

NUCLEAR REGULATORY COMMISSION

Regulatory

FILE CYA



IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING
CO.

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

and

CLEVELAND ELECTRIC ILLUMINATING
CO., et al.

(Perry Nuclear Power Plant, Units 1 & 2

Place - Silver Spring, Maryland

Date - Thursday, 26 February 1976

Pages 5554-
5695

Docket Nos.

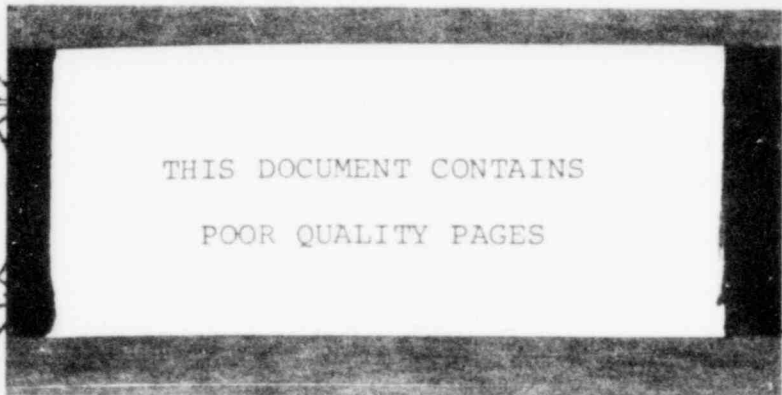
50-346A

50-500A

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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TOLEDO EDISON COMPANY and
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(Davis-Besse Nuclear Power Station,
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et al.

(Perry Nuclear Power Plant,
Units 1 and 2)

First Floor Hearing Room
7915 Eastern Avenue
Silver Spring, Maryland
Thursday, 26 February 1976

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

BEFORE:

MR. DOUGLAS RIGLER, Chairman

MR. JOHN FRYSIAK, Member (Absent)

MR. IVAN SMITH, Member

APPEARANCES:

As heretofore noted.

C O N T E N T S

<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
William M. Lewis, Jr.	5605	5631		

<u>EXHIBITS</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
DJ-315		5586
DJ-322		"
DJ-323		"
DJ-324		"
DJ-325		"
DJ-328 thru 332		"
DJ-333 thru 338		5587
DJ-340 thru 343		5588
DJ-344 thru 350		5587
DJ 352 thru 372		5583
DJ 374 and 375		"
DJ 377		"
DJ0378 and 379		5589
DJ-380 thru 383		5589
DJ-385		5589
DJ-391 thru 397		5589

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	<u>EXHIBITS</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
1			
2			
3	DJ-399 thru 401		5590
4	DJ-312		5591
5	DJ-313		"
6	DJ-326		"
7	NRC 127		5630
8	DJ-402(211376)	5695	
9	DJ-403(24203)	"	
10	DJ-404 (2086880)	"	
11	DJ-405 (206874)	"	
12	DJ-406 *206231	"	
13	DJ-407 (207229)	"	
14	DJ-408 (208945)	"	
15	DJ-409 (208696)	"	
16	DJ-410 (207224)	"	
17	DJ-411 (218581)	"	
18	DJ-412 (218584)	"	
19	DJ-413 (311528)	"	
20	DJ-414 (218583)	"	
21	DJ-415 (218618)	"	
22	DJ-416 (218163)	"	
23	DJ-417 (218606)	"	
24	DJ-418 (218596)	"	
25	DJ-419 (218598)	"	

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<u>EXHIBITS</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
DJ-420(218600)	5695	
DJ-421(218818)	"	
DJ-422 (220224)	"	
DJ-423 (25762)	"	
DJ-424(25760)	"	
DJ-425 (24846)	"	
DJ-426 (22729)	"	
DJ-427 (213305)	"	
DJ-428 (213306)	"	
DJ-429 (21646)	"	
DJ-430 (11652)	"	
DJ-431 (22561)	"	
DJ-432 (22559)	"	
DJ-433 (25687)	"	
DJ-434 (25684)	"	
DJ-435 (21683)	"	
DJ-436 (215426)	"	
DJ-437 (25730)	"	
DJ-438 (25403)	"	
DJ-439 (21560)	"	
DJ-440 (22487)	"	
DJ-441 (218661)	"	
DJ-442 (218660)	"	

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25EXHIBITSFOR IDENTIFICATIONIN EVIDENCE

DJ-443 (218623)

5695

DJ-444 (217168)

"

DJ-445 (206865)

"

DJ-446 (206863)

"

DJ-447 (2226)

"

DJ-448 (206816)

"

DJ-449 (218851)

"

P R O C E E D I N G S

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2 MR. CHARNO: We have been conferring with
3 counsel concerning the use of depositions, and it appears
4 that there is a very limited area where we might be able
5 to reach agreement.

6 We haven't been able to explore the parameters
7 of that area yet, and we would not propose to raise the
8 issue today, until we have had a chance to go into it a little
9 more fully.

10 CHAIRMAN RIGLER: The Board has had opportunity to
11 review in fairly close detail the pages from the Rudolph
12 deposition which were submitted to us by the Department.

13 Based on that we think it would be helpful
14 to have the entire five inch stack of deposition testimony
15 which the Department propose to use.

16 MR. CHARNO: They should be tendered to the
17 Board, as well as the parties?

18 CHAIRMAN RIGLER: Right, and what the Board
19 will do is take a look at the number of witnesses,
20 pages of testimony and advise you which ones we might
21 accept on deposition and which ones we would require the
22 Witness to make a live appearance.

23 MR. CHARNO: We would also like to correct
24 certain --

25 MR. REYNOLDS: Mr. Chairman, I understand

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what the Board is looking for in terms of the question.

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arl 1 I have serious problems with that. I have gone
2 through, at the Board's request, a good number of the
3 excerpted pages and one of the difficulties that I'm
4 having in getting to the point of reaching an agreement or
5 an accommodation on this situation is that the excerpted
6 material leaves out testimony which would bear directly
7 on the red-lined testimony, leaves out in certain instances
8 questions and just puts in the answers, and I guess that
9 it seems to me that it is not a very realistic approach
10 to the question to look at just those portions that have
11 been red-lined from excerpted pages of depositions in
12 order to make a determination as to whether it is
13 controversial or non-controversial.

14 CHAIRMAN RIGLER: Based on our reading of the
15 Rudolph deposition, I'm not sure I agree with you. That
16 testimony is cut and dried and is consistent with the
17 documentary evidence we have received from testimony of
18 witnesses and it is consistent with the stipulations made
19 by CEI.

20 MR. REYNOLDS: That is the problem you run into
21 when you read excerpted portions of transcripts.

22 CHAIRMAN RIGLER: Moreover, we indicated you
23 would have the privilege of red-lining additional pages
24 and showing us those portions you feel should be
25 considered in conjunction with the red-lined portions of

1 the Department.

2 MR. REYNOLDS: With Mr. Rudolph, we would call
3 him instead of red-lining. My point is --

4 CHAIRMAN RIGLER: You can do both.

5 MR. REYNOLDS: It may be that both would be
6 appropriate. I guess my problem with that, without
7 cross-examination and without any full development of what-
8 ever the matter happens to be, it is awfully easy for
9 somebody looking at excerpted portions to state that
10 it is cut and dry, and non-controversial.

11 I can appreciate how the Board arrives at that
12 conclusion.

13 All I'm suggesting is that if it is based on
14 that kind of analysis, it is perhaps a conclusion that is
15 not warranted in many cases -- not in all cases -- and
16 it is not really a fair approach to what the issue is.

17 CHAIRMAN RIGLER: Well, that is why we want to
18 see the nature of the material because based on the first
19 deposition we have examined, it strikes us as a very fair
20 approach, a wise exercise of our discretion, and one which
21 couldn't create prejudice to the Applicant since, A, the
22 Applicant would have opportunity to do its own red-lining
23 and, B, the Applicants would have opportunity to call
24 the witnesses live during their own cases if they felt
25 that was necessary.

1 MR. CHARNO: We would like to offer into
2 evidence at this time exhibits for identification DJ 312,
3 313, 315, and 322 through 401.

4 CHAIRMAN RIGLER: Is there objection?

5 Not hearing any objection --

6 MR. REYNOLDS: We have objections. Counsel was
7 out of the room, and we were waiting for him to return to
8 proceed.

9 CHAIRMAN RIGLER: Proceed.

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S3 1 MR. GREENSLADE: I would like to object to
bwl 2 Document 312. It is a 1962 document and was outside the
3 period of discovery.

4 I suggest that it has no relevance to the issues,
5 because of its remoteness.

6 I might suggest also, your HONOR, that the same
7 objection would apply to Document 313, for the same
8 reason.

9 And also documents 326 and 327.

10 Mr. Chairman, Would you wish that I go through
11 all of the objections at this time or would you care to
12 rule on each one separately?

13 CHAIRMAN RIGLER: Approximately how many of the
14 documents will you be objecting to?

15 MR. GREENSLADE: I guess about one-third of them,
16 perhaps even less.

17 CHAIRMAN RIGLER: I think perhaps we would prefer
18 to have you go all the way through your listing.
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1 MR. GREENSLADE: I would like to add a further
2 objection to Document 313 on the ground that it consists
3 of two separate memoranda with no apparent relationship
4 between the two, and yet it is coming in as one document.

5 MR. CHARNO: That is apparently another mistake
6 on the part of the Department. We would be happy to
7 number separately the second page of what is now DF 313.

8 CHAIRMAN RIGLER: Continue.

9 MR. GREENSLADE: I would like to object to
10 Document No. 329 on the basis that it falls within the
11 Noerr-Pennington rules. This document consists of a magazine
12 article and I believe falls within the doctrine of free
13 speech in the Noerr-Pennington rules.

14 CHAIRMAN RIGLER: I have difficulty with that.
15 You mean that companies could, by writing magazine articles,
16 could agree to fix prices and that would exempt them from a
17 price-fixing charge?

18 MR. GREENSLADE: I suggest the writing
19 itself produced to whoever it was produced to, to be
20 exempt from consideration by the Board or Court that is
21 hearing it.

22 CHAIRMAN RIGLER: All right. We hear you.

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1 MR. GREENSLADE: I would like to ask the
2 Department of Justice for an offer of proof on Document
3 Number 333 at this time.

4 MR. CHARNO: The Department would offer DJ-333
5 for identification as proof of a request for standby service
6 of the date indicated thereon by the City of Cleveland
7 system.

8 MR. GREENSLADE: Could you expand your offer to
9 explain to us the relevance of the offer that you just
10 stated to the issues in the proceeding?

11 MR. CHARNO: I believe that standby power is
12 a term of art and is something other than what was supplied
13 by CEI.

14 CEI is supplying a competitively disadvantageous
15 alternative.

16 MR. GREENSLADE: Is it the Department's intent
17 to claim that -- to prove that CEI refused to furnish
18 standby service to the City of Cleveland?

19 MR. CHARNO: The Department's intent was as I
20 stated.

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1 MR. GREENSLADE: I would like to object to the
2 introduction of Document 332, based on the proof given to
3 support this document. It indicates there is no relevance
4 to the document in this proceeding.

5 I would like to state for the record that
6 Document 339 has already been admitted into evidence in this
7 proceeding as Applicants Exhibit Number 27(CBI).

8 MR. CHARNO: Is it an identical copy?

9 MR. REYNOLDS: I think ours is a little more
10 legible.

11 MR. CHARNO: Identical copy in all respects,
12 except legibility.

13 The Department would withdraw DJ-339.

14 CHAIRMAN RIGLER: What was the cross reference
15 number?

16 MR. GREENSLADE: Applicant Exhibit 27(CBI.)

17 I would like to review the -- strike that.

18 With regard to Document Numbers 344 through
19 350, we do not object to introduction of the documents,
20 insofar as they refer or are being introduced to show price-
21 or service-sensitivity in the retail market in Cleveland,
22 but we do object to the introduction of these documents for
23 any other purpose and to the extent that the offer of
24 proof given yesterday was broader.

25 I object to Document --

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CHAIRMAN RIGLER: Do you concede that CEI was aware of the price-sensitivity nature of the market and do these documents reflect that awareness?

MR. GREENSLOPE: I don't believe at this time I am prepared to concede that, Mr. Chairman.

CHAIRMAN RIGLER: All right.

Proceed.

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1 MR. GREENSLADE: I would like to object to
2 Document 351 on the ground that it is wholly irrelevant
3 to any of the issues in this proceeding insofar as it
4 relates solely to retail competition matters in the City
5 of Cleveland.

6 MR. REYNOLDS: Mr. Chairman, it might -- in
7 response to the Board's earlier question, it might help,
8 since Mr. Greenslade is here at certain times, and Mr.
9 Buchmann is here to expand a bit and explain that CEI
10 is not disputing the fact that the Cleveland retail market
11 is price-sensitive and service-sensitive.

12 There is some dispute as to what is meant by
13 price sensitivity and service sensitivity.

14 In answer to your question, it is difficult to say
15 that CEI does concede as a blanket matter that the whole
16 question -- concedes the question of price sensitivity
17 and service sensitivity in the market. There is a
18 difference among the parties as to what that means.

19 CHAIRMAN RIGLER: Does it mean that customers
20 are likely to switch from one electrical source to the
21 other, based upon price considerations?

22 MR. REYNOLDS: I'm not so sure that that
23 generalization would apply in certain situations.

24 In certain situations it may well apply. It
25 also may well relate to time period that we are talking

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1 about, within '65 to the present, as a whole.

2 That is why I wanted to explain because I didn't
3 want to leave the impression --

4 CHAIRMAN RIGLER: Actually my question went
5 further than that. It related to CEI awareness of the
6 price sensitivity in the market.

7 MR. REYNOLDS: There is some agreement in this
8 area. But the question put as does CEI concede may go
9 further than CEI is prepared to go as to certain aspects
10 of price sensitivity and service sensitivity in the retail
11 market.

12 There is some dispute among the parties
13 depending on the time period we are talking about, and the
14 particular fact situations.

15 Conceptually CEI will not contest that those
16 factors were certainly at play in the retail market.

17 CHAIRMAN RIGLER: All right.

18 MR. GREENSLADE: I would like to object to the
19 introduction of Document 373. I do not consider this
20 document probative at all of future acquisition
21 policy of Cleveland Electric Illuminating Company, as was
22 stated in the offer of proof.

