

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 & 2)

Place - Silver Spring, Maryland

Date - Monday, April 5, 1976

Pages 8069- 8135



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of: : Docket No. :
 : 50-344A :
TOLEDO EDISON COMPANY and : 50-500A :
CLEVELAND ELECTRIC ILLUMINATING CO. : 50-501A :
 : :
(Davis-Besse Nuclear Power Station : 50-110A :
Units 1, 2 and 3) : 50-111 :
 : :
 : :
and : :
 : :
CLEVELAND ELECTRIC ILLUMINATING CO. : :
et al. : :
 : :
(Parry Nuclear Power Plant : :
Units 1 and 2) : :
 : :

Fifth Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland

Monday, 5 April 1976

The hearing in the above-captioned matter was
reconvened, pursuant to adjournment, at 9:30 A. M.,

BEFORE:

- MR. DOUGLAS RIGLER, Chairman
- MR. JOHN FRISEAN, Member (Absent.)
- MR. IVAN SMITH, Member

APPEARANCES:

(As heretofore noted.)

C O N T E N T S

1	<u>Exhibits</u>	<u>For Identification</u>	<u>In Evidence</u>
bw	DJ -607 (Additional Red-Lining)	8121	8121
4	DJ-190		8122

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MELTZER/mm¹P R O C E E D I N G S

2 CHAIRMAN RICLER: I think we will start out
3 this morning with your comments on the Applicants 105 Motion,
4 Mr. Goldberg.

5 MR. GOLDBERG: The NRC Staff would like to ask the
6 Board's patience while it discusses a number of things which
7 we believe are important for the Board's consideration in
8 ruling on the Applicants Rule 105 Motion.

9 The Administrative Procedure Act in the
10 Commission's Rules of Practice, as well as case law from
11 the Supreme Court on down makes it clear that the strict
12 rules of evidence do not apply to Administrative Proceedings.

13 Consequently, Rule 105 should not be
14 accorded the same weight, nor applied with the same strictly
15 as would be done in the federal courts.

16 Rule 105 and the Advisory Committee notes on 105,
17 make it clear that the main purpose of the Rule is with
18 respect to trials heard by a jury. The concern is with a jury
19 misusing evidence which has been introduced into the record.

20 We surely recognize that this Board sits as a
21 trier -- as a finder of fact. But this Board is clearly more
22 capable of properly using the evidence than would be a jury
23 without very explicit instructions.

24 The Staff would like to make clear to Applicants
25 once again that we are not in court attempting to prove

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1 that Applicants have violated Section 1 or Section 2 of the
2 Sherman Act. We are not conducting a criminal proceeding
3 of any type here, rather we are before a Federal Administrative
4 Agency conducting a prelicensing antitrust review and
5 attempting to prove only that Applicants activities under
6 the license will create or maintain a situation inconsistent
7 with the antitrust laws or the policies underlying those laws.
8 as we noted many times before, for example in our trial
9 briefs, and as we note once again now.

10 The Staff need not prove a violation of anything,
11 only an inconsistency with the antitrust laws and the policies
12 underlined in those laws. The legislative history makes it
13 clear that Congress considered both violations and
14 inconsistencies as the standard, and specifically chose a
15 standard of inconsistency.

16 The Atomic Energy Act in its legislative history
17 explicitly states that the Federal Trade Commission Act
18 is one of the antitrust laws for purposes of the Atomic Energy
19 Act. It necessarily follows that Section 5 of the FTC Act
20 and the policy underlying Section 5, sets a proper standard
21 of conduct against which Applicants conduct and position in
22 the market should be measured.

23 The same standard of reasonable probability
24 required under Section 7 of the Clayton Act should be
25 applied to determine whether the activities under the license

mm3

1 would create or maintain the situation inconsistent with the
2 antitrust laws.

3 The Staff stated and discussed this position
4 thoroughly in its trial brief dated November 10, 1975. We
5 advise Applicants once again today that we -- of our
6 position, and we will state our position once again in our
7 proposed findings of facts and conclusions of law in post-
8 trial briefs.

9 As the Staff noted in its December 3, 1975 answer
10 of the NKC Staff to Applicants' statement of procedural
11 matters to be considered, the Staff has not charged Applicants
12 with a conspiracy.

13 Neither has the Board so characterized any of
14 Staff's allegations.

15 CHAIRMAN RIGLER: ^{But you} ~~They~~ have approved the conspiracy.
16 Perhaps you haven't charged it, but perhaps you proved more
17 than you charged. [?]

18 MR. GOLDBERG: That is a possibility and our posi-
19 tion is that the Board should be in a position to make all
20 reasonable inferences from the evidence which has been
21 introduced. As I will discuss shortly, this necessarily
22 requires denying Applicants' rule and applied motion.

23 MR. SMITH: What is your answer to the Chairman's
24 question?

25 MR. GOLDBERG: The Staff has maintained and has

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1 proven that there has been joint action by the Applicants.
2 We have introduced evidence against CAPCO as a whole, we have
3 shown, have alleged and shown that Applicants individually
4 and as a group dominate the relevant markets, that Applicants
5 individually and as a group have controlled access to
6 essential resources and have denied access to those essential
7 resources.

8 So our case is basically, in addition to being
9 against each Applicant individually, against the Applicants
10 as a group, their policies, their activities, their position
11 in the market, their dominance and abuse thereof.

12 MR. SMITH: The answer then is no?

13 MR. GOLDBERG: I think that we should not be in
14 a position to eliminate that possibility by merely stating
15 so now.

16 I think that --

17 CHAIRMAN RIGLER: Well what better time than
18 at the end of your complete case?

19 MR. GOLDBERG: I think that the evidence can be --
20 that there is an inference of conspiracy that one could
21 draw from the evidence, and I think the Board is entitled to
22 do that if it so chooses.

23 That has not been the main focus of our case,
24 However, I don't think it would be improper to make a
25 finding of such.

mun5

1 MR. SMITH: Would you urge that finding upon us?
2 We are not going to let you avoid this.

3 MR. GOLDBERG: We would characterize the case as
4 one of joint action, or action in concert as opposed to a
5 specific agreement which constitutes conspiracy.

6 As the case law shows, and as I will discuss
7 shortly, an agreement, a specific agreement need not be
8 proven in order to establish a conspiracy.

9 CHAIRMAN RIGLER: We understand that. That is not
10 the basic question.

11 MR. SMITH: We are able to distinguish between what
12 you are required to prove and what you claim you have proved
13 and they are not necessarily equal.

14 MR. GOLDBERG: The direct answer then to your
15 question is no, we have not proven what has traditionally
16 been called a conspiracy with the traditional definition of
17 getting together and agreeing and conspiring to do something
18 illegal.

19 We have not alleged conspiracy.

20 CHAIRMAN RIGLER: We understand you haven't
21 alleged it. We have been around that track twice now.

22 Mr Smith's question and my question was, have
23 you proved more than you have alleged. If it takes a
24 certain quantum of evidence to support your allegations and
25 you are putting more than enough evidence so that we can justify

mm6

1 even further conclusions with respect to antitrust violations,
2 or have you fallen short and are you at the part where you
3 said you would be with your allegations?

4 MR. GOLDBERG: The only thing I can say is that
5 we certainly have proven everything we have alleged, and we
6 may have proven more. And that is really the best I can say
7 now.

8 The Staff in its September 5th pleading, nature
9 of the case presented by the NRC Staff set forth clearly and
10 specifically the legal and factual arguments planned to be
11 made by the Staff with respect to individual and group
12 action.

13 In this regard the Staff would like to advise
14 Applicants once again what we have stated numerous times
15 before.

16 CHAIRMAN RIGLER: That is not necessary. Just
17 tell us what group actions you established.

18 MR. GOLDBERG: That is what I am about to do,
19 Mr. Chairman.

20 CHAIRMAN RIGLER: All right.

21 MR. GOLDBERG: Applicants have jointly applied for
22 licenses to construct and operate the Davis-Besse nuclear
23 power plants. This alone makes Applicants as a group the
24 natural ^{entity} ~~entity~~ to examine for the purposes of determining
25 whether or not the activities under the license would create

am7

1 or maintain a situation inconsistent with the antitrust laws.

2 The Staff case is directed at the issues in
3 matters in controversy which were set forth by the Board in
4 Prehearing Conference Order No. 2 on July 23th, 1974.

5 Broad issue A concerns the structure of the
6 relevant market or markets and Applicants' ability --

7 "Acting individually together, or together
8 with others --"

9 -- to hinder or prevent others from certain achievements.

10 Broad issue B states:

11 "If the answer to broad issue A is yes, has
12 Applicants' ability been used, is it being used, or
13 might it be used to create or maintain a situation
14 inconsistent with the antitrust laws or the policies
15 underlying those laws."

