

NUCLEAR REGULATORY COMMISSION
Regulatory Docket File



IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING
CO.,

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

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

and

CLEVELAND ELECTRIC ILLUMINATING
CO. et al.

50-440A
50-441A

(Perry Nuclear Power Plant, Units 1

Place - and 2)

Silver Spring, Maryland

Date -

Monday, 9 February 1976

Pages

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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TOLEDO EDISON COMPANY and	:	50-346A
CLEVELAND ELECTRIC ILLUMINATING CO.	:	50-500A
	:	50-501A
(Davis-Besse Nuclear Power Station, Units 1, 2 and 3)	:	
	:	
and	:	
CLEVELAND ELECTRIC ILLUMINATING CO.	:	50-440A
<u>et al.</u>	:	50-441A
	:	
(Perry Nuclear Power Plant, Units 1 and 2)	:	
	:	
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First Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland

Monday, 9 February 1976

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

BEFORE:

Mr. Douglas Riqler, Chairman

Mr. John Frysiak, Member

Mr. Ivan Smith, Member

APPEARANCES:

As heretofore noted with the addition of:

ALAN P. BUCHMANN, Esquire, Squire, Sanders and
Dempsey, Cleveland, Ohio, on behalf of Cleveland
Electric Illuminating Company.

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C O N T E N T S

WITNESS:

DIRECT CROSS REDIRECT RECROSS

EXHIBITS:

IDENTIFICATION EVIDENCE

DJ-15 (DJ 15-302)	4080	4080
DJ-16 (DJ 15-283)	4087	
DJ-17 (DJ 15-311)	4088	4088
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DJ-19 (DJ15-312)		
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	<u>EXHIBITS:</u>	<u>IDENTIFICATION</u>	<u>EVIDENCE</u>
1			
2	DJ-32 (DJ15-325)		
3	DJ-33 (DJ15-326)		
4	DJ-34 (DJ15-327)		
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EXHIBITS:

IDENTIFICATION

EVIDENCE

- DJ-56 (DJ15-352)
- DJ-57 (DJ15-353)
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- DJ-78 (DJ30338 thru --340)
- DJ-79 (DJ300337)

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- 1 DJ-80 (DJ300258 thru 300260)
- 2
- 3 DJ-81 (DJ300415)
- 4 DJ-82 (DJ300191)
- 5 DJ-83 (DJ303068)
- 6 DJ-84 (DJ17000008 thru 17000010)
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- 8 DJ-85 (DJ17000011)
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- 23 DJ-100 (DJ302768)
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1	<u>EXHIBITS:</u>	<u>IDENTIFICATION</u>	<u>EVIDENCE</u>
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5	DJ-103 (DJ308686)		
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EXHIBITS:IDENTIFICATIONEVIDENCE

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DJ-125 (DJ302027 thru
302028)

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308727)DJ-132 (DJ307581 thru
307634)DJ-133 (DJ307675 thru
307712)DJ-134 (DJ307634 thru
307675)DJ-135 (Colorado Edison Answers
to Interrogatories by
DOJ)

DJ-136 (DJ311945)

DJ-137 (Deposition of James
E. Sullivan)DJ-138 (DJ307713 thru
307717)DJ-139 (DJ30011505,
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EXHIBITS:IDENTIFICATIONEVIDENCE

DJ-141 (DJ305928)
 DJ-142 (DJ306015)
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 DJ-145 (DJ30010 thru
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 DJ-158 (DJ30011789 thru
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EXHIBITS:IDENTIFICATIONEVIDENCE

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DJ-168 (DJ118559)

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DJ-173 (DJ115382)

DJ-174 (DJ118567, 118568)

DJ-175 (DJ118550 thru
118554)

DJ-176 (DJ118548, 118549)

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P R O C E E D I N G S

1
2 CHAIRMAN RIGLER: Are you ready to proceed,
3 Mr. Charno?

4 MR. REYNOLDS: Mr. Chairman, I would like to intro-
5 duce to the Board Mr. Allen P. Buckman, who was with Squire,
6 Sanders & Dempsey and will be representing CSI in one
7 proceeding from now on. Or, at least for a period of time.

8 One other preliminary matter I would like to
9 raise with the Board at this time, the discovery requests that
10 were served on all of the Applicants have been completed and,
11 truthfully, to the fullest extent possible according to the
12 knowledge that the Applicants had at the time.

13 Certainly that is true to my satisfaction.

14 In preparing for the Department's case during
15 this past break, and in fact only in the last several days,
16 it has come to my attention for the first time, and also to the
17 attention of those whom I coordinated the discovery with,
18 that there are some files in the company's possession which
19 could be labeled archive files or older files which had not
20 been reviewed and which it now appears contain some
21 information that would be responsive to the discovery request.

22 It is not yet clear to me how much information we
23 are talking about or the full extent of the problem. I
24 was out in Ohio the last couple of days of last week trying to
25 get all of the information I could and I am now convinced

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2 I have been in Ohio trying to get to the
3 bottom of the situation so that I can advise the Board and
4 the other parties as quickly as possible what it is.
5 I do not have all of the details in my possession. I do not
6 feel comfortable at this juncture trying to give bits and
7 pieces and putting together the whole situation until I
8 know the full score.

9 I will make a diligent effort if I can get Thursday
10 off and since Friday and Monday are open dates, to try to
11 be in a position to come in on Tuesday to advise everyone on
12 the situation.

13 MR. CHARNO: Mr. Reynolds had previously requested
14 Thursday as a free day without explaining the reasons that
15 necessitated his request.

16 So we have done some preliminary checking with our
17 witnesses. We have a serious problem in that Mr. Allen,
18 who was scheduled for Thursday is going into the hospital
19 next week and we are not sure how long he will be in, or
20 exactly what the problem will be.

21 If we can reschedule him -- we haven't been able
22 to contact him -- for Wednesday --

23 CHAIRMAN RIGLER: What would happen if we met
24 this Thursday and took next Tuesday as the additional free
25 day?

MR. CHARNO: That would be a help for the

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1 that I am going to need some time and hopefully, not much, to
2 determine the extent of the problem and the extent to
3 which discovery, responses to discovery requests have not
4 been as complete as we thought they were.

5 I would like to ask the Board, and specifically
6 Mr. Charno, if we could possibly have the day of Thursday
7 of this week, and since Friday is scheduled as an open date
8 and Monday is a holiday, I believe that if given that
9 time I would be in a position by next Tuesday to come in
10 and fully advise the Board as to the nature of this problem
11 which has just come to my attention and also to advise
12 the other parties.

13 I would not ask for the time if I did not think
14 it was essential, if I did not think by doing it this way
15 we could, perhaps, avoid what otherwise could be a delay in
16 the hearing.

17 CHAIRMAN RIGLER: How many companies have these
18 archive files that you first learned about?

19 MR. REYNOLDS: I am not sure at this juncture
20 how many companies are involved. It certainly is more than one,
21 and it could well be all of the companies. The problem -- and
22 it may be less than all of the companies.

23 This is something that came to my attention and to
24 the attention of the people who coordinated discovery with
25 me for the first time in the last several days, literally.

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1 Department substantially.

2 CHAIRMAN RIGLER: That would give you another day
3 in the consecutive string of days you say you need.

4 MR. REYNOLDS: I need the consecutive string of days
5 Thursday would be preferable for a number of reasons, which
6 go more to scheduling and meetings and talking to people
7 and so on, than the following Tuesday would be. But --

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1 CHAIRMAN RIGLER: If Justice has a problem
2 with a witness who has a date to be in the hospital, maybe
3 we will have to ask you to move that until Tuesday.

4 Let's think about that over the noon hour.

5 If you do have a witness going into the hospital,
6 I think it may be preferable to get him out of the way this
7 first week before he goes in.

8 MR. LESSY: Mr. Chairman, the Staff also has a
9 couple of matters. We have distributed and identified as
10 Modification Number 5 to the operating agreement between
11 CBI and Ohio Power, dated March 21, 1962. This would be
12 Supplement 5 to Staff Exhibit 174 which has been received
13 into evidence.

14 For completeness we ask that it be included as
15 part of Staff Document 174.

16 In addition to that --

17 CHAIRMAN RIGLER: Staff Document or Staff Exhibit?

18 MR. LESSY: Staff Exhibit 174.

19 Secondly, the Board asked that we inquire as to
20 the Chapter 4906 of the Ohio Code which was referenced in
21 Mr. Mozer's testimony and which was received into evidence,
22 which was identified as Staff Exhibit Number 206.

23 Our checking the Ohio Code indicates that it is
24 the current copy of the statute.

25 My record indicates it has been received. This

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1 was subject to our statement that it was a correct copy
2 of the statute and we have checked it.

3 In addition to that, there are a few other
4 matters, such as that, that at an appropriate time during
5 a break in the Department's case, I would take another
6 five minutes to clear up. That is all we have at this time.

7 In light of Mr. Reynold's statement that there
8 may be additional documents produced, I don't want to formally
9 rest our case in chief until we have had opportunity to look
10 at those.

11 CHAIRMAN RIGLER: That is understandable.

12 Any other preliminary matters?

13 (No response.)

14 Is the Department ready to proceed?

15 MR. CHARNO: It is, Mr. Chairman.

16 We would like to begin our case by the
17 introduction of a substantial number of unsponsored
18 documentary exhibits.

19 We would like to offer for identification as
20 Exhibit DJ-15, a document identified as FPC Number 11 with
21 DJ Number 15-302.

22 I will state initially that this first group of
23 documents is taken directly from the files of the Federal
24 Power Commission and were copied there.

25

1 MR. CHARNO: AS DJ-16 we would like to offer
2 for identification on its face as Consumer Power FPC Rate
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3 Schedule Number 12, D7 Number 15-283.

4 Let me ask at this time would it be appropriate
5 for these to identify each of the pieces of each of these
6 filings. For example, it could be Consumer's filing contains
7 different material from different dates and should we make
8 those appendices?

9 CHAIRMAN RIGLER: I note that you have kindly
10 provided the Board with notebooks in which these appear
11 to be serially indexed. Do the other parties have a
12 comparable file?

13 MR. CHARNO: We have them in the same order,
14 but not in notebooks.

15 CHAIRMAN RIGLER: Would the other parties'
16 Exhibit 16 consisting of Department of Justice Document
17 Number 15-283 contain the same number of pages in the same
18 order as they are in the Board's notebooks?

19 MR. CHARNO: Yes.

20 CHAIRMAN RIGLER: In that case I see no reason
21 to take the time of all of the parties to identify each
22 page separately.

23 MR. REYNOLDS: Let me ask at the outset to get
24 it straight what the procedure is going to be? Does
25 Mr. Charno intend to identify a number and move in en masse
a number of documents? How are we going to do it? If we

1 do that it will result in some confusion, since there may
2 be objections to some and not to others. I think we
3 ought to maybe get the procedure straight now, so we know
4 how we are operating.

5 CHAIRMAN RIGLER: All right. Why don't we
6 introduce them into evidence at the time they are identified.
7 If there is a problem with a particular document, we can
8 single it out.

9 Otherwise, we won't have to go through the routine
10 of separately discussing supplements to each document.

11 MR. REYNOLDS: Fine.

12 MR. CHARNO: In that case we would like to offer
13 into evidence DJ-15.

14 CHAIRMAN RIGLER: Hearing no objection, it will
15 be admitted.

16 MR. REYNOLDS: I make the continuing objection
17 on behalf of all of the Applicants, except the Cleveland
18 Electric Illuminating Company and Duquesne Light Company.

19 CHAIRMAN RIGLER: You are making that objection
20 on behalf of all Applicants, notwithstanding the whereas
21 clause which specifically refers to the CAPCO group and
22 mentions the other companies involved in this proceeding?

23 MR. REYNOLDS: Sure. Absolutely.

24 CHAIRMAN RIGLER: The objection is overruled,
25 and it will be received into evidence at this time.

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(The document referred to
was marked Exhibit DG-15
for identification and
was received in evidence.)

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5 MR. REYNOLDS: May I ask whether we --
6 whether this is coming in as an unsponsored document and,
7 if so, whether we could have an offer of proof as to the
8 unsponsored documents that the Department is going to
9 introduce in this fashion.

10 MR. CHARNO: Mr. Chairman --

11 CHAIRMAN RIGLER: Can you do that?

12 MR. CHARNO: Could I note that the documents do
13 have the pertinent portions identified at least with respect
14 to the first several volumes. The documents consist of
15 FPC filings which are either contracts between the Applicants
16 or between the Applicants and others, often wholesale
17 customers.

18 We could make separate offers of proof on each
19 document, and we will do so if it is felt necessary.

20 CHAIRMAN RIGLER: Do the documents contained
21 in volume one, for example, have some coverall purpose
22 with respect to the Department's case? If they are a
23 continuing series of contracts, all of which are in the
24 same vein, it seems an offer of proof with respect to each
25 one individually would needlessly use the time of the

1 Parties.

2 So, if Mr. Charno would speak to all of the
3 documents which have similar intent or purpose, that
4 would satisfy our purpose at this time.

5 MR. REYNOLDS: If he could speak to one and
6 refer back to that as an offer of proof that would work too.

7 MR. CHARNO: With respect to DD-15, this contract
8 is being introduced as evidence of the working relation-
9 ships of members of the CAPCO group with each other.

10 With respect to ---

11 CHAIRMAN RIGLER: On that, do you mean the
12 implementation of the CAPCO agreement? Would that be
13 incorporated within your offer?

14 MR. CHARNO: That would.

15 CHAIRMAN RIGLER: Or did you mean their
16 working relationship, absent and apart from the CAPCO
17 agreement?

18 MR. CHARNO: Their working relationship,
19 including the CAPCO agreement, as indicated on page 3 of
20 the exhibit.

21 MR. REYNOLDS: I don't intend to quarrel with
22 each offer of proof, but I think we ought to get it straight.

23 The document as I read it is not in effect today.
24 I'm not sure as I understood the offer of proof that
25 Mr. Charno was focusing on then.

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1 MR. CHARNO: I'm not sure that I understood the
2 nature of Counsel's objection. If we are indicating a
3 working relationship of the Applicants, certainly past
4 contractual relationships and present contractual
5 relationships are all contributing factors to that working
6 relationship.

7 We are not trying to crystallize a segment of
8 the relationship among CAPCO members in time. We are
9 looking at it basically prior to and since the formation
10 of CAPCO, and how the companies have dealt with each other
11 through that period.

12 That is the context in which the offer or proof
13 was made.

14 CHAIRMAN RIGLER: 15 is received into evidence
15 at this time.

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MR. CHARNO: We would offer DJ-16. We offer this in general support of the Department's allegation of a territorial allocation agreement between Toledo Edison and Consumers Power Company. This document going to the contractual relationship between a customer of Consumers Power and Consumers itself.

MR. REYNOLDS: Mr. Chairman if we could have a minute. We have not seen this document until this morning. We will have to take a few minutes to review it.

If you will wait a few minutes, we will respond at that point.

MR. KLEE: Mr. Chairman, Toledo Edison objects to this document on the grounds that it has no relevancy to this proceeding. It is strictly a unilateral contract between Consumers Power and one of its customers. It does not in any way involve the Toledo Edison Company. It is not a party and is not mentioned.

It, therefore, should not be introduced as an exhibit in this proceeding.

MR. CHARNO: The Department is introducing the document as circumstantial evidence in support of the allegation of the territorial agreement.

The indicated portions on the third page state that Consumers, restricts the energy that it will furnish under this contract to sales within the State of Michigan

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which would, of course, be consonant with a territorial allegation agreement between Consumers serving in Michigan, and Toledo Edison serving in Ohio, since the border between their service area is a state line between Michigan and Ohio.

CHAIRMAN RIGLER: Where does it restrict the company to sales within the State of Michigan?

MR. CHARNO: I must have misspoken.