23 It is also a 1957 document reporting on matters
24 that took place in 1946, 1950, 1951, and 1956.

25 To that extent it is extremely remote in time

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1 from the issues in this proceeding.

2 I would like to object to Documents No. 378
3 and 379.

4 Those documents deal with retail competition and
5 are not relevant to the issues in this proceeding.

6 In particular as they refer to the so-called
7 goals of the Commercial Sales Department.

8 MR. CHARNO: Would counsel care to indicate
9 the basis for the statement that retail competition is not
10 relevant to the matters in controversy in this proceeding?

11 MR. GREENSLADE: There certainly is no
12 relationship to the activities under the license connected
13 with retail competition in the City of Cleveland between
14 the Municipal Light Plant and the Illuminating Company.

15 MR. CHARNO: Thank you.

16 MR. GREENSLADE: I would like to object to
17 documents -- strike that.

18 I would like to request at this time that
19 Document No. 381 be red-lined in its entirety.

20 I would like to object to Documents No. 303 through
21 390 on the grounds that the material contained therein
22 is non-probative as to any of the issues in this proceeding,
23 and on the ground that the Noerr-Pennington rules would
24 hold that the -- would protect the documents.

25

1 I would like to object to Document No. 398, on the
2 ground that the offer of proof related to the truth of the
3 facts contained therein, whereas the red-lined portion of
4 the document refers in a number of places to matters
5 that are purely legal conclusions or volunteered statements.

6 For example, like --

7 CHAIRMAN RIGLER: I think it would be useful to
8 go through the document on a page by page basis and designate
9 those portions which include only legal conclusions.

10 MR. GREENSLADE: I call the Board's attention
11 to page 3, and the middle page red-lining which is at
12 the end of paragraph 2, which is a legal conclusion.

13 I call the Board's attention to page 6 --

14 CHAIRMAN RIGLER: The portion on page 3 is that
15 portion which states on balance, it would seem, that the
16 entire city would be the most reasonable geographic
17 market.

18 MR. GREENSLADE: Yes.

19 CHAIRMAN RIGLER: All right.

20 MR. GREENSLADE: Page 6, the red-lined matter,
21 which is the last sentence of the first full paragraph.

22 Page 8, the parenthetical sentence that is
23 contained in the red-lined portion.

24 CHAIRMAN RIGLER: Which one?

25 MR. GREENSLADE: It is the second parenthetical

1 excerpt which is a full sentence.

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2 CHAIRMAN RIGLER: However, CEI --

3 MR. GREENSLADE: However, CEI --

4 CHAIRMAN RIGLER: CEI may be vulnerable to the
5 extent that it agreed to such an interconnection reluctantly
6 or only after a substantial history of refusing it?

7 MR. GREENSLADE: Yes.

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Finally, on page 26, the red-lined portion states a legal conclusion.

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CHAIRMAN RIGLER: Refresh my recollection. I believe that the Department's offer of proof indicated that a portion of this document was to be introduced as an admission against interest; is that correct?

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MR. ZAHLER: If I could respond to the Chairman's question, since I was involved in that colloquy.

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Mr. Charno indicated at page 5550 of the transcript that the factual assertions were admission and I queried admissions by whom, and he said counsel.

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MR. GREENSLADE: I suggest, Your Honor, that after the legal conclusions are removed from the red-lined portions of the document, the document becomes irrelevant.

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Secondly, I object to the document on the ground that some of the factual material contained in the document is stated by a person who is a non-expert in the field/which he is stating his facts.

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Nor is he a company -- employee of the Cleveland Electric Illuminating Company. And therefore the statement would be non-probative.

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I call the Board's attention to page 23 in support of this objection. The red-lined portions contained thereon.

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1 Finally I would like to make the general
2 obje tion that I see no basis for the introduction of a
3 document prepared by outside counsel for the company where
4 there is no way of knowing what facts were known by
5 the preparer of the document at the time it was prepared.

6 CHAIRMAN RIGLER: Is Mr. Lansdale a director of
7 the CEI company?

8 MR. GREENSLADE: Mr. Lansdale is a director,
9 yes. He is also outside counsel.

10 I should also point out that the document
11 itself was not prepared by Mr. Lansdale. It was prepared
12 by Mr. Murphy, who is an associate of the Squire, Sanders
13 firm.

14 I should also like to point out that Mr.
15 Lansdale was not acting in his capacity as a director
16 with regard to this document, but as outside
17 counsel for -- in preparation for a meeting with the
18 Department of Justice.

19 CHAIRMAN RIGLER: Is he able to make a
20 distinction between when he is operating in one capacity
21 or the other?

22 MR. GREENSLADE: Certainly.

23 MR. CHARNO: I would like to note for the
24 record that the Department's statement concerning this
25 document appears at 5550.

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To the extent that that doesn't coincide
precisely with Mr. Zahler's paraphrase of it, I think I
would stand on the transcript.

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CHAIRMAN RIGLER: Mr. Charno, the objection is that certain portions of this document constitute legal conclusions and, as I understand Mr. Greenslade's argument, he is saying that your offer of proof was that the admissions related to factual assertions, rather than legal conclusions.

MR. CHARNO: Well, to a certain extent I think he is right.

I think we would disagree on some of what he characterizes as legal conclusions, however.

For example, the parenthetical sentence, I don't believe to be a legal conclusion. On page 8.

MR. GREENSLADE: I think that is one of the most clear examples of a legal conclusion, Mr. Chairman.

CHAIRMAN RIGLER: Are there any other objections, Mr. Greenslade?

MR. GREENSLADE: Not on behalf of CEI, but there will be other objections on behalf of the other applicants, I understand.

MR. CHARNO: Would it be appropriate to answer Mr. Greenslade's objections now, or shall I wait?

CHAIRMAN RIGLER: Let's wait until we have all of the objections.

MR. REYNOLDS: With respect to all Applicants, other than CEI, I will make the continuing objection with

1 respect to all of the documents that are being moved into
2 evidence, except Documents 323, 324, 325 and, as to those
3 three, the continuing objection would be on behalf of all
4 Applicants, other than Toledo Edison.

5 CHAIRMAN RIGLER: And CEI; is that correct?

6 MR. REYNOLDS: No, just Toledo Edison for 323, 324,
7 325. There is the continuing objection for all of the
8 Applicants, other than Toledo Edison.

9 CHAIRMAN RIGLER: Including CEI?

10 MR. REYNOLDS: That is correct.

11 These are documents prepared by Mr. Les Henry,
12 counsel for Toledo Edison, and then circulated to a number
13 of people, to the extent that they are coming in this
14 proceeding as evidence against any of the Applicants, it
15 seems to me it would only be proper to introduce them as
16 against the Applicant for whom the documents were prepared,
17 which would be Toledo Edison Company.

18 As to Document 327, there is no continuing
19 objection. Also on behalf of all of the other Applicants,
20 I would join with Mr. Greenslade in the Noeri Pennington
21 objection with respect to Documents 329 and 383 through
22 390, which represent First Amendment communications that
23 clearly come within the scope of the protection of that
24 doctrine.

25 I would, in addition, on behalf of all Applicants,

bw3 1 join in the objection of CEI with respect to Document 398,
2 which is a document prepared by an individual who is
3 clearly not a director, officer or managing agent of the
4 company, and to the extent that this is a document where the
5 effort is being made to introduce it for the truth of the
6 matters asserted therein, it seems to me to be -- to
7 border on the outrageous.

8 It is obviously a legal memorandum that was
9 prepared by outside counsel, and there is no basis, whatsoever,
10 to attribute this to the company or to characterize it as
11 admissions by the company in any way, shape or form.

12 CHAIRMAN RIGLER: Where did Mr. Murphy obtain the
13 information he used as background in preparing this
14 document?

15 MR. REYNOLDS: It might be appropriate to call
16 Mr. Murphy and ask him and that would be the way to
17 determine that. Short of that, to introduce this as
18 admissions, is wholly inappropriate.

19 CHAIRMAN RIGLER: Does that conclude the
20 objections?

21 MR. REYNOLDS: That is correct.

22 MR. CHARNO: Initially, Documents 312, 313,
23 326 and 327, we believe, are related at least on the face
24 of some of them, directly to the offers of interconnection
25 that were made at that time, that are in evidence. And I think

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1 to give the background behind the offers of those
2 interconnections, and the reason they are couched in the
3 terms they are.

4 Coincidental with the offers of interconnection,
5 the CEI was attempting to limit the expansion and
6 competitive viability of the MELP system. They go hand
7 in glove with each other.

8 To admit a document containing an offer with an anti-
9 competitive condition attached to it and to exclude a document
10 showing that offer was designed to stave off the expansion of the
11 MELP system, tells half the story.

12 With respect to 329 I would like to note a
13 stipulation of counsel that that appeared in the May 1965
14 issue of the Motor, which is the house organ of the Cleveland
15 Electrical Illuminating Company.

16 The Department would offer that as being of
17 more than normal probative value, as far as interview
18 articles go, by virtue of the complete and unbiased
19 opportunity to review the contents and wording and to
20 place exactly what material was desired into the house organ,
21 in terms of Mr. Fause's interview.

22 CHAIRMAN RIGLER: Let me stop you there, since a
23 Near-Pennington objection was posed as to this. If a
24 company were to assert only through the medium of the
25 press, in a newspaper article, that it was willing to raise

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1 its prices to a certain level and stabilize its prices
2 at that level, provided that its competitors did the
3 same thing, effective of first day of the next month, would
4 that be protected by Noerr-Pennington?

5 MR. CHARNO: Not, it would not.

6 We have specifically attacked things that
7 rested upon no more than -- rate fixing agreements that
8 rested upon no more than an announcement --

9 CHAIRMAN RIGLER: So that mere publication
10 in a press forum of some type does not give the Noerr-
11 Pennington immunity, in the opinion of the Department of
12 Justice?

13 MR. CHARNO: It does not.

14 MR. REYNOLDS: Could I ask the Department a
15 question for clarification on that.

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1 CHAIRMAN RIGLER: You may.

2 MR. REYNOLDS: Is it the Department's position
3 that the content of the statement is what determines
4 whether Noerr-Pennington applies?

5 MR. CHARNO: It is the Department's position
6 that an announcement in response to the Chairman's
7 question of a rate-fixing agreement being printed in the
8 press, and that being the only evidence of the rate-
9 fixing agreement would be ample to sustain a finding of
10 violation, criminal violation of the Sherman Act.

11 MR. REYNOLDS: Is that based on the content of
12 the announcement?

13 MR. CHARNO: We couldn't find a violation
14 without going to the content of the announcement.

15 MR. REYNOLDS: Is that why you are saying
16 Noerr-Pennington doesn't apply, because of what the
17 announcement contains?

18 CHAIRMAN RIGLER: He has answered the question.
19 We can proceed.

20 MR. REYNOLDS: He clearly hasn't answered the
21 question.

22 MR. CHARNO: The Department offers DJ 344
23 through 350 for additional factors in relation -- additional
24 points in --

25 CHAIRMAN RIGLER: Where is the offer of proof

1 with respect to those found in yesterday's transcript?

2 MR. CHARNO: I don't have the page reference,
3 but I can recap the additional items very rapidly.
4 It was for the awareness of price sensitivity and
5 service sensitivity as well as the awareness of the
6 public opinion, specifically MELP customers as to a sale
7 or the possibility of sale of the City system to Cleveland
8 Electric Illuminating Company, and it also indicated
9 an awareness of the impact of CEI's course of conduct
10 upon MELP standing with its own customers.

11 Finally, it indicated that a weakness in
12 reliability on MELP's part led directly to conversations
13 to CEI. The converse was also true.

14 Basically a restatement of service sensitivity.

15 The argument with respect to 351, 378 and 379
16 which basically come down to no nexus being established
17 between retail competition and the activities under the
18 license don't seem to be appropriate for decision at
19 this time, if they haven't already been decided.

20 Certainly the retail competition is one of the
21 markets in this proceeding and one of the tasks that lies
22 before the Department and any other party that is going to
23 rely upon a situation inconsistent occurring in a retail
24 market is to establish a nexus, but that is not the basis
25 for exclusion of evidence.

1 With respect to Exhibits 385, 387, and 388, in
2 addition to the offer the Department made yesterday, we
3 would like to note that they attempt to create a false
4 impression in the mind of the public, the consuming
5 public, one of dissatisfaction with MELP service.

6 In 385, this is brought about by the establish-
7 ment of a bogus letter to the editor campaign,
8 and in 387 by placing statements in the mouth of the
9 principal competitors' spokesmen.

10 388 is comparable to 385 in that it constitutes
11 a solicitation of the press and an attempt to supply
12 them with information concerning the competitors'
13 problems.

14 MR. GREENSLADE: I would like to object to
15 the characterization by Mr. Charno of the information as
16 being false. He may not agree with the information that
17 is contained in there, but that does not necessarily
18 make it false.

19 MR. CHARNO: I believe my statement was to create
20 a false impression of dissatisfaction.

21 Certainly the impression that is being created,
22 for example by 385, would not be a genuine impression of
23 dissatisfaction. I said nothing with respect to the issue
24 of whether the reliability or any of the other statements
25 concerning reliability were true or false. Merely that

1 the impression that was being created, for example, the
2 groundswell of angry people writing their editor was a
3 false impression.

4 MR. REYNOLDS: Mr. Chairman, I can't think of
5 anything that would be closer to the facts of the Noerr
6 case than what Mr. Charno just stated.

7 MR. CHARNO: I think we have an exception for
8 sham, and I think that is clearly sham.

9 MR. REYNOLDS: Well, they didn't think so in
10 Noerr.

11 CHAIRMAN RIGLER: Continue.

12 MR. CHARNO: We have no further answer for
13 the argument set forth.

14 CHAIRMAN RIGLER: Did you address 398?

15 We had some discussion on 398, and having
16 compared that with the Department's offer on page 5550 of
17 the transcript, absent some additional offer of proof,
18 I think Mr. Greenslade's argument is well taken.

19 MR. CHARNO: The Department would offer 398 for
20 the factual basis of the opinion which we would argue
21 were supplied by CEI to counsel.

22 We would note that this is normally privileged
23 material and that the privilege has been clearly waived by --
24 either waived or lost by CEI in this case.

25 CHAIRMAN RIGLER: Yes, but that is not the issue.

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1 Although Mr. Greenslade had a series of objections,
2 the one I was concentrating on was the one where at the
3 Board's request he singled out certain of the red-lined
4 portions which he described as legal conclusions.

