were saying. It is the burden of the Applicants to show --

12

13

CHAIRMAN RIGLER: How it would not apply or would be inaccurate with respect to relevant considerations in these proceedings. If this is the CAPCO '69 map and it is the latest map that CAPCO companies have supplied to the Staff, I think we should be entitled to rely upon it unless you can point out to us what changes would be appropriate.

14

15

16

17

18

19

MR. REYNOLDS: I have no problem with the Board relying upon it to the extent the map shows what is on the face of it.

21

22

CHAIRMAN RIGLER: All right.

23

BY MR. LESSY:

24

25

Q Dr. Guy, based on your knowledge and experience, is it standard electric utility industry practice to describe service areas by territorial boundaries?

eax4 1 A I think that is a very typical way of doing it.

2 Q Mr. Reynolds pointed you to some language
3 which referred to a full requirements wholesale customer.
4 I would like to ask you a hypothetical question. If there
5 was a full requirements wholesale customer but in that full
6 requirements contract with the supplier there was a capacity
7 restriction, if the full requirements wholesale customer
8 required more power than was in the capacity restriction
9 without an amendment to the contract, would he have a contractual
10 right to it?

11 A It would limit the demand to the extent the con-
12 tract said it limited it.

13 Q So a full requirements wholesale customer who was
14 up against the capacity restriction in a contract couldn't
15 get all of his requirements without a contractual modification,
16 is that correct?

17 A That would seem to be true, yes.

18 Q With respect to JDG-5, entitled "Structural
19 Data," with specific reference to pole miles, would in your
20 view and based on your investigation, pole mile ownership
21 outside of the territorial boundaries which were not included
22 in these figures materially or significantly change the figures
23 in any way?

24 A Not in my opinion.

25 MR. REYNOLDS: Could I have the question back again.

1 I am not sure it conforms with my recollection of the
2 testimony.

3 (The reporter read the record as requested.)

4 MR. LESSY: I see the problem.

5 BY MR. LESSY:

6 Q Pole miles ownership which were included in these
7 figures if they were taken out, if the pole miles were outside
8 the service territory, would they significantly change
9 the figures in any way.

10 A No.

11 Q Now, turning again to NRC -- the map again.

12 CHAIRMAN RIGLER: NRC Exhibit 85.

13 BY MR. LESSY:

14 Q NRC 85, if the blue dots representing the
15 other electric entities within the service areas were drawn to
16 scale, what size would the dots be?

17 A Certainly smaller than Pittsburgh is on the map.
18 Pittsburgh is quite small.

19 Q Would they be barely visible.

20 A If at all.

21 CHAIRMAN RIGLER: We understand that, Mr. Lessy.

22 BY MR. LESSY:

23 Q Now, with respect to Exhibits JDC-2A and 4A,
24 the figures are representing the electrical demand of the
25 distribution co-ops. What do these figures tell you about

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1 the size of the load of the co-ops?

2 A It shows they are quite small compared to the
3 other loads.

4 Q With respect to the five amended or new contracts
5 that Mr. Reynolds sought to enter into evidence at an earlier
6 date, did you directly participate in NRC Staff discovery
7 of the Toledo Edison Company?

8 A Well, I was not a party to the screening process
9 at Toledo Edison. I did the second screening at the Applicants'
10 offices when we went through the documents for copying
11 purposes.

12 Q Were these August 1, '73 agreements available
13 at the central depository, to your knowledge?

14 A Not to my knowledge.

15 Q When you noticed that some of the contracts had
16 expired, did you attempt to get copies at the Federal Power
17 Commission?

18 A I did.

19 Q With what results?

20 A Negative results.

21 Q Earlier on in response to some of the earlier
22 questions of Mr. Reynolds, you indicated that you had
23 read certain of these contracts. Did you just read them. What
24 did you mean by read?

25 A I read them. I studied them and analyzed them and

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1 discussed them with other staff members.