The contract does not restrict the company to sales within the State of Michigan, but restricts the energy to be sold under the contract to "Use by the customer for the operation of all of the customer's electric distribution systems located in the State of Michigan."

So that under this contract the customer, Southeastern Michigan Rural Electric Cooperative could not utilize that energy in the State of Ohio even though it has facilities located in the State of Ohio.

CHAIRMAN RIGLER: Does it?

MR. CHARNO: Yes, it does.

Pursuant to other contracts, the two halves of this utility system are operated in isolation from each other.

CHAIRMAN RIGLER: Do you intend to connect with document or documents which would support the conclusion that there is agreement between Consumers Power and Toledo Edison which allocates territories to those respective companies?

MR. CHARNO: Yes, we do.

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We have it first because we put the FCC filings at the beginning of our exhibits.

MR. REYNOLDS: On behalf of Applicants, I want to object to this.

On the face of this document it could be that the provision he is referring to is in there because Consumers was, at that time, fighting the idea of being under FCC jurisdiction and operating only within a state, and could have absolutely no relationship or relevance whatsoever to the assertion that he is making.

I think to the extent the Department wants to introduce documents which, on their face, are relevant to that allegation, that is a different matter.

If we are coming in on an unsponsored basis with this kind of material, then I think it has to come in with a witness and we have to have opportunity to explore fully what the nature is of the document and what the real import is.

I think there are certainly different explanations for the red-marked provision equally plausible.

On this basis, it seems this a document is not one that should come in unsponsored. Mr. Zahler informed me the document itself is incomplete in that it does not contain the transmittal letter in regard to the jurisdictional reservation which would indicate more support for the statement

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that I made than for the statement Mr. Charno made. It says the filing is made subject to the jurisdictional reservation contained in the transmittal letter to the Federal Power Commission dated February 2, 1967.

To redline a paragraph and then make the kind of argument that has been made, and get it in on an unsponsored basis, is inappropriate.

If he has other documents that go to this, we can deal with them at that time. But he cannot bootstrap this in on that basis.

MR. CHARNO: This is the complete tariff filed. We are unaware of and do not have a copy of the letter referred to, but we will supply it if it is necessary to complete the exhibit.

We do not contend certainly that the only possible inference which may be drawn from the indicated language is the one that we urge the Board to draw.

But we believe the authenticity of the document is demonstrated upon its face and that it comes within the exceptions to the hearsay rule provided in the Federal Rules of Evidence, and that it should be admissible. And that Applicants' objection to it should go to the weight, or certainly is not relevant until the conclusion of our case at which point they could move to strike.

CHAIRMAN RIGLER: What we will do, Mr. Charno, is

defer receiving it into evidence at this time, subject to introduction of other documents which would support the offer of proof at which time you may renew your offer.

(The document referred to was marked DJ-16 for identification.)

MR. CHARNO: The Department would offer into evidence as Exhibit -- offer for identification as Exhibit DJ-17, a document identified as Ohio Edison Company, FPC rate schedule No. 14, which bears Department of Justice identification number DJ-15-310.

The Department offers this contract between Ohio Edison and a rural electric cooperative located within its service area in support of the course of conduct alleged in other briefs, that Ohio Edison has had restraints upon alienation included in its wholesale contracts.

end 4

MR. STEVEN BERGER: May I have a moment, Mr. Chairman.

CHAIRMAN RIGLER: Off the record.

(Discussion off the record.)

MR. STEVEN BERGER: I will need a moment, Mr. Chairman.

MR. CHARNO: In addition, all of these contractual materials were covered in the request for admissions, all of the rates schedules.

MR. STEVEN BERGER: Your Honor, Ohio Edison has no

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objection to the admission of this document.

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

CHAIRMAN RIGLER: The continuing objection is overruled and Department of Justice Exhibit 17 will be admitted into evidence.

(The document referred to was marked DJ-17 for identification and received in evidence.)

MR. CHARNO: The Department offers for identification as Exhibit DJ-18, a document bearing identification number Ohio Edison Company, FPC Rate Schedule No. 15, which bears the identification number DJ-15-311. The offer of proof on this document is identical with that for DJ-17.

MR. STEVEN BERGER: Your Honor, as to the September 5 filing by the Department of Justice, there was contained in that filing a charge, page 8, where it states, "prior to 1973, Ohio Edison enforced provisions of its wholesale power contracts with municipal systems which allocated customers in territories thereby restricting competition between itself and the municipal systems."

I haven't read the document through in its entirety, but it was my recollection there was not a September 5 charge made in regard to the earlier contracts between Ohio Edison and the cooperatives as to wholesale service that was

in existence prior to the Buckeye arrangements coming into existence.

MR. CHARNO: The cooperative contracts are no longer in effect. There is another relationship between Ohio Edison and the cooperative systems within its retail service area which is directly under attack by the Department and was one of the specific allegations.

It is within the context of not only its wholesale contracts, but the relationships within the cooperative systems within its area that we would offer this document as indicative of its overall long-term course of conduct.

MR. STEVEN BERGER: Your Honor, in light of the fact that the Buckeye arrangement superseded the wholesale relationships between Ohio Edison and the cooperatives in its area, and in light of the fact that it was not contained in the September 5 filing, I would like to have included in Mr. Charno's offer of proof, if I may request it, how it is that the existence of such provisions in contracts dating back prior to 1966 which have been superseded by new contracts with a different power supplier in some way impact upon the issues in this proceeding.

MR. CHARNO: We would be happy to furnish that as part of our offer of proof.

The Department is alleging that the contract between the cooperative systems in Ohio Edison's area and their power

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suppliers contains a restriction upon their resale of power in competition with Ohio Edison, and that that restriction is also contained in a contract to which Ohio Edison is party, under which Ohio Edison provides for the delivery of that power to the cooperatives.

The nature of that restriction, as I said, is one that prevents the cooperative systems with competing with Ohio Edison at wholesale.

We find the identical effect of a restrictive agreement in the exhibit presently being offered in that these contracts prevent the cooperative systems who, prior to 1970 were being supplied directly by Ohio Edison, from competing with Ohio Edison at wholesale.

CHAIRMAN RIGLER: Are you saying that the Buckeye agreement continues in effect restraints from predecessor contracts with individual cooperatives?

MR. CHARNO: Effectively so, yes, sir.

CHAIRMAN RIGLER: What was the date of the Buckeye contract?

MR. CHARNO: I believe the Buckeye contract was in 1968, generally, but the cooperatives in Ohio Edison's area did not begin to be supplied by Buckeye until approximately August of 1970. And these contracts were in effect until that time.

CHAIRMAN RIGLER: These contracts being contracts

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similar to Department Exhibit 18, and they were in effect in whole or in part in the interval between 1966 and 1970.

MR. CHARNO: Some of them go back as far as the '50s, but they were all in effect, I believe, from '66 onward, yes.

We would offer these additionally as evidence of the intent of Ohio Edison in participation in the Buckeye arrangement.

CHAIRMAN RIGLER: Is there objection?

MR. STEVEN BERGER: I still feel that Buckeye agreement superseded these arrangements in terms of Mr. Charno trying to establish some connection between the provisions in those wholesale contracts and the superseding Buckeye arrangement. I think the offer of this document suffers somewhat from the same problem as the earlier one offered by the Department in regard to the relationship between Consumers and a customer of Consumers in relation to Toledo.

I think there is a problem of connection. I urge the Board to defer on these as well until such connection can be established in regard to the earlier wholesale contracts between the cooperatives and Ohio Edison and connecting it up in some way to the inclusion in the Buckeye contracts of such a similar provision alleged by the Department to be anticompetitive.

CHAIRMAN RIGLER: I think the first part of your

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objection goes to the weight, and with respect to the second, I do see a distinction between a document which doesn't on its face mention the Applicant companies and one which specifically is a contract entered into by Ohio Edison, one of the Applicants.

We will receive DJ Exhibit 18 into evidence at this time, overruling the continuing objection which I assume you are on your feet to make, Mr. Reynolds.

MR. REYNOLDS: I am on my feet to make the continuing objection.

I would like to get a clarification as to whether the Board's ruling is a ruling which, in effect, is stating that the Department of Justice has established its burden of showing sufficient good cause to add the new allegation which was not made in its September 5 filing?

CHAIRMAN FIGLER: Which new allegation was that?

MR. REYNOLDS: The allegation that we are now hearing for the first time regarding the earlier pro-Buckeye agreements between Ohio Edison and cooperatives that may have been restrictive in nature.

That is not an allegation in those September 5 filings. It has been my understanding in the absence of such an allegation in those September 5 filings that they are not proper matters in the present proceeding.

All I am really asking is if the Board is

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ruling that here the burden has been met to show good cause by the government.

I would like the record to reflect that the Board has so ruled that.

CHAIRMAN RIGLER: I thought -- and maybe I misunderstood -- but I thought Mr. Charno indicated these documents supported that allegation in that they showed a continuing course of action on the part of Ohio Edison.

MR. CHARNO: The Department did not have an allegation in the September 5 filing that went specifically to restraint on alienation of power sold by Ohio Edison to cooperative systems.

CHAIRMAN RIGLER: Did I misunderstand, then, the relationship of these documents to the Buckeye agreement?

MR. CHARNO: No, sir, you did not.

CHAIRMAN RIGLER: State it again now so that the Board understands.

MR. CHARNO: The Department would offer these documents -- they are a series of contracts with cooperatives -- which are intertwined with the Buckeye arrangement two ways.

Number one, they contain a restraint, anticompetitive restraint on alienation which is perpetuated in the Buckeye agreement and thereby gives some light to Ohio Edison's intent in entering the agreement in the manner in which it did, and in the structure of the agreement as it stands.

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Further, it shows a continuing course of conduct with respect to the dealings of Ohio Edison with the cooperative systems located within its service area.

We are not introducing this as evidence of a Section 1 violation in and of itself.

CHAIRMAN RIGLER: In other words, this is not an independent allegation of a violation of the antitrust laws?

MR. CHARNO: It is not.

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1 CHAIRMAN RIGLER: I see you nodding.

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2 MR. STEVEN BERGER: I was nodding as to your
3 clarification of Mr. Charno's latest statement in regard
4 to his offer. In that Mr. Charno, as I understand it, is
5 not making any effort to allege with regard to the
6 Cooperatives in Ohio Edison's Area a separate charge in
7 regard to anticompetitive positions in the pre-existing
8 wholesale contracts as has been alleged in regard to the
9 municipals in Ohio Edison's area.

10 CHAIRMAN RIGLER: I think that is right.

11 MR. REYNOLDS: I need further clarification. As
12 I said, the September 5 allegation of the Department, there
13 is no allegation that the Buckeye agreement operated in a
14 manner that would impact on the retail customers of the
15 Cooperatives or caused the kind of alienation problem he
16 is saying he is trying to support with respect to earlier
17 agreements and walking in from the earlier agreements to
18 the Buckeye and saying that that is the Buckeye allegation.

19 I'm asking we do have clarification, because
20 it is the first time I have heard that allegation with
21 respect to Buckeye or with respect to the other contracts.

22 MR. STEVEN BERGER: Can we have a moment?

23 MR. CHARNO: We can note for the record on
24 page 9, the specific allegation, while it does not mention
25 Buckeye, is as follows: "In 1968 Ohio Edison entered into

1 an agreement with the Ohio Power Company that restricts
2 the sale of power by rural electric cooperatives to
3 municipal power customers of Ohio Edison, thereby foreclosing
4 competition in supplying bulk power."

5 This was expanded in some detail and explained in
6 our brief in November.

7 MR. REYNOLDS: That is my difficulty. That is
8 bulk power. What we have heard here this morning does
9 not relate at all to bulk power. Therefore, it is an
10 entirely different situation. If he wants to make the
11 allegation with respect to retail, that is all right with
12 me, and the Board can rule that it will add the allegation,
13 but this allegation he has just read relates to bulk power
14 and it is a different allegation.

15 MR. CHARNO: We would note that our allegation
16 does not state wholesale or retail as contained. It would
17 encompass both.

18 We were focusing in this case on the restraint
19 of wholesale, as I stated earlier in my offer of proof.

20 CHAIRMAN RIGLER: I think that is adequate
21 clarification.

22 Let's move ahead.

23 (The document referred to
24 was marked Exhibit DJ-18
25 for identification and was
received in evidence.)

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1 MR. REYNOLDS: Mr. Chairman, it may be that
2 we could go quicker on this. We are into a series of
3 documents we have not seen until this morning. There are
4 a good number of documents we have seen.

5 I don't know whether Mr. Charno wants to go in
6 a special order, but it might be quicker to jump past
7 these and at the lunch break give us opportunity to look
8 at them, so we don't need to take the time we are obviously
9 taking on each one and go to the documents we did have
10 ahead of time and move quicker.

11 CHAIRMAN RIGLER: Suppose we identify the
12 documents until we reach the ones where you have seen
13 them and at that point receive the previously-seen ones
14 into evidence and allow you to come back to the other
15 documents after lunch.

16 MR. STEVEN BERGER: Although we did receive
17 copies of the documents that were going to be introduced
18 today by the Department against Ohio Edison on Thursday,
19 the time has not been such between Thursday and this
20 morning that the volume of documents that have been
21 received could have been reviewed and determined that
22 such documents were authentic and to formulate objections
23 we may have had to the receipt of such documents, so as
24 to enable the Board and Parties to expedite things today and
25 receive documents en masse.

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1 I believe it is going to be necessary with
2 regard to substantially all of the documents that are
3 going to be introduced against Ohio Edison today to go
4 document by document.

5 CHAIRMAN RIGLER: All right, then, we will
6 just identify them today and tomorrow you may move them
7 into evidence, Mr. Charno.

8 Perhaps we can then get to a fact witness
9 today.

10 MR. STEVEN BERGER: Will the offer of proof be
11 made today as well?

12 CHAIRMAN RIGLER: Well, I don't know if that is
13 going to be necessary, if you have this additional time
14 and with Mr. Charno having given you the general offer
15 of proof with respect to power contracts or other
16 classifications of documents.

17 MR. STEVEN BERGER: I agree in regard to that,
18 but when we start getting to letters and memorandums, I
19 feel our ability to formulate objections overnight with
20 regard to these documents will be aided by whatever offers
21 the Department may make with regard to those documents.

22 CHAIRMAN RIGLER: Were you intending to offer
23 all three of these looseleaf notebooks for identification
24 right now?

25 MR. CHARNO: There are more than three and, yes

1 CHAIRMAN RIGLER: How many more than three?

2 MR. CHARNO: We have -- I think you have seven
3 each.

4 The first three are primarily contracts, however.

5 CHAIRMAN RIGLER: How many separate numbers are there?

6 MR. CHARNO: I haven't any idea.

7 CHAIRMAN RIGLER: These are all unsponsored
8 documents?

9 MR. CHARNO: They are. Those that did not
10 come from the FPC files came from the Applicant files
11 and these were all the subject of a request for admissions
12 which has been outstanding for some months, and we had
13 a little bit of trouble initially with the Applicants' having
14 difficulty working with the document list we supplied
15 so several months ago we began to make available our copies
16 of the documents to those companies among the Applicants
17 who were interested and they used our files to identify what
18 had come from their files.

19 CHAIRMAN RIGLER: So that the letters as to
20 which they seek offer of proof came from their own files?

21 MR. CHARNO: That is correct. I don't believe there
22 are any exceptions to that.

23 MR. REYNOLDS: That wouldn't bear on the offer
24 of proof, though.

25 MR. CHARNO: Any exceptions to that were documents
furnished to them in discovery. And those would be very

limited. NOT more than ten or fifteen.

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CHAIRMAN RIGLER: We will proceed with the identification and you can make your offers of proof as you go along, briefly.

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MR. CHARNO: The Department would offer for identification as DJ-19, a document identified on its face as Ohio Edison FPC Rate Schedule 16, bearing the Department of Justice Identification Number 15-712.