16 The Matters in Controversy all relate to issues
17 A and B and thus all relate to Applicants as a group as
18 well as individual.

19 Matter in Controversy No. 10 concerns Applicants
20 policies with respect to access to nuclear facilities, with
21 respect to their granting access to those nuclear facilities
22 to others.

23 Thus this group of Applicants is the natural
24 ^{entity} ~~enemy~~ against which all of the evidence in this proceeding
25 should be considered relevant.

mm8, The Board's Memorandum and Order with respect
2 to Applicants' request for certain procedural rulings fully
3 supports this position. For example, on page 7 of the
4 Board's Order, the Board stated:

5 "Here we have both an allegation that the
6 CAPCO agreement as fashioned and implemented
7 constituted an express agreement in restraint of
8 trade coupled with an assertion that Applicants
9 parallel courses of action with respect to
10 refusals to wheel or to permit coordinated operation
11 or development except with each other, resulted in
12 restraint of trade in combinations to monopolize
13 within the CAPCO area."

14 The Board further stated on page 9 of its order:

15 "The issues in controversy set forth so
16 early in this proceeding clearly contemplate
17 situations inconsistent with the antitrust laws
18 resulting from monopolization in combinations of
19 conspiracies to monopolize in the relevant market
20 is postulated to be the combined CCCT territories."

21 CHAIRMAN RIGLER: Yes, we know what we said.

22 The question is, at the time we wrote that we
23 were repeating our understanding of the allegations made.

24 What we wanted to ask today is, what evidence
25 supports those allegations?

mm9 1

MR. GOLDBERG: I will discuss the evidence which
2 supports those allegations now, if you wish me to do it
3 right now.

4

CHAIRMAN RIGLER: Yes, please.

5

MR. GOLDBERG: I think, however, that the past
6 ruling of the Board should be kept in mind when ruling on
7 this motion.

8

CHAIRMAN RIGLER: We have it in mind, Mr. Goldberg.
9 That is why we want now to relate the evidence to the
10 allegations.

11

MR. GOLDBERG: I would like then to discuss a
12 few examples of things that the evidence, we believe, has
13 proven in this proceeding, and I would like to discuss these
14 not by way of limitation at all, but only as examples.

15

The Board, now that all the evidence of the
16 Staff, the Department of Justice and the City of Cleveland
17 is in, should be able to draw reasonable inferences from this
18 evidence.

19

For example, this proceeding concerns applications
20 for five major nuclear facilities constituting approximately
21 5000 megawatts for nuclear baseload capacity.

22

The Board can now take notice of the fact that
23 there are no participants in those unuclear units other
24 than the CAPCO members.

25

This is clearly inconsistent with the policy of

mm10

1 the United States and the purpose of the Atomic Energy Act
2 as set forth in Sections 1-B and 3-D of the Act.

3 The Board now knows that Painesville, Pitzairn,
4 Cleveland and the Wholesale Consumers of Ohio Edison requested
5 access to these facilities, and were in effect denied access.

6 What does that tell us about the Applicants'
7 policies as a group with respect to non-CAPCO participation in
8 those nuclear units.

9 It is the Staff's position that the Board must
10 permit itself to be in a position to draw reasonable inferences
11 from the evidence and should not tie its own hands in such a
12 way as to omit the inferences which the Board can draw from
13 the evidence.

14 As another example, and again not by way of
15 limitation, but only as an example, the evidence in the record
16 clearly establishes that CEI has refused to wheel for
17 Cleveland; that Toledo Edison has refused to wheel for
18 Bowling Green; that Ohio Edison was reluctant to interconnect
19 with Orrville; and Ohio Edison refused to wheel for Orrville;
20 that Ohio Edison has refused to discuss wheeling; and Ohio
21 Edison has in effect refused to wheel to each of the Wholesale
22 Consumers of Ohio Edison; that Ohio Edison directed the
23 Wholesale Consumers of Ohio Edison to delete the subject of
24 wheeling from the elements of a study of alternative sources
25 of bulk power supply.

mm11

1 What reasonable inferences can be drawn from this
2 evidence?

3 CHAIRMAN RIGLER: What conclusions should we
4 draw from that evidence?

5 MR. GOLDBERG: You should conclude that this is
6 the policy of CAPCO as a group.

7 CHAIRMAN RIGLER: What is the policy of CAPCO
8 as a group?

9 MR. GOLDBERG: Refusals to wheel as this example
10 relates.

11 Similarly, with respect to access to nuclear in
12 my prior example.

13 CHAIRMAN RIGLER: You are saying that the evidence
14 establishes a collective refusal to wheel, which is exercised
15 by individual CAPCO members pursuant to some joint prior
16 understanding?

17 MR. GOLDBERG: Yes.

18 As another example, Mr. McCabe of Pitcairn
19 contacted by separate letter, each of the five CAPCO company
20 presidents, and requested membership in CAPCO.

21 Each company denied the request in nearly
22 identical language and jointly arrived at a consensus.

23 Once again the Board should be able to draw a
24 reasonable inferences from this evidence about the policies
25 of CAPCO as a group.

mm12

1 CHAIRMAN RIGLER: Well the Board can draw inferences
2 from the evidence.

3 The question is what conclusions does the Staff
4 urge us to draw from the evidence.

5 MR. GOLDBERG: This evidence establishes a clear
6 group boycott. And these examples, I think, require the
7 Board to deny Applicants' Rule 105 Motion so that it can
8 draw those reasonable inferences from this evidence.

9 Now, I think there is some relevant Supreme
10 Court Case Law --

11 CHAIRMAN RIGLER: Well let's keep going with the
12 examples, first.

13 MR. GOLDBERG: Well those are the only three
14 examples I intended to point out now.

15 I could give another example of the reserve --
16 the policies with respect to reserve requirements. I think
17 the evidence shows that that reserve formula of C&CO is
18 inherently discriminatory against small systems. And it
19 was specifically designed that way.

20 CHAIRMAN RIGLER: All right.

21 Now when did Applicants conceive or put into
22 effect these joint policies?

23 MR. GOLDBERG: Because of my discussion so far
24 and the few Supreme Court Cases I would like to briefly
25 discuss, I don't believe it is necessary for us to specify a

mm13

1 date. I think the law makes it clear that we cannot
2 specify -- cannot always specify a date as to when even a
3 conspiracy began. The law doesn't require it and I don't
4 think we should have to be put in a position now to specify
5 a date when we believe this all began.

6 If you do want us to specify a date, however,
7 even though we don't believe it is necessary for the purpose
8 of ruling on the 105 Motion because we think it should be
9 denied in its entirety, I would say only that the CAPCO
10 as a group, as of the date it was planned and as of the date
11 it began operating, including its implementation of the
12 discriminatory reserve formula and other CAPCO policies,
13 clearly constitutes a situation inconsistent with the
14 antitrust laws or the policies underlying those laws.

15 CHAIRMAN RIGLER: Is that because it was a
16 policy of CAPCO right from the formation to deny wheeling
17 and to deny membership in CAPCO to smaller entities in the
18 area?

19 MR. GOLDBERG: I think that from the very
20 beginning it was structured that way and that is the furthest
21 date back we believe that these activities began or that we
22 would care to allege that these activities began.

23 It was from that point on that Applicants'
24 activities have to be looked at very carefully. And when
25 all the evidence is in against the Applicants is in as it is

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1 now, I think the conclusion is clear.

2 CHAIRMAN RIGLER: What are we to do with the
3 allegations relating to price-fixing by CBI back in 1962 in
4 connection with working out some arrangement with MELP?

5 MR. GOLDBERG: Well that is not one of our allegations,
6 and I am not saying that this is all-inclusive for all parties
7 in this proceeding. For the purpose of Staff's case it
8 goes back that far.

9 Now this Board has set September 1st, 1965, I
10 believe, as a cutoff date. In order to be consistent
11 with that we would, if we had to specify a date, simply
12 then say September 1st, 1965. From that date on the evidence
13 is clear as to CAPCO as a group.

14 I would like to very briefly point out a few
15 Supreme Court Cases which I think requires denying Applicants'
16 motion in this proceeding.

17 In Interstate Circuit, Inc. v U.S. 306 US208,
18 page 227, 1939 case, the Supreme Court said, and I quote:

19 "It is elementary that an unlawful
20 conspiracy may be and often is formed without
21 simultaneous action or agreement on the part of
22 conspirators."