5 Then when we turn to your statement, line 17
6 through 20, at page 5550, you state that you regard the
7 factual assertions as admissions, and that they are red-
8 lined.

9 If we agree with Mr. Greenslade that some of the
10 red-lined portions are legal conclusions rather than
11 factual assertions your offer is defective and we would
12 rule for Mr. Greenslade.

13 That would be on the assumption that we over-
14 ruled his other series of objections.

15 I'm concentrating on that particular point
16 from the series of objections he made with respect to
17 398.

18 MR. CHARNO: Mr. Chairman, the Department
19 would like to withdraw Exhibit 398. We would not propose
20 to reintroduce it as part of our direct case.

21 CHAIRMAN RIGLER: You mentioned with respect to 312,
22 313, 326, and 327 that evidence relating to interconnec-
23 tion in 1962 was already in the record. Refresh our
24 recollection as to the circumstances of that evidence.

and 10

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1 MR. CHARNO: If it wasn't the documentary
2 materials -- I don't believe it was objected to, and it is
3 either going in with nothing other than the continuing
4 objection today or previously.

5 It went in the last time we moved in documents.
6 Mr. Chairman, that would be Department Exhibits 293, 294 and,
7 as to 1963, 295.

8 Mr. Chairman, I did not mean to state that the
9 Applicants have not objected to the remoteness of these
10 exhibits. They informed me they did.

11 CHAIRMAN RIGLER: Now that you have pointed to the
12 record references, which you contend support the position
13 that the Board has received evidence with respect to this
14 interconnection, it is clear to us that the reason we
15 admitted 293 and 294 into evidence, despite the fact that
16 the events occurred prior to 1965, is because of the price
17 fixing aspect included within those document. And the Board
18 took the position that that constituted good cause in the
19 overall context of these proceedings to go to a time period
20 prior to 1965.

21 We felt that the significance of a continued
22 effort on behalf of a utility company to cause a municipality
23 to agree to adjust its rate schedule, did have a direct
24 bearing on the issues in controversy.

25 It seems to me, however, with respect to 312, 313

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1 and 326, there is a piggy-back effect in play here, in that
2 the interconnection which was mentioned in the earlier
3 documents was not the primary source of interest to the
4 Board, and we do continue to have the remoteness problem,
5 so that we will sustain the objection to Numbers 313 and
6 326.

7 With respect to 327, we have a different
8 situation. That refers in paragraph five and in paragraph
9 six, to future commitments desired by CEI, subject to
10 negotiation, as indicated in the headnote, to have
11 MELP change and charge the same effective rates as CEI in
12 the City of Cleveland.

13 So, 327 will be admitted.

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arl 1 CHAIRMAN RIGLER: No objection having been
2 made other than the continuing objection, which will be
3 overruled, 315, 322, 323, 324, 325 will be admitted
4 at this time.

5 (DJ Exhibits 315, 322, 323,
6 324, and 325, previously
7 marked for identification,
8 were received in evidence.)

9 CHAIRMAN RIGLER: The objection to 329 is
10 overruled, and Nos. 328 through 332 will be admitted,
11 with the continuing objection overruled.

12 (DJ Exhibits 328 thru 332,
13 inclusive, previously marked
14 for identification, were
15 received in evidence.)

16 CHAIRMAN RIGLER: Commenting for a minute about
17 the objection posed to Nos. 324 and 325; 324 indicates
18 that Mr. Hauser of CEI voted upon what was to be
19 included in the draft analysis being prepared by counsel
20 for Toledo Edison.

21 The objection to 333 is overruled. We will
22 receive Exhibits 333 into through 343 into evidence at
23 this time, with the exception of 339, which was with-
24 drawn.

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(DJ Exhibits 333 thru 338,

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and 340 thru 342, previously

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marked for identification,

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were received in evidence.)

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CHAIRMAN RIGLER: With respect to 344 through

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350, the objection is overruled, except that the offer

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of proof will be limited per the discussion on page 5510

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of the transcript, where the Board indicates its

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reading of the limits of the offer of proof, but we also

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admit as part of that offer of proof the Department's

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offer appearing on page 5507 of the transcript, lines 8

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through 15.

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Within the context of those two transcript

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references, Nos. 344 through 350 will be received into

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evidence at this time.

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(DJ Exhibits 344 thru 350,

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inclusive, previously

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marked for identification,

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were received in evidence.)

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MR. ZAHLER: So that the record is clear, I

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believe pages 5507 and 5508 have been reversed.

22

CHAIRMAN RIGLER: That's correct.

23

MR. ZAHLER: Are you referring to the way

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they have been numbered now?

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CHAIRMAN RIGLER: I'm referring to the correct

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1 number, which would be the reversed and renumbered
2 pages.

3 The objection to 351 on the basis of the facts
4 asserted therein are irrelevant for the resolution of any
5 of the issues in controversy is sustained, and the document
6 will be rejected.

7 We will admit numbers 352 through 372.

8 (DJ Exhibits Nos. 352 thru
9 372, inclusive, previously
10 marked for identification,
11 were received in evidence.)

12 CHAIRMAN RIGLER: The objection to 373 is
13 sustained. It will be rejected.

14 Nos. 374 through 375 are admitted, and the
15 continuing objection is overruled.

16 (DJ Exhibits Nos. 374 and 375,
17 previously marked for
18 identification, were received
19 in evidence.)

20 CHAIRMAN RIGLER: 376 was withdrawn.

21 377 will be admitted.

22 (DJ Exhibit No. 377, previously
23 marked for identification,
24 was received in evidence.)

25 end 12

1 CHAIRMAN RIGLER: After consideration of the
2 arguments relating to 378 and 379, we have referred in
3 particular to the red-lined portion in Number 378 appearing
4 on Department of Justice page number 005280 under competition
5 and many developments, and we will overrule the objections
6 and admit 378 and 379.

7 (DJ Exhibits Nos. 378 and 379,
8 previously marked for
9 identification, were received
10 in evidence.)

11 CHAIRMAN RIGLER: With respect to numbers 380
12 through 382, the continuing objection is overruled. They
13 will be admitted at this time.

14 (DJ Exhibits Nos. 380 thru
15 382, previously marked
16 for identification, were
17 received in evidence.)

18 CHAIRMAN RIGLER: With respect to the group of
19 documents beginning with 383 and extending through 390,
20 they will be rejected from evidence, with the exception
21 of number 385, which will be admitted.

22 (DJ Exhibit 385, previously
23 marked for identification,
24 was received in evidence.)
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1 CHAIRMAN RIGLER: Numbers 391 through 397 will
2 be admitted and the continuing objection is overruled.

3 (DJ Exhibits 391 through
4 397, previously marked
5 for identification, were
6 received in evidence.)

7 CHAIRMAN RIGLER: The Department withdraw number
8 398.

9 399 through 401 will be admitted, and the
10 continuing objection will be overruled.

11 (DJ Exhibits 399 thru 401,
12 previously marked for
13 identification, were
14 received in evidence.)

15 MR. GREENSLADE: Mr. Chairman, in light of the
16 Board's ruling with respect to Document 327, which was
17 admitted, on behalf of CEI, I would like to withdraw
18 our objection to Documents 312, 313 and 326, since it is
19 believed that the entire series of documents should come in,
20 in order to make a complete record, even though those
21 documents are remote in time, if the Board is satisfied that
22 good cause has been shown, in order to support the
23 introduction of a part of that series.

24 CHAIRMAN RIGLER: Do you still wish to offer
25 those documents, Mr. Charno?

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MR. CHARNO: As a matter of fact, we did put in
2 312 and 313 to complete the record initially.

3

CHAIRMAN RIGLER: And 326?

4

MR. CHARNO: No, 326 was going in for something
5 in addition. We would still wish to offer them.
6 don't

6

We certainly want an incomplete record before
7 the Board.

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CHAIRMAN RIGLER: All right. The Board will
9 amend its ruling and we will receive 312 and 313 into
10 evidence, and we will receive 326 into evidence.

11

(DJ Exhibits Nos. 312, 313,
12 and 326, previously marked
13 for identification, were
14 received in evidence.)

15

CHAIRMAN RIGLER: Do you have a witness?

16

MR. CHARNO: Yes, we do. We have a problem
17 with respect to this witness which was brought to the
18 attention of counsel for Ohio Edison this morning,
19 which is when we became aware of the problem.

20

We had intended to focus primarily upon the
21 City of Napoleon with very limited questioning concerning
22 the City of Orrville and the availability of surplus
23 power by the City of Orrville.

24

We had previously explained the nature of our
25 examination to the Applicants, and we told Duquesne we

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1 would not be conducting any examination in their field,
2 although our witness, Mr. Lewis, was also a consultant
3 for Pitcairn.

4 We found this morning in a hitherto
5 unexplored area that the witness had certain information
6 concerning refusals to wheel by Ohio Edison in 1974 which
7 specific refusals we had not previously alleged, and had not
8 answered interrogatories with respect to, since we had
9 made no allegations and which we had not previously
10 informed counsel.

11 We had informed counsel of the particulars of
12 Mr. Lewis' testimony and it was suggested, and properly so,
13 that we bring it to the Board's attention with the witness
14 outside.

15 We feel that good cause lies in the fact that a
16 refusal to wheel in the immediate proximity by a utility
17 which refutes allegations that it refuses to wheel is of
18 some significance, and I think these refusals are an
19 extremely anticompetitive context as it relates to the
20 matters in controversy in this proceeding.

21 CHAIRMAN RIGLER: Were these refusals set forth
22 in writing?

23 MR. CHARNO: No, sir. We had no documentary
24 evidence whatsoever indicating that this might have
25 occurred.

1 CHAIRMAN RIGLER: Was there any other discovery
2 response which, made available to the Department, indicates
3 a refusal to wheel that occurred in 1974?

4 MR. CHARNO: Exactly to the contrary.

5 MR. STEVEN BERGER: Mr. Charno correctly
6 states that it was this morning that I was first informed
7 that Mr. Lewis' testimony would involve an alleged refusal
8 to wheel with respect to Ohio Edison and the Orrville
9 system, and that the nature of that alleged refusal was
10 oral, that the September 5 filings, answers to interroga-
11 tories in no way reflected this allegation.

12 The Board has heard me on behalf of Ohio Edison
13 speak of notice and opportunity before in this proceeding.
14 With a witness coming on the stand today, testifying
15 as to an alleged refusal to wheel on behalf of my company,
16 and the importance of such a charge to this proceeding,
17 my having had no opportunity to investigate into the
18 underlying basis of that charge either within
19 my own company, no less within the Orrville system, to
20 take the deposition of Mr. Lewis and to otherwise inquire
21 into the underlying basis of the charge, I think would
22 amount to a very substantial denial of procedural due
23 process to my client.

S15 1 CHAIRMAN RIGLER: Was there any discovery request
2 addressed to Ohio Edison which would have required Ohio
3 Edison to disclose any refusals to wheel in the year 1974?

bwl 4 MR. STEVEN BERGER: In the year 1974?

5 CHAIRMAN RIGLER: Yes,

6 MR. STEVEN BERGER: I can't point to a specific
7 request, but I'm sure that was probably the case, your Honor.

8 MR. LESSY: The Orrville situation is one that
9 first came to light in Witness Lyren's testimony, when he
10 was asked, I believe, on redirect examination, if he knew
11 of any wheeling contracts relevant to that section of Ohio,
12 where the wholesale consumers of others were.

13 He mentioned the Orrville, AMP-O, Ohio Power
14 wheeling contract. He subsequently provided the Staff,
15 who put in evidence through Witness Mozer, a copy of that
16 document. And Ohio Edison objected at that time with
17 respect to that matter and claimed surprise.

18 This is a late developing matter.

19 We then find that Orrville, City of Orrville,
20 negotiated not only with Ohio Power, we found out today,
21 apparently, but also with Ohio Edison.

22 The point is, why did Ohio Edison -- why did
23 Orrville seek or arrange for an interconnection agreement
24 with Ohio Power instead of Ohio Edison and that -- if it is
25 late-breaking information, it is certainly within the

1 discretion of the Board to permit it.

2 MR. STEVEN BERGER: I don't know the relevance
3 to what the issue is before the Board presently of what
4 Mr. Lessy said.

5 What I do know about the Orrville situations
6 from my conversations with the company and having no
7 relationship to the context I'm talking about here, is that
8 as far as the City of Orrville is concerned, the City of
9 Orrville has on occasion come to Ohio Edison for an emergency
10 situation and was provided help in an emergency situation.

11 They asked for a 138 kv interconnection service
12 from Ohio Edison, and they did, I believe, from Ohio Power,
13 received a specific offer from our company and determined
14 on the basis of, apparently, the offers made by Ohio Power
15 and Ohio Edison, to go with Ohio Power. Competition in
16 its very purest form. I don't know what Mr. Lessy is
17 referring to, and what Mr. Lyren has in relation to the
18 charge I first learned about this morning.

19 MR. LESSY: Before I was interrupted, I was
20 about to say that since the Department made this information
21 available to counsel for Ohio Edison, he also made it
22 available to counsel for staff, in that, if there has been
23 a refusal by Ohio Edison to wheel and if that refusal is
24 related to the City of Orrville, this would fall within
25 Staff's general allegation on page 12 of its September 5

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1 filing that "Ohio Edison has refused to wheel for or to
2 discuss wheeling with other electric entities, or to admit they
3 wheel for other investor-owned utilities. Thus Ohio
4 Edison has denied and may continue to deny other electric
5 entities access to bulk power source, to other entities
6 outside the CCCT, without appropriate license conditions."

7 Because this is a later-
8 breaking event, there is ample reason to let it in.

9 Since the Department found out about it today,
10 as did the Staff, and since it is relevant to both of our
11 cases, it ought to be permissible on that basis.

12 Counsel for Ohio Edison has opportunity to either
13 cross-examine the Witness now or to consult with -- Counsel
14 for Ohio Edison to consult with members of Ohio Edison
15 to rebut the information.

16 The evidence ought to be permitted on that
17 basis.

18 CHAIRMAN RIGLER: We will take a five-minute
19 break.

20 MR. STEVEN BERGER: Just one more moment, if I
21 may. I want it to be eminently clear that the statements
22 I have made thus far in regard to this are not to keep from
23 the Board matters they believe, and we all believe, to be
24 relevant for consideration in this proceeding. I have
25 just learned about this, when I walked into this building

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1 here this morning and for counsel for the staff to be
2 saying, certainly, Ohio Edison can protect itself by
3 cross-examining this Witness is folly to me, and it is
4 outrageous.