The offer of proof is the same as for the prior two documents.

MR. SMITH: This is 19. Are you confident of that document number. Oh, yes, I see you are.

MR. CHARNO: The Department of Justice offers for identification as DJ-20 a document bearing identification as Ohio Edison Rate Schedule Number 17, bearing Department of Justice Identification Number 15-313, with the same offer of proof as the prior three exhibits.

The Department offers for identification as Exhibit DJ-21, a document identified as Ohio Edison FPC Rate Schedule Number 18, bearing Department of Justice Identification Number 15-314. The offer of proof is the same as for the prior document.

The Department offers for identification as Exhibit DJ-22, a document identified as Ohio Edison FPC Rate Schedule Number 19, bearing the Department of Justice

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1 Identification Number 15-315. The offer of proof would
2 be the same as for the prior document.

3 The Department of Justice offers for
4 identification as Exhibit DJ-23, a document bearing the
5 legend Ohio Edison Company FPC Rate Schedule Number 20, and
6 the Department of Justice Identification Number DJ-15-316.
7 The offer of proof is identical with that for the prior
8 documents.

9 The Department offers for identification as
10 Exhibit DJ-24 a document entitled Ohio Edison Company,
11 FPC Rate Schedule Number 21. This bears the Department's
12 Identification Number 15-317. The offer of proof on this
13 document is that this document is being submitted in support
14 of the Department's allegations that Ohio Edison has restraints
15 upon alienation, anticompetitive provisions in its contracts
16 with its municipal wholesale customers.

17 If I put that in the present tense I should
18 have put it in the past tense with respect to this contract.

19 As indicated in our brief, these restraints
20 upon alienation also function as customer and territorial
21 allocation provisions. The specific breakdown is contained
22 in the brief and these are identified by document -- the
23 Department internal document identification in our brief.

24 The Department would offer for identification
25 as Exhibit --

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MR. REYNOLDS: Excuse me one minutes.

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Was that last comment part of your offer of proof for this document?

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MR. CHARNO: It was.

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MR. STEVEN BERGER: Mr. Chairman, this is a municipal contract that was in existence from 1956, and I don't have the date of termination of the contract.

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CHAIRMAN RIGLER: Mr. Berger, I thought you wanted a chance to read them all, so you could make the objections cogently.

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MR. STEVEN BERGER: Now question in regard to that. I thought perhaps Mr. Charno's offer of proof might include something with regard to an inclusion of a document that predates what has become the date of importance in these proceedings for purposes of admissibility of documents sometime in 1965, I believe it is September 1965.

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I thought his offer might include that, as well, to aid us in forming whatever objections we had.

19

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MR. CHARNO: The contract in question, I note, has an effective date of September 1964. The Department has attempted to make available all contracts which indicate a course of conduct over any period of time.

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We think the continuity of conduct is indicative of a number of things.

25

CHAIRMAN RIGLER: Was this contract in effect

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1 to at least 1965, but I can't determine from the face of
2 this document the date it was terminated.

3 CHAIRMAN RIGLER: All right. Let's proceed.

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4 MR. CHARNO: The Department offers for identi-
5 fication as Exhibit DJ-25 a document bearing identification
6 of Ohio Edison Company FPC Rate Schedule Number 22 and
7 the Department of Justice Document Identification 15-318.
8 The offer of proof would be the same as with respect to
9 the prior document.

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10 The Department of Justice offers for
11 identification as Exhibit DJ-26, a document entitled
12 Ohio Edison FPC Rate Schedule Number 23, bearing Justice
13 Identification Number 15-319 with the offer of proof
14 the same as for the prior document.

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15 The Department of Justice offers for
16 identification as Exhibit DJ-27, Ohio Edison FPC Rate
17 Schedule Number 24, bearing Justice Identification
18 Number 15-320 with the same offer of proof as the prior
19 document.

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20 We offer for identification as DJ-28, Ohio
21 Edison FPC Rate Schedule Number 25, bearing Justice
22 Identification Number 15-321 with the same offer of proof
23 as the prior document.

24 We offer for identification as DJ-29, Ohio Edison
25 FPC Rate Schedule Number 26, bearing the identification

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1 Number DJ-15-322, with the same offer of proof as the prior
2 document.

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3 We offer for identification as DJ-30, Ohio
4 Edison FPC Rate Schedule Number 27, bearing Justice
5 Identification Number 15-323 with the same offer of proof as
6 for the prior documents.

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7 We offer for identification as DJ-31, Ohio
8 Edison FPC Rate Schedule 28, bearing Justice Identification
9 Number 15-324 with the same offer of proof as the prior
10 document.

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11 We offer for identification as DJ-32, Ohio
12 Edison FPC Rate Schedule Number 29, bearing the Department
13 of Justice Identification Number 15-325 with the same offer
14 of proof as the prior document.

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15 We offer for identification as DJ-33, Ohio
16 Edison FPC Rate Schedule Number 30, bearing the internal
17 identification 15-326, with the same offer of proof as
18 the prior document.

19 CHAIRMAN RIGLER: Stop for the minute.

20 Off the record.

21 (Discussion off the record.)

22 MR. CHARNO: We would offer for identification
23 as DJ-34, Ohio Edison FPC rate Schedule Number 31, bearing
24 the Identification Number DJ-15-327, with the same offer
25 of proof.

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1 We would offer for identification as Exhibit
2 DJ-35, Ohio Edison FPC Rate Schedule Number 32, bearing
3 Document Identification Number DJ-328, with the same offer
4 of proof.

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5 We would offer for identification as DJ-36, Ohio
6 Edison FPC Rate Schedule Number 33, bearing internal
7 Identification Number 15-329, with the same offer of
8 proof.

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9 We would offer for identification as DJ-37, Ohio
10 Edison FPC Rate Schedule Number 34, bearing identification
11 Number 15-330, with the same offer of proof as the
12 prior document.

13 We would offer for identification as DJ-38,
14 Ohio Edison FPC Rate Schedule Number 35, bearing
15 Justice Identification Number 15-331, with the same offer
16 of proof as the prior document.

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17 We would offer for identification as DJ-39,
18 Ohio Edison FPC Rate Schedule 36, bearing Justice Document
19 Identification Number 15-332, with the same offer of
20 proof as the prior document.

21 CHAIRMAN RIGLER: We will take a five minute
22 break.

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23 (Recess.)
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MR. CHARNO: The Department would offer as Exhibit DJ-40, Ohio Edison FPC Rate Schedule No. 37 bearing Justice Identification No. 15-333.

The offer of proof would be the same as for the prior document.

The Department offers for identification as DJ-41, Ohio Edison FPC Schedule No. 38, bearing the Department's Identification No. 15-334, with the same offer of proof as the prior document.

The Department offers as DJ-42, Ohio Edison Rate Schedule No. 39, bearing Justice Identification No. 15-335 with the same offer of proof as the prior document.

The Department offers as DJ-43, Ohio Edison FPC Rate Schedule No. 40, bearing Justice Identification No. 15-336.

If I may restate and expand somewhat the offer of proof on Exhibits DJ-24 through 43 for identification. There are two allegations in the September filing which are directly relevant to these contracts.

The first is -- they appear on page 8 of that filing.

Prior to 1973, Ohio Edison enforced provisions in its wholesale power contracts with municipal systems which allocated customers and territories thereby restricting competition between itself and the municipal systems, and the third

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paragraph on that page which begins:

"Ohio Edison has eliminated the ability of its wholesale municipal customers to compete with it for industrial customers."

The Department offers for identification as DJ-44, Ohio Edison FPC Rate Schedule No. 46 bearing the Department's Identification No. 15-340 with the same offer of proof as for the prior municipal contracts.

We offer for identification as DJ-45, Ohio Edison FPC Rate Schedule 47, bearing Justice Identification No. 15-341 with the same offer of proof as the prior document.

We offer for identification as DJ-46, Ohio Edison FPC Rate Schedule No. 48, bearing Justice Identification No. 15-342 with the same offer of proof as the prior document.

We offer for identification as DJ-47, Ohio Edison FPC Rate Schedule 49 bearing Justice Identification No. 15-343 with the same offer of proof as the prior document.

We offer for identification as DJ-48, Ohio Edison FPC Rate Schedule 50 bearing Justice Identification No. 15-344 with the same offer of proof as the prior document.

We offer for identification as DJ-49, Ohio Edison FPC Rate Schedule 51, bearing Justice Identification No. 15-345 with the same offer of proof as the prior document.

We offer for identification as DJ-50, Ohio Edison

mm3 FPC Rate Schedule No. 52, bearing Justice Identification No. 15-346 with the same offer of proof as the prior document.

WE offer for identification as DJ-51, Ohio Edison FPC Rate Schedule No. 53, bearing Justice Identification No. 15-347.

We offer for identification DJ-52, Ohio Edison FPC Rate Schedule No. 54, bearing Justice Identification No. 15-348 with the same offer of proof as the prior document.

We offer for identification as DJ-53, Ohio Edison FPC Rate Schedule No. 55, bearing Justice Identification No. 15-349, with the same offer of proof as the prior document.

WE offer for identification as DJ-54, Ohio Edison FPC Rate Schedule No. 56, bearing Justice Identification No. 15-350 with the same offer of proof as the prior document.

We offer for identification as DJ-55, Ohio Edison FPC Rates Schedule No. 57 bearing Justice Identification No. 15-351 with the same offer of proof as the prior document.

WE offer for identification as DJ-56, Ohio Edison FPC Rate Schedule No. 58, bearing Justice Identification No. 15-352 with the same offer of proof as the prior document.

We offer for identification as DJ-57, Ohio Edison FPC Rate Schedule No. 59, bearing Justice Identification No. 15-353 with the same offer of proof as the prior document.

WE offer for identification as DJ-58, Ohio Edison FPC Rate Schedule No. 60, bearing Justice Identification No.

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15-354 with the same offer of proof as the prior document.

We offer for identification as DJ-59, Ohio Edison FPC Rate Schedule No. 61, bearing Justice Identification No. 15-355 with the same offer of proof as the prior document.

We offer for identification as DJ-60, Ohio Edison FPC Rate Schedule No. 62, bearing Justice Identification No. 15-356, with the same offer of proof as the prior document.

We offer for identification as DJ-61, Ohio Edison FPC Rate Schedule No. 63, bearing Justice Identification No. 15-357, with the same offer of proof as the prior document.

We offer for identification as DJ-62, Ohio Edison FPC Rate Schedule No. 70, bearing Justice Identification No. 15-363 with the same offer of proof as the prior document.

We offer for identification as DJ-63, Ohio Edison FPC Rate Schedule No. 72, bearing Justice Identification No. 15-366, with the same offer of proof as the prior document.

MR. SMITH: Did you skip some schedules, sir?

MR. CHARNO: Some FPC Schedules?

MR. SMITH: Yes.

MR. CHARNO: Yes, sir.

The intervening schedules were put in by the NRC Staff.

We will offer for identification as DJ-64 Ohio Edison FPC Rate Schedule 73 bearing justice Identification No. 15-367, with the same offer of proof as the prior document.

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We would offer for identification as DJ-65, Ohio Edison FPC Rate Schedule No. 74, bearing Justice Identification No. 15-368 with the same offer of proof as the prior document.

We would offer for identification as DJ-66, Ohio Power Company FPC Rate Schedule No. 26, identified as Justice 15-395. The offer of proof for this document would be an agreement between one of the Applicants and an adjacent utility indicating the terms and conditions for a specific interconnection between the two.

The offer is as stated.

CHAIRMAN RIGLER: I notice that my copy is not redlined in any way.

Is that correct?

MR. CHARNO: That is correct.

MR. REYNOLDS: Mr. Chairman, could I ask for the offer of proof to address itself also to the attachments which go back to 54 and 57, so we will be able to respond also in that regard tomorrow?

MR. CHARNO: The Department, while identifying this document, would prefer not to offer it into evidence until such time as we have been able to secure the Akron parties agreement, which is referenced in this agreement and offer them both concurrently.

CHAIRMAN RIGLER: All right.

MR. REYNOLDS: May I ask whether that means that

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at the present time there is no offer of proof that is related to this document, or do you want to stand by your present offer of proof?

MR. CHARNO: Since it is not being offered into evidence, there is no offer of proof.

MR. REYNOLDS: You are withdrawing --

MR. CHARNO: My offer of proof.

MR. REYNOLDS: All right. Thank you.

MR. CHARNO: The Department would offer for identification as DJ-67, Pennsylvania Power Company PPC Rate Schedule No. 3, bearing Justice Identification No. 15-404. This document is offered in support of the Department's allegation that PPC had and has a corporate policy restricting competition between Municipal Electric Systems and itself for industrial customers.

CHAIRMAN RIGLER: Mr. Charno, I don't seem to have that.

MR. CHARNO: That would be the second allegation, or second paragraph --

CHAIRMAN RIGLER: No, I mean I don't have the document. I have two 405 which do not appear to be the same, and I have no 404.

Off the record.

(Discussion off the record.)

CHAIRMAN RIGLER: I have located DJ-15-404, which is marked DJ Exhibit 67.

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1 MR. CHARNO: Continuing the offer of proof ---

2 MR. SMITH: Excuse me. Before you go ahead,
3 in the past you have identified the specific method of your
4 allegation of restraint or competition. This time you just
5 assert that it is a general impeding. Is the price
6 squeezed or restraint on resales or what? I don't see it
7 here. If you would care to say, it would be helpful to me.

8 MR. CHARNO: What I was trying to do was taking it
9 directly in the September filing. We also mentioned other
10 things in the September filing.

11 Prior to 1966, we have alleged that PPC had
12 restrictive provisions in its wholesale contracts which
13 prevented the resale of power by whole customers to
14 industrial customers, thereby eliminating competition for
15 such industrial customers and then we further have alleged
16 since mid-1966, PPC has enforced territorial allegation --
17 pardon me, territorial and customer allocation provisions
18 in its contract with its municipal wholesale customers,
19 thereby eliminating those systems' ability to compete with
20 it for industrial, commercial and residential customers
21 at retail.

22 The Department would offer for identification
23 as --

24 MR. REYNOLDS: Excuse me one minute. Is that
25 your offer of proof with respect to these documents?

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1 MR. CHARNO: That is.

2 MR. REYNOLDS: The whole statement?

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3 MR. CHARNO: Yes. The Department offers
4 for identification as DJ-68, Pennsylvania Power Company
5 FPC Rate Schedule Number 4 which correctly bears the
6 internal identification Number 15-405. We make the same
7 offer of proof as the prior document.

x

8 The Department offers for identification as
9 DJ-69, Pennsylvania Power Company FPC Rate Schedule Number
10 5, which omcprrectly bears the Justice identification number
11 15-405 which should read 15-406, as it is identified
12 in its department document list.

13 CHAIRMAN RIGLER: I have a problem with that,
14 because I have a 406 coming up next. I think you better
15 have everyone pencil in 405-A. That is the document
16 DJ Number 69, which is the Pennsylvania Company rate
17 contract FPC Schedule 5.

18 The Department offers for identification as
19 DJ-70, Pennsylvania Power Company FPC Rate Schedule Num
20 Number 6, bearing Justice Identification Number 15-406 with
21 the same offer of proof as the prior document.

22 MR. REYNOLDS: I don't know what your copy looks
23 like, Mr. Chairman, but mine looks like a number of blank
24 pages with nothing showing at all.

25 CHAIRMAN RIGLER: Ours do too. With the exception

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1 of the supplement pages which it reproduced quite satis-
2 factorily and which are the red-lined pages.

3 I don't know if there is any redling on the
4 blank pages or not.

5 MR. CHARNO: There is no red-lining. This
6 copy of the contract in the files of the Federal Power
7 Commission apparently did not reproduce well, and we have
8 no way to secure a better copy. We sent some of these back
9 and requested recopying. This was one of them, as I believe
10 the prior one was.