23 In United States v Masonite Corporation --

24 CHAIRMAN RIGLER: Wait a minute.

25 That is ^{causing} ~~having~~ trouble with your earlier position.

mm15

1 Did CAPCO, applying the Rule of Interstate Circuit,
2 contribute -- find that CAPCO conspired to eliminate smaller
3 systems by denying them access to bulk power supplies?

4 MR. GOLDBERG: Well, the point was -- I think
5 the point to be considered with respect to Interstate Circuit,
6 is that even where we had a conspiracy, and as I have answered
7 your questions before, we don't have a conspiracy case --
8 even when you have a conspiracy it is not necessary to sit
9 down and prove exactly when the contract or when the
10 conspiracy began. That you don't need simultaneous action,
11 that it is a lot more complicated than that. It is just not
12 as simple as saying what date did we conspire.

13 And that is the point, I think, to be drawn from
14 that even when you have a conspiracy case.

15 In United States v. Masonite Corporation, 316
16 US265 pages 274 to 275, 1942 case, the Court said -- the
17 Supreme Court said:

18 "But for Masonite's patents and the del
19 credere agency agreements there can be no doubt that
20 this is a price-fixing combination which is illegal
21 per se under the Sherman Act."

22 That is true, though the District Court found
23 that in negotiating and entering into the first
24 agreements each appellee, other than Masonite acted
25 independently of the others, negotiated only with

1 mn16, Masonite, desired the agreement regardless of the
2 action that might be taken by any of the others, did
3 not require as a condition of its acceptance that
4 Masonite make such an agreement with any of the
5 others and had no discussions with any of the
6 others. It is not clear at what precise point of time
7 each appellee became aware of the fact that its
8 contract was not an isolated transaction, but part
9 of a larger transaction."

10 In American Tobacco Company v the United States,
11 328 US781 at pages 809-10, 1946, the Supreme Court said:

12 "No formal agreement is necessary to
13 constitute an unlawful conspiracy...The essential
14 combination or conspiracy in violation of the Sherman
15 Act may be found in a course of dealings or other
16 circumstances as well as in any exchange of words."

17 CHAIRMAN RIGLER: And what we have been asking you
18 to do all morning is identify the course of dealings.

19 MR. GOLDBERG: I have given several examples of
20 that.

21 CHAIRMAN RIGLER: All right.

22 MR. GOLDBERG: Theatre Enterprises, Inc. v Paramount
23 Film Distributor Corporation, 346 US537,540 to 541, 1954.

24 The Supreme Court said:

25 "Business behavior is admissible circumstantial

mm17 1 evidence from which the factfinder may infer agreement."

2 Based on what I have stated here today and based
3 on the Supreme Court Law, I think the Applicants' Rule 105
4 motion should be denied in its entirety and that Staff should
5 not have to specify a date or further specify which companies
6 our evidence is introduced against.

7 CHAIRMAN RIGLER: Justice?

8 MR. CHARNO: At the outset, the Department would
9 like to adopt certain of the Staff's positions to save
10 time.

11 First that Rule 105 is a jury rule, we agree fully
12 with that.

13 Further their argument concerning the standards
14 inconsistency under 105 C were completely in accord with
15 our position.

16 We would like to adopt their Summary Statements
17 of Evidence and their citations of case law concerning the
18 requirement for specificity with respect to the date of
19 inception of a conspiracy.

20 CHAIRMAN RIGLER: What was that?

21 Don't adopt it. Tell me what Justice's position
22 is with respect to it.

23 MR. CHARNO: That the Department is not required
24 to prove the exact date of inception of the conspiracy,
25 would be the Department's position.

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CHAIRMAN RIGLER: All right.

2

Let us assume that that is correct.

3

4

5

What would be the date, the earliest date at which the Department contends the record finally demonstrates unlawful --

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7

MR. CHARNO: I will attempt to set forth the Department's position on each of the conspiracies.

8

9

10

The Department is in a position, we believe, of having proved more than we initially alleged in our September 5, filing.

11

12

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14

Examination of the record indicates that the degree and extent of joint action was more comprehensive than we initially believed at the time we filed our pleading on September 5.

15

16

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18

19

We would note first -- ask the Board to conclude that the evidence demonstrates that the members of CAPCO entered into a conspiracy to eliminate competition by denying the benefits of coordinated operation and edevelopment to other entities located within the CCEF.

20

21

22

23

24

25

The earliest date at which we can identify such a conspiracy appears in DJ-568, pages 26 through 28, where Mr. Lindseth, former Chief Executive of Cleveland Electric Illuminating Company, stated that during the negotiation of the CAPCO agreement there was discussion of the exclusion of municipal systems from the then contemplated CAPCO agreement.

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1 and that this took place sometime prior to 1967 when he left
2 Cleveland Electric Illuminating Company.

3 We are unable to supply the beginning date of
4 the conspiracy with greater specificity than that.

5 The next document, or the first document of which
6 we are aware, which makes reference to the conspiracy was
7 one dated in February of '67 which was Exhibit C-26 which was
8 rejected by the Board.

9 We would take exception, since we were not the
10 introducing party, to that rejection.

11 CHAIRMAN RIGLER: What was the document?

12 MR. CHARNO: That was a document which indicated
13 that municipalities might challenge an application to construct
14 800-megawatt generating units, and I believe it was excluded --
15 I wasn't here at the time -- on the basis of the fact that that
16 that referred to an application prior to the time the 105-C in
17 its present time was passed.

18 I would feel it would be immaterial whether 105-C
19 existed with respect to the presence of a conspiracy or the
20 desire to exclude municipals from the conspiracy.

21 We believe that there is evidence prior to the
22 execution of the CAPCO agreement; specifically documents 346,
23 DJ-278, C-48, DJ-279 which indicate that the agreement,
24 Memorandum of Understanding, was designed as a step in the
25 effectuation of conspiracy to eliminate competition by denying

mm20

1 benefits of coordinated operation.

2 We are faced with the situation where the same
3 conduct is violative of a number of provisions of the antitrust
4 laws. We believe it does constitute conspiracy in violation
5 of Section 1. It also constitutes an agreement and a
6 combination in violation of Section 1.

7 CHAIRMAN RIGLER: When you say an agreement, are
8 you referring to the CAPCO agreement, or are you referring
9 to an agreement in the general course of dealing and
10 understanding from CAPCO?

11 MR. CHARNO: Specifically to the CAPCO
12 agreement.

13 It further constitutes bottleneck monopolization
14 by the members of CAPCO and a concerted refusal to deal in
15 violation of Section 1. So that the conduct that has been
16 proven, while it definitely supports the allegations
17 initially made by the Department in our September 5 filing,
18 also supports charges of violation of other provisions of
19 the antitrust clause.

20 CHAIRMAN RIGLER: I notice you mention
21 Section 1. Do you make any contentions with respect to
22 Section 2 and any combinations to monopolize?

23 MR. CHARNO: The bottleneck monopolization which
24 the Department charges would be a shared monopoly as
25 bottleneck monopolizations often are.

mm21

1 The Department would further ask the Board to
2 conclude from the evidence of record, that the Buckeye
3 agreements, in addition to being agreements in combinations
4 violative of Section 1 of the Sherman Act, are also a conspiracy
5 in violation of Section 1 of the Sherman Act. And we
6 would argue on the basis of DJ-80 and DJ-577, cases 40 and
7 41, that this conspiracy was first conceived -- pardon me,
8 was first conceived in 1962 and --

9 CHAIRMAN RIGLER: Which of the CAPCO companies
10 were parties to the Buckeye agreement?

11 MR. CHARNO: This would be Ohio -- Buckeye agreements
12 would be Ohio Edison and Toledo Edison.

13 CHAIRMAN RIGLER: And you are contending that not
14 only is there a conspiracy between those companies and
15 Buckeye, but between each other as well? A horizontal
16 conspiracy among CAPCO members?

17 MR. CHARNO: That is correct.

18 Further evidence again relating to the formation
19 of the conspiracy was contained in DJ-360 and 480, which
20 were rejected by the Board.

21 MR. REYNOLDS: May I interrupt just to get the
22 answer to your question about horizontal conspiracy?

23 Could you just give it to me again? I am not
24 sure I caught what the answer was.

25 CHAIRMAN RIGLER: My question was: Do you charge

mm22 1 with respect to the Buckeye agreement, a horizontal conspiracy
2 among CAPCO members, and you answered --

3 MR.CHARNO: Yes, with respect to the two ^{named} main
4 CAPCO members.

5 In addition to the conduct which is directly
6 susceptible to categorization as a conspiracy, the Department
7 is also alleging that each of the CAPCO companies individually
8 has engaged in conduct inconsistent with the antitrust laws
9 including bottleneck monopolization within their territories
10 and a number of violations of Section 1 of the Sherman Act
11 and the Federal Trade Commission Act.