5 CHAIRMAN RIGLER: Given your recognition that
6 it would be in the public interest to have all relevant
7 facts before the Board, but given your problem of being
8 unprepared for cross-examination, how would you suggest
9 that we resolve it at this time?

10 What solution do you propose?

11 MR. STEVEN BERGER: Let them call him in their
12 rebuttal case or put him off for a couple of weeks, but
13 not to come in here and testify about it today.

14 Let them recall him.

15 MR. LESSY: I suggest, as a solution, that we
16 permit the Witness to testify to the matter and permit
17 cross-examination, and then, if they want to recall him
18 for further cross, that would be a permissible solution.

19 CHAIRMAN RIGLER: We will take a ten minute break.

20 (Recess.)

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arl 1 MR. STEVEN BERGER: Mr. Chairman, before we
2 took a recess, you asked me as to the proper way of
3 proceeding, and perhaps there is a threshold question
4 we should consider at the outset.

5 It seems to me heretofore when new allegations
6 have been brought into the proceedings different from
7 those in the September 5 filings, the Board has queried
8 whoever the party may be for a showing of good cause for
9 amendment of these September 5 allegations.

10 I presumed that the Department of Justice
11 spoke to Mr. Lewis prior to the time it made its
12 September 5 filing and setting forth with specificity the
13 allegations they had set forth in that document.

14 I think before moving ahead as to what, if
15 anything, should be done with regard to this alleged
16 refusal to wheel on the part of the company which I believe
17 has been stated there is no documentation to support,
18 apparently it is the basis of some oral conversation that
19 took place, there should be a demonstration by the
20 Department as to good cause for bringing this allegation
21 in at this point in time.

22 In addition, as to the Staff's reliance on
23 its own September 5 filings, I suspect that the particular
24 allegation they are referring to is set forth on page 5 in
25 their document which states that OE has had a past and

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1 present policy of refusing to provide or discuss the
2 possibility of providing transmission services, paren,
3 wheeling, close paren, of power over its transmission
4 lines for the benefit of certain wholesale customers
5 notwithstanding a written request on behalf of its whole-
6 sale customers requesting such services on August 11, 1972.

7 Orrville, to my knowledge, has never been a
8 wholesale customer of Ohio Edison.

9 MR. CHARNO: We take it that constitutes a
10 stipulation at least in this context of counsel that
11 emergency service does not constitute wholesale service;
12 is that correct?

13 MR. STEVEN BERGER: That's correct.

14 The question of wholesale services is with
15 regard to the Staff statement, and not with anything
16 that the Department said heretofore.

17 MR. CHARNO: The Department has a similar
18 allegation that in 1974 Ohio Edison refused to wheel
19 for its municipal wholesale customers. I guess that
20 would turn upon the definition of emergency service, and
21 counsel has indicated their definition, or indicated
22 the Ohio Edison definition.

23 If counsel is asking for an expression of
24 negligence on behalf of the Department in its prior
25 interrogation of the witness, I cannot comply.

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1 This is a matter that came up tangentially.
2 We did not talk to Mr. Lewis initially about Orrville.
3 Indeed, we have never met with Mr. Lewis, or at least
4 not in the last year, but we have had a number of appoint-
5 ments. He has been unable to keep any of them.

6 We have talked to him telephonically on a
7 number of occasions with respect to the testimony that
8 we expected him to give. We previously talked to him
9 concerning Napoleon at length in person.

10 As Mr. Lessy pointed out, the situation of
11 Orrville has recently surfaced. To the extent it has never
12 been a wholesale customer of Ohio Edison, its
13 relationships and interactions with Ohio Edison were not
14 known to the Department.

15 We initiated some questioning of him to elicit
16 whether or not the -- whether or not he knew whether or
17 not the City of Orrville had surplus capacity available
18 to sell the City of Cleveland since this matter had come
19 up through Mr. Hart's testimony.

20 It was in this context that the information
21 came to our attention that they had had comprehensive deal-
22 ings with Ohio Edison and that they had met with
23 refusals to wheel by Ohio Edison.

24 CHAIRMAN RIGLER: Who is "they"?

25 MR. CHARNO: "They" being the City of

ard

1 Orrville, who Mr. Lewis represented as a consultant.

2 We had no reason to explore for this material
3 previously.

4 Indeed, the position of the people with whom
5 Mr. Lewis was dealing would seem to indicate that we should
6 have received some response of it in response to our 20
7 questions and subsequent interrogatory answers.

8 MR. STEVEN BERGER: That is if there is any
9 substance to the charge, and are we talking -- I would
10 like to know, and I think it should aid the Board in
11 reaching its determination as to whether or not they
12 will permit further inquiry into this matter -- are we
13 talking about an offhand discussion that took place
14 between Mr. Lewis and somebody from the company, or
15 was it a specific request in regard to a specific situa-
16 tion?

17 CHAIRMAN RIGLER: How do we know that until we
18 get Mr. Lewis on the stand?

19 MR. STEVEN BERGER: This should be part of
20 the discussion with the Department before we get Mr. Lewis
21 on the stand.

22 CHAIRMAN RIGLER: Earlier in this discussion
23 you indicated your awareness of, I believe your phrase
24 was, the importance of a refusal to wheel to the issues
25 in these proceedings if it occurred as late as 1974.

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1 That is not a direct quote, but it is a fair
2 statement.

3 MR. STEVEN BERGER: I amend it to not a refusal
4 to wheel that came up as an aside in a conversation and
5 was just a matter of general conversation, but rather was
6 with regard to a specific situation where power was
7 available from one source ready to go to another source,
8 and there was intervening transmission of Ohio Edison
9 that was needed in order to effectuate the transaction
10 and Ohio Edison specifically refused to allow that
11 transaction to take place.

12 I amend my earlier statement in that regard,
13 if I may.

Ely CHAIRMAN RIGLER: The point is, we all
No. 17 14 recognize we should hear evidence with respect to the
15 details of this allegation.
16

17 I think the Department's explanation as to why
18 they are so late in calling the specifics of the Orrville
19 situation to our attention is satisfactory.

20 At the same time we do sympathize with your
21 original objection, and we are going to rule for you, at
22 least insofar as precluding examination on that topic
23 today.

24 We will give leave to the Department either to
25 recall Mr. Lewis after Ohio Edison has had an opportunity

1 to conduct such discovery as it cares to into this
2 particular allegation, or the Department may decide to use
3 him during a -- as a rebuttal witness at some point.

4 But we will rule in your favor, Mr. Berger,
5 with respect to examination today in this subject area
6 with Mr. Lewis.

7 MR. STEVEN BERGER: Before determining to
8 conduct my own discovery into the matter, I would think
9 that the Department would have to at least inform us
10 all that after they have made their own investigation,
11 obviously today is all they have -- they have had a
12 simple conversation with Mr. Lewis. I hope that the
13 Department would be --

14 CHAIRMAN RIGLER: We will ask the Department
15 to furnish you with details as to when and under what
16 circumstances this discussion took place, and with whom Mr.
17 Lewis spoke at the Ohio Edison organization.

18 MR. STEVEN BERGER: And with an intention to recall
19 Mr. Lewis to so testify as to those facts and circumstances?

20 CHAIRMAN RIGLER: That would be at thier
21 option.

22 MR. STEVEN BERGER: I realize that. But I'm
23 not going to engage in unnecessary discovery and the time
24 and effort involved unless I know I will be met with that
25 at some future point in time.

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1 CHAIRMAN RIGLER: That is clear, because they
2 have indicated they are willing to go into it today.

3 MR. STEVEN BERGER: Is that right, Mr. Charno?
4 On the basis of the Board's ruling, you will definitely
5 be recalling Mr. Lewis for the purpose of a refusal to
6 wheel on behalf of Orrville by Ohio Edison?

7 CHAIRMAN RIGLER: I think we gave him the option
8 of using that in rebuttal.

9 We are not insisting that Mr. Lewis be
10 recalled.

11 MR. STEVEN BERGER: I recognize that, but before
12 we expend the effort of inquiring into this, however
13 we choose to do it, I want to be satisfied that it is
14 going to be part of the Department's case.

15 MR. CHARNO: The Department presently intends
16 to call Mr. Lewis which respect to this. I can't say
17 anything more than that.

18 CHAIRMAN RIGLER: Do you want to summons your
19 witness?

20 MR. MELVIN BERGER: At this time the Department
21 would like to call Mr. William M. Lewis, Jr., as its
22 witness.
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1 Whereupon,

2 WILLIAM M. LEWIS, JR.

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

6 DIRECT EXAMINATION

7 BY MR. MELVIN BERGER:

8 Q Will you please state your name?

9 A William M. Lewis.

10 Q What is your business address, sir?

11 A 740 Fifth Street, Portsmouth, Ohio 45662.

12 Q Will you give us a brief rundown of your educa-
13 tion after high school?

14 A Yes. I graduated from Ohio State
15 University in June of 1948 with a degree in electrical
16 engineering.

17 Since that time I have taken several courses
18 in power system operation and management of Ohio State and
19 Ohio Universities.

20 Q Would you briefly relate your employment
21 experience subsequent to your graduation from Ohio State
22 University?

23 A Immediately after graduation I was employed by
24 Ohio Power Company as an industrial power engineer.

25 After that I was associated with an electrical

1 contractor involving the installation and construction
2 of industrial power systems and utility type electric
3 systems.

4 After that I was with the Gergler Construction
5 Company, who were contractors for the Atomic Energy
6 Commission, heavy water plant in Dana, Indiana.

7 After that I was associated with Patterson,
8 Emerson and Comstock, an electrical contractor engaged
9 in building a new coal roll mill and blast furnace
10 in New Boston, Ohio.

11 After that I was general power coordinator
12 for the Atomic Energy Commission Gaseous Diffusion Plant
13 at Piketon, Ohio.

14 After that I formed W. M. Lewis & Associates,
15 Consulting Engineering Firm.

16 Q In what year did you form W. M. Lewis &
17 Associates?

18 A January 1, 1959.

19 Q How many people are now employed by W. M. Lewis
20 & Associates?

21 A Approximately 20.

22 Q Have you worked as a consultant for Napoleon,
23 Ohio?

24 A Yes.

25 Q When were you first hired as a consultant for

1 Napoleon?

2 A In the latter part of July 1971.

3 Q At that time, Mr. Lewis, do you know how Napoleon
4 was meeting its bulk power needs?

5 A At that time?

6 Q Yes, at that time.

7 A At that time Napoleon was meeting its bulk
8 power needs primarily by its own generating units,
9 taking certain small amount of power from the Toledo
10 Edison Company.

11 Q Mr. Lewis, what work did Napoleon ask you to
12 perform for them?

13 A They asked --

14 CHAIRMAN RIGLER: When was this?

15 MR. MELVIN BERGER: After he was hired as a
16 consultant.

17 CHAIRMAN RIGLER: When was that, once more,
18 please?

19 THE WITNESS: Latter part of July 1971.
20 Can you not hear me up there? I pushed this
21 mike away.

22 CHAIRMAN RIGLER: I can hear you. I just
23 missed it.

24 THE WITNESS: The City of Napoleon asked our
25 firm to do a number of things during the course our

1 employment.

2 One was to assist them in negotiations with
3 Toledo Edison Company for a new contract.

4 Another was to make a bulk power supply study.

5 Another was to make a retail rate study.

6 An intangible value study.

7 We were also retained to assist them in
8 operation of their power system and to advise their
9 operating people.

10 We also assisted them in negotiations with
11 other power suppliers besides Toledo Edison.

12 And we designed some modifications to their
13 existing substation in order that they could receive
14 additional power supply.

15 I think that is all that we did.

16 One other thing: We prepared specifications
17 for bidding by power suppliers to furnish the City's power
18 requirements for a certain period of time.

19 BY MR. MELVIN BERGER:

20 Q You mentioned that you had made a retail rate
21 study for Napoleon; is that correct?

22 A Yes.

23 Q During the course of that study, did you compare
24 the retail residential rates of the City of Napoleon to
25 the retail residential rates of the Toledo Edison

1 Company in the geographic area around Napoleon?

2 A Yes.

3 Q Do you recall which rates, if either, were
4 higher?

5 A We found that the City's residential rates
6 were lower than those of Toledo Edison Company.

7 Q Do you recall what approximate percentage
8 the difference was?

9 A No, I don't.

10 Q I believe you also stated that you made a study
11 on the intangible -- you said you made an intangible value
12 study; is that correct?

13 A Yes, of their electric utility.

14 Q What was the purpose of this study?

15 A Toledo Edison wanted to buy the City of
16 Napoleon's electric system, and they had offered them a
17 certain amount of money. And the City Council wanted to
18 know from some independent source whether or not this was a
19 proper amount of money.

20 And so they retained us to make an intangible
21 value study to determine what the price should be, should
22 the Toledo Edison Company buy the system.

23 MR. REYNOLDS: Mr. Chairman, I will make the
24 continuing objection on behalf of all Applicants other
25 than the Toledo Edison Company with respect to the testimony

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of this witness.

CHAIRMAN RIGLER: Overruled.

end 17

BY MR. MELVIN BERGER:

1
2 Q Did this study reach any conclusion or
3 recommendation.

4 A The study itself reached the conclusion that the
5 intangible value on a present worth basis was approximately
6 16 million.

7 We did not make a judgment as to what the
8 tangible value was.

9 The study itself did not make a recommendation.
10 However, we were asked by City Council to make a recommenda-
11 tion concerning the study as opposed to the amount of
12 money that has been offered by Toledo Edison, and we did make
13 a recommendation concerning that.

14 Q What was that recommendation?

15 A Well that recommendation was that Toledo
16 Edison's tentative offer of 3,200,000 , as I recall, should
17 be at least doubled before serious consideration should be
18 given to their purchase of the system, or should be given,
19 before the Council decided to sell the system.

20 Q Did Napoleon decide to retain the system?

21 A Yes, they did.

22 Q I believe you also mentioned earlier that
23 you were asked to conduct a bulk power supply study for the
24 City of Napoleon; is that correct?

25 A That is correct, yes, sir.

Q Did you conduct such a study?

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1 A Yes, we did.

2 Q What was the purpose of the study?

3 A The purpose of the study was to determine
4 the most economical means of meeting the City's bulk
5 power requirements for the ten-year future period.
6 that would be the period from '72 through '81.