2 Q In addition to your assignments in the Perry case,
3 what other nuclear facilities' applicants involving antitrust
4 aspects were you involved in?

5 A The application by the Delmarva Light and Power
6 Company, the application for Farley 1 and 2 by Alabama Power
7 Company, the application by Public Service of Oklahoma for
8 Black Fox 1 and 2.

9 Q Basically, what were your duties with respect
10 to those applications?

11 A Similar duties except that there was no hearing
12 to testify at on my part in those proceedings.

13 Q What has been the extent of your participation
14 in this case, not just the hearing aspect but the entire aspects?

15 A I was involved in prehearing conferences from the
16 Staff -- I attended them that is. I was involved in the full
17 range of discovery operations for Staff and with counsel for
18 the NRC Staff. I have made numerous trips to visit the
19 Applicants and entities in their service areas.

20 Q You visited each of the Applicants' areas?

21 A Yes.

22 Q You talked to electrical entities in each of those
23 service areas?

24 A Yes.

25 Q What was your participation in the discovery phase?

eak8 1

A It went to the writing of the discovery request
2 to the filing of final documents received from the Applicants.

3

MR. LESSY: That completes the redirect examination.

4

REXCROSS EXAMINATION

5

BY MR. REYNOLDS:

6

Q Dr. Guy, do you know of a single instance in which a
7 contract capacity specification limited the ability of a
8 wholesale customer to obtain power service from its
9 retail?

10

A You mean executed contract?

11

Q Yes.

12

A I can't think of any.

13

Q On the map --

14

CHAIRMAN RIGLER: NRC 85.

15

BY MR. REYNOLDS:

16

Q Will you look in the CEI area and do you know whether
17 the Lakeshore facility that is on the edge of Lake Erie
18 is inside or outside of Cleveland?

19

A The city limits of Cleveland?

20

Q Right.

21

A It is inside to the best of my knowledge.

22

MR. REYNOLDS: I don't have anything further,

23

Mr. Chairman.

24

I do have now the additional pages that Mr. Berger
25 indicated were missing in the contracts. We can pass those out.

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1 CHAIRMAN RIGLER: All right. The Board
2 has a few comments. As I reflect further on our discussion
3 about the effect of the FPC action on these contracts, assuming
4 for purposes of our discussion that provisions of these
5 contracts would create or maintain a situation inconsistent
6 with the antitrust laws, it begins to occur to me that the
7 burden may then be on the Applicants if they wish to make the
8 argument that the FPC has sanctioned these provisions, to present
9 any additional information with respect to the FPC action.

10 I addressed my question to all parties. As I
11 reflect on it, if we have nothing more than the contracts
12 and we are persuaded they contain anticompetitive provisions
13 and if the Applicants intend to argue that FPC action in some
14 way should influence our decision, it would be the Applicants
15 burden to go forward with respect to the effect of the
16 FPC action.

17 Changing the subject, I am advised by Ace Reporters
18 that they have accommodated us in our desire to serialize
19 the December 31 hearings. However, rather than reprint the
20 transcripts they are asking us to renumber our pages. They
21 will advise us by letter and I have agreed to that procedure.

22 Mr. Reynolds has advised the Board with
23 respect to his consultation with officials of CEI reviewing
24 the assertedly privileged documents identified in Exhibit H
25 to the City of Cleveland disqualification brief. He informed

1 us he is willing to or prepared to put the results of
2 that further screening on the record. I think this may be
3 an appropriate time to do that.

4 MR. REYNOLDS: Thank you, Mr. Casimira. I would
5 like to have it reflect on the record that at the end of the
6 proceeding yesterday, I made a request of the Board to look
7 at the documents that are referenced on Exhibit H and it was
8 with the consent of the counsel for the City of Cleveland,
9 Mr. Hjelmfelt, that I was able to review the Board's copies
10 of those documents.