11 This was the best copy they could proceed for us
12 from what they have on file.

13 If the Applicants would care to submit a copy
14 of the contract, we will make it part of our exhibit.

15 MR. STEVEN BERGER: I will try to secure that.

16 MR. CHARNO: The Department offers for
17 identification as DJ-71, Pennsylvania Power Company
18 Rate Schedule 17, which is identified as DJ-15-414, subject
19 to the same offer of proof as the prior document.

20 The Department also offers this exhibit as
21 evidence of an allocation agreement between the named
22 customer and Pennsylvania Power.

23 MR. REYNOLDS: Would you be a little more
24 specific. You said allocation. Of what?

25 MR. CHARNO: Specifically of customers. The

1 Department offers as DJ-72, Pennsylvania Power Company
2 FPC rate schedule number 23, bearing Justice identification
3 number 15-420 with the same offer of proof as the prior
4 documents.

5 We would offer as DJ-73, Pennsylvania Power
6 Company FPC Rate Schedule Number 24 bearing Justice
7 Identification Number 15-421 with the same offer of proof
8 as the prior documents.

9 MR. SMITH: Does that include customer
10 allocation?

11 MR. CHARNO: The provisions in this contract is
12 territorial in nature. Specifically, Mr. Smith, on page
13 2 of the actual contract, paragraph 3, that indicated
14 paragraph contains what could be construed as either a
15 territorial or customer allocation, but it is certainly
16 an agreement, not to compete without consent by
17 the other contracting party.

18 I'm not sure which is the more apt characterization,
19 since it has both effects.

20 The Department offers as DJ-74, Pennsylvania
21 Company FPC Schedule Number 25 which bears Justice Identifi-
22 cation Number 15-422 with the same offer of proof as the
23 prior document.

24 We would offer for identification as DJ-75,
25 Pennsylvania Power Company FPC Rate Schedule Number 26,

1 Department of Justice Identification Number 15-423 with
w5 2 the same offer of proof as the prior document.

3 We would offer for identification as DJ-76,
4 Pennsylvania Power PFC Schedule Number 27, bearing Justice
5 Identification Number 15-424 with the same offer of proof as
6 the prior document.

7 The Department offers as DJ-77 documents
8 produced by Toledo Edison during discovery, the first of
9 which being a letter to John McKinney, dated July 15, 1966,
10 on the stationery of Fuller, Seney, Henry and Lodge.

11 CHAIRMAN RIGLER: What is the internal
12 identification number on it.

13 MR. CHARNO: 300263.

14 CHAIRMAN RIGLER: It is apparent by now that the
15 copies are illegible. The Board can't read its copies and
16 I see some other counsel can't read theirs.

17 There will have to be substitution on this
18 document.

19 MR. CHARNO: The Department has a very faint
20 legible copy, but since it was initially a copy of an
21 original, if we could possibly secure the original to
22 make copies for all of the parties --

23 CHAIRMAN RIGLER: Why don't you retype your
24 faint legible copy and distribute that to the parties with
25 a copy of your faint legible copy, so that the Applicants

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1 and Toledo Edison can check your original against the
2 retyped copy and then we will work from the retyped copy.

3 MR. KLEE: Your Honor, we have a copy of
4 this document which is more legible.

5 CHAIRMAN RIGLER: It's more legible?

6 MR. KLEE: Yes.

7 CHAIRMAN RIGLER: Make it available to the D
8 Department at the noon hour, and they can Xerox it and
9 substitute it.

10 MR. CHARNO: Now, with respect to the numbering
11 of these exhibits, we have grouped together different
12 packets of related material for ease in handling and
13 locating the material.

14 However, there are letters here attached
15 together which were not initially attached together.
16 Would it be acceptable to number subsequent documents within
17 the same exhibit by attaching a letter to the exhibit
18 number?

19 MR. REYNOLDS: Wait a minute.

ES10

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MR. REYNOLDS: I have a problem introducing into evidence documents which were attached, which were not originally attached.

I think if we are going to do it, and separately number them that they come in without the Justice Department's collation whatever it might be.

MR. CHARNO: They are identified on the record. There is no conceivable problem in having them stapled together.

CHAIRMAN RIGLER: I see Mr. Reynolds' point. He doesn't want the Board to draw inferences of a relationship between the documents and that is probably a well-taken point.

MR. CHARNO: Then I take it it is the Board's desire that each one of these should be separately introduced and bear its own document number?

CHAIRMAN RIGLER: I think so.

MR. CHARNO: We would offer them as DJ-73, a letter of June 18, 1968, from Bruce Mansfield to Donald Cooke, bearing Justice Identification No. 300338.

We would offer for identification as --

CHAIRMAN RIGLER: When you do that, give us the final page of the document as well.

This would be 300338 through 300340 is that correct?

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MR. CHARNO: Right.

CHAIRMAN RIGLER: In my compilation I have a 300341 through 343. It is not clear to me what these pages should be attached to.

MR. CHARNO: We believe those were initially attached to the letter which is illegible.

MR. REYNOLDS: Until we can -- if we can defer 300269 through 300343 until after lunch, it might be helpful. We might be able to resolve or clarify it. I think there is a problem until we can see the letter and attachments.

But, while we are stopped, I would like to ask the Board a question as to how we are going to now proceed with respect to the correspondence.

Are we going to continue with the identification and offer of proof, and then wait until tomorrow to move them in, or how does the Board wish to proceed?

CHAIRMAN RIGLER: Yes.

MR. CHARNO: We would offer for identification as DJ-79 --

MR. STEVEN BERGER: Could I go back to 78 which is the June 18, 1968 letter of Mr. Mansfield, and start over again as to that? I am a little bit confused as to what documents are coming in together and I didn't hear an offer of proof as to that document by Mr. Charno.

CHAIRMAN RIGLER: Well, all of these documents

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coming in now relate to Buckeye. Do you have a general offer of proof that would cover all of these documents?

MR.CHARNO: I was going to wait until I finished the packet, but if you want it now, we can do it.

CHAIRMAN RIGLER: You can wait, if it will be common to all of the documents coming in.

MR. CHARNO: It will.

We would like to offer for identification as DJ-79, a telegram dated June 20, 1968 from Donald Cooke to Bruce Mansfield, bearing Justice Identification No. 300337.

We would like to offer for identification as DJ-80, a file folder bearing a tab, publicity, and containing a draft dated 6-21-68, bearing Justice Identification No. 300258.

We would like to offer as DJ --

CHAIRMAN RIGLER: Does that go through 260?

MR.CHARNO: Yes, it does.

While the pagination is serial, the exhibit number would be the number of the first page and that is the way they are listed in our document list.

MR. REYNOLDS: I have illegible copies.

MR. CHARNO: Of what?

MR. REYNOLDS: I can't read the material on 259 or 260.

CHAIRMAN RIGLER: That is true of the Board's copy

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as well.

MR. CHARNO: The Department would offer as DJ-81, a memorandum dated January 15, 1969 to a group of individuals headed by J. K. Davis from D. H. Schwalbert, bearing Justice Identification No. 300415.

The Department would offer for identification as DJ-82, a memorandum dated September 25, 1969, from Marvin Keck, to T. J. Kozak. That memorandum bears the identification No. 300181.

The Department would offer as DJ-83, a memorandum dated September 25, 1972 from a Mr. Cooke to Mr. Keck, bearing Justice Identification No. 306068.

CHAIRMAN RIGLER: My copy -- this is Cooke to Keck?

MR. CHARNO: Yes, sir.

CHAIRMAN RIGLER: My copy doesn't have the date or the Justice Identification number you mentioned.

I have it.

MR. CHARNO: With respect to DJ-77 through 83, the Department is offering these in support of the following allegations:

That Toledo Edison is a party to an agreement with Buckeye Power which is anticompetitive in nature in that it requires a wholesale customer of Toledo Edison to operate as an isolated system for 90 days if it wishes to purchase

power from Buckeye and it imposes a territorial restriction on the sale of Buckeye power.

CHAIRMAN RIGLER: What do you mean by "on the sale of Buckeye power?"

MR. CHARNO: It confines the sale of Buckeye power to sales within the State of Ohio.

CHAIRMAN RIGLER: By individual members of the Buckeye Cooperative?

MR. CHARNO: That is correct.

The Department has additional allegations with respect to the application of this agreement to municipal systems of Bryan and Napoleon.

The Department would also offer this documentary material in support of its allegations relating to Ohio Edison's participation in the so-called Buckeye agreement. There are a number of interrelated and interlocking agreements that we will put in evidence in their entirety but for shorthand purposes at this point, the relationship of supplying cooperative, potentially supplying municipal loads from the generation owned by Buckeye Power, Inc., we are referring to as the Buckeye Agreements.

MR. STEVEN BERGER: That was the offer with regard to Ohio Edison as well, the specific offer with regard to Ohio Edison?

MR. CHARNO: That is correct.

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MR. REYNOLDS: Could I ask for clarification, whether your offer is that Ohio Edison is a party to the Buckeye agreement?

Is that what you say?

MR. CHARNO: We have stated that the Ohio Edison Company is a party to contract with the Ohio Power Company, which is part of what we are referring to as the Buckeye agreements.

MR. REYNOLDS: These documents go to that aspect of the Ohio Edison and Ohio Power Arrangement.

Is that what your offer of proof is?

MR. CHARNO: They go to an aspect of the Buckeye arrangement that is embodied in the agreement between Ohio Edison and Ohio Power among other places.

MR. REYNOLDS: All right.

MR. CHARNO: It is not confined to the Ohio Power-Ohio Edison contract, no.

MR. REYNOLDS: Mr. Chairman, could I ask for a separate offer of proof with respect to Document 300258, which is part of the Department of Justice Exhibit 80?

MR. CHARNO: This document would constitute the background information on the formation of Buckeye as of 1968, which was found in the files of Toledo Edison Company.

MR. REYNOLDS: That would include the internal document page No. 300258. Is that your offer of proof for

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that document?

MR. CHARNO: Yes.

The Department would offer as DJ-84, a memorandum from Mr. Cooke to Mr. Zeck, which is identified therein as Minutes of a Meeting held June 24, 1971, bearing Justice Identification No. 17000008. This would run through 10.

CHAIRMAN RIGLER: Mine appears to run through 11. There is a handwritten page of notes at the end of mine.

MR. CHARNO: I don't believe that that handwritten page of notes was produced as part of this exhibit.

CHAIRMAN RIGLER: All right.

end #11

EAK:bw1

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1 MR. CHARNO: We would offer for identification
2 as DJ-85, a page of handwritten notes which says in the
3 upper right-hand corner "Southeastern Mich, Period: June
4 24, 1971." It is internal Number 17000011.

5 We would offer as DJ-86, a memorandum dated
6 July 20, 1971, from Mr. Keck to Mr. Kozak. This would
7 run to 929 and begins on 301927.

8 We offer for identification as DJ-87 an August
9 10, 1971, letter from Mr. Keck to J. E. Heifner, bearing
10 Justice Identification Number 301926.

11 We would offer for identification as DJ-88,
12 a memorandum dated March 11, 1974, from Mr. Tony Bosch
13 to Mr. John Lbbe, bearing Justice identification number
14 301976, being two pages.

15 MR. BUCHMAN: My copy of that is completely
16 illegible.

17 CHAIRMAN RIGLER: So are the Board's. That is
18 another document where you will have to provide a retyped
19 copy.

20 MR. CHARNO: We offer as DJ-89 a letter from a
21 Mr. Joseph Whigham to Mr. Tony Bosch, dated May 17, 1974,
22 bearing Justice Identification Number 301930.

23 We would offer as DJ-90 a letter from
24 Mr. Paul Hutchison, to Mr. Tony Bosch, dated May 20, 1974,
25 bearing Justice Identification Number 301931.

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1 The offer of proof with respect to --

2 MR. REYNOLDS: Is that also a two-page document.

3 MR. CHARNO: Yes, it is.

4 The offer of proof with respect to exhibits
5 for identification 84 through 90 would consist of evidence
6 in support of the allegation that Toledo Edison is a party
7 to an agreement or understanding with Consumers Power
8 Company which is anticompetitive in nature and in that
9 both companies have agreed not to serve customers in the
10 other company's state.

11 This agreement prevented Southern Michigan
12 Electric Cooperative from obtaining power at wholesale
13 from Toledo Edison.

14 MR. REYNOLDS: Mr. Chairman, could I make a
15 request at this time as to the source of the documents
16 that are identification as Department of Justice Exhibits
17 84 and 85?

18 MR. CHARNO: This particular copy of the first
19 document, the memorandum from Mr. Cook to Mr. Keck was
20 produced by Toledo Edison pursuant to subpoena duces tecum
21 in the Consumer's Power case before this Commission.

22 However, the document was produced -- another
23 copy of the document was produced in discovery in this
24 proceeding at a very late point, when we requested it.

25 MR. REYNOLDS: What about Document 85?

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1 What is the source of that?

2 MR. CHARNO: Same source.

3 MR. REYNOLDS: Which source?

4 MR. CHARNO: Subpoena duces tecum.

5 MR. REYNOLDS: And was a copy of that produced,
6 do you know?

7 MR. CHARNO: I don't know with respect to that.

8 MR. REYNOLDS: But you are sure there was
9 produced by Toledo Edison under a subpoena duces tecum?

10 MR. CHARNO: Yes.

11 MR. REYNOLDS: All right. Thank you.

12 MR. CHARNO: The Department offers for
13 identification as DJ-91 a document titled CAPCO generating
14 capacity allocations, 9-1-1971 through 9-30-1973.
15 It bears Justice Identification Number 301538.

16 CHAIRMAN RIGLER: Mr. Charno, the Board has
17 conferred and where the Department has an identification
18 number on the document, we would save a substantial
19 amount of time if we avoided reading in the date of the
20 document and the Board and the author and addresses of
21 the document. So we can proceed just with reference to
22 the Department's identification number.

23 However, Mr. Smith reminds you once again where
24 it is a multiple page document, you should refer to all of
25 the consecutive list of the Department identification numbers

1 on the document.

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2 MR. CHARNO: The Department offers this document
3 in evidence of --

4 MR. REYNOLDS: Mr. Chairman, excuse me. I think
5 we can short-form it. What you suggested concerns me a
6 little bit, because on the Department's designated list
7 there are some documents which bear the same internal DOJ
8 document number. If we are just going by numbers, my
9 guess is that we are all right, but I don't want to be
10 looking at one document with a number and have everybody
11 else looking at another document with a number.

12 On the Department of Justice list, there is that
13 kind of confusion. Perhaps we ought to have a quick
14 reference to make sure everybody is looking at the same
15 document and not just the same document number.

16 MR. CHARNO: I think Mr. Reynolds is referring
17 to cases where the same document has been listed twice and
18 different people looked at it, and one would characterize it as
19 a note and one would characterize it as a memorandum.

20 They are, in essence, the same document. In some
21 instances you would get different page counts. There are no
22 documents, however, bearing identical numbers.

23 MR. REYNOLDS: If you are satisfied that when
24 you give us the number, everybody is looking at the
25 same document, that is fine with me, but I want to make

1 sure that the Board and all of the parties are looking at
2 the same document when you read off the number on your
3 document.

4 That is all I'm saying. There is confusion
5 with respect to your large list. Maybe, in terms of what
6 we have here and the way it has been produced, that confusion
7 is eliminated and we can proceed the way Mr. Smith suggested.
8 I want to be sure before we do, when you give me a number,
9 we are all looking at the same document.

10 CHAIRMAN RIGLER: Throw the date in. That will
11 give you a double check.

12 MR. CHARNO: DJ-91 is offered as evidence of
13 the manner in which CAPCO was expected to operate as of
14 1971, as far as Toledo Edison was concerned.

15 MR. REYNOLDS: What is the offer of proof?
16 All I heard was a description of what the document is.
17 I didn't hear an offer of proof. What allegation does it go
18 to, or what is it relevant to?