12 CHAIRMAN RIGLER: Well are you charging that
13 in addition there they combined to strengthen the individual
14 monopolies within each of their territories?

15 MR.CHARNO: Yes, sir.

16 The joint monopolization, the joint course of
17 conduct which is capable or susceptible characterization in
18 a number of different ways, the concerted action in which
19 the Applicants engaged, had the effect of perpetuating their
20 individual monopolies. And since the purpose of that joint
21 action was the suppression of competition, it is identical
22 with the purpose of their individual course of conduct
23 prior to entering into joint action.

24 The joint action simply extends over a wider
25 area those policies and practices which had been maintained

mm23

1 within the individual CAPCO company service areas prior to
2 initiation of joint action.

3 So basically the Department would ask on the
4 basis of the record at this point, that the Board draw the
5 conclusion that there is conspiracy in the two instances
6 that I have just outlined in argument.

7 CHAIRMAN RIGLER: And in addition to conspiracy
8 you have also charged combinations in restraint of trade
9 agreements, and restraint of trade concerted refusals to
10 deal?

11 MR. CHARNO: Monopolization bottleneck,
12 monopolization violations of the Federal Trade Commission
13 Act.

14 CHAIRMAN RIGLER: And you relate those back to
15 the formation of the CAPCO group as the formation period.

16 MR. CHARNO: Well to the period prior to the
17 execution of agreement. I am not sure what formation
18 means. If it means the execution of agreement, no we are
19 before that.

20 CHAIRMAN RIGLER: A minute ago I asked
21 Mr. Goldberg how the parties were asking the Board to treat
22 the allegations with respect to price-fixing by CEI in
23 its dealings with MELP 1961 and 1962.

24 MR. CHARNO: We would argue that that was an
25 attempt to establish a violation -- an agreement violative

mm24 1 of Section 1 of the Sherman Act and that it was a practice
2 in support and furthering of monopolization in both the
3 wholesale and retail markets as we have defined them in this
4 proceeding.

5 MR. SMITH: Do the CAPCC arrangements enhance
6 Cleveland's capacity to engage in that type of activity within
7 its own service area?

8 MR. CHARNO: Sir, when you say Cleveland, do you
9 mean Cleveland Electric Illuminating Company?

10 MR. SMITH: CEI, yes.

11 MR. CHARNO: Clearly so.

12 They add to and enhance monopoly power and
13 they constitute a misuse and abuse of monopoly power.

14 MR. SMITH: I may have been inattentive. Did you
15 discussed the role of the allegations of territorial allocations
16 this morning?

17 MR. CHARNO: No, I have not.

18 We would not constitute -- we would not -- the
19 territorial allocation agreements are, on their face, violations
20 of Section 1 of the Sherman Act. Again they are in furtherance
21 and in support of monopoly power in the retail and wholesale
22 markets with respect to each of the Applicants who engaged in
23 such agreements.

24 They are also a device which can be utilized to
25 effectuate the monopolization that takes place in the CCCT

run25 1 with respect to all of the members of CAPCO.

2 MR. SMITH: Would you repeat that, please?

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

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1 MR. SMITH: So there is a nexus between CAPCO
2 arrangement and the territorial allocations.

3 MR. CHARNO: The Department would at the outset that
4 these territorial allocation agreements coincide
5 chronologically with the beginning of coordinated operation
6 and development among the CAPCO members.

7 We would further note that as Dr. Wein pointed
8 out, coordination on the scale employed by the CAPCO
9 members is often accompanied by the elimination of
10 competition between the coordinating parties.

11 Clearly, the agreements are wholly consistent
12 with, and supportive of, a conspiracy to eliminate competition
13 by denying the benefits of coordinated operation and
14 development to entities within the CCCT.

15 CHAIRMAN RIGLER: City of Cleveland.

16 MR. HJELMFELT: I would like to join in adopting
17 the Staff's discussion of the role of Rule 105, the standard
18 of inconsistency and their summary of the evidence and their
19 discussion of the case law with regard to the specificity
20 of the date of the inception of the conspiracy.

21 I would also largely adopt Mr. Charno's discussion
22 of the CAPCO as a conspiracy and agree with his suggestion
23 that the date of inception was at least in the early
24 discussions as described by Mr. Lindseth. I would without
25 attempting to make an exhaustive reference to exhibits,

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add references to NRC-12, NRC-53 and 54.

CHAIRMAN RIGLER: What are they?

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1 MR. HJELMFELT: NRC 12, I believe, is the Duquesne
2 letter to Mr. McCabe, which contains a parenthetical phrase
3 on the bottom that that reply represents a consensus of the
4 attorneys for the CAPCO companies.

5 NRC 53 and 54 are a letter from Las Henry to Mr.
6 Davis, reviewing a draft of NRC 6, which was another
7 response to Mr. McCabe, and says that the draft was
8 contrary to the consensus of the CAPCO lawyers at the last meet-
9 ing.

10 Also I refer to City Exhibit 47, 49, 51, 52, and
11 54.

12 CHAIRMAN RIGLER: What is the subject matter of
13 those exhibits?

14 MR. HJELMFELT: 47 is a May 16, 1967 memo by Mr.
15 Dempler regarding the effects of adding a small system to
16 CAPCO.

17 C-49 is an August 24, 1967 document expressing
18 concern that municipals would try to join the CAPCO pool.

19 C-51 is a September 11, 1967 document which again
20 expresses the belief that municipalities should not be in
21 CAPCO.

22 C-52 is an October 22, 1967 document in which there
23 is a discussion of how the CAPCO companies are going to
24 explain to the Federal Power Commission the exclusion of
25 municipalities, public power groups from CAPCO.

1 C-54 is a November 1, 1967 document of Ohio
2 Edison discussing ways to increase the burden on a
3 municipality if it should become a member of CAPCO and
4 thus place disincentives on joining CAPCO.

5 I believe that is the issue that the Board was
6 interested in hearing from parties on.

7 CHAIRMAN RIGLER: Have you established the allegations
8 in your September 5 filing?

9 MR. HJELMFELT: I believe we have.

10 CHAIRMAN RIGLER: Have you established more than
11 those allegations or have you established what you have
12 alleged?

13 MR. HJELMFELT: I think I have certainly established
14 what I have alleged. That is that there was a conspiracy to
15 preclude municipalities from obtaining access to bulk power
16 supplies, conspiracy to exclude municipalities from CAPCO
17 and from obtaining access to economies of scale and
18 coordinated operations and development as well as bottle-
19 neck monopolization of generation and transmission.

20 I think I have also, although I don't think in
21 this discussion, probably proved the allegations with
22 respect to the acts that are more directly relevant to CEI
23 and the City.

24 CHAIRMAN RIGLER: How do you contend we should look
25 at the alleged price-fixing which CEI urged upon the City in

1 1961 and 1962? That is in terms of joint action or its
2 relation to any overall CAPCO action.

3 MR. HJELMFELT: With respect to 1962 and 1963,
4 the earlier refusals precede the evidence which shows the
5 CAPCO conspiracy. And therefore are acts of monopolization
6 and attempt to engage in price-fixing by CEI alone.

7 MR. SMITH: You see no relationship?

8 MR. HJELMFELT: Well, I see a relationship in that
9 this was the same sort of activities going on elsewhere in that
10 the idea that the Toledo Edison wanted -- had at least an
11 informal policy, desire to acquire municipalities. Duquesne
12 Light was doing the same, acquiring all municipalities
13 in an attempt to monopolize.

14 I don't think that they had gotten together
15 and discussed it together, at least on the record.

16 CHAIRMAN RIGLER: I thought you told us that
17 wasn't necessary. I thought you started out by adopting
18 Mr. Goldberg's citations and those citations told us it
19 wasn't necessary for the companies to get together and
20 discuss these common objectives.

21 MR. HJELMFELT: I agree with that.

22 I think there may need to be more than just
23 the fact that each of them were doing it. I think later
24 on they got together and had a community of interest in
25 doing it.

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That was the effect of the CAPCO conspiracy,
to continue this and to strengthen each other in this.

CHAIRMAN RIGLER: Applicants?

MR. REYNOLDS: Yes, sir.

CHAIRMAN RIGLER: Do you have any response?

MR. REYNOLDS: No.

CHAIRMAN RIGLER: Okay.

How about a report on your Friday meeting and any
further thoughts on timing?

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1 MR. REYNOLDS: Yes, sir.

2 We took a very careful look on Friday at what we
3 envision to be the parameters of the Applicants' case at
4 this particular stage.

5 And our estimates in that regard are that we would
6 contemplate being in a position to put on all of the
7 Applicants' fact cases inside of six weeks, and we would
8 at the present anticipate that the expert witnesses
9 of the Applicants would take no more than three weeks
10 as we now see it.