7 Q What procedure did you use in conducting this
8 study?

9 A We first made a survey to determine what
10 studies had been made prior to 1971 by certain other engineer-
11 ing firms that had been employed by the City.

12 And to determine the City's past historical
13 load growth and bulk power supply requirement, and then we
14 projected for the ten-year period, the future ten-year period,
15 what their requirements would probably be.

16 After that we considered their present mode of
17 operation and what the costs were and with known
18 factors and certain estimated factors, we tried to determine
19 what those costs would be in the future ten-year period.

20 After that, we determined what sources of power
21 supply would be available to Napoleon and factored those
22 supplies and the cost of obtaining those supplied into
23 their present mode of operation and made a comparison.

24 And from that, we came up with a
25 recommended plan for providing for Napoleon's bulk power

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1 requirement for the next ten years.

2 Q What sources of supply did you consider?

3 A We considered their own generation, their
4 existing generation with the addition of another unit,
5 another -- as I recall, it was a 12 megawatt unit.

6 We also considered purchasing all of their power
7 requirements from Toledo Edison Company.

8 We considered supplemental power or, rather,
9 purchasing supplemental power from an entity known as
10 the Buckeye Power Co-op, Inc., which is a G&T, generation
11 and transmission co-op for the rural electric cooperatives
12 in Ohio.

13 Then we considered combinations of these three
14 entities.

15 Q Did you consider Ohio Power Company as a potential
16 source of bulk power for Napoleon?

17 A No, sir.

18 Q Why not?

19 A Well, to consider Ohio Power would have
20 required construction of the same facilities as to receive
21 power from Buckeye and from our discussions on -- in regard
22 to other clients or with regard to other clients with
23 Ohio Power, we did not feel that we could get as good a
24 rate as we could from Buckeye. So therefore, there was
25 no point in considering Ohio Power.

1 Q Did this bulk power supply study recommend a
2 course of action for Napoleon?

3 A Yes, it did.

4 Q What was that recommendation?

5 A That recommendation was that Napoleon purchase
6 supplemental power from Buckeye; that they either, one,
7 secure the power through a local co-op called Tri-County
8 Rural Electric at a delivery point that was presently
9 in existence on the Toledo Edison system or, two, to build
10 approximately seven miles of 69 kv transmission line to
11 an existing substation that Tri-County owned, where
12 they received power over the transmission lines of Ohio
13 Power Company. And that this power, by one of these two
14 means, be integrated with Napoleon's existing generation,
15 and that that generation be operated three months
16 out of the year, in order to avoid creating a peak on
17 the Buckeye system over and above the peak that would be
18 created by Buckeye's own members.

19 And, in that manner, Napoleon could obtain the
20 lowest-cost power supply.

21 Q At this time was Napoleon's existing delivery
22 point on the Toledo Edison system?

23 A Yes, for the power received from Toledo Edison.
24 You understand, of course, that Napoleon was generating
25 a large part of their power supply, but the power they did

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1 purchase from Toledo Edison came from a delivery point that
2 was on the eastern border of the corporation, of
3 the town.

4 Q I believe in your prior testimony you mentioned
5 that you also prepared a specification for bids for bulk
6 power supply; is that correct?

7 A Yes.

8 Q Was that an outgrowth of this study?

9 A Yes.

10 Q Mr. Lewis, do you recall preparing an affidavit
11 on or about January 19, 1973?

12 A Regarding Toledo Edison?

13 Q Yes, regarding Toledo Edison and Napoleon.

14 A Yes.

15 Q Would you tell us what procedure you used in order
16 to prepare that affidavit?

17 MR. REYNOLDS: I will object to that question.

18 CHAIRMAN RIGLER: Overruled.

19 THE WITNESS: As I recall, I went back into my
20 files where I had notes concerning various meetings I had
21 had with representatives of the City of Napoleon and
22 representatives of Toledo Edison and used that information to
23 prepare my affidavit.

24 MR. MELVIN BERGER: I would like to hand you
25 now a copy of a document which bears the identification

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1 number NRC Exhibit 127.

2 BY MR. MELVIN BERGER:

3 Q I would like to ask you if this is the affidavit
4 you just referred to.

5 CHAIRMAN RIGLER: Is this an NRC Exhibit?

6 MR. MELVIN BERGER: This is an NRC Exhibit.

7 CHAIRMAN RIGLER: Was the exhibit number?

8 MR. MELVIN BERGER: 127. It is marked for
9 identification as 127. It has not been received in
10 evidence as yet.

11 MR. LESSY: Ruling was deferred on this,
12 Mr. Chairman. It was part of Dr. Guy's testimony or
13 attached to Dr. Guy's testimony, and the Board deferred
14 ruling on this, inasmuch as the Department intended to
15 call the affiant.

16 THE WITNESS: Yes, this is a copy of the
17 affidavit I prepared.

18 BY MR. MELVIN BERGER:

19 Q I would like you to look at that affidavit now,
20 and I ask you if what is contained in that affidavit is true
21 and correct, to the best of your knowledge and belief?

22 A Yes, it is.

23 Q I would like to refer you, if I may, for a
24 moment to paragraph numbered 1, subsection (a), where it --

25 CHAIRMAN RIGLER: Before you do that, Mr. Berger,

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1 I would appreciate it if you would inquire into the
2 circumstances under which the affidavit was made.

3 MR. MELVIN BERGER: Yes, sir.

4 BY MR. MELVIN BERGER:

5 Q Mr. Lewis, do you recall why this affidavit
6 was prepared?

7 A At the time this affidavit was prepared, we were
8 doing some work for a number of different groups. We were
9 doing some work for a group called American Municipal Power,
10 Ohio. Doing some work for a group called Midwest Ohio
11 Power Pool.

12 We were doing some work for the Ohio Municipal
13 Electric Association.

14 And we were doing work for several municipalities
15 in Ohio, who were interested at that time in purchasing an
16 undivided interest into several nuclear power plants that
17 were then being proposed or planned.

18 As I recall, the attorney who was representing
19 these various entities, asked me to prepare an affidavit of
20 this type.

21 CHAIRMAN RIGLER: Was it for use in a particular
22 proceeding or was it merely to set down in affidavit form,
23 your present recollection with respect to certain events?

24 THE WITNESS: I believe that it had to do with the
25 Zimmer plant, Zimmer Unit Number 1, that

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Cincinnati Gas and Electric, Dayton Power and Light
and Columbus and Southern Electric Company were planning.

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CHAIRMAN RIGLER: It was not prepared in connection with any then-pending litigation?

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THE WITNESS: No, not to my knowledge.

4

BY MR. MELVIN BERGER:

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Q Mr. Lewis, I would like to refer you to numbered paragraph 1, subsection (a). I note in that paragraph you use the term "supplemental power."

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8

What do you mean by the term supplemental power?

9

10

MR. REYNOLDS: Mr. Chairman, I am going to object to the question. I think the witness is here and he can ask him the questions, and if it is necessary to refresh his recollection, then reference can be made to the affidavit.

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CHAIRMAN RIGLER: He is asking him what he meant by the term as he used it in the affidavit. That is proper and I will permit it.

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THE WITNESS: Supplemental power as used in my affidavit in Section 1(a) was simply power to supplement the generating capabilities or capacity of the City of Napoleon and as I testified earlier, it was our recommendation that the City purchase power for nine months from Buckeye to supplement their generating capacity, and then that their generating capacity would be used for the other three months to avoid increasing

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1 the peak of the Buckeye system.

2 BY MR. MELVIN BERGER:

3 Q Which three months would Napoleon be using its
4 own generating capacity?

5 A These would be winter months and would normally
6 be December, January, and February.

7 However, they could be November, December,
8 January. It depends on what the forecast was for the
9 winter peak on the Buckeye system.

10 Q Do you recall if Napoleon had a summer peak?

11 A Yes, they did.

12 Q In paragraph 1(a), you state that you asked
13 Toledo Edison about establishing a delivery point for
14 Tri-County Rural Co-op at the present interconnection
15 point of Toledo Edison's transmission system, and the
16 electric system of Napoleon.

17 Mr. Lewis, do you know whether Toledo Edison
18 would have had to have made any physical changes in its
19 existing transmission network in order to establish
20 this delivery point?

21 A They would not have to have made any physical
22 changes. The delivery point was already established.
23 The Buckeye Power could flow over the Toledo Edison
24 system to the same delivery point.

25 Q Mr. Lewis, I would like to refer you to page 2

1 of the affidavit and more particularly to the second full
2 paragraph on that page which begins with the words, "The
3 supplemental power."

4 I would like to ask you to read that paragraph
5 over and tell me what the basis for this statement is.

6 A Okay. The basis for this statement is to simply
7 reiterate the fact that Toledo Edison actually is wheeling
8 Buckeye power to the cooperatives that are taking power at
9 delivery points on the Toledo Edison system. And under
10 the Ohio Power-Buckeye Power agreement, Buckeye generators
11 at the Cardinal Station feed power into Ohio Power's
12 transmission system, and by virtue of the various inter-
13 connections that Ohio Power has with other systems,
14 including the Toledo Edison system in Ohio, that Buckeye
15 power flows into their systems, and then to the various
16 delivery points for the cooperatives on the particular
17 utilities' system.

18 Q Mr. Lewis would the power flow that you have just
19 described be the same for any municipal utility which was
20 located in Toledo Edison's retail service area, and
21 which was interconnected with no other investor-owned
22 utility besides Toledo Edison?

23 A If they were taking Buckeye power, is that what
24 you mean?

25 Q Yes.

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1 A Yes, same identical system -- same identical
2 flow and type of flow.

3 Q Mr. Lewis, in this paragraph you refer to as
4 Federal Power Commission Rate Schedule No. 70, I would
5 like to show you now a copy of an exhibit which is marked
6 NRC 188.

7 CHAIRMAN RIGLER: Mr. Briley?

8 MR. BRILEY: Excuse me, Mr. Rigler. I didn't
9 mean to interject at this point.

10 BY MR. MELVIN BERGER:

11 Q I would like to ask you if this is what you
12 have referred to in your affidavit as Rate Schedule 70?

13 A It appears to be. It is a rather long
14 document, but it appears to be.

15 Q Mr. Lewis, I would now like to refer you to
16 numbered paragraph 2 in your affidavit. I note you
17 use the term in this paragraph "continuous synchron" --
18 What do you mean by that term?

19 MR. BRILEY: Chairman Rigler, I have tried to
20 be patient with Mr. Berger with respect to the use of this
21 affidavit.

22 I'm compelled to object strenuously at this
23 point.

24 I have no objection to him having shown the
25 affidavit to the witness and used for the purpose for

1 refreshing his memory. To use it to quote from it and
2 to introduce evidence is patently improper.

3 There is an administrative procedure provision
4 that allows introduction of affidavit in lieu of
5 presenting a witness, but not both.

6 He should ask the witness the questions or
7 submit the affidavit, but he shouldn't do both at the
8 same time.

9 MR. MELVIN BERGER: This is somewhat an en-
10 lightening statement in view of the fact when the Staff
11 attempted to introduce the affidavit into evidence, the
12 Applicants objected and asked us to bring in the witness.

13 MR. BRILEY: The point is that the witness is
14 here. I have no objection to the witness testifying,
15 Chairman Rigler, and I have no objection to the affidavit
16 being used to refresh his recollection, but he shouldn't
17 use it in connection with the testimony and in connec-
18 tion with the questioning by quoting from the affidavit
19 to him. That is why the witness is here.

20 †20 CHAIRMAN RIGLER: Do you intend to offer
21 the affidavit into evidence?

22 MR. MELVIN BERGER: Yes, I do.

23 CHAIRMAN RIGLER: While I tend to agree with
24 Mr. Briley, if you intend to offer the affidavit for the
25 truth of the matters set forth herein, there is no need

1 to review the matter with the witness. If you are relying
2 on the witness' testimony, on the other hand, then you
3 wouldn't need the affidavit.

4 I would permit you to go into supplemental
5 matters not covered in the affidavit, but for those
6 matters set forth in the affidavit, I'm going to sustain
7 Mr. Briley's objection.

8 MR. MELVIN BERGER: Mr. Chairman, I'm not sure
9 of the ruling here with regard to the questions that I
10 have been asking which really relate to clarifying certain
11 terms which Mr. Lewis has used in the affidavit.

12 CHAIRMAN RIGLER: I'm not sure that some of
13 the terms need clarification, Mr. Berger. Again, it looks
14 as if the request for clarification may be a vehicle to
15 effectively put the same material in the record twice;
16 once through the affidavit and once through the witness.

17 MR. REYNOLDS: Could I ask what the basis is for
18 introducing this affidavit into evidence? I raise that
19 because we deferred the introduction of this affidavit
20 which the Staff tried to bring in specifically because
21 the witness was going to be here.

22 The Board has made it very clear in this
23 proceeding that but for expert witnesses we are not going
24 to rely on canned testimony.

25 It seems if the witness is here, we don't

1 introduce an affidavit for the truth of the matters
2 asserted herein.

3 The Witness is here and he is a fact witness
4 and he is here so that the Board can hear him and get the
5 full benefit of his testimony in the course of examina-
6 tion and cross-examination.

7 I don't see any basis whatsoever, once a witness
8 is called, for introducing an affidavit into the record
9 in lieu of his testimony.

10 CHAIRMAN RIGLER: This affidavit couldn't
11 properly be characterized as canned testimony in that it
12 was not prepared with reference to these proceedings.

13 It may furnish the best evidence with respect
14 to the events reported therein, and it represents his
15 sworn testimony perpetuated at the time the events were
16 fresh in his mind.

17 MR. REYNOLDS: It is two years after the time
18 of the events, rather than the time they were fresh in
19 his mind.

20 CHAIRMAN RIGLER: It is still three years
21 closer than it would have been today.

22 MR. REYNOLDS: It is sworn testimony today
23 that we are talking about. It seems to me if we have
24 the witness here, he ought to testify as to what his
25 knowledge is.

1 His testimony was that the procedure used
2 was to go back and look at his notes and that was the
3 basis for his preparation.

4 I understand it was not prepared for this
5 case, but it is now as the Department is trying to use it,
6 being used as canned testimony, whatever the purpose was
7 for preparing this.

8 I think we already have gone past the mark of
9 whether this affidavit is something that should come in
10 for the truth of the matters stated therein without the
11 benefit of this witness, and the witness was brought in to
12 testify, and he should be required to testify as to those
13 matters.