19 MR. CHARNO: It is relevant to request for
20 participation in CAPCO as are virtually all of the documents
21 the Department will be introducing on the benefits that
22 CAPCO provides.

23 They are extremely relevant to somebody
24 requesting participation in the pool.

25 We would offer as DJ-92 --

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1 MR. SMITH: Excuse me. Is Pennsylvania Power
2 included, as well as Ohio Edison, on these?

3 MR. CHARNO: We will be introducing evidence
4 to indicate that in many contexts OE and Pennsylvania
5 Power are considered one system for purposes of CAPCO
6 planning.

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CHAIRMAN RIGLER: I think that for documents that relate to generating capacity allocations of the particular nuclear units involved and operating entities referring to the use of that power that the relevance is so apparent that I will not require any offer of proof on those.

Let's pick this up a bit.

MR. CHARNO: The Department would offer as DJ-92, a document bearing the internal identification No. 301071 dated April 27, 1972, three pages in length which specifically relate to --

CHAIRMAN RIGLER: You can dispense with the offer on that.

MR. CHARNO: The department would offer for identification as DJ-93, a document bearing Department of Justice Identification No. 302084 through 88.

We would offer for identification as DJ-94 --

MR. SMITH: Excuse me, I have an extra document attached to an Exhibit.

MR. CHARNO: That is what I will identify as 94, a one-page document bearing Justice No. 300676.

The Department offers for identification as DJ-95, a two-page document bearing Justice Identification No. 302735.

We offer for identification as DJ-96, a two-page document bearing Justice Identification No. 306552 dated October 7, 1968.

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Offer for identification as --

MR. LERACH: Could we have an offer of proof on 96?

MR. REYNOLDS: Can we get an offer of proof on the last document?

MR. LERACH: I asked for that.

MR. CHARNO: This relates specifically to --

MR. LERACH: One other question before you start.

I see this document is entitled Exhibit B, which suggests to me that it was perhaps part of a larger document or package of documents.

Do you know from whence it comes?

MR. CHARNO: The Exhibit B was placed on the document by Toledo Edison. When it waived privilege on certain documents it forwarded the copies to the Department of Justice and labeled them Exhibit A, B, C and so on. It was not part of an attachment to anything, except that.

MR. LERACH: Thank you.

This document is evidence in support of the Department's allegations concerning the refusal to allow Pitcairn to participate in the CAPCO pool, and also is received relating to the relationship between Ohio Edison, Pennsylvania Power and the Municipal Electric System of Grove City.

MR. REYNOLDS: What was the last -- could you read back the last sentence?

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(The reporter read the record as requested.)

CHAIRMAN RIGLER: Who is L.H., the author of this document?

MR. REYNOLDS: Les Henry of the law firm of Fuller, Henry, Hodge and Snyder.

CHAIRMAN RIGLER: It is not Mr. Rowley, then?

MR. REYNOLDS: No.

CHAIRMAN RIGLER: What position did Mr. J. E. Davis occupy in 1968?

MR. KLEE: He was the President of Toledo Edison Company.

CHAIRMAN RIGLER: What position did Mr. John White occupy in 1968?

MR. STEVEN BERGER: He was general counsel of Ohio Edison at that time.

MR. LERACH: May I ask Mr. Charno, do you suggest to the Board that in accepting this evidence, if it would, that it accept it as evidence of the truth of the matters asserted therein, or is the offer limited merely to showing that statements were made and that knowledge was had on behalf of the author and recipient?

MR. CHARNO: I would read the document through, if I may, before I answer.

MR. LERACH: Sure.

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MR. CHARNO: We would be submitting this document for evidence of the fact that the communications were made and received, and not for the truth of the statements contained in the communications.

MR. LEPACH: Thank you.

MR. CHARNO: The Department offers for identification as DJ-97, a cover letter with three attachments bearing Justice Identification No. 305066 dated April 17, 1973. The attachments are sequentially numbered and end in 069.

The Department offers as DJ-98, document bearing identification No. 303114, and they are consecutively numbered to -- together with the three attachments to the minutes noted in the body, the document is dated April 27, 1973.

CHAIRMAN RIGLER: Mr. Charno, I have 303114 through 123. Is that the complete document DJ-98?

MR. CHARNO: The attachments numbered 301327 through 29 although they were not produced with the document, were produced separately and are referred to as attachment in the document.

CHAIRMAN RIGLER: Were draft minutes of the CAPCO Executive Committee produced during discovery?

MR. CHARNO: Yes, they were.

MR. REYNOLDS: I didn't hear the question.

CHAIRMAN RIGLER: I notice Exhibit 98 was the final minutes. I wonder if draft minutes were produced during

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discovery.

MR. REYNOLDS: Yes, they were.

MR. CHARNO: The Department would offer for identification as DJ-99 --

MR. REYNOLDS: Wait a minute.

I am not clear what your internal numbers are for 98.

MR. CHARNO: Off the record.

(Discussion off the record.)

MR. CHARNO: We would offer for identification as DJ-99, a one-page document bearing Justice Identification No. 302767.

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

MR. CHARNO: This document was attached to the following exhibit during production. The following exhibit we would offer for identification as DJ-100, bearing Justice Exhibit No. 302768, dated August 3, 1973 and running sequential through 302777.

MR. REYNOLDS: I haven't heard the offer of proof for the document identified as Department of Justice Exhibit 99-99. All I heard was that it was attached to another document. I have not heard what the offer of proof was with respect to that document.

CHAIRMAN RIGLER: Well, did I understand you to say it was attached to Exhibit 100?

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MR. CHARNO: That is correct.

CHAIRMAN RIGLER: Then he is trying to give you a complete file, and I don't think Document 100 needs any explanation.

MR. REYNOLDS: That is fine if that is what the Department's position is.

MR. CHARNO: It also indicates the existence of a meeting and indicates a distribution list.

MR. REYNOLDS: I am asking for an offer of proof. I know what it says. I can read the document.

MR. CHARNO: Well, the document specifically refers to what we have alleged to be a refusal of access to CAPCO of the City of Cleveland, participation in the nuclear unit in question.

CHAIRMAN RIGLER: I don't get that out of it.

It seems to me the Applicants have asked the entire file be introduced. If it was attached and the Department includes it, why have we quibbled for five minutes about the offer of proof on it?

MR. REYNOLDS: I am quibbling because the Board has to make a determination on unsponsored documents as to relevance. We have to make a determination as to relevance for purposes of objection.

If I am getting documents that are attached and I don't understand the significance of certain attachments, I

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want the Department to explain to the Board and parties what relevance it is attaching, so I can make a response tomorrow in connection with the motion that the Department makes to introduce it.

It may be that that is what the document is about. If the Department is trying to attach more significance, I want to hear it now and not when they are trying to write their brief.

CHAIRMAN RIGLER: Off the record.

(Discussion off the record.)

CHAIRMAN RIGLER: Ms. Urban, did you get in touch with Mr. Lewis?

MR. MELVIN BERGER: I was not able to reach Mr. Lewis this weekend.

I will try again in the lunch break.

(The documents referred to were marked Exhibits No. DJ-19 thru DJ-100 for identification.)

CHAIRMAN RIGLER: We will come back at five o'clock.

(Whereupon, at 1:10 p.m., the hearing was recessed, to resume at 1:55 p.m. this same day.)

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AFTERNOON SESSION

(2:10 p.m.)

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3 CHAIRMAN RIGLER: Mr. Frysiaak is tied up on a
4 matter concerning another Board. He will be joining us
5 and you can proceed now.

6 MR. CHARNO: Over the luncheon break we were
7 able to reach Mr. Allen. He can testify one day earlier,
8 on Wednesday.

9 CHAIRMAN RIGLER: That is Wednesday the 11th.
10 All right.

11 MR. CHARNO: This was in the context of Applicants'
12 request for Thursday off. Our only objection was if we
13 couldn't reschedule Mr. Allen.

14 CHAIRMAN RIGLER: Thursday would be as any
15 other.

16 MR. CHARNO: It would.

17 MR. REYNOLDS: I would appreciate it if we could
18 work on that schedule and reconvene the Tuesday of the
19 following week.

20 I would like to run a four-day week, Tuesday
21 through Friday.

22 CHAIRMAN RIGLER: We will convene Tuesday.
23 We will not be running on Friday the 20th. And we may
24 have to break mid-afternoon on Thursday.

25 MR. CHARNO: The Department would offer for

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1 identification as DJ-101 a document bearing the internal
2 identification number 300453 through 60. This is a
3 document where Toledo Edison has claimed confidential
4 treatment. We have indicated as of this time they have not
5 waived that, but that they may in the future waive that.
6 It is the Department's understanding that documents designated
7 for confidential treatment may be viewed by outside counsel
8 for any of the parties, but will not be shown to the
9 personnel employed by an Applicant or Intervenor
10 directly.

11 MR. REYNOLDS: That is also Applicants' understanding.

12 CHAIRMAN RIGLER: We will direct the report to keep
13 Department 101 sealed on the record for now. I don't
14 know what distribution has been made in supplying it to
15 the Counsel for various parties here.

16 MR. CHARNO: It has been supplied to counsel of
17 all of the parties. Counsel have been made aware of the
18 nature of the exhibit and I think we have no problem at
19 all.

20 Everybody has agreed to that.

21 CHAIRMAN RIGLER: It will be identified as
22 a confidential document.

23 MR. CHARNO: We would offer for identification as
24 DJ-102, a three-page document bearing identification
25 number 305569 through 71.

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1 We offer for identification as DJ-103 a
2 one-page memorandum bearing internal number 300586.

3 CHAIRMAN RIGLER: Hold up for a minute.

4 What do you propose to do with your sealed
5 or confidential treatment documents in terms of final
6 argument to the Board in any briefing or proposed findings
7 of fact you may wish to make?

8 MR. CHARNO: It is our understanding that --

9 CHAIRMAN RIGLER: That is not just addressed
10 to you, Mr. Charno, but to all parties.

11 MR. CHARNO: We are not at all sure this will be
12 a document that will remain confidential. Confidentially
13 has been waived on a number of them. There should be
14 very, very few. We haven't got into the issue of how to
15 handle that.

16 CHAIRMAN RIGLER: That is something that the parties
17 might start considering with reference to the sealed documents
18 to which reference may be made during final arguments.

19 MR. CHARNO: I would offer for identification as
20 DJ-104, a three-page document bearing the identification
21 number 300583 through 585.

22 We would offer for identification as DJ-105,
23 a document bearing the internal identification number 302731
24 through 733.

25 We would offer for identification as DJ-106 a

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1 a two-page document bearing internal identification number
2 305060 through 61.

3 We would offer for identification as DJ-107,
4 a document bearing internal identification number 17000072
5 which is a nine-page document.

6 We offer for identification --

7 MR. REYNOLDS: Just a minute.

8 MR. KLEE: Mr. Charno, can we have an offer
9 of proof on the DOJ Document 17000072?

10 MR. REYNOLDS: Your Exhibit 107.

11 MR. CHARNO: The Department would offer this
12 in the same manner as the agreement between Consumers
13 and the Southern Michigan Cooperative. This is a comparable
14 agreement between Toledo Edison and the same cooperative
15 which restricts the utilization of energy purchased from
16 Toledo by the co-op to the State of Ohio.

17 You should have said restricted, since this
18 contract is no longer in effect.

19 CHAIRMAN RIGLER: It also applies to resale
20 of the energy supplies. I'm looking at Article 14.

21 MR. CHARNO: 14 is a restraint upon resale.

22 CHAIRMAN RIGLER: You say this agreement is
23 no longer in effect. Do you know when it terminated?

24 MR. CHARNO: This would have been an agreement
25 that was superseded by the Buckeye agreements and the

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1 cooperative customer began taking its power from Buckeye
2 power.

3 CHAIRMAN RIGLER: This agreement was in effect
4 until approximately 1970?

5 MR. CHARNO: No, with respect to Toledo Edison
6 the date would have been approximately '68. I would like
7 to identify for the record the October 21, 1966 letter which
8 was produced, appended to the contract, which is being
9 discussed, and we consider that part of the document, since
10 that was the way it was produced to us.

11 MR. SMITH: Is that part of 107?

12 MR. CHARNO: Yes, sir.

13 CHAIRMAN RIGLER: You offer that as proof that
14 the agreement was still in effect at least as late as
15 October 21, '66?

16 MR. CHARNO: Yes, sir.

17 The next sequence of documents appear under a
18 certificate ~~under~~ seal from the Department of Agriculture.

19 Would it be appropriate to mark those as initial
20 exhibit with lettered supplements?

21 CHAIRMAN RIGLER: Why don't you mark the whole
22 thing as one exhibit, since I notice there is a serial list
23 of eleven other documents referred to. Why can't
24 they all be part of the same exhibit number?

25 MR. CHARNO: Then we would offer the next exhibit

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23 --

1 MR. REYNOLDS: Excuse me, Mr. Chairman.

2
3 Before we go down that road, I would like
4 to suggest we mark each one of them separately or at
5 least that we identify them separately with respect to
6 the individuals who are referenced on the report.

7 These are all people who have been designated
8 on the Department's list as witnesses and, if the effort
9 here is to introduce this material on an unsponsored basis,
10 I will at the appropriate time make an objection on the
11 ground that they will be here as witnesses. If they are
12 called, then we should have a separate identification
13 number on each of these documents at the time they
14 appear, so that they can be dealt with individually.

15 CHAIRMAN RIGLER: Are the witnesses government
16 employees?

17 MR. REYNOLDS: I don't believe they are.

18 MR. CHARNO: One of them is and one of them
19 isn't, at this point.

20 MR. REYNOLDS: The Secretary of Agriculture
21 is not on their list.

22 CHAIRMAN RIGLER: I don't see any need to mark
23 them separately. They are all described in the cover
24 document, specifically. I can't see how you would be
25 prejudiced in cross-examination. You would be able to refer

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1 to any document cited in the cover document at the time
2 of cross-examination.

3 We will apply one number to them.

4 MR. CHARNO: We will then offer for identification

5 CHAIRMAN RIGLER: How do we identify this with
6 respect to your internal document number?

7 We will identify it then, as the Butz' affidavit
8 of January 22, 1976, and attachments.

9 MR. REYNOLDS: Is it the Department's intention
10 to introduce this as a document coming in for the truth
11 of the matters contained therein or just from the point
12 of view of a report that is in existence?

13 MR. CHARNO: For the truth of the matters
14 contained herein.

15 MR. REYNOLDS: We will save our objection to
16 the appropriate time.

17 CHAIRMAN RIGLER: That will be DJ-108.

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CHAIRMAN RIGLER: What was your response, Mr. Charno?

MR. CHARNO: For the truth of the matter contained therein, sir.

We would offer for identification as DJ-109, a document bearing the Department's internal number 302031. It is a two-page document sequentially numbered.

The Department would like to note at this point that those file numbers beginning with the numeral three are documents which were produced to us on discovery by Toledo Edison and when we placed them in evidence, we were placing them in evidence and part of our showing with respect to those is that they were contained in the files of Toledo Edison.

Thus, there will be some overlap of Exhibits which may or may not be identical. I think most of them vary in some small part between the different companies.

We would like to offer for identification --

MR. REYNOLDS: Just a minute.

I assume the time to respond to that is when the Department moves these into evidence?

CHAIRMAN RIGLER: Yes, although would you like to respond to the limited point?

MR. RIGLER: No, I think we can defer the whole thing.

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MR. CHARNO: We would offer for identification as DJ-110, the document bearing the internal No. 302026.

We would offer for identification as DJ-111, a one-page document bearing the No. 302014.

We would offer as DJ-112, a one-page document bearing the No. 302021.

We would offer as DJ-113, a one-page document bearing the No. 302013.

We would offer as DJ-114, a one-page document bearing the No. 302012.

We would offer as DJ-115, a one-page document bearing the No. 302011.