11 That obviously depends on the length of cross-
12 examination of those witnesses.

13 In terms of the time we were talking about for
14 the recess, I would still like to request the four weeks.
15 You indicated you didn't want a repeat of all of the
16 argument we went through before. I don't intend to do that.
17 I would only add that a good part of our discussion on
18 Friday was addressed to the matter of motions, and we
19 do intend to file a number of motions.

20 I think that we can do it fairly promptly, but
21 there then has to be an opportunity for the other sides
22 to reply, and I believe the system with the public interest
23 factor that you discussed on Thursday, Mr. Chairman, of
24 having an expedited hearing and not having it drag out,
25 that it would be in the interest of everybody for the

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1 Board to have the opportunity before we dimension our
2 to look at those motions.

3 We are very confident that those motions will
4 provide a narrowing of this proceeding.

5 CHAIRMAN RIGLER: What is the nature of the
6 motions?

7 MR. REYNOLDS: The motions are in the nature
8 of dismissal motions and some partial summary judgment
9 motions, for the most part.

10 CHAIRMAN RIGLER: So you may file a motion --
11 I won't hold you to this -- you may file a motion for
12 summary disposition with respect to the entire proceeding?

13 MR. REYNOLDS: That is correct.

14 CHAIRMAN RIGLER: When you will file additional
15 motions seeking to obtain summary disposition of limited
16 portion or limited issues?

17 MR. REYNOLDS: That is correct, addressed to
18 issues and also as to allegations which have been set forth
19 that we feel no evidence our insufficient evidence has
20 come in to sustain the allegations.

21 CHAIRMAN RIGLER: When do you anticipate you
22 would be in a position to file these motions?

23 MR. REYNOLDS: We are working on them now.
24 I hesitate to give you a date, because as you can appreciate,
25 there are a number of different people in a number of

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1 different locations working on the motions.

2 Until I can coordinate with everybody, it is
3 hard for me to predict. I have indicated to everyone
4 that these have to be filed promptly and, as soon as we can
5 get them filed, we will do that.

6 Again, when we talked we talked in terms of
7 what you had given us, as a tentative date on Thursday.

8 The only additional input that I really have to
9 what I said before is that I think that the extra week
10 we had asked for would serve a legitimate purpose in light
11 of the fact we do intend to file the motions, and the other
12 side will need opportunity to respond. And I believe it
13 would be productive for the Board to have the opportunity
14 to carefully consider the motions before we commence with
15 our affirmative case.

16 CHAIRMAN RIGLER: Did I understand that with
17 respect to the fact case, probably the firms representing
18 individual applicants will conduct the bulk of the examination?

19 MR. REYNOLDS: That is correct.

20 CHAIRMAN RIGLER: Let's take ten minutes,
21 ^{we} and I can talk.

22 MR. CHARNO: Before we adjourn, I would like
23 to reply briefly to Counsel's remarks.

24 I think we are going to be faced with a
25 situation when these motions are made that the Department

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1 is going to seek an opportunity to fully reply to those
2 motions.

3 Until we see them, it is impossible to determine
4 how much time that reply will take.

5 But we would oppose a schedule that began the
6 Applicants' case at such a point that we did not have an
7 ample opportunity, sufficient opportunity to reply to the
8 motions prior to the time they began their case.

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24 1 CHAIRMAN RIGLER: I thought on Friday you were
21 2 among the parties urging that we require the Applicants
3 to proceed forthwith.

4 MR. CHARNO: That is not correct. The Department
5 took no position whatsoever. We certainly are not in favor
6 of any delay of this proceeding. But with that sole limita-
7 tion we have not opposed the Applicant's request at all.

8 MR. HJELMFELT: I would like to join in Mr.
9 Charno's remarks. I would be very hard-pressed if we got
10 these motions and immediately went to trial before we had any
11 time to start preparing responses.

12 MR. LESSY: Don't both of those comments tell us
13 what we have to do is get the motions in as soon as possible?
14 We shouldn't take a 2-1/2 week break and file the motions
15 two days prior to hearing. Then the other parties need time
16 to respond to the motions.

17 CHAIRMAN RIGLER: Why?

18 MR. LESSY: You may have to.

19 CHAIRMAN RIGLER: We won't necessarily delay
20 the resumption of the hearing pending resolution of the
21 motions.

22 What if the motions were filed on the eve of
23 resumption?

24 MR. LESSY: But I think the fairest way to do it
25 is get the motions in as soon as possible. I would like to

1 see that.

2 CHAIRMAN RIGLER: All right, we will take 10
3 minutes.

4 (Recess.)

5 CHAIRMAN RIGLER: Mr. Smith and I have had an
6 opportunity to confer and the motion under Rule 105 of
7 the Federal Rules of Evidence to limit the admissibility
8 of evidence is denied.

9 With respect to a hearing date, we would like
10 everyone to come back on the 21st of April, please.

11 MR. REYNOLDS: Could I ask a question on your
12 first ruling?

13 CHAIRMAN RIGLER: Yes.

14 MR. REYNOLDS: Could you give me any indication
15 as to whether it is denied as to a certain date or certain
16 time period so we might have some ^{feel} ~~feel~~ as to whether your
17 denial goes to all of the evidence that has been introduced
18 in the case from 1962 forward, or whether there is a cut-
19 off period?

20 CHAIRMAN RIGLER: There is no cut-off period.

21 However, it is the Board's observation that
22 little evidence for dates prior to 1965-66 has come in.
23 It has been discussed very thoroughly when it has come in
24 because we have had argument on good-cause showing with
25 respect to going behind our September 1, 1965 discovery date.

1 MR. REYNOLDS: But it comes on against all
2 Applicants under the Board's ruling.

3 CHAIRMAN RIGLER: Yes.

4 MR. GOLDBERG: Mr. Chairman, I have two other
5 matters.

6 We are assuming that the 10-day rule for the
7 designation of witnesses and the 24-hour rule for the distribu-
8 tion of exhibits will apply to Applicant's case; is that
9 correct?

10 CHAIRMAN RIGLER: That's correct.

11 MR. GOLDBERG: The other matter is that on
12 September 5, 1975, all of the parties except
13 Applicants were required to file nature of the case that they
14 would be presenting, pleadings.

15 This was relief which was not called for in
16 the Rules of Evidence, nor required by law. It is now for
17 the first time that all of the evidence against Applicants
18 is in under the direct case of the Staff, the Department of
19 Justice, and the City of Cleveland.

20 We think it is appropriate at this time to request
21 that Applicants file a nature of the defense to be presented
22 by them.

23 CHAIRMAN RIGLER: Didn't they file a prehearing
24 brief?

25 MR. GOLDBERG: Yes. That was clearly not sufficient

1 in that as Mr. Reynolds stated on Friday, and again
2 today, now is the first time that Applicants can focus
3 their defense on all of the evidence that has been
4 introduced.

5 This is the purpose for the break, as I understand
6 it, so they can coordinate their defense and focus it on what
7 the evidence is in the record to date.

8 Therefore, I think it would be appropriate if
9 they filed within 10 days from this date a nature of the
10 defense pleading.

11 CHAIRMAN RIGLER: Do you agree to that, Mr. Reynolds?

12 MR. REYNOLDS: No, sir.

13 CHAIRMAN RIGLER: Do you want to comment?

14 MR. CHARGO: Before the Applicant's comment.

15 the Department would support that unless, of course, the
16 Applicants state that they don't wish to raise any new
17 matters of defense that weren't raised in their fact briefs
18 and their law brief.

19 We would gather from the cross-examination that
20 has occurred that there are at least some new areas, not
21 previously mentioned on brief, and we have no idea of
22 the parameters of those areas or how many areas there are.

23 I think it would expedite these proceedings
24 substantially if we could narrow ours to the argument the
25 defendants are actually making, and we are not spread out trying

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1 to counter things they are not asserting.

2 CHAIRMAN RIGLER: We are off on the wrong foot
3 here with Staff and Justice when we speak of defense.
4 We are talking about a response.

5 Don't we start out with a presumption that
6 Applicants for license have not violated the antitrust laws?
7 Isn't there a presumption of competitive behavior with
8 respect to license applications?

9 MR. CHARNO: I think it is certainly the position
10 of the Department and I presume the Staff that a prima facie
11 refutation at the least has been made of that presumption.

12 CHAIRMAN RIGLER: Then you would ^{know} ~~notice~~ the
13 evidence that shows the violation or anticompetitive
14 situation, wouldn't you?

15 MR. CHARNO: Your logic is impeccable. I can't
16 quibble with it. But I believe we are not going to be faced
17 with a case which goes to refutations of specific allega-
18 tions.