14 I have no difficulty with the Department using
15 the document to refresh the witness' recollection if that
16 becomes necessary, but I think the best evidence rule
17 would require that the Board have the benefit of the witness'
18 independent recollection on the matters, and to the full
19 extent that that is possible with whatever refreshing
20 of recollection that is necessary from the affidavit and
21 that that is the evidence that should be received in this
22 case rather than the affidavit coming in for the truth
23 of the matters stated therein with the witness right
24 here in front of us.

25 MR. MELVIN BERGER: We do not believe that the

1 Applicants are prejudiced in any way by the use of
2 this affidavit.

3 They have full right of cross-examination of
4 Mr. Lewis on the events which are in this affidavit, and
5 if we are just going to have to go through each of these
6 meetings step by step, I think we will all waste a lot
7 of time and in fact make it more difficult for conducting
8 cross-examination.

9 CHAIRMAN RIGLER: Mr. Lewis, did you review
10 your affidavit in connection with your testimony today?

11 THE WITNESS: I reviewed it in about two or
12 three minutes this morning.

13 CHAIRMAN RIGLER: The more expeditious course
14 would be to permit the Department its option of either
15 live examination with respect to these events, or putting
16 the affidavit in because the Applicants will have
17 full opportunity for cross-examination.

18 I think that is particularly useful since
19 the witness already has been exposed to the affidavit
20 and already refreshed his recollection with reference to
21 it, and I see no purpose to be served by having him
22 rehash each sentence in the affidavit.

23 What is the Department's option?

24 MR. MELVIN BERGER: We would prefer to stand
25 on the affidavit, but we do have one more clarifying

1 question.

2 CHAIRMAN RIGLER: All right. Pose it.

3 BY MR. MELVIN BERGER:

4 Q Mr. Lewis, in paragraph 3(a), of this affidavit,
5 you make reference to large-scale generating facilities.

6 I would like to ask you what type of facilities
7 are encompassed by that term.

8 A Generating facilities that have generating
9 units of a size larger than three or four hundred
10 megawatts.

11 MR. MELVIN BERGER: That would conclude our
12 examination of Mr. Lewis.

13 I would like to offer -- well, this may be a
14 problem. This is a Staff exhibit. It has a Staff
15 exhibit number. I would like to offer NRC Staff Exhibit
16 127 into evidence.

17 MR. LESSY: If it is the Board's preference,
18 we can withdraw it and have them put their number on it,
19 or we can move it into evidence now; whatever the Board's
20 preference is.

21 CHAIRMAN RIGLER: I think we can keep the Staff
22 number on it.

23 Does the Staff join in the moving it into
24 evidence at this time?

25 MR. LESSY: Yes, we would, sir.

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MR. BRILEY: There is no objection on the part of Toledo Edison Company.

end 20

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1 MR. SMITH: Mr. Lewis --

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2 MR. REYNOLDS: Excuse me, Mr. Smith, the
3 Department had moved into evidence the affidavit. I will
4 make the continuing objection on behalf of the Applicants
5 other than Toledo Edison with respect to the acceptance
6 of this affidavit into evidence, as well as the renewing
7 of the other objection I have already made, regarding use
8 of this document at a time when the Witness is presented
9 and ready to testify.

10 CHAIRMAN RIGLER: The objections are overruled,
11 and NRC Exhibit 127 will be admitted into evidence
12 at this time.

13 (NRC Exhibit 127, previously
14 marked for identification,
15 was received in evidence.)

16 CHAIRMAN RIGLER: We note that there are two
17 attached pages, which have been designated A and B, attached
18 to this exhibit.

19 MR. MELVIN BERGER: I believe the September
20 29, 1971, letter from John Cloer to Mr. Lewis is
21 mentioned in the affidavits. The remaining pages to
22 my understanding were not attached by Mr. Lewis, and they
23 are not part of this affidavit.

24 CHAIRMAN RIGLER: The record will so reflect.
25 And the remaining pages will not be received into evidence.

1 MR. SMITH: Mr. Lewis, would you explain, please,
2 why is there a difference in cycle or in the peak periods
3 between the municipality and the rural cooperative?

4 THE WITNESS: You mean in connection with why
5 Napoleon would need to generate during the three winter
6 months --

7 CHAIRMAN RIGLER: Why does Buckeye peak during
8 the winter months?

9 THE WITNESS: Because they have a tremendous
10 amount of electric heat load and have little airconditioning
11 load.

12 MR. SMITH: Thank you.

13 CHAIRMAN RIGLER: Staff?

14 MR. LESSY: I have a couple of questions,
15 Mr. Chairmen.

16 CROSS-EXAMINATION

17 BY MR. LESSY:

18 Q Mr. Lewis --

19 MR. REYNOLDS: I would like to note objection
20 to the Staff cross-examination of this witness, on behalf
21 of all of the Applicants.

22 CHAIRMAN RIGLER: Overruled.

23 BY MR. LESSY:

24 Q Mr. Lewis, in paragraph 3 of your affidavit, you
25 refer to requests by you on behalf of Napoleon to Toledo

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1 Edison for joint ownership in large-scale generating
2 facilities.

3 Why did you request the joint ownership of such
4 large-scale facilities over, for example, a contract to
5 purchase power by Napoleon from Toledo Edison?

6 A Because I found in past practice that the
7 municipality has a lot better control over its future power
8 supply, if it owns the generating facilities, rather than
9 if it simply has a contract.

10 So often, a contract with a utility, if it is
11 not a Sierra-Mobile type contract, can be changed by merely
12 application to the Federal Power Commission. What is, the
13 rates can be changed.

14 It can seriously affect the cost of the power
15 supply to the municipality.

16 On the other hand, if the municipality owns
17 or has direct control over the generating facilities, it is
18 in a much better position to control its cost of power
19 supply.

20 Q Now, in paragraph 2 of your affidavit, you
21 referred to requests by you on behalf of Napoleon to
22 Toledo Edison for "continuous synchronization with the
23 system of the City of Napoleon, if Napoleon enters into
24 agreement with Tri-County.

25 What advantage would there be to Napoleon of

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1 having such continuous synchronism with Toledo Edison under
2 the circumstances described?

3 A It would decrease the spinning reserves that
4 Napoleon would have to maintain, so that if an emergency
5 occurred on the Napoleon generators, the emergency could
6 be compensated for by picking up power from Tri-County and the
7 Buckeye system.

8 If they were not in continuous synchronism,
9 this would not be possible.

10 Secondly, the continuous synchronism enables
11 the Napoleon system to have greater stability and,
12 therefore, greater reliability in the case of system swings.

13 MR. LESSY: That concludes Staff's cross-
14 examination.

15 CHAIRMAN RIGLER: Mr. Lewis, with reference to
16 the study you made for the City of Napoleon, you mentioned
17 several options, including additional self-generation.

18 Was consideration to participation in nuclear
19 plants included in the concept of additional self-generation?

20 THE WITNESS: No.

21 CHAIRMAN RIGLER: Mr. Briley?

22 MR. RIGLER: I would like just a couple of
23 minutes to prepare for my cross-examination of this Witness.
24 I wonder if it might be more convenient for us to pick this
25 up after the luncheon break?

CHAIRMAN RIGLER: All right.

Let's take a 50-minute break today.

(Whereupon, at 12:45 p. m., the hearing was recessed, to reconvene at 1:50 p.m., this same day.)

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AFTERNOON SESSION

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(1:50 p.m.)

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3 Whereupon,

4 WILLIAM M. LEWIS, JR.

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

7 CROSS-EXAMINATION (Contd)

8 BY MR. BRILEY:

9 Q Mr. Lewis, during the course of your meetings
10 with Toledo Edison, referred to in your affidavit, was it
11 ever explained to you that there was some concern that
12 existed on the part of Toledo Edison that if an inter-
13 connection were established, at Napoleon for Tri-County,
14 there may have been a possibility of some power circulation
15 difficulties arising from that interconnection?

16 A No.

17 Q That concern was never expressed to you; is that
18 your testimony?

19 A That is my testimony.

20 Q Also, Mr. Lewis, during the time period covered
21 by your discussions with Toledo Edison, were you aware of
22 any requests for an interconnection having been made of
23 Toledo Edison, by either Buckeye or the Tri-County rural
24 electric cooperative?

25 THE WITNESS: Could I have that question read
back?

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(The reporter read the pending question.)

2

THE WITNESS: NO.

3

BY MR. BRILEY:

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Q And isn't it a fact, Mr. Lewis, that Mr. Moran

5

told you he would consider such a request if made by Tri-

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County to Toledo Edison?

7

Mr. Lewis, are you now referring to your affidavit

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to refresh your memory?

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A Yes. I don't recall that he did.

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Q Mr. Lewis, I would like to refer you to page 2 of your affidavit, wherein you have said, and I will quote, I will read from the first full paragraph on page 2:

"Affiant then asked Mr. Moran if it were not Toledo Edison's policy to provide a delivery point when requested by Tri-County for the purposes of Tri-County serving its members. Mr. Moran responded that unless there were technical difficulties Toledo Edison would establish such delivery points when requested by Tri-County."

Is that correct or isn't it?

A That's correct as far as it concerns Tri-County's members. Your previous question I understood to mean if Tri-County would request such a delivery point to serve the City of Napoleon. And his response to that was that they would resist such a request and would not honor it.

As far as serving Tri-County's members, of course, he was obligated by contract to do that.

Q Who are the members of Tri-County?

A Who are the members?

Q Yes.

A Their customers.

Q Wouldn't Napoleon be a customer, Mr. Lewis, if Tri-County was going to provide service to them?

1 A Yes. Yes, they would; but let me make it very
2 clear to you that Mr. Moran and I each knew what the
3 other one was talking about, and he specifically said
4 that he would not allow an interconnection on behalf
5 of Tri-County or a delivery point for the City of
6 Napoleon.

7 Now what Mr. Moran was referring to that, I have
8 referred to on page 2, were Tri County's members or
9 customers other than the City of Napoleon.

10 There was never any pussy-footing around as
11 to what each of us meant.

12 Q All right. On page 3 of your affidavit,
13 apparently in your subsequent meeting with Mr. Moran, and
14 Mr. Cloer on January 24, 1972, you asked him the same
15 question; and according to your affidavit he responded
16 by saying that the company would give careful considera-
17 tion to it.

18 How is that a refusal?

19 A Mr. Moran was in a difficult position then
20 because he was in the presence of City Council.

21 Q I asked you how that was a refusal. You say here
22 in your affidavit that he would give consideration to it.
23 If he said that and if your affidavit is accurate, how is
24 that a refusal?

25 A I started to try to tell you.

1 MR. MELVIN BERGER: Objection. I think the
2 question calls for a legal conclusion as to whether there
3 is a refusal.

4 MR. BRILEY: The witness testified that he
5 refused.

6 CHAIRMAN RIGLER: Mr. Lewis, try to respond
7 to the question as posed.

8 THE WITNESS: May I have the question read?

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

11 THE WITNESS: That was a refusal because later
12 Mr. Moran said that he would not make the delivery point.

13 BY MR. BRILEY:

14 Q Mr. Lewis, subsequent to the time period
15 referred to in your affidavit, did you do any further
16 consulting work for the City of Napoleon with respect to
17 their obtaining Buckeye Power as an alternate source of
18 power?

19 A Yes.

20 Q What was the period that you had that additional
21 consulting work?

22 A That period was up until the early part of 1973.

23 Q When you say the early part of 1973, could you
24 be more specific?

25 A No.

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Q You don't know when that was in 1973?

Maybe I can point to a date that will help your memory.

Are you aware of the fact that in May of 1973 the Toledo Edison Company, at the request of Tri-County, agreed to establish a delivery point for them at Napoleon?

A No.

end 23

1 Q You were not aware of that.

24

2 A I was not.

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3 Q In your meetings with Mr. Moran and Mr. Cloer,
4 referred to in your affidavit, do you recall the capacity
5 in which Mr. Cloer was representing the company at the time?

6 A I was told that Mr. Cloer was, I believe, a
7 division manager, district manager of the southern district.

8 Q Then you were aware of the fact that Mr. Cloer
9 was not an officer of the Toledo Edison Company; is that
10 correct?

11 A Yes.

12 Q Were you also aware at the time that Mr. Moran
13 was an officer of the Toledo Edison Company?

14 A I really don't know whether at that time I
15 knew Mr. Moran was an officer or not.

16 Q According to your affidavit you recite herein
17 that Mr. Moran was vice-president, administrative services
18 of the Toledo Edison Company; isn't that correct?

19 A Yes.

20 Q Mr. Lewis, you testified that you, when you
21 were studying the Napoleon system, one of your proposals
22 was this interconnection to Tri-County to receive Buckeye
23 power, and you said you had two proposals.

24 You said you had one proposal for an inter-
25 connection at the present Toledo interconnection point in

1 Napoleon, and a second proposal for the construction of
2 a 69 kv line to a new Liberville substation, which was
3 the Tri-County present interconnection with Toledo
4 Edison; is that correct?

5 A Yes.

6 Q Did you subsequently abandon the idea of the
7 construction of that 69 kv line and, if so, why?

8 Let's take them one at a time. Did you abandon
9 the idea of constructing the 69 kv line?

10 A Not, not entirely.

11 Q What do you mean "not entirely"?

12 Did you abandon the idea in part?

13 A Well, we felt it would be preferable and less
14 expensive to Napoleon, if they could establish the
15 interconnection at Napoleon's present delivery point
16 from Toledo Edison. But in absence of that, we did not
17 abandon the building of the line, except that it would
18 be the less attractive of two alternatives.

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1 Q In your testimony with respect to
2 preparation of this affidavit, you stated you relied on
3 some notes that were contained in a file in preparation
4 of the affidavit.

5 A Yes.

6 Q Do you still have the notes?

7 A I don't know.

8 Q If you do have them, will you look for them and
9 make them available to us?

10 MR. MELVIN BERGER: Objection. I think this is
11 another attempt to reopen discovery.

12 CHAIRMAN RIGLER: Overruled.

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

15 THE WITNESS: I will look for them, and if
16 I find them, I will make them available.

17 BY MR. BRILEY:

18 Q Thank you.

19 What load growth for bulk power supply did
20 your studies show for the City of Napoleon from 1972 to
21 1981?

22 A I don't remember.

23 Q Would you have any notes on that anywhere that
24 would reflect that?

25 A I may have.

1 Q Mr. Lewis, do you recall whether the load
2 growth you were able to project for Napoleon was anywhere
3 in the magnitude of 7 to 8 percent?