We would offer as DJ-116, a one-page document bearing the No. 302030.

We would offer as DJ-117, a one-page letter bearing the No. 302010.

MR. HJELMFELT: Excuse me.

I don't have the number on DJ-117, apparently.

Is that Mansfield to McCabe, January 30, '68?

MR. CHARNO: Yes, it is.

CHAIRMAN RIGLER: What was the Department's number again?

MR. CHARNO: 302010.

We would offer for identification as DJ-118, a three-page document bearing the No. 302017 through 19.

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MR. REYNOLDS: This is a document already in evidence. It came in as part of the Staff's case. I believe that they put it in -- I believe it was on January 5, but I will have to doublecheck on that.

MR. CHARNO: If it is in evidence, we will certainly withdraw it, unless it came in subject to an offer of proof.

Was that the case?

CHAIRMAN RICLER: It will be identified for now.

MR. REYNOLDS: Fine.

MR. CHARNO: We would offer for identification as DJ-119, a one-page document bearing the No. 302009.

MR. ZAHLER: It appears to be 08 on our number. Could you check?

MR. CHARNO: That would be a letter dated January 2, 1968 from Mr. Fleger to Mr. McCabe.

MR. REYNOLDS: We have an 8.

MR. SMITH: It is 009.

MR. CHARNO: The original was 9 that we copied it from.

We would offer for identification as DJ-120, a one-page document numbered 302020.

We would offer as DJ-121, a two-page document numbered 302015 through 16.

We would offer as DJ-122, a one-page document

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numbered 302033.

We would offer as DJ-123, a one-page document numbered 302006.

We would offer as DJ-124, a one-page document numbered 302006.

We would offer as DJ-125, a two-page document numbered 302027 through 28.

We would offer as DJ-126, a one-page document numbered 302025.

We would offer as DJ-127, a one-page document numbered 302023.

We would offer as DJ-128, a one-page document numbered 302022.

We would offer as DJ-129, a one-page document numbered 302123.

We would offer as DJ-130 --

MR. REYNOLDS: Before you do that, Mr. Chairman can I get an offer of proof with respect to the documents now that have been identified as DJ Exhibit 109 through 129?

end
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#18 nml

MR. CHARNO: The Department would attempt to prove in support of its allegation concerning denial of Pitcairn's request for CAPCO membership, the fact that the CAPCO members communicated fully with each other, both concerning the request and concerning their respective answers. And that they circulated draft responses to the Pitcairn request for comment and consideration. And that the decision to refuse Pitcairn membership was a consensus rather than unilateral on the part of each and every CAPCO member.

MR. REYNOLDS: Is that your offer?

MR. CHARNO: Yes.

MR. REYNOLDS: Well, Mr. Chairman, I don't have at my fingertips the point in the record where Mr. Charno made the statement, but I certainly will get it and furnish it to the Board.

The Justice Department has gone on record in this case as not alleging a conspiracy and conspiracy not being a part of its case. It is a matter of record and to the extent that the offer of proof is going to go in this direction, we can argue it tomorrow. But it does seem to me this is an appropriate time with respect to the handful of documents we are talking about here and the apparent significance of the internal numbering by the Department of Justice as being the only thread that is woven between and among these.

It certainly should be, at this time, noted for

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the record that the offer of proof is inconsistent in my view with the nature of the case that the government has stated in its September 5 filing and orally on the record to this Board.

CHAIRMAN RIGLER: Okay.

For your information, during our short break of a week or ten days, whatever it was, the Board was able to consider the procedural ruling requested by the Applicants.

That ruling is being issued today.

I am sorry that we don't have copies available here for you. It is being docketed and should be out in the afternoon mail. In that ruling we disagree with the Applicant's contention with respect to conspiracy. We hold as a matter of law that there is a substantial difference between a criminal law conspiracy and combinations, boycotts, restraints and agreements in restraint of trade and neither the Department nor any other party is being held to a "conspiracy" case.

We will refer you to that ruling for a fuller explanation of the cases on which we rely. However, it wouldn't be productive to pursue your argument at this time.

As I listened to Mr. Charno's offer, I did not hear him mention conspiracy. He charged joint action, consensus action and collective action, a combination action or perhaps even a group boycott.

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Proceed.

MR. REYNOLDS: Let me if I may, ask Mr. Charno which one of the actions that the Board listed is the one he is addressing in his offer of proof with respect to the documents?

You ran down quite a list. It seems it would be relevant to the Applicants and to the matters in controversy if Mr. Charno would tell us which of those he believes is relevant here for purposes of these documents.

MR. CHARNO: If I may, I believe my original characterization would encompass all of those.

We would offer as DJ-130, a two-page document bearing the internal identification No. 305058 through 59.

We would offer as DJ-131, a two-page document bearing the No. 308726 through 27.

We would offer as DJ-132, a multiple-page document bearing the Department's Internal No. 307581 through 634. This was a document for which confidentiality had been which. That is the reason for the C.

We would offer as DJ-133 --

MR. REYNOLDS: Could we have an offer of proof for 132?

MR. CHARNO: 132 is being placed in the record to facilitate the identification of persons who are -- and positions redlined therein, and to determine their

mm4 responsibilities for those positions.

MRE. REYNOLDS: As of 1973?

MR. CHARNO: As of 1973.

MR. REYNOLDS: All right.

MR. CHARNO: We would offer as DJ-133, a multiple-page document bearing the Department of Justice Identification No. 307675 through 172. The offer of proof would be for 1970 on that.

MR. REYNOLDS: Same as the other but for 1970?

MR. SMITH: 307675 --

MR. CHARNO: Through 307712.

We would offer as DJ-134, a multiple-page document bearing the Justice Identification Nos. 307634 through 307675.

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CHAIRMAN RIGLER: Hold up a minute, please.

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I already have a 307634 as the last page of

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D-132.

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MR. CHARNO: I assume the front page on this was unnumbered. The first page is unnumbered and the second page is 307675.

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CHAIRMAN RIGLER: The front page should be 307685-A?

8

MR. CHARNO: 134.

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MR. SMITH: Your final page 307675 is the same as the initial page of 133. It is not the same, but you have the same document number.

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12

MR. CHARNO: That would be the identical problem. We can identify the first page of 133 as 307675-A.

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14

We would identify as DJ-135, a 26-page document which bears no identification number on its cover, but is entitled the Toledo Edison Company's answers to supplemental interrogatories by the Department of Justice.

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MR. REYNOLDS: I would like an offer proof on this document, please.

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MR. CHARNO: The Department would show by this document that the Toledo Edison Company engages in coordinated operation with certain utility companies mentioned in the answer. And enjoys therefrom the benefits of coordinated operation as to the other utility companies.

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That is the Department's offer.

The Department offers DJ-136, document bearing DJ internal number 311945.

MR. KLEE: Mr. Charno, could we have an offer of proof on this one too?

MR. CHARNO: The Department offers this document as evidence of or in support of the same premise as stated with respect to the prior document, since this was a supplementary filing, supplementary request. We would note for the record that this interrogatory answer was amended on the record of a deposition or supplemented by counsel for Toledo Edison at that deposition, and that this amendment has been attached by the Department to the interrogatory answers as filed by Toledo Edison.

MR. REYNOLDS: Let me have that back again.

(The reporter read the record as requested.)

MR. REYNOLDS: Could we number separately the attachment? In terms of moving them into evidence there may be separate treatment.

CHAIRMAN RIGLER: Yes.

MR. CHARNO: We would then offer the attachment bearing the caption, "Deposition of James E. Sullivan," as DJ-137.

MR. MELVIN BERGER: May I approach the bench? I want to give you an additional notebook.

MR. CHARNO: The Department would offer as

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1 DJ-138, a multi-page document bearing the numbers 307713
2 through 17.

3 MR. REYNOLDS: Is the offer of proof on this
4 similar to that with respect to the organization manuals?

5 MR. CHARNO: It would be with respect to the date
6 specified at the top of every page.

7 MR. REYNOLDS: All right.

8 MR. CHARNO: We would offer as DJ-139 a document
9 bearing the internal number 30011505 through 06.

10 We would offer for identification as DJ-140 --

11 MR. REYNOLDS: I can't read what you just
12 identified as 139.

13 CHAIRMAN RIGLER: Off the record.

14 (Discussion off the record.)

15 MR. REYNOLDS: Could we have an offer on 139?

16 MR. CHARNO: The Department would offer 139
17 with respect to its allegation of a history of acquisitions
18 by Toledo Edison.

19 MR. REYNOLDS: Is this being offered for the
20 truth of the matter set forth therein?

21 MR. CHARNO: Yes, it is.

22 Can we request the Board's indulgence with
23 respect to the next seven pages? We haven't got the
24 originals and we can't read them.

25 MR. BUCHMAN: Mr. Chairman, I don't know
what "requests the Board's indulgence" means. I have a sheet

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1 on which I can see nothing but the red line. Somebody
2 was able to read enough to know they wanted to red-line
3 it, I assume, but this is impossible.

4 MR. CHARNO: What "requests the Board's indulgence"
5 means, is we would prefer not to offer the seven pages,
6 until we can secure a legible copy.

7 CHAIRMAN RIGLER: That makes sense.

8 MR. CHARNO: We offer as DJ-140 a two-page
9 document numbered 305929 and 930.

10 CHAIRMAN RIGLER: The first lone of the paragraph
11 which says, it reads it comes to our attention and then
12 it says has been considerable.

13 MR. CHARNO: It reads, "has come to our attention
14 that there has been."

15 MR. REYNOLDS: Could I see the original for
16 a minute?

17 MR. CHARNO: We would offer as DJ-141, a one-
18 page document dated -- numbered 305923.

19 We would offer as -- We would offer as DJ-142 a
20 document numbered 306015. We would offer as DJ-143 a
21 one- page document numbered 305926.

22 We would offer as DJ-144, a one-page document
23 numbered 305927.

24 We would offer as DJ-145 a three-page document
25 numbered 30010 through 12.

bw5

1 We note for the record there is a notation in the
2 right margin which was not placed thereon by the Department
3 nor was it ascertained in depositions' inquiry from counsel
4 of Toledo Edison that it was placed on the memorandum by
5 any of the copy notations or the signator, which places
6 no reliance on that marginal note.

7 We have no objection to substituting a copy
8 without that word on it for this document.

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CHAIRMAN RIGLER: We will disregard it.

MR. REYNOLDS: If we do have copies without the word on it, it would be my preference if at some later time we could make the substitution.

CHAIRMAN RIGLER: All right.

MR. CHARNO: We offer as DJ-146, a four-page document numbered 30011715 through 718.

MR. BUCHMAN: This is another one, Mr. Chairman that is illegible in my set.

MR. CHARNO: This is a poor copy here.

I think we could type it. We will endeavor to do so.

May I inquire, since we are not relying upon the attachment which is a draft of something, can we avoid typing the extra three pages?

MR. BUCHMAN: I can't tell as far as I am concerned until I read the first one to see what it says.

CHAIRMAN RIGLER: Make it available during the next break and then you can make your decision. Let's not go to needless work if it is not relevant.

MR. BUCHMAN: Surely, but I would like to read it to see what the reference is before I would waive something like that.

MR. CHARNO: We would offer as DJ-147, a one-page document numbered 30011722.

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We would offer as DJ-148 --

MR. REYNOLDS: I indicated that Exhibit 147 is another one we will need a typed copy of.

CHAIRMAN RIGLER: That was understood.

Same will apply to 148, I believe.

MR. CHARNO: 148 being a one-page document numbered 30011735.

We offer as DJ-149 a one-page document numbered 14000067.

MR. ZAHLER: Would you repeat that again?

MR. CHARNO: It is a letter to John Clear from M. R. Dorsey dated June 6, 1973.

MR. REYNOLDS: The number?

MR. CHARNO: 14000067.

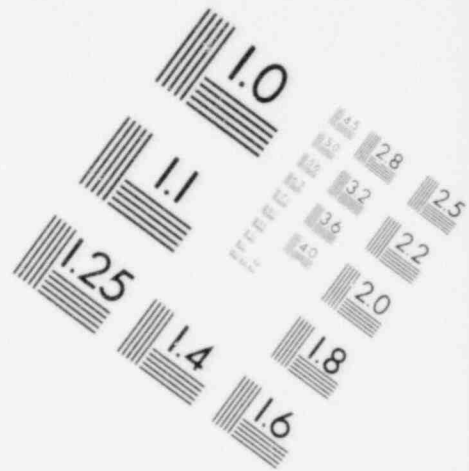
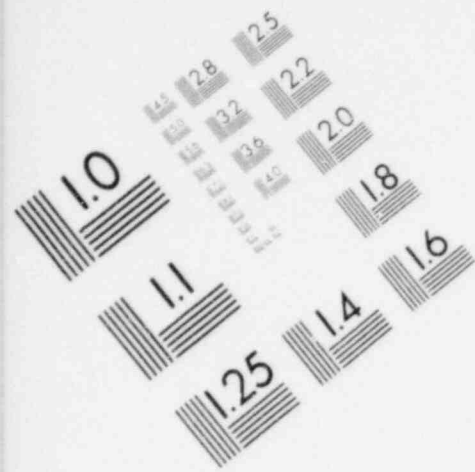
We would offer as DJ --

MR. REYNOLDS: Excuse me.

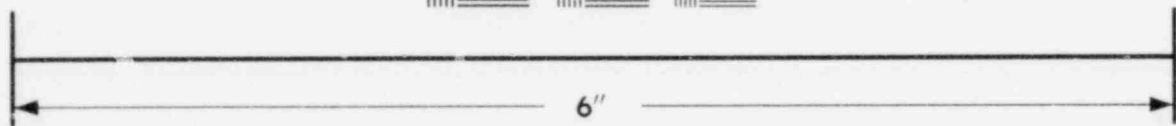
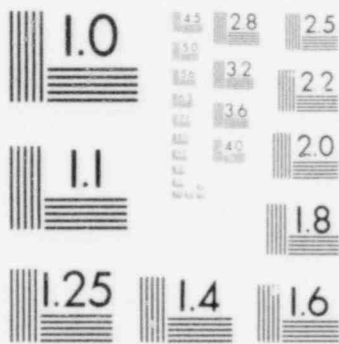
Could I ask the Department to tell me what the source of this document is?

MR. CHARNO: This document was made available to the Department by the City of Napoleon. A copy was produced by Applicants, but this is a better copy so that we used this rather than the one produced from Applicants' files.

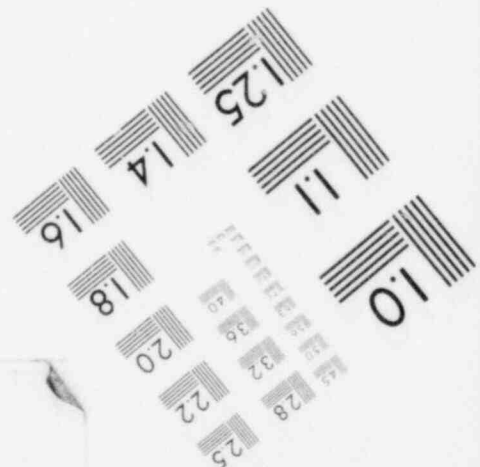
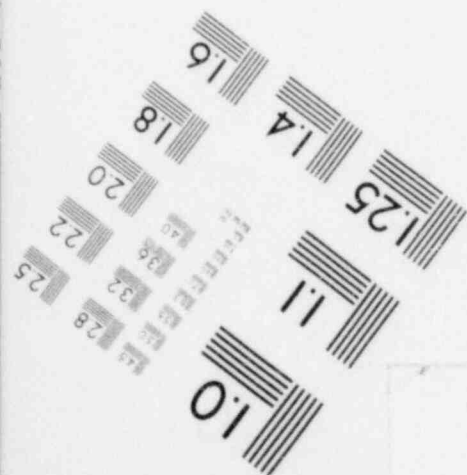
We would offer as DJ-150, a document numbered 30011797.