11 On the basis of the review and sensitive to the
12 problems that are inherent in the motion for disqualification
13 question and the privileged document issue, I have made
14 a determination after consultation with the Cleveland
15 Electric Illuminating Company, that its claim of privilege
16 can be waived with respect to the following four documents
17 for purposes of this Board's Review of that material in
18 connection with a motion for disqualification.

19 I will undertake to furnish copies of those
20 documents to Mr. Hjelmfelt at the end of the
21 hearing. For the record, those are documents numbers 6 and 7
22 as listed on Exhibit H; Document 9 as listed on Exhibit H.

23 I ought to make it clear I am talking about Exhibit H
24 to the City's brief that was filed with the Board in connection
25 with or in support of its motion for disqualification.

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Document 3054. Document No. 3055. Mr. Chairman,

I have reviewed the other documents. It is my own view that they are entitled to privilege status.

In my judgment they do not have any relationship to the matters before the Board with respect to the motion to disqualify. I recognize that this Board has the authority on its own and in its discretion to undertake a review of these documents as listed on Exhibit H for the purposes of determining whether in this Board's view they are entitled to privilege status.

If the Board should conclude after that review that they are not, then the documents would be available for purposes of the motion to disqualify. I think that if the Board should determine that they are privileged, it would be necessary for a decision to be made by the Board on the question of whether as a matter of law, that privilege might not apply in the face of a finding that the documents are indeed relevant to the motion for disqualification.

In that event, I would like to request an opportunity to -- I would like to request that CBI be given an opportunity to address itself to that legal question if the Board should determine that as a matter of law a document which is relevant to the motion for disqualification is not entitled to privilege.

I would like to request an opportunity either on

1 motion for reconsideration or motion to certify to address
2 that legal question separately and of course, have the
3 city provide an opportunity to address it too, prior to
4 any circulation of the documents that might fall into such
5 a category.

6 CHAIRMAN RIGLER: Prior to circulation to any
7 counsel for the city or counsel for any other party in
8 this proceeding.

9 MR. REYNOLDS: Or anybody that is
10 connected with the city.

11 I think that that states CEI's position on the
12 matter at this time.

13 MR. HJELMFELT: I have a problem with a further
14 round of briefing. I am not sure whether the Board --- I
15 am not clear in my own mind if the Board preferred charges
16 if from that time on Mr. Lansdale would be disqualified
17 and his firm. If that is the case, then I suppose some further
18 delay pending the outcome is not so crucial.

19 If he is not disqualified until we have some further
20 hearing, then delaying for another round of briefing becomes
21 a problem. I note the city is apt to get into the presentation
22 of its case very soon.

23 I would also simply state that the city thinks that
24 the documents on their face are relevant to this issue and
25 as long as CEI is continuing to assert the right to have the

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1 Lansdale firm represent them, they are waiving their right to
2 claim the privilege for these documents.

3 MR. SMITH: Mr. Reynolds, you are prepared, at
4 least in relation to the five documents that you named, for
5 us to turn copies of those over to counsel for the city?

6 MR. REYNOLDS: That is correct.

7 CHAIRMAN RIGLER: Mr. Hjelmfelt, I think we can
8 disagree with you right now with respect to the status of Mr.
9 Lansdale or the firm of Squire, Sanders, Dempsey in the event
10 we should prefer charges but prior to resolution by another
11 presiding officer.

12 Rule 2.7143 states that charges should be preferred
13 by the presiding officer and second, that the affected
14 party should be afforded an opportunity to be heard. It seems
15 he would not be suspended until he had been afforded an
16 opportunity to be heard by the presiding officer.

17 MR. HJELMFELT: We strongly oppose another round
18 of briefing.

19 CHAIRMAN RIGLER: I see the quandry. Mr. Reynolds,
20 since we are talking about a question of law which would
21 apply irrespective of the documents involved, I wonder
22 if you could go ahead and get your brief underway on that now.
23 It may be that the brief would never be filed and we might review
24 the documents and determine they are not privileged or second,
25 that they are privileged but that they did not bear upon or

eak13 1 would not materially affect our action with respect
2 to disqualification.