4 A I don't remember. I have no idea what it was.

5 Q Mr. Lewis, that study you prepared for Napoleon,
6 was that in written form?

7 A Which study?

8 Q The study with respect to the projected load
9 growth.

10 A Yes.

11 Q And the bulk power supply studies as well?

12 A Yes. That load growth was a part of the bulk
13 power study.

14 Q I see. All right.

15 A We did not make a separate study regarding load
16 growth.

17 MR. BRILEY: I have no further questions of
18 this witness, Chairman Rigler.

19 MR. REYMOLDS: No cross-examination on behalf
20 of the other Applicants.

21 MR. MELVIN BERGER: We have no redirect.

22 MR. LESSY: Staff has one additional question.

23 BY MR. LESSY:

24 Q Mr. Lewis, the meetings referred to in your
25 affidavit --

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1 MR. REYNOLDS: I object to this. There is no
2 redirect, and Staff has had its opportunity to cross-
3 examine. I'm not sure I understand now what the basis
4 is for Mr. Lessy asking any questions.

5 CHAIRMAN RIGLER: Let me hear the question.

6 BY MR. LESSY:

7 Q Mr. Lewis, the meetings referred to in your
8 affidavit on September 2, 1971, and January 24, 1972, and
9 March 6, 1972, did Mr. Cloer make the statements which
10 you recounted in the affidavit in the presence of Mr. Moran?

11 A Yes.

12 MR. REYNOLDS: I object and move to strike.

13 CHAIRMAN RIGLER: We will grant the motion to
14 strike.

15 MR. REYNOLDS: Pardon?

16 CHAIRMAN RIGLER: Granted.

17 Thank you, Mr. Lewis.

18 MR. MELVIN BERGER: Is Mr. Lewis being
19 excused temporarily?

20 CHAIRMAN RIGLER: Have you discussed his
21 possibility of being recalled with him?

22 MR. MELVIN BERGER: Over the lunch hour, we did.

23 (Witness temporarily excused.)

24 CHAIRMAN RIGLER: Before we proceed to docu-
25 ments, the Board wishes to refresh its recollection with

1 respect to a point that the Department made earlier
2 related to the motion to compel production of the CID docu-
3 ments.

4 Did we correctly understand the Department's
5 position to be that the documents are unavailable for use
6 in this proceeding unless they produced under NRC process
7 because and due to the provisions of the Antitrust Civil
8 Process Act?

9 MR. CHARNO: They are unavailable to the
10 Department, sir, yes.

11 CHAIRMAN RIGLER: For use in this proceeding?

12 MR. CHARNO: That's correct.

13 CHAIRMAN RIGLER: Unless produced pursuant
14 to NRC agency process?

15 MR. CHARNO: That's correct. That is
16 the Department's position.

17 The reason for my clarification was we don't
18 believe they would be available to anyone else,
19 including the Board, on its own motion. The injunction in
20 the Antitrust Civil Process Act operates solely against
21 the Department.

22 The Department would continue at this time with
23 the introduction of documents for identification.

24 We would begin by discarding 003322 through 331.

25 MR. SMITH: Where are those?

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MR. CHARNO: That would be the last one

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following Exhibit 401.

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The Department would offer as DJ 402 a multi-
page document numbered 211376 through 417.

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MR. STEVEN BERGER: May I have an offer of

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proof, please?

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1 MR. CHARNO: We would offer this to show the
2 positions and corporate structure of the company as of
3 the date indicated thereon, and immediately surrounding
4 that date.

5 The Department would offer as DJ-403 a document
6 numbered 24203 through 206.

7 We would ask that the first page and the top half
8 of the second page be red-lined.

9 MR. STEVEN BERGER: May I have an offer of proof?

10 MR. CHARNO: Same offer as the preceding document.

11 CHAIRMAN RICLER: What do you want red-lined?

12 MR. CHARNO: Entire first page and the top
13 half of the second page.

14 The Department would discard pages 206687 through
15 890.

16 The Department would offer as DJ-404 --

17 MR. SMITH: I'm not with you again on your
18 exhibits.

19 MR. CHARNO: The Department would offer as
20 DJ-404 for identification, a multi-page document numbered
21 2086880 through 886.

22 MR. STEVEN BERGER: May I have an offer?

23 MR. CHARNO: This document demonstrates that
24 Hiram College represented a substantial portion of the
25 Hiram Municipal System load, and that CE offered a subsidy

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1 to the College, in order to further the OE goal of
2 acquiring the system, the system being the Hiram Municipal
System.

4 MR. STEVEN BERGER: Would you put a time frame
5 on the offer?

6 MR. CHARNO: That would have occurred in
7 1962 and is stated in the Department's answers to
8 interrogatories as a specific allegation.

9 CHAIRMAN RIGLER: In 1962?

10 MR. CHARNO: Yes, sir.

11 CHAIRMAN RIGLER: The memo is dated July 18,

12 '63.

13 MR. CHARNO: Page 4 of that memorandum, the
14 last paragraph --

15 CHAIRMAN RIGLER: -- refers to events in '63.

16 MR. CHARNO: The offer is a 1963 offer. The
17 acquisition attempt referred to, subsequently, is 1962.

18 CHAIRMAN RIGLER: All right.

19 MR. CHARNO: The Department would offer as
20 DJ-405, a multi-page document numbered 206874 through
21 879.

22 MR. STEVEN BERGER: May I have an offer?

23 MR. CHARNO: Same offer as the previous
24 document.

25 The Department would discard 206869 through 871.

1 The Department would offer as DJ-405, a
2 one-page document numbered 206231.

3 MR. STEVEN BERGER: May I have an offer?

4 MR. CHARNO: the offer for this document and a
5 number of succeeding documents --

6 MR. STEVEN BERGER: Excuse me, Mr. Charno, I would
7 appreciate it if at all possible that you will limit offers
8 of proof to the documents in their form, so that if you have
9 a document that has an attachment and it is a single
10 exhibit, fine, but I would appreciate separate offers as
11 to each of the documents, if I may.

12 CHAIRMAN RIGLER: The problem with that is a
13 practical one, which is, if there are a group of documents
14 that all relate to the same offer, it is foolish to
15 have to repeat the offer time after time.

16 MR. STEVEN BERGER: If each document is offered
17 for the offer of proof being given, I have no problem
18 with that, Mr. Chairman, but I don't want to have groups
19 of documents that are not being proffered as single
20 exhibits to be grouped together under a single offer of
21 proof.

22 We are dealing here with unsponsored exhibits.
23 Unless the documents are connected otherwise, I would prefer
24 to have the offer of proof given as to each exhibit
25 separately.

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1 It may be more time-consuming, but I think in
2 light of what the Board has said about offers of proof, I
3 think it important to my client to have it done this way.

4 MR. CHARNO: DJ 406 is offered by the Department
5 to show a request by the City of Niles for a primary line
6 extension.

7 It is the Department's intention to offer this
8 document in support of an allocation agreement between the
9 City of Niles and Ohio Edison, and to further show
10 potential competition and the elimination of that
11 potential competition with respect to both parties and
12 finally we would submit this document to show the operation
13 of the agreement which is contained in the wholesale
14 contract between Ohio Edison and Niles.

15 The Department would offer as DJ 407 a one-page
16 document numbered 207229.

17 MR. STEVEN BERGER: I would like an offer as to
18 that.

19 MR. CHARNO: The offer is identical with the
20 prior document, and we would note that it is expanded to
21 the extent that Ohio Edison's refusal as chronicled
22 in Exhibit DJ 408 for identification -- I'm sorry, 407
23 for identification, resulted in a restraint upon Niles'
24 ability to extend its primary lines, and thereby the scope
25 of its system.

1 The Department would offer as DJ 408 for
2 identification a one-page document numbered 208945.

3 MR. STEVEN BERGER: May I have an offer?

4 MR. CHARNO: We would give the same offer of
5 proof as with the preceding document, unless it has been
6 possible to reach a stipulation on the handwriting.

7 MR. STEVEN BERGER: We haven't as yet been able
8 to reach a stipulation on that handwriting.

9 MR. CHARNO: The Department would reserve the
10 right to modify its offer of proof upon ascertaining what
11 the notification -- what the marginal notation at the top
12 of the page is, and who was the author of it.

13 MR. STEVEN BERGER: Excuse me, Your Honor.

14 MR. CHARNO: I made an error in saying the
15 pagination on that document. It should be 95 through 9.
16 It does not modify the offer of proof, however.

17 The Department would offer as DJ 409 a one-
18 page document numbered 208696.

19 MR. STEVEN BERGER: May I have an offer?

20 MR. CHARNO: The same offer as is in the
21 preceding document.

22 The Department was offer as DJ 410 a multi-
23 page document numbered 207224 through 223.

24 MR. STEVEN BERGER: May I have an offer?

25 MR. CHARNO: We would make the same offer as

1 with the preceding document and add as with respect to
2 this document that it demonstrates competition between
3 Ohio Edison and the municipal system outside the City of
4 Niles.

5 Further, that the territorial provision or the
6 allocation provision is used not only to eliminate
7 competition for specific customers, but as a device to
8 block future expansion by the city system, and that this
9 is not an inadvertent use, but a contemplated use of
10 the restrictive agreement by Ohio Edison.

11 The individual pages fo DJ 410 are 207224,
12 207225, 207232, 207233, 206227, which is illegible, and
13 for which the Department will place in the record a typed
14 page, and 207228.

15 MR. STEVEN BERGER: I take it that pages 20732
16 and 233 are nonetheless to the best of the Department's
17 knowledge the documents that were attached to this exhibit?

18 MR. CHARNO: They are to the best of the
19 Department's knowledge, and we would be happy to accept
20 any advice to the contrary since we would have no other
21 reason for putting them together.

22 The Department would discard the next page,
23 218602.

24 The Department would offer as DJ 411 for
25 identification a one-page document numbered 218531.

1 MR. STEVEN BERGER: May I have an offer?

2 MR. CHARNO: The offer with respect to the
3 nature and effect of the allocation agreement would
4 remain the same, and this document would be introduced
5 to show the ongoing operation of that agreement.

6 The Department would offer -- the department
7 would offer as DJ 412 for identification a two-page
8 document numbered 218584 through 585.

9 MR. STEVEN BERGER: May I have an offer?

10 MR. CHARNO: The same offer as the preceding
11 document, in addition to showing that in this case
12 permission is granted to Niles to serve a customer in
13 exchange for a future right of Ohio Edison to purchase
14 existing distribution facilities belonging to the City
15 of Niles.

16 The Department would characterize this as a customer
17 exchange agreement.

18 The Department would offer as DJ 413 for
19 identification a three-page document numbered 211528,
20 211529, and 218582.

21 MR. STEVEN BERGER: May I have an offer?

22 MR. CHARNO: The Department would offer DJ 413
23 for identification as showing the allocation agreement as
24 previously described, its operation, and specifically
25 with respect to this document, its application to an

1 industrial customer.

2 MR. STEVEN BERGER: Could I get a statement
3 from the Department as to the basis for believing that
4 218582 is attached to the letter dated June 3, 1971,
5 identified as Department of Justice Document No. 2115267

6 MR. CHARNO: I think the basis for our attaching
7 them is the last sentence of the first paragraph of the
8 initial sheet of the letter.

9 If you would prefer to have offered separately
10 and wouldn't complain that the document is incomplete, we
11 would be happy to do it that way.

12 MR. STEVEN BERGER: I think that would be a
13 better procedure since there is no indication in the
14 letter that that letter is an attachment.

15 MR. CHARNO: In which letter?

16 I believe that very clearly on the first page
17 of DJ 413, which is a letter from Mr. Bixler to Mr.
18 Olds of June 3, 1971, it states:

19 "Also attached is a copy of my reply to Mr.
20 Burgess."

21 The third page --

22 MR. STEVEN BERGER: You are correct; I'm
23 sorry. I didn't see that statement. You are correct.

24 MR. CHARNO: The Department would offer as DJ
25 414 for identification a one-page document numbered 218583.

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MR. STEVEN BERGER: May I have an offer?

MR. CHARNO: We reserve our right to amend the offer of proof if requested to do so upon securing a stipulation on the material in the upper right-hand corner of the letter.

We would presently offer this document to show a policy of exchanging customers or trading customers which existed between Niles and Ohio Edison.

We believe subject to confirmation on stipulation that the upper right-hand corner is an instruction from Mr. Zimmerman, corporate officer, to Mr. Bixler, division manager, setting forth company company as to the usual practice of trading customers with municipal systems as of 1971.

MR. STEVEN BERGER: Mr. Chairman, I do understand, do I not, that as to all documents that have been red-lined before the red-line rule was established, that the Board is disregarding any red-lining whatsoever on documents of three pages or less, and that although it might have been better for -- it is available to us as an alternative if we desire to do so, we can submit clean copies of the document without any of the red-lining, not necessarily for this Board, but for purposes of the record?

CHAIRMAN RIGLER: Well, if you intend to

submit clean copies, you should do so prior to the closing of the record of this Board. We have indicated that we will consider the entire document and not just the red-lined portions for documents three pages or less.

You do have that assurance.

MR. CHARNO: The Department would offer as DJ 415 identification a one-page document numbered 218618.

MR. STEVEN BERGER: May I have an offer?

MR. CHARNO: DJ 415 is offered by the Department to show an awareness by Ohio Edison of Niles' anticipated requirement of 138 kV service as early as mid-1969.

We would further use this document to demonstrate that 138 kV service is helpful to assist them in serving large industrial loads, and further we would offer this document to prove that in the context of these discussions -- I'm sorry, scratch the last part.

That is the entire offer.

The Department would offer as DJ 416 for identification a two-page document numbered 218163 and 614.

MR. STEVEN BERGER: Can I have an offer?

MR. CHARNO: The Department would offer DJ 416 for identification to prove the time of the meeting at which Niles first obtained initial tentative cost figures,

although incomplete, for 138 kV service.

We would offer this document further to show again that 138 kV service is helpful in serving industrial loads and would show that in this context Ohio Edison made representation that a 5 percent high voltage discount would be available.

29

The Department would offer as DJ 417 a two-page document numbered 216606 through 607.

MR. STEVEN BERGER: May I have an offer?

MR. CHARNO: The offer for this would be identical with the prior document and would go beyond since it is a draft of the minutes that are finalized in the prior document. And there is a certain portion that is excluded in these minutes, excluded in the final minutes that appears in these minutes.