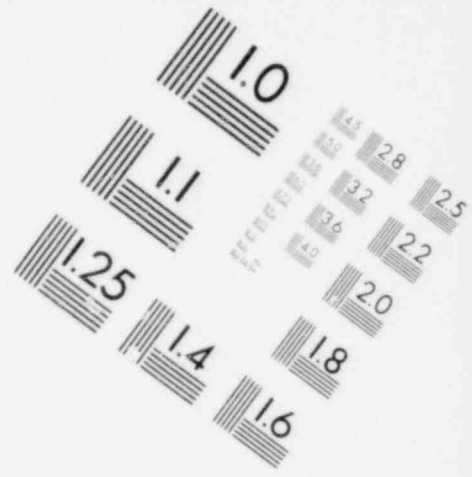
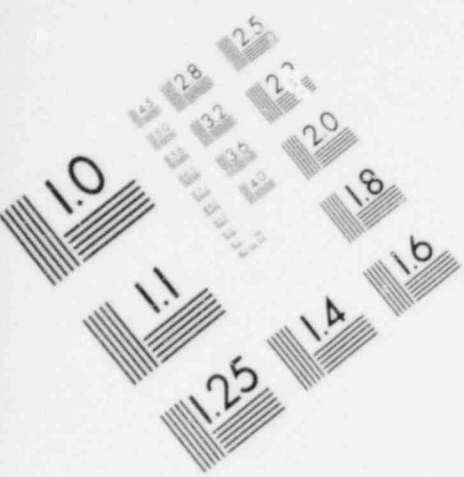


**IMAGE EVALUATION
TEST TARGET (MT-3)**

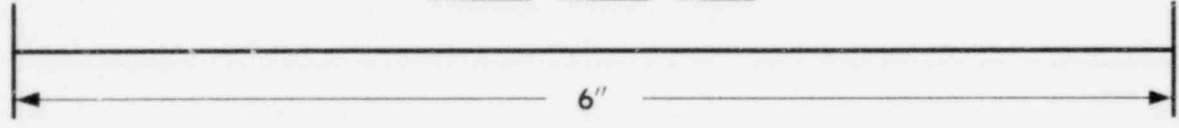
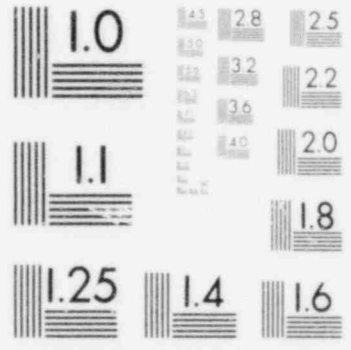


MICROCOPY RESOLUTION TEST CHART

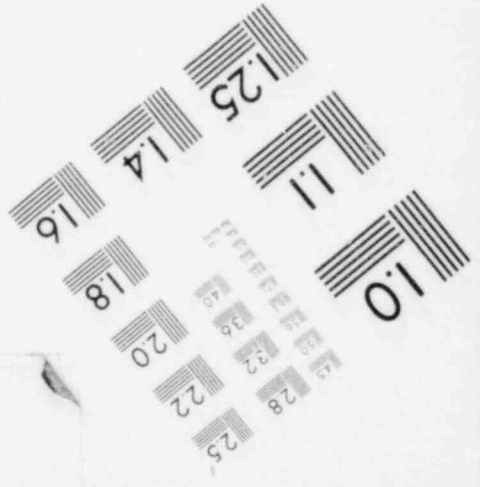
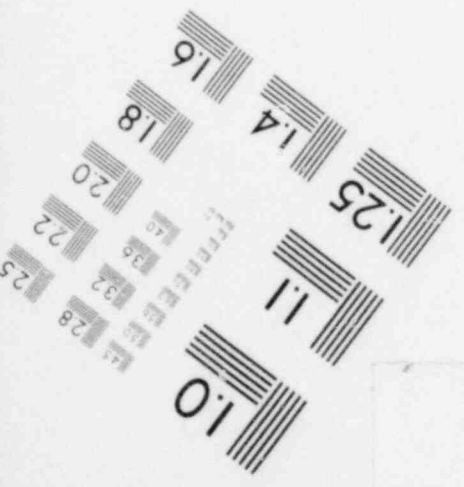




**IMAGE EVALUATION
TEST TARGET (MT-3)**



MICROCOPY RESOLUTION TEST CHART



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MR. REYNOLDS: I have an 87. I will go either way.

MR. CHARNO: Why don't we make it firm until a 9.

We would offer as DJ-151 a one-page document numbered 30011801.

CHAIRMAN RIGLER: You better identify that because my number is blurred.

MR. CHARNO: It is a letter to Mr. M. R. Dorsey from W. R. Moran, dated September 18, 1974.

We would offer as DJ-152, a multi-page document bearing the No. 302486 through 302505. We would make an offer of proof similar to the company tables of organization with respect to the scope and date.

We would offer as DJ-153, a multi-page document bearing numbers 300500 through 521.

MR. REYNOLDS: Could I get an offer of proof on this?

MR. CHARNO: Generally in proof of the structure of Toledo Edison and CAPCO and the benefits flowing to Toledo Edison from coordinated operation and development and similarly its obligations to other utilities and coordinated obligation and development, plus the specific materials relating to the units which are the subject of this proceeding and the impact upon them disclosed by the company. Finally the management and operating statistics on the last two pages as of the time this prospectus was published.

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We would offer as DJ-154, a one-page document numbered 305762.

MR. ZAHLER: Would you identify that, please?

MR. STEVEN BERGER: Could I have the number again?

A. CHARNO: 305762, being a letter from, initials W.H.S. to Mr. Thomas M. Hexman, October 2, 1963.

We would offer as DJ-155, a multi-page document bearing the Identification Nos. 305763 through 771.

We would offer as DJ-156, a two-page document bearing the Document No. 30011784 through 85.

MR. KLEE: Can we have an offer of proof with respect to this document, please?

MR. CHARNO: Did you inquire about Exhibit E?

It is my understanding that Exhibit E was placed on the document by Toledo Edison when that document was forwarded in response to documentary discovery in the Davis-Besse 2 and 3 proceeding. That was a cover letter and then they had a small document production which was identified by placing exhibit numbers on it.

MR. KLEE: No, I know about that, Mr. Chairman. What does the document purport to show?

MR. CHARNO: The Department would offer DJ-156 in support of the proposition that municipal utilities have requested coordinated operation and development and are capable of making a meaningful contribution to coordinated operation

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and development, and finally that it would have general relevance to the allegation of the Department's, that Toledo Edison has a long outstanding acquisition history.

end 20

We would offer as DJ-157 --

start 21

MR. KLEE: Mr. Charno, is this being introduced for the truth of the matters asserted therein?

MR. CHARNO: It is being submitted, I believe, for the communications. That is to say the indicated portions, redlined portions.

MR. REYNOLDS: The fact of communication?

MR. CHARNO: Yes.

We would offer as DJ-157, a one-page document numbered 30011788.

MR. REYNOLDS: Could we have an offer of proof on that one, please?

MR. CHARNO: In addition to the offer on the prior document, we would add that this document specifically evidences the position of a small utility to whom coordinated operation and development is not available.

MR. REYNOLDS: Is that it?

Is that what your offer is?

MR. CHARNO: Yes.

We would offer as DJ-158, a document identified as 30011789 through 92.

MR. REYNOLDS: What is the offer on 158?

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MR. CHARNO: That it demonstrates the degree of coordinated operation and development available to the small municipal system and available to Toledo Edison and the extent to which the benefits thereof are available to both.

MR. REYNOLDS: Is Exhibit 158 being introduced to show the truth of the matters contained therein?

MR. CHARNO: No, it is not.

We would offer as DJ-159, a document numbered 310900 through 906. That is a document for which Toledo Edison has requested confidential treatment and has not waived that request at this time.

CHAIRMAN RIGLER: Number 159 will be sealed in the transcript copies and counsel will abide by the restrictions on sealed documents.

MR. CHARNO: We would offer as DJ-160, a document numbered 309636 through 640 and note that this is similarly claimed to be confidential information by Toledo Edison.

CHAIRMAN RIGLER: It will be sealed.

MR. REYNOLDS: Could we have an offer of proof as to this document -- both 159 and 160?

MR. CHARNO: Both Exhibits 159 and 160 are offered to prove the advantages of CAPCO membership and generally coordinated development with respect to the procurement and utilization of nuclear fuel.

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MR. REYNOLDS: This goes to what allegation?

MR. CHARNO: Goes to each of the allegations relating to requests for participation in nuclear generation.

It goes to structure, and generally the benefits enjoyed by the members of CAPCO of coordinated operation and development. In this case specifically coordinated development.

We would offer as DJ-161, a document numbered 309754 through 760 and would note that it is also subject to the claim of confidentiality.

The Department would offer as DJ-162 --

MR. REYNOLDS: Excuse me just a minute.

On DJ-161, I am not yet clear on the basis for the confidentiality claim. I guess we ought to clear that up before we move on.

CHAIRMAN RIGLER: Are you saying the Applicants have not claimed confidentiality?

MR. REYNOLDS: I don't know of any claim of confidentiality with respect to this document.

CHAIRMAN RIGLER: All right.

Then it won't be sealed.

MR. CHARNO: We would offer as DJ-162, a multi-page document numbered 310955 through 975, which is subject to a claim of confidentiality.

CHAIRMAN RIGLER: All right, it will be sealed on

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the record and afforded confidential treatment.

And we will take a five-minute break at this point.

end 21

(Recess.)

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MR. CARNO: The Department would offer as DJ-163, a three-page document numbered 310667 through 69.

This should be treated with the same claim of confidentiality.

CHAIRMAN RIGLER: It will be marked confidential and sealed.

Did you say that 162 was also subject to a claim of confidentiality?

MR. CHARNO: Yes, sir. We would offer as DJ-164, a document bearing the numbers 310674 through 685 and this would be subject also to the claim of confidentiality.

CHAIRMAN RIGLER: It will be designated confidential.

MR. CHARNO: We would offer as DJ-165, a document numbered 310686 through 692 which is also subject to the claim of confidentiality.

CHAIRMAN RIGLER: It will be marked confidential.

MR. REYNOLDS: Can I get an offer of proof as to Exhibits 162 through 165?

MR. CHARNO: That would be the same offer of proof as that with respect to 160 and 161.

The next document was included by error. It is already in evidence. Number 300002.

We would offer for identification as DJ-166

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1 a multi-page document bearing the identification number
2 30011018 through 11090. This document is subject
3 to a claim of confidentiality.

4 CHAIRMAN RIGLER: It will be marked confidential.

5 MR. CHARNO: We would offer as DJ-167 a
6 multi-page document which bears the title the Duquesne
7 Light Company's answer to the interrogatories and document
8 requests served upon it by other parties.

9 We would offer as DJ-168, a one-page document
10 numbered 118559.

11 MR. LERACH: Mr. Rigler, I would like to raise
12 a question about the red-lining of single page documents
13 which I feel I should take exception to. It was my
14 understanding that the red-lining procedure was one devised
15 by the Board as more or less a matter of convenience in
16 the case of lengthy documents. I don't think it as
17 should be utilized in the case of single page documents
18 whereby a party can just pick out one section of the document
19 he finds particularly attractive and red-line it.

20 As to individual or short documents, I think the
21 entire document should come in, so that the Board can consider
22 whatever statements made therein in their total context.

23 CHAIRMAN RIGLER: The red-lining was done as a
24 convenience. We indicated it was not necessary to red-line
25 short documents.

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I don't think the practice does any harm.

MR. LERACH: Well, it may. Let us look at the document that was before us. They have red-lined basically only the final paragraph. Let us say there is an earlier paragraph in that document which I find favorable to my clients clause or to offset the red-lined paragraph. Do you have assurance that that paragraph, even though not red-lined, is coming into the case on the same basis as the red-lined paragraph and that the Board would consider it.

CHAIRMAN RIGLER: You would be wise to call it our attention, although I believe you could assume that with a one-page document, we would read. Out of an abundance of caution maybe you should red-line those portions, you would like us to read.

MR. LERACH: Then pursuant to that I reserve the right to do that to all of the Department of Justice documents being identified today, in addition to any other objections I may have as to their admissibility.

MR. REYNOLDS: For clarification, I want to make sure everybody is on the same wave length. I assumed it would also be appropriate at the time each Applicant put in their direct case to take the designated documents or portions of documents by some lineation or inner lineation that may have been introduced by other parties

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1 and have not been lined.

2 CHAIRMAN RIGLER: You have that privilege.

3 MR. REYNOLDS: I don't want anybody to be under
4 the impression that we can't later do this to these documents.

5 CHAIRMAN RIGLER: Red-lining is to call to the
6 attention of the Board things that you want to consider.

7 MR. REYNOLDS: The whole document is in evidence,
8 and it is a question of the important parts being lined,
9 so as to draw the attention of the Board to those portions.

10 CHAIRMAN RIGLER: We would accord Applicants
11 the privilege of showing us the portions of any document
12 they want us to consider.

13 MR. STEVEN BERGER: My reason for
14 rising was only in regard to the point raised by
15 Mr. Reynolds. The entire document, in any event, comes into
16 evidence notwithstanding the portions of it not being
17 red-lined or if Applicants choose in their way blue-lined
18 at the time they wish to point paragraphs out to you.

19 Even assuming that portions of documents are not
20 lined at all, their being in evidence and certainly they are
21 available to the parties to use for whatever purpose they
22 see fit, in terms of proposed findings.

23 CHAIRMAN RIGLER: Yes, with this caveat. If it
24 is the introducing party that has red-lined the document and
25 then chooses to put in a proposed finding with respect to

1 some other portion that might create some difficulties.

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2 MR. STEVEN BERGER: I understand that. But as to
3 the Applicants' documents that are being put in now by the
4 Department of Justice and being red-lined, if we at the
5 time of our case or at the time we object don't point out
6 particular portions of that document that we want to bring
7 to the Board's attention, we can nevertheless at the time
8 of making proposed findings or submitting proposed findings
9 alluded to any portion of that document.

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CHAIRMAN RIGLER: Yes, although I would encourage you to put us on early notice as to the portions that you would like us to consider. If it comes up during your case, or even during cross-examination, it would be helpful.

MR. CHARNO: The Department offers for identification as DJ-169, a two-page document numbered 118561 and 62.

CHAIRMAN RIGLER: 168 was 118559.

MR. CHARNO: That is correct.

MR. LERACH: I request an offer on this document, please.

MR. CHARNO: 168 or 169?

MR. LERACH: 168 please.

MR. CHARNO: This and a number of subsequent exhibits are being offered with respect to the Department's allegation concerning Duequesne's goal of acquiring the Aspinwall Municipal System.

CHAIRMAN RIGLER: Who is the author of this document?

MR. CHARNO: The initials which are those of a Mr. Gilfillin appear on the document. I don't know whether the counsel can stipulate as to the authenticity.

MR. LERACH: I didn't know that I was called on to stipulate the authenticity. I do recognize it to be Mr. Gilfillin's writing, but I am not being asked to stipulate as I understand it.

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Is there any further offer?

MR. CHARNO: No.

MR. LERACH: Mr. Chairman, I don't really think it is an adequate offer to say that it relates to a given charge a party has made.

The question is what does this document prove, what do you intend to prove with it.

I would request a more specific offer.

CHAIRMAN RORIGLER: Are you in the process of responding, Mr. Charno?

MR. CHARNO: If the Board wishes, I will formulate a more explicit response.

CHAIRMAN RIGLER: Yes, I'm sorry.

MR. CHARNO: Sorry.

This document is evidence of the method by which Duquesne Light Company acquired the Aspinwall Municipal system, indicating the series of steps both prospectively and retroactively on the face of the document which they pursued with respect to this acquisition and in some of the other documents which were to other acquisitions.