3 In other words, we might review them and determine
4 that the claimed privilege was well-founded but in the
5 course of that review, we might also determine that in any
6 event they would not figure with respect to any charges
7 we might prefer because they had an insufficient relationship
8 to the grounds for disqualification.

9 MR. REYNOLDS: Mr. Chairman, I will make every
10 effort to somehow sandwich that in between my brief to the
11 Appeal Board and --

12 CHAIRMAN RIGLER: Maybe Mr. Gallagher or someone
13 else could work on that. It may be the responsibility
14 of the attorney that Squire, Sanders has chosen to represent
15 them in connection with the disqualification motion. I don't
16 want a delay. If we are talking about a question of law, Mr.
17 Gallagher or someone else from his firm may get to working
18 on that right away.

19 MR. REYNOLDS: I will undertake to get that
20 moving.

21 CHAIRMAN RIGLER: A couple of final matters
22 about the map. First, we would like to have the original
23 with the original color marks and lines filed with the Reporter
24 as the official copy. The Board would like to see it.

25 MR. LESSY: The witness has it in his possession and

eak 1 I will transmit it to the Board now.

2 MR. SMITH: Is this one before he marked it?

3 MR. LESSY: Mr. Smith, you want a copy of it before
4 it was marked.

5 MR. SMITH: Yes.

6 MR. LESSY: We will provide that also.

7 MR. REYNOLDS: That is fine if we can have it
8 marked as a separate exhibit and I can see it first.

9 MR. LESSY: The unmarked copy of that will be filed
10 when we file the application next week for the nuclear
11 license.

12 MR. REYNOLDS: I have the other pages to the contract.
13 I would like to see if we can go ahead and have them
14 introduced with these additions.

15 CHAIRMAN RIGLER: With the parties' consent we
16 will make these copies that Mr. Reynolds distributed as a
17 separate exhibit which we will number Applicants Exhibit 42(TT)
18 and under the parties' identification numbers, I will
19 put FPC revised rate sheets 17, 18, 19.

20 MR. MELVIN BERGER: They are term and condition
21 sheets.

22 CHAIRMAN RIGLER: Revised term sheets 17, 18, 19,
23 dated October 19, 1973. They are to be read in conjunction
24 with Applicants Exhibits 35, 36, 38, 39, 40, 41.

25 Without objection from any party we will admit

eak1 Exhibit 42 into evidence.

2 (The document referred to was marked
3 Applicants Exhibit No. 42(TE), for
4 identification and was received in
5 evidence.)

6 CHAIRMAN RIGLER: We will admit 35 through 41 at
7 this time.

8 (The documents referred to, marked
9 Applicants Exhibit Nos. 35(TE) thru
10 41(TE), for identification, was
11 received in evidence.)

12 CHAIRMAN RIGLER: To follow up on Mr. Reynolds,
13 I hope somebody will have the opportunity to tell us what
14 the purpose of the map was, what it purports to show, what the
15 CAPCO facilities on the map are, who owns the CAPCO facilities,
16 whether any of the CAPCO facilities market electricity
17 outside of the boundaries designated on the map and if so,
18 where.

19 That would include external to the entire CAPCO
20 area designated or outside of their own individual territorial
21 limits. Toledo Edison selling in Ohio Edison territory,
22 for example.

23 That leads me to ask if you are going to
24 develop a definition of the term "CAPCO territory" and
25 also whether the CAPCO agreement defines CAPCO territory.

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I know you haven't had a chance to put the CAPCO agreements into evidence yet. Let's be thinking of that.

We will see everyone at 9:30 next Tuesday morning and the witness will be Mr. Pandy.

(Whereupon, at 4:40 p.m., the hearing was adjourned, to reconvene at 9:30 a.m., Tuesday, 13 January 1975.)