We would offer it for the existence of the discussions referred to therein concerning territorial allocation between Niles and Ohio Edison.

We would further offer the -- that proposition in support of the proposition that Ohio Edison expected high voltage service to be of competitive benefit to the City of Niles. And that it was in the context of such discussions that a 5 percent discount high voltage rate was discussed.

The Department would offer as DJ 418 for

identification a two-page document numbered 218594 through 597.

MR. STEVEN BERGER: May I have an offer?

MR. CHARNO: We offer this for the notice to Ohio Edison of the request contained therein. Specifically for more specific cost figures concerning 138 KV service.

The Department would offer as DJ 419 for identification a two-page document numbered 218598 through 599.

MR. STEVEN BERGER: May I have an offer?

MR. CHARNO: The Department would offer DJ 419 for identification to prove that Ohio Edison wrote to Niles informing the City that Ohio Edison had no rate on file or resale to a municipal at 138 KV despite the existence of such a rate for service to retail industrial customers.

We further offer the document to prove that Ohio Edison did not intend to file such a rate until the municipal system was ready or nearly ready to take service thereunder.

We further offer the document to show that whatever prior indication of a 5 percent discount rate might have been made by Ohio Edison, that that was no longer the case, and we direct the Board's attention to the specific discussion of industrial discount rates and

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the statement by Ohio Edison that, "In view of that fact, and in view of the differences and service characteristics between the industrial class and the municipal resale class, detailed studies will be required to determine the appropriate level of and design for a rate for municipal resale service at 138 kV."

end 29

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1 This coming some three years after the initial
2 knowledge of interest of the City in securing 138 kv
3 service, and some time after the discussions of 138 kv
4 service with the City, as indicated by the prior exhibits.

5 The Department would offer as DJ-420 for identifi-
6 cation a two-page document numbered 218600 through 601.

7 MR. STEVEN BERGER: May I have an offer?

8 MR. CHAMNO: This document constitutes a memorandum
9 of a meeting. We would offer it to demonstrate that Ohio
10 Edison was requested at this meeting to provide the post
11 data necessary for Niles to proceed with its plans to
12 receive power at 138 kv.

13 We offer it further to demonstrate that the
14 City's utility superintendent indicated that he could
15 not receive Council approval to secure such service, and
16 all its ramifications without first making a complete
17 economic analysis, and that such presentation could be made
18 only after all costs were ascertained by the City. We
19 offer it to prove that, notwithstanding these facts being
20 in front of Ohio Edison, the Company responded that they
21 were not in a position to review the coordination
22 between Niles' system and Ohio Edison's system at that time.

23 We would offer as DJ-421 for identification,
24 a two-page document numbered 218818-189.

25 MR. STEVEN BERGER: May I have an offer?

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1 MR. CHARNO: We would offer DJ-421 for identification
2 to show that, in addition to requests made by Niles
3 for 138 kv rate and service, Cuyahoga Falls requested such
4 service and that the letter which comprises DJ-421 for
5 identification summarizes and recapitulates previous
6 conversations that Ohio Edison had had with respect to those
7 requests and this document further refuses to file such a
8 rate or to give the individual seeking a rate any
9 indication of what that rate might be or the components
10 of that rate.

11 The Department would offer as DJ-423 for
12 identification a three-page document numbered 220224 and
13 220223.

14 MR. STEVEN BERGER: May we have an offer?

15 MR. CHARNO: We would offer DJ-422 for
16 identification, in support of our allegation that Ohio
17 Edison would purchase Norwalk's generating units only if
18 Norwalk would also sell Ohio Edison its distribution
19 system.

20 That is, we would offer it to prove that Ohio
21 Edison is willing to acquire certain facilities, in order
22 to secure a retail customer, but would not purchase those
23 facilities to acquire a wholesale customer who would
24 remain in competition with it.

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MR. CHARNO: The Department would offer as DJ 423 for identification a multi-page document numbered 25668. I'm sorry. I would like to discard 25668 through 575.

We would like to discard the next single page 25785.

We would offer as DJ 423 for identification a one-page document numbered 25762.

MR. STEVEN BERGER: I would like an offer.

MR. CHARNO: This document demonstrates that Ohio Edison competed here or in the circumstances described in this document for a single specific large customer.

It indicates further that OE had engaged in a program for an unspecified period of time to acquire the Norwalk system.

The Department would discard 25759.

The Department would offer as DJ 424 for identification a one-page document numbered 25760.

MR. STEVEN BERGER: May I have an offer?

MR. CHARNO: The Department would offer DJ 424 for identification in support of the proposition that Ohio Edison was willing to secretly fund the efforts of those individuals who sought an acquisition of municipal systems by Ohio Edison.

The Department would discard 25761.

CHAIRMAN RIGLER: Wait a minute.

MR. STEVEN BERGER: You are offering that separately, 25761?

MR. CHARNO: No, I said I was discarding it.

CHAIRMAN RIGLER: Wait a minute. Isn't this an attachment, or if not an attachment, isn't that the reference in Department Exhibit 424?

MR. CHARNO: We think it is, but we are not sure. If you would like to attach it there, that is fine. We had no way to attach it. We had not previously listed it.

We will put it in or not, as the Applicants see fit.

MR. STEVEN BERGER: Did you receive the document attached?

MR. CHARNO: No, as far as we know, we did not.

CHAIRMAN RIGLER: I'm having a little trouble with 424 also.

MR. STEVEN BERGER: I might note that the Department's designation of this document in their list of documents designated lists it as a letter from A. J. Goran, from Roger Waite, with attachments. In the column it was page number 12, indicating 12 pages.

Perhaps it was a misprint, and should have been

two pages.

Nonetheless, it is stated as an attachment.

end 31

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1 CHAIRMAN RIGLER: I'm having difficulty finding
2 out what is wrong with Ohio Edison putting out PR releases
3 extolling the virtues of its sale of industrial power.

4 MR. CHARNO: I don't think Mr. Waite is an employee
5 of Ohio Edison. He is a citizen of the town. He is asking
6 him to fund his efforts at an acquisition.

7 MR. STEVEN BERGER: I am specifically not
8 addressing myself to any of the offers here, but since you
9 have focused in on this document, in particular, at this
10 point I believe the offer also stated something about
11 this being done secretly and nefariously, with the
12 implication of it being nefarious in some way.

13 I don't think this document is probative of
14 that.

15 CHAIRMAN RIGLER: I might agree.

16 The only reason I'm discussing it prior to the
17 attempt to introduce it into evidence is to give the
18 Department my preliminary feeling, because I think their
19 series addressed to the same subject matter, and that may
20 be useful to the Department to know the Board's
21 preliminary thoughts at this time.

22 MR. CHARNO: The Department would discard 21664.

23 CHAIRMAN RIGLER: Do you want it marked or
24 withdrawn?

25 MR. CHARNO: Discarded, 21664. And also
discard 25714 and 25699 through 7037

1 MR. STEVEN BERGER: Maybe we can go back to
2 424. I don't know what we did with the attached letter.
3 I indicated that it was part of the Department's
4 designation that the letter had an attachment.

5 MR. CHARNO: The Department initially so
6 designated, and we have been unable to determine that
7 there was an attachment. We had to do guesswork in the
8 beginning, because things were not stapled together.
9 We had to search to discover what went with
10 what.

11 This may not have been attached to it, but it is
12 indicated in there.

13 I will do it whatever way is convenient for
14 anyone else.

15 MR. STEVEN BERGER: Let's make it an attachment.

16 MR. CHARNO: Fine.

17 So 424 would be a two-page document numbered
18 25760 through 61.

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MR. CHARNO: The Department would further discard 21899 and 25706 through 709.

MR. CHARNO: The Department would offer as DJ 425 a one-page exhibit numbered 24846.

MR. STEVEN BERGER: May I have an offer of proof?

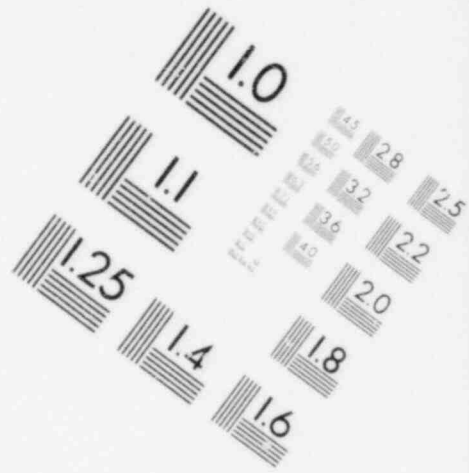
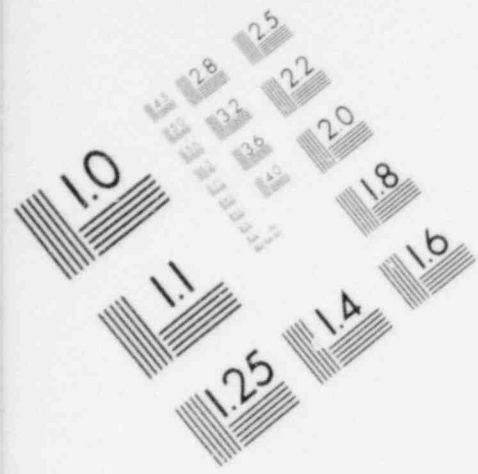
MR. CHARNO: There is a stipulation in existence as to the top line on the document which is apparently cut off of the copies which says 3-16-71, dictated to Ann Martin by Pat Warren, Mr. Goran's secretary.

The Department would offer 425 for identification to show Ohio Edison's almost instantaneous awareness of Norwalk's search for alternative sources of bulk power and we would offer it further for the statement contained in the second paragraph which was made in the context of this communication to be representative for the town of Norwalk.

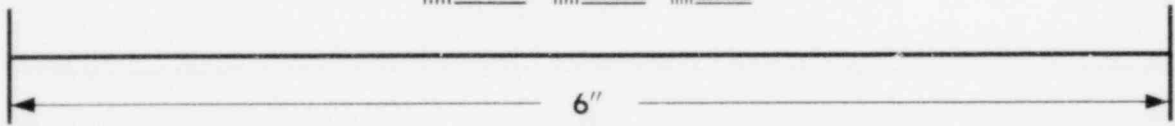
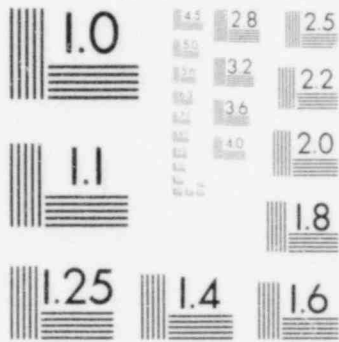
I would offer this document for the internal circulation indicated on the face of the document, Mr. Spetrino, and did we reach a stipulation on RGE, Mr. Zimmerman, a corporate officer.

MR. STEVEN BERGER: Yes.

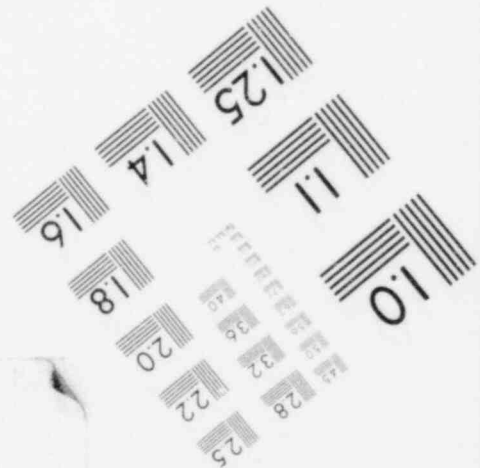
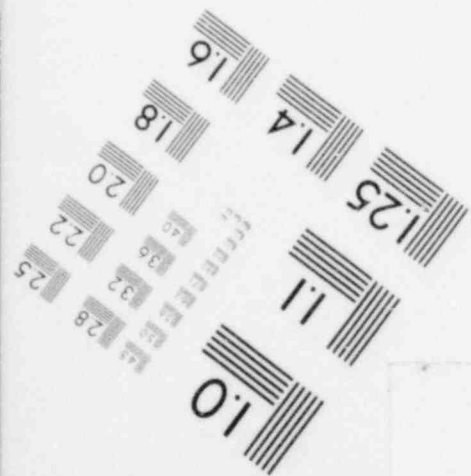
MR. CHARNO: We would offer as DJ 426 for identification a one-page document numbered 22729, note a stipulation that the handwritten notation, Mr. R. G. Zimmerman has been cut off the top of the page.

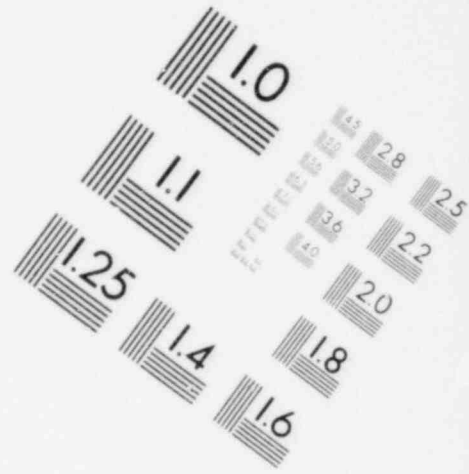
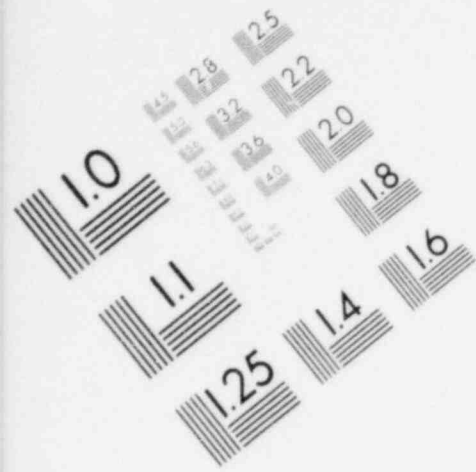


**IMAGE EVALUATION
TEST TARGET (MT-3)**

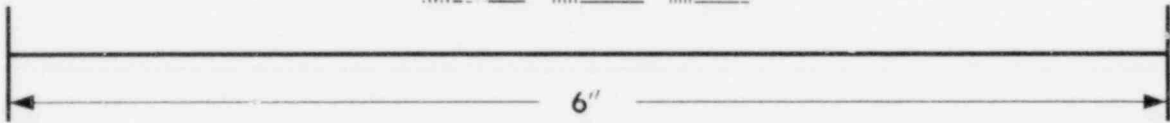