19 I could indeed be very wrong in that the comprehensive
20 overall position designed to refute the prima facie case is not
21 going to be presented by the Applicants.

22 But at this point, I am a bit leary of attempting
23 to meet their direct case without having any indication that
24 I am wrong.

25 CHAIRMAN RIGLER: Isn't their direct case going

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1 to be an attempt to meet your charges and your evidence?

2 MR. CHARNO: As I was trying to state earlier, I
3 think there are a number of ways of doing that. Certainly
4 they have set forth some in their beginning pleadings.

5 Certain others are immediately suggested by the
6 nature of the case we have put in.

5 7 I believe there are again possibilities of
8 others coming to light, and it might expedite the hearing
9 substantially if we didn't have to chase down every specter
10 on the theory that it constituted some attack on the case
11 that is not immediately relevant in its scope and nature.

12 MR. GOLDBERG: Mr. Chairman, for any one allegation
13 which we may have proven, there may be many, many possible
14 defenses. Some of the defenses I have heard from Applicants
15 have not even been founded in law.

16 We would like to get an indication as to which of
17 the many defenses there may be to an allegation, which of
18 those they are going to rely on.

19 MR. HJELMFELT: I would like to note that the City
20 joins in the motion.

21 MR. REYNOLDS: I was prepared to make a brief
22 response, Mr. Chairman, but I don't think I can do any
23 better than you can.

24 I think your logic was also impeccable. Our
25 intent is to respond to the argument made and to answer the

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1 evidence that has been put in, and we have no intention of
2 setting up straw men in order to knock them down.

3 We will confine ourselves to the material that is of
4 record and before this Board, and we intend to respond to that
5 evidentiary matter specifically and directly.

6 We have already met and have carefully planned
7 the course that we are going to take, with it in mind that
8 this Board is interested in expediting this proceeding.

9 We want to put our case on as rapidly and concisely
10 as we possibly can.

11 I don't think at this juncture to require the
12 Applicants within the three-week period we are talking
13 about, not only to do everything that is already planned to
14 be done, but also to come in with a statement of the sort
15 that the Staff suggests is something that would be
16 productive to this proceeding or would further the course of
17 the hearing in any way.

18 In addition to which, I think it is probably
19 physically impossible to do.

20 CHAIRMAN RIGLER: The suggestion or the notion,
21 however it may be characterized, that Applicants file a state-
22 ment of the nature of the defense is denied.

23 You needn't answer this if you don't want to, Mr.
24 Reynolds, but do you have an indication now as to what
25 the sequence of events is going to be?

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1 I ask that only because we would like to start
2 out by reading that particular fact brief in more detail.

3 MR. REYNOLDS: I can give you a general idea.

4 Let me just preface that by saying that one of
5 the problems that we saw on the horizon in our meeting Friday
6 was the scheduling conflict with respect to some of the
7 local counsel or counsel for the Applicant that are going
8 to conduct the direct case for the most part, who are
9 already committed to try other cases in courts, I believe
10 in early May.

11 Because of that, there may well be a need to juggle
12 our cases somewhat to accommodate those commitments.

13 CHAIRMAN RIGLER: I appreciate that. The only
14 purpose in asking was for the convenience of the Board, as
15 we reread the fact briefs, to get them in the right sequence.

16 MR. REYNOLDS: That is why I want to preface it.

17 The sequence I give you now may have to be altered,
18 but only for that kind of contingency. Our present intent
19 is to begin with two fact witnesses who will discuss
20 generally the industry and how it operates, what the
21 technical terms are, and how the industry does in fact
22 function, including a discussion with regard to what
23 the different types of transactions are, and the pricing
24 mechanisms that the specific Applicants use as a factual
25 matter in their dealings with other entities.

1 That will then be followed by, I believe, at the
2 moment, anyway, two of the expert witnesses, and then we
3 would -- our thinking is now we would begin with the case of
4 Duquesne Light Company.

5 Following that, we would move to the Ohio Edison
6 case and that would be followed by Pennsylvania Power's
7 case.

8 Then I believe the next Applicant would be
9 Toledo Edison, and then the Cleveland Electric Illuminating
10 Company, followed by the remaining expert witnesses.

11 I would only at this juncture add that the first
12 two fact witnesses that I mentioned are witnesses which we
13 feel are important specifically in response to some comments
14 by the Board as to how certain of the aspects of the industry
15 work, and what certain of the transactions are, and what
16 they mean, and I think that it is something that really has
17 not been fully articulated and would be helpful for a
18 full understanding of the case in order to have that educational
19 process, if you will, at the front end of our case.

20 It is for that reason we have scheduled those
21 witnesses. We do not anticipate they would take more
22 than two to two and a half days for both of them.

23 I think it is important in response to various
24 questions that have been made by the Board about certain
25 specific details and aspects of the industry, both in its

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1 operation and its pricing aspects.

2 CHAIRMAN RIGLER: I would anticipate we would

3 run three days starting on the 21st.

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S6 1 MR. REYNOLDS: Starting the 21st. I would
2 anticipate they would complete those two witnesses those
3 first three days.

4 MR. LESSY: I would like to note that the questions
5 the Board had about industry operations, to my recollection,
6 were primarily directed to expert witnesses of the Staff,
7 Justice and Cleveland. I'm starting to get concerned that
8 these two witnesses who are going to go first,
9 maybe should have filed testimony in advance, if they are,
10 in fact, going to discuss things other than events.

11 MR. CHARNO: The Department would like to
12 reserve the opportunity to lodge objections, as appropriate,
13 to any attempt to introduce expert testimony under the
14 guise of fact testimony.

15 CHAIRMAN RIGLER: That is the remedy.

16 MR. REYNOLDS: Let me, just because I think it
17 is important if we are going to thrash this out, and I'm
18 getting ready to prepare the case, make it clear
19 that, to the extent somebody is outside the industry and
20 comes to it, everybody appears to be an expert.

21 What these people will testify to are their
22 day-to-day operations as they have experiences then with
23 their particular companies on a factual basis, in an
24 effort to explain such things as one that comes to mind
25 as a question raised by the Board, what peaking power is as

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1 opposed to baseload. What is the difference as between
2 an emergency transaction and short-term transaction. It is
3 how you go about this industry effectuating transactions,
4 and what the types of transactions are. What we mean when we
5 say an interconnection, either synchronous or nonsynchronous.
6 What it means when you are wheeling power with an inertia
7 versus and interconnection. It is that kind of
8 dissertation. It is not intended to be anything more than
9 that. They do come in as fact witnesses, and I will say,
10 candidly, they were not originally contemplated, but they come
11 in because we do feel it is essential on the basis of
12 what is going on thus far to have this kind of introductory
13 presentation in the case, in order to give everybody
14 a full awareness of exactly how things do operate in
15 the industry.

16 MR. LESSY: We reserve the right to make
17 appropriate motions at the appropriate time. If it is
18 information that has become available since the filing
19 of expert testimony, we would accept written testimony
20 ten days in advance.

21 The definitions such as Mr. Reynolds has
22 described we are going into in the direct testimony of
23 Mr. Mozer.

24 MR. REYNOLDS: The Board had advised the
25 Applicants, I think, in the course of the several discussions

1 we had with respect to red-lining that because of a change
2 in the approach to red-lining, if the Applicants wished to
3 designate portions of documents that they had put in prior
4 to that change, as being red-lined portions, it should be
5 done by the close of the other parties' cases, and we have
6 undertaken to go back through what is no more than a handful
7 of documents and would like to put on the record those
8 portions that we didn't red-line that we now would like
9 to have red-lined.

10 CHAIRMAN RIGLER: All right.

11 MR. REYNOLDS: I don't think it will take
12 long, but I feel now is the time to do it.

13 MR. ZAHLER: Applicants request that Applicant
14 Exhibit 3-A(DL) be red-lined as follows: The cover page.
15 Page 1, the first full paragraph. Page 2, the second
16 and third full paragraphs. At page 7 the fifth and sixth
17 sentences of the last paragraph, beginning "Nevertheless,
18 the direct cost," and ending "the 40 to 45 cent range."

19 And the last sentence of the last paragraph,
20 beginning "Thus the total production cost,"

21 On page 10, the first and second full sentences.

22 On page 12, the subparagraphs numbered 4, 5, 6, 7
23 and on page 15, the subparagraph numbered 4.

24 With respect to Applicant 7 (OE-PP), the
25 entire document.

With respect to Applicants Exhibit 8(OE-PP), the

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1 entire document. With respect to Applicant Exhibit 9(OE-PP),
2 the entire document.