MR. LERACH: Okay.

MR. REYNOLDS: Mr. Chairman, my copy of the last line is illegible, of the first page. I don't know if everybody else has the same problem.

MR. CHARNO: I think it is legible on ours,

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and we could read it and show it to the Applicants.

CHAIRMAN RIGLER: Read it to all of us.

MR. CHARNO: "Be involved at this point with PEL."

CHAIRMAN RIGLER: This is being offered in support of the first paragraph on page 7 of the Department's statement of September 5, is that correct?

MR. CHARNO: Yes, it is.

The Department would offer as DJ-170, a two-page document numbered 118563 and 64.

The Department would offer as DJ-171, a document numbered 118565 and 66.

MR. REYNOLDS: Could you identify the document.

I don't have any number on the first page.

MR. CHARNO: It has an initial line saying:

"Fleger called me 4-29-66."

MR. REYNOLDS: All right.

CHAIRMAN RIGLER: What numbers are those again?

MR. CHARNO: 118565 and 566.

I would offer for identification as DJ-172, a two-page document numbered 115380 and 81.

We would offer as DJ-173, a one-page document numbered 115382.

We would offer as DJ-174, a two-page document numbered 118567 and 568.

We would offer as DJ-175, a multi-page document

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numbered 118550 through 54.

MR. BUCHMAN: Mr. Chairman, on the second sheet of that, is that supposed to be that way Mr. Charno?

There is something covering up half the page.

MR. CHARNO: The page that is covered up is the page after that.

The second sheet would be just the cover note.

MR. BUCHMAN: That is fine.

Thank you.

MR. CHARNO: We would offer as DJ-176, a two-page document numbered 118548 and 49.

MR. LERACH: Mr. Charno as to the memorandum that comprised part of 175 and the memorandum that comprised the second page of 176, do you offer those memoranda to prove the truth of the matters asserted therein?

MR. CHARNO: We do with respect to the redlined portions thereof. On pages 118552 and 53 of Exhibit 175.

With respect to page 118549 of 176, we introduce that for the communications that is redlined therein.

MR. LERACH: Do I understand you to offer nothing in the document 176 to prove the truth of the matters asserted therein?

MR. CHARNO: We would be offering 176 in proof of a meeting which contained negotiations and that the existence of these negotiations were communicated to the officers of

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Duquesne Light at the higher level than that held by the individual who attended the meeting.

MR. LERACH: Do I understand you to be offering only those parts of Document 175 which are redlined, or do you offer the entire document and then have a suboffer that it is only the redlined matter that you offer as to the truth of the matters asserted therein?

MR. CHARNO: I am having conceptual difficulty with the concept of a suboffer.

Broadly stated this memorandum and the attachment indicates the existence of alternatives which are mutually exclusive between acquisition of a municipal distribution system and the purchase of power at wholesale.

It indicates a meeting was held at which there were negotiations concerning the purchase of the Aspinwall system and would be offered in proof of the allegation which appeared on page 7, the first full paragraph of the interrogatory answers.

MR. LERACH: Are you offering into evidence at all, those portions of 175 that are not redlined, or are you --

MR. CHARNO: In view of the discussion on the record this morning, yes, we are.

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1 CHAIRMAN RIGLER: Now, I don't think you have
2 that privilege.

3 MR. CHARNO: We had originally red-lined the
4 materials as part of multi-page exhibits.

5 CHAIRMAN RIGLER: I thought the Board had
6 indicated was the purpose of red-lining was to single out
7 that portion of the exhibit you wanted us to consider and
8 we would feel free to disregard other portions of the
9 exhibit noting that some of the exhibits consisted of several
10 hundred pages of FPC schedules, for example.

11 MR. LERACH: Let's go off the record for a
12 minute.

13 (Discussion off the record.)

14 CHAIRMAN RIGLER: Let's go back on the record.

15 MR. CHARNOFF: The Department has no objection
16 to allowing all of the documents to come in on the same
17 basis.

18 MR. LERACH: Objection. As to 175.

19 MR. CHARNO: This is 176, I believe.

20 MR. LERACH: I'm also looking at 175, which
21 is the longer memo.

22 CHAIRMAN RIGLER: We are going to interrupt
23 you now, Mr. Charno. That is as far as we are going to
24 get today, because there is something else we wanted to
25 bring up. That relates to the Department's outstanding

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1 motion to produce documents of the Applicants' which are
2 subject to the CID.

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3 (The documents referred to were
4 marked Exhibits DJ-101 through
5 176 for identification.)

6 CHAIRMAN RIGLER: We have been talking this over
7 among the Board members and we have some questions that
8 perhaps need answered.

9 We are not aware of the exact relief request
10 or the exact relief granted in the District Court, but
11 if that relief consisted of refusing to enjoin the Department
12 from offering documents obtained pursuant to the CID into
13 evidence at this proceeding, then there may be no necessity
14 for this Board to make any ruling. We have tended to
15 treat your requests as a request to obtain documents for
16 introduction into evidence and not for discovery purposes.

17 It seems to us there would be a timeliness
18 problem with respect to late application for discovery
19 purposes.

20 On the other hand if you are doing nothing more
21 than seeking to have documents which you would introduce
22 into evidence not in a discovery context, but in a straight
23 evidentiary context, that would be a different matter and
24 we are confused about the purpose of your request and the
25 necessity for our granting any relieve, depending upon what
went on in the District Court.

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MR. CHARNO: I think our position before the District Court was that --

CHAIRMAN RIGLER: You were not the moving party, as I recall.

MR. CHARNO: That is correct. Was that CEI filed suit to require the Department, one, not to use the documents that it obtained pursuant to CID and, two, to retrieve all document descriptions and lists of the documents that we had circulated in the course of requesting process before this Board.

The Department took the position before the District Court that we had made no unlawful use in contravention of the CID statute of those documents by requesting process to use them in another forum.

We relied upon the legislative history which states in the Department's view that the major fear that was brought to Congress' attention when it restricted the use of the documents was that they would be taken for one purpose and then they would be used by a different agency or in a different forum for a wholly different purpose, and the party to whom the documents belonged would have not notice of the new charges and no attempt to argue the relevancy of those documents to the new proceeding. It would find itself deluged with evidence which it wouldn't protect itself against or prepare against.

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Whether the District Court accepted that or not, we don't know from the very brief order that it issued.

It did, however, deny the request for preliminary relief and granted our motion to consolidate any issue of a bad faith issuance of a civil investigative demand with the preliminary injunction, and then dismiss the entire petition.

It did state in the very brief order that it was not a misuse by the Department to request process and to identify the documents in the context of doing so.

CHAIRMAN RIGLER: The opinion did not address the issue whether you could proceed without the use of process to utilize these documents in an agency proceeding.

MR. CHARNO: It is the Department's opinion that we cannot do so.

MR. SMITH: You must have our process before you can bring them here.

MR. CHARNO: That is correct.

MR. SMITH: You didn't really say that in your papers before.

MR. CHARNO: I'm not sure what we had said in our papers at this point, but that is our papers at this point, but that is our position after we went into the

legislative history.

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CHAIRMAN RIGLER: Is it your further position that you are not seeking to obtain the documents for deposition purposes or discovery purposes at this stage, but you are seeking to obtain them because you wish to introduce them into evidence at this proceeding.

MR. CHARNO: That is correct.

MR. SMITH: You are seeking more than just a declaratory opinion on our part that you may use them. You affirmatively want to have those documents produced under our discovery authority.

MR. CHARNO: That is correct.

MR. SMITH: That is the main purpose -- sole purpose of our papers.

You already have the documents.

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MR. CHARNO: That is correct.

MR. SMITH: Do you wish to have our authority behind it?

MR. CHARNO: We would -- it would be virtually impossible for us to put the defendants on notice without filing as we did file -- in other words, our obligation is to inform them that we seek those documents for use in this proceeding, and their relevance to this proceeding.

MR. SMITH: You could have done that by your exhibit list.

MR. CHARNO: I don't believe that that would rise to the level of notice that Congress felt was necessary.

MR. SMITH: Do we have the responsibility of deciding whether the Antitrust Civil Process Act prohibits us from using those documents or considering them in our proceeding.

Is this within our scope?

MR. CHARNO: I think it could be within your scope, but the Applicants have chosen to take it to, at this point, the Court of Appeals for the District of Columbia, so that I am not sure what gain would be had by having it decided here, and then taken up through another appellate route.

MR. SMITH: Your last papers now said the only thing remaining for this Board to decide is relevance and

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timeliness.

I think perhaps you have gone farther than that, today.

I think under your position today we have to decide how the Antitrust Civil Process Act enters into our consideration of those documents.

MR. CHARNO: I am not sure of the basis for your statement in that if you issue process for the documents of a determination that they are indeed relevant to this proceeding, you are not bound or subject to the Antitrust Civil Process Act and we would utilize those documents more or less at our peril subject to any determination by the reviewing court of what our obligation was.

MR. SMITH: Why play games.

You have the documents.

MR. CHARNO: Because if this Board were to determine that those documents were not relevant to this proceeding, we could not utilize them in this proceeding.

MR. SMITH: What if we were to decide that the documents have sufficient relevancy for discovery purposes to be considered, but defer the precise question of relevancy until you offer them.

Would that satisfy your requirements?

MR. CHARNO: It would satisfy the Congressional test, but in fact the two would come so closely one upon the

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other that practically speaking they would be identical.

MR. SMITH: We have to first determine a general relevance before we can compel the discovery you seek.

Then a special precise relevance, when you offer them into evidence.

Is that right.

MR.CHARNO: That is correct.

CHAIRMAN RIGLER: Mr. Reynolds, did you want to make a comment?

MR. REYNOLDS: Yes.

I got a call at noon today from Mr. Lansdale, who advised me that the Court of Appeals has with respect to this issue, indicated that it will defer ruling of any of the matters that are before them on the CID question until such time as this Board has resolved the question pending before it.

As I understand it, I think there is quite a bit of difference, though. The issue before the Court of Appeals centers on whether the disclosure by the Department of Justice thus far in the papers that have been filed, that is the disclosure as to the material that is CID material was improperly within the restrictions or limitations of the statute.

The question that is before this Board, which I view as a much different question, is whether or not this Board

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has the authority under the Antitrust -- Civil Investigative Demand Statute to effectuate process, if you will, or to order these documents to be available for purposes in this proceeding

And that was the thrust of our filing which, as I recall it, went first to the question of whether this Board under that statute, can even look at the documents for relevance purposes, and only if an affirmative answer is given to that looking at the statute, then do we get to the question of whether the Department has met its burden on the relevance standard for purposes of using those documents here in response to a discovery request which we have argued is out of time.

end 25

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CHAIRMAN RIGLER: Did the District Court address the first question you posed?

MR. REYNOLDS: No, it did not.

MR. CHARNO: It did, upon argument, somewhat extensively.

MR. REYNOLDS: I was not at the argument. The order does not reflect it. What went on at the argument, I do not know. The District Court did not address the question of whether this Board had authority under the statute to order that these documents -- to look at the documents for any purpose or to order them available in this proceeding.

Our position is one that basically rests in the first instance on what we believe to be the reading of the statute as not permitting those documents to be used in this sort of proceeding when obtained in a civil investigative demand and then if the Board disagrees with us on that point, we go to the relevance question, because of the untimeliness of the discovery request. As Mr. Charno explained his position, I have a hard time understanding how the Department now is doing any more than subverting the whole purpose of the statute by indirectly asking this Board to get to the documents he has admitted the statute doesn't permit to come into the proceeding in any other way.

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MR. CHARNO: That was the issue precisely determined by the District Court, that the Department's behavior was proper.

MR. REYNOLDS: As to disclosure thus far?

MR. CHARNO: And as to seeking the matter before this Board.

MR. REYNOLDS: As to whether you could seek it in the manner you had, so as not to have committed disclosure that would violate the statute, the District Court said that element of disclosure was not contrary to whatever the statute said. It did not go further and address the question of whether the statute would permit this Board to independently examine the documents or to order that the documents are available for this proceeding.

MR. SMITH: Doesn't the one subsume the other? If there was no possibility of us determining that we had a right to consider those documents, then there would have been no justification for the Department of Justice describing those documents to us.

MR. REYNOLDS: The Department took a different view when it described the documents to you as to what was available to this Board that had been obtained under the civil investigative demand. The fact that the Department construed the statute in that way and described it to them, does not resolve the question, and I think a serious legal

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question that is before the Board.

I don't think the fact they described then does resolve it.

I know that the petition that went to the District Court was complaining about the manner in which that description was made on the basis that that description alone without anything more was violative of the statute.

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CHAIRMAN RIGLER: Would you undertake to provide us with a copy of the petition for relief, the order of the Court, and the issues pending in the Court of Appeals?

MR. REYNOLDS: They are already on file.

MR. SMITH: We don't have the order of the Court.

CHAIRMAN RIGLER: We don't have the order of the District Court and the petition in the Court of Appeals.

MR. CHARNO: I think the oral argument, if we have a copy of it, might be instructive as to what the Judge did take into account, and what changes were actually made by the Applicants. They amended their pleadings upon argument.

CHAIRMAN RIGLER: Is that correct, Mr. Reynolds?

MR. REYNOLDS: What was that last statement?

CHAIRMAN RIGLER: He said during the course of oral argument, Applicants amended their pleadings for relief.

MR. CHARNO: Effectively amended their pleadings.

MR. REYNOLDS: He said effectively.

I was not at the argument. I am here and I have no problem with respect to filings, orders and petitions. But I am handicapped if we are going to start using the arguments there.

CHAIRMAN RIGLER: I am not sure how important the argument would be, but I am more interested in finding out what the terms of the order were and what the relief

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granted was.

MR. REYNOLDS: I agree.

We can provide that to you.

MR. SMITH: The Court of Appeals is going to wait until we decide if those documents are otherwise appropriate for use in our hearing, notwithstanding the Antitrust Civil Process Act. Then the Court of Appeals would decide if the Antitrust Civil Process Act would preclude their use before us.

Is that your understanding of what will happen?

They don't want to decide an issue that is moot?

MR. REYNOLDS: That is not my understanding.

CHAIRMAN RIGLER: Perhaps you can get whatever order or instructions the court did issue.

MR. REYNOLDS: The Court of Appeals is concerned about a mootness question but I don't understand it to be the way you described it, Mr. Smith.

I will say that I just got the word by telephone that the Court of Appeals was going to wait. I don't know any more than that. I can check.

CHAIRMAN RIGLER: We would like to see all of the relevant orders as we take this matter under consideration.

We will see everyone at 9:30 in the morning.

MR. STEVEN BERGER: I would like to get clarification as to where we are going with the documents,

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and what is going to be the procedure with regard to tomorrow morning.

Do I understand it that all of the other documents which have not been marked for identification, will not be marked this week and will be put off until sometime in the future, that will be put aside as a day for documents?

MR. CHARNO: Mr. Chairman, it is the Department's intention to answer Mr. Berger, to begin by moving in the documents that have been previously identified, and then moving forward with the testimony. And if we get breaks in testimony that are brought about by having changed our schedule around and we may, to begin the introduction of documents at that point, so there won't be any dead time in the hearing.

MR. STEVEN BERGER: If we are going to have a witness tomorrow, will the 24-hour rule prevail in regard to the documents that the Department intends to put in through that witness?

CHAIRMAN RIGLER: Yes.

We may have as many as two witnesses tomorrow.

MR. CHARNO: In view of the estimates of cross-examination perceived, it seems unlikely. Plus the fact that it may take some time to get through the resolution on the exhibits that have been introduced thus far.

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CHAIRMAN RIGLER: All right.

9:30 tomorrow.

(Whereupon, at 4:50 p.m., the hearing in the above-entitled matter was recessed, to resume at 9:30 a.m. on Tuesday, 10 February 1975.)