3 With respect to Applicants Exhibit 10(OE-PP), the
4 entire document.

5 With respect to Applicants Exhibit 11(OE-PP),
6 the entire document.

7 With respect to Applicants Exhibit 14(OE-PP),
8 the entire document.

9 With respect to Applicants 16(OE-PP), page 1.

10 With respect to Applicants Exhibit 18(CBI) 19,
11 20 and 21, the entire document.

12 With respect to Applicants Exhibit 22 (CBI)
13 pages 1, 2, 3, inclusive of the opinion which is the
14 entire opinion.

15 With respect to Applicants Exhibit 23(CBI), the entire
16 document.

17 With respect to Applicants Exhibit 29(OE-PP), the
18 entire document.

19 With respect to Applicants Exhibit 31(OE-PP)
20 the entire document.

21 With respect to Applicants Exhibit 34(OE-PP),
22 the entire document.

23 With respect to Applicants Exhibits 35(TE),
24 36, 38, 39, 40, 41, the entire document.

25 With respect to Applicants Exhibit 43(CBI),

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1 page 1, which is the cover letter.

2 With respect to Applicants Exhibits 45, 46,
3 47, the entire document.

4 With respect to Applicants Exhibit 71 (CEI),
5 pages 1 to 2.

6 With respect to Applicants Exhibit 78 (CEI), page
7 1.

8 With respect to Applicants Exhibit 80 (CEI), pages
9 1 to 3.

10 With respect to Applicants Exhibit 85 (CEI), page
11 1.

12 That is the end of the additional redlining
13 requested by Applicants.

14 CHAIRMAN RIGLER: Off the record.

15 (Discussion of the record.)

16 MR. CHARNO: The Department also has its red-
17 lining that it was required to file at the end of this
18 case.

19 Rather than read them into the record, we have
20 prepared lists of the additional red-lining which we would
21 pass out at this time.

22 The Department would offer the document bearing
23 the caption, additional red-lining, as Exhibit for Identification,
24 DJ-606 and would move that document into evidence at this
25 time.

1 We would ask the Board to consider the entire
2 document as being red-lined.

3 MR. REYNOLDS: I make the continuing objection.

4 CHAIRMAN RIGLER: That is overruled, and we
5 will receive Department Exhibit 607.

6 (The document referred to was
7 was marked DJ Exhibit 607
8 for identification and was
9 received in evidence.)

10 MR. CHARNO: The Department would also like
11 to request clarification. It is our assumption that the
12 expert testimony of all of the witnesses, of all of the
13 expert witnesses when received into the record would be
14 regarded as red-lined in its entirety, with the exception
15 of those portions which were struck; is that correct?

16 CHAIRMAN RIGLER: That is correct.

17 MR. CHARNO: The Department would like to pass
18 out an attachment to DJ-190 for identification, which
19 was requested by the Cleveland Electrical Illuminating
20 Company. We were including that attachment at their request.

21 We move DJ-190 into evidence as supplemented.

22 Initially, Cleveland Electrical Illuminating
23 Company had requested an entire brief be attached which
24 was forwarded with the letter which constitutes DJ-190.

25 In order to eliminate the Xeroxing problem of

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1 including the entire brief we have agreed that only the
2 Appendix to that brief need be submitted.

3 That Appendix was just distributed to all
4 parties.

5 CHAIRMAN RIGLER: Hearing no objection, we will
6 receive Department Exhibit 190 at this time.

7 (The document previously marked
8 DJ Exhibit 190 for identification
9 was received in evidence.)

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1 MR. REYNOLDS: I would like to make the continuing
2 objection with respect to Exhibit 190 as to all Applicants
3 other than CEY.

4 CHAIRMAN RIGLER: Overruled.

5 MR. CHARNO: At this point the Department would
6 like to enter into the record certain stipulations that
7 have been reached.

8 CHAIRMAN RIGLER: All right.

9 MS. URBAN: As to DJ 534, 535, and 540, we have
10 received stipulations that those maps were prepared by Ohio
11 Edison Company and that they were received by Toledo Edison
12 on or about October 1, 1965.

13 As to DJ 537 -- that they were physically
14 prepared by Ohio Edison.

15 As to DJ 537, 538, and 539, these were
16 physically prepared by Ohio Edison and were received by
17 Toledo Edison some time after October 1, 1965, and we have
18 been informed that the Applicants do not know how much after
19 1965 they were received, and they may have been received as
20 early as October 1, 1965.

21 Excuse me, that Toledo Edison does not know.

22 As to DJ 536, this document was physically
23 prepared by Toledo Edison some time after 1962.

24 CHAIRMAN RIGLER: Off the record.

25 (Discussion off the record.)

1 MR. MELVIN BERGER: The Department would like to move
2 that DJ 118, which had been previously withdrawn, be
3 received in evidence.

4 I would like to note for the record the problem
5 with DJ 118. DJ 118 is a three-page document, the first
6 page of which is a short note from Mr. Lesley Henry to John K.
7 Davis, and the second and third pages of which are draft
8 of a letter dated December 18, 1967.

9 NRC has introduced the first page as NRC 53, and the
10 second and third pages as NRC 54. The question has arisen as
11 to whether or not this three-page document is in fact one
12 document, and we would ask the Board to find that it is
13 one document for the following reasons:

14 This three-page document was produced as a three-
15 page document to us. It should be noted that the date of
16 the first page, the memo on the first page is December 19,
17 1967, and it is a cover memo.

18 It would appear to refer to the second and third
19 pages which is a letter of December 18, 1967.

20 Therefore, it is contemporaneous with the second
21 page.

22 We would also note that in the Pitcairn files
23 produced by the Toledo Edison Company, there is only one
24 other draft memorandum which appears therein and that is
25 dated March 1, 1968.

1 Therefore, it would logically appear that the
2 cover memo by Mr. Henry would have to be referring to the
3 draft of December 18, 1967.

4 In addition, the cover memo from Mr. Henry to Mr.
5 Davis refers to a meeting. It should be noted that DJ 130
6 and DJ 131 each refer to a meeting which occurred within a
7 week, week prior to the preparation of this memo, and that
8 meeting dealt with the question of Pitcairn's request for
9 CAPCO admission.

10 MR. REYNOLDS: Mr. Chairman, we were asked to
11 enter into a stipulation, Toledo Edison was asked to enter
12 into a stipulation to the effect that these documents were
13 attached as a single document.

14 That request was made not once, but I think on
15 two and maybe three occasions. Toledo Edison has no
16 problem agreeing that the attachment to the Les Henry
17 cover memo is in Toledo Edison's files, but there is reason
18 to believe that the cover memo by Les Henry was not attached
19 to the attachment.

20 It certainly doesn't, at least on a review of the
21 files of Mr. Les Henry and Mr. John Davis of Toledo Edison
22 Company, there is nothing to indicate that those materials
23 were attached.

24 I have no reason to doubt Mr. Berger's representa-
25 tion that at the time they received the documents, they were

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1 attached. I would explain to the Board, and I think Mr.
2 Berger can confirm this, that there was some considerable
3 confusion with respect to the Toledo Edison and Ohio Edison
4 documents prior to their review by the Department, after
5 those documents had arrived at the offices of Shaw, Pittman,
6 to the point where a number of documents were collated in-
7 correctly and also were sent back when they were returned
8 to the wrong company.

9 I don't know, and I'm not going to represent to
10 this Board that this document was in that category. I can't
11 state unequivocally that it was. I do know that at the
12 request of the Department on several occasions a very careful
13 effort was made, an exhaustive effort was made to determine
14 that these two documents were indeed attached or do indeed
15 go together, and we were unable to ascertain that.

16 We have no doubt at all that both documents were
17 in the files of Toledo Edison Company, but we do not have
18 any reason to believe they were attached or that the one
19 goes with the other.

20 For that reason we were unable to enter into a
21 stipulation.

22 CHAIRMAN RIGLER: Did anyone ask Mr. Henry
23 directly before he died?

24 MR. REYNOLDS: I think that -- I was going to
25 say something -- I think they had and he didn't know. I'm not

1 that confident of that.

2 Mr. Henry, the last month before -- month or
3 so before he died was away in Florida. I just better not
4 indicate to the Board or suggest to the Board that that was
5 the case.

6 I do know that they did undertake to determine
7 that these documents were indeed companion documents. They
8 were satisfied at Toledo Edison that from the review of
9 their files there is no basis of concluding that they had
10 been attached.

11 MR. LESSY: As I recollect the record, we marked
12 53 and 54 as separate documents because we had that in all
13 instances. That is the way we did it with all documents.

14 That is the way the Staff received them on
15 discovery. I think at this late stage, since it is about
16 three months since that has been received in evidence, if
17 Applicants cannot produce a different attachment to NRC 53,
18 that the overwhelming presumption is that 54 is the attach-
19 ment and I think that is apparent from the context.

20 MR. REYNOLDS: Briefly, to respond to that, the
21 reason that the NRC exhibits were numbered separately was
22 because we raised this objection at the time the Staff
23 sought to introduce them.

24 At that time we were asked to make a determination
25 and were unable to do so.

1 CHAIRMAN RIGLER: I take it from your response that
2 you are not denying that NRC 54 is the attachment to NRC 53.
3 You are saying you cannot stipulate to that as a fact
4 because you do not know it to be the case.

5 MR. REYNOLDS: I am saying I will not stipulate
6 to it and I object to them coming in as a single document
7 based on the knowledge of the company and the facts available
8 to the company after a thorough search of their files.

9 CHAIRMAN RIGLER: The company has no direct
10 knowledge that NRC 54 is not the attachment to NRC 53?

11 MR. REYNOLDS: I guess they have as good knowledge
12 as you can determine on the basis of their review of the
13 files which shows that the two were not attached. I don't
14 really know what better knowledge you could have.

15 CHAIRMAN RIGLER: How do they know they were
16 not attached?

17 MR. REYNOLDS: There is no -- in John Davis'
18 file there is no document similar to 53 which has attached
19 to it 54, if we use those numbers, NRC Staff 53 and 54.

20 In Les Henry's files there is no document which
21 has 53 and 54 attached to it, and in Toledo Edison's files
22 there is not.

23 On the other hand, there is in Toledo Edison's
24 files Document 54 and there is a copy of what is 53 in Toledo
25 Edison's files that are not attached.

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1 CHAIRMAN RIGLER: Are they in a file dealing
2 generally with Pitcairn's request for membership in CAPCO?

3 MR. REYNOLDS: Certainly 54 is. I'm not sure whether
4 53 is or not. I don't know whether Document 53 was in the same
5 file folder. I don't believe it was.

6 CHAIRMAN RIGLER: It would almost have to be, or
7 why would it have been designated for discovery purposes?

8 MR. REYNOLDS: The reason I'm being so careful is
9 that I'm not about to dispute Mr. Lessy or Mr. Berger's
10 representation that when they received these documents,
11 they were collated.

12 CHAIRMAN RIGLER: That isn't my question.

13 MR. REYNOLDS: I think there is an explanation
14 for that, that is more attainable to the fault of Shaw,
15 Pittman.

16 MR. LESSY: I dispute that directly. I went
17 to Toledo Edison's discovery in Toledo before it was sent
18 to Shaw, Pittman. My recollection was I made a copy of this
19 document there because I thought it was that important.

20 Mr. Reynolds' representation that 53 and 54 were
21 numbered separately at Applicant's request is wrong. We
22 submitted a list of exhibits long before the Applicants
23 objected, and we had numbered them separately.

24 In terms of shipping to Washington to the Central
25 Depository, the shipping itself may have caused a stapled

1 document to become unstapled. But it was produced to my
2 recollection in a stapled version.

3 MR. MELVIN BERGER: I would like to ask Mr.
4 Reynolds one question, and then note something.

5 If 54 was not attached to 53, what was attached to
6 53?

7 Secondly, it should be noted that 54 is a Duquesne
8 Light document and not an Ohio Edison document. If we
9 had an intermingling of Toledo Edison and Ohio Edison material,
10 it still wouldn't explain the finding of a Duquesne document
11 in Toledo Edison files, in the same file as 53.

12 MR. REYNOLDS: What was the first question?

13 MR. MELVIN BERGER: It was what document was
14 attached to 53. Obviously some document was attached to it
15 when it was sent.

16 MR. REYNOLDS: I don't have a response. Toledo
17 Edison is not here. I don't have a response to that ques-
18 tion.

19 Wait a minute. I have the transcript and I
20 may have misspoken. If so, I don't want to leave a mis-
21 understanding in anyone's mind.

22 I have checked the reference to the transcript
23 where Documents 53 and 54 were introduced. At that time,
24 in response to a request by the Chairman, I did in fact
25 indicate that I didn't have any objection to the fact that

1 the two documents were attached, indicating that 53, as I saw
2 it, was a cover memo to 54.

3 I think I have been advised by co-counsel of
4 Toledo Edison that I was in error on that, which is the
5 reason we have no stipulation or were unable to enter into
6 a stipulation, but Mr. Lessy is right, I did, at the time
7 he introduced it, represent that I thought the two appeared to
8 go together.

9 MR. CHARNO: If the record is clear that 53 and
10 54 were together, we will again withdraw 118.

11 MR. REYNOLDS: I'm saying it is clear from my
12 exchange with Mr. Lessy at the time he introduced it that
13 I didn't see any reason they should come in without their
14 being attached.

15 I have ascertained from Toledo Edison
16 counsel that they may not have been attached. I'm not
17 prepared to enter into a stipulation after what I have
18 been advised by local counsel.

19 I can go no further than that. I have no
20 difficulty stipulating that both documents came from and are
21 contained in the files of Toledo Edison.

22 To the extent that more than that is needed, I
23 do have a problem because I misspoke the first time the
24 two documents came in.

25 CHAIRMAN RIGLER: All right. My feeling is that

1 it is not necessary to move 118 into evidence. I think
2 the record is clear now with respect to the position of the
3 parties.

4 We could accomplish anything with 53 and 54 that
5 we could with 118 in and what finding the Board might make
6 with respect to the relationship of the two documents we will
7 have to leave to the judgment of the Board.

8 MR. CHARNO: On the basis of that ruling, we
9 will withdraw 118 permanently.

10 The Department is still waiting for a limited
11 amount of additional material from the Applicants, so we
12 will not close our case at this time.

13 The Department has nothing further at this time.

14 MR. REYNOLDS: As I understand it, there is a
15 document, Department of Justice Exhibit 40, which we had
16 posed an objection to, Ohio Edison had posed an objection to,
17 and we are willing to withdraw our objection.

18 On Department of Justice Document 98 and 104,
19 the Department asked that the Applicants enter into a
20 stipulation to the effect that the copies of those documents
21 are contained in all of the Applicant's files and we
22 are prepared to agree to that stipulation.

23 I think that takes care of everything, doesn't it?

24 CHAIRMAN RIGLER: All right, then we will admit

25 DJ 40.

1 MR. CHARNO: The Department has a problem with
2 DJ 40. The objection, as we understand it, is that the rate
3 scheduled contained in DJ 40 is meaningless without a
4 contract. I don't think that objection can be
5 withdrawn.

6 We are waiting for a contract, a stipulation that
7 there was no contract or that the contract was comparable
8 or identical with the remaining contracts.

9 We have not yet received it. We do not wish
10 to offer DJ 40 until we can come to some understanding
11 with the Applicants with respect to this document. It
12 has been outstanding for some months.

13 We have renewed our request a large number of
14 times, at least five.

15 We have yet to get a response on this particular
16 one. They have been cooperative on other ones, specifically
17 Ohio Edison's counsel has been cooperative on other ones,
18 but we have a problem on this one.

19 We will not offer DJ 40 without a definitive
20 response from Applicants.

21 CHAIRMAN RIGLER: All right.

22 MR. CHARNO: We are waiting for one page of
23 the document from Duquesne Light.

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CHAIRMAN RIGLER: Off the record.

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(Discussion off the record.)

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MR. REYNOLDS: You said you are waiting for one page from Duquesne and it is with respect to a document, as I understand, that is not in evidence.

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MR. CHARNO: The Department intends to introduce an excerpt from the 1971 Form 1 from Duquesne Light. That would be the last exhibit.

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MR. REISER: This request was just made of me today. I'm totally confused as to what is going on.

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CHAIRMAN RIGLER: Work it out during the recess. We don't want to sit here and go through this procedure.

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The record can't be closed because you haven't reached agreement on DJ-40.

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Take the opportunity when you work on that to work out the other two problems.

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MR. REYNOLDS: Can we agree the record is closed as to the other cases, but for those few problems and maybe Mr. Lewis being recalled for cross-examination?

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CHAIRMAN RIGLER: Yes.

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MR. HJESSEFELT: There is a possibility that the City will obtain some of the documents which claimed privileged.

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MR. REYNOLDS: And the privileged document

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1 question, if it turns out to be resolved differently
2 in the Court of Appeals.

3 CHAIRMAN RIGLER: We will see everyone at
4 9:30 a. m., on the 21st.

5 (Whereupon, at 12:00 p.m., the hearing was
6 adjourned, to be reconvened at 9:30 a.m., on Wednesday,
7 April 21, 1976.)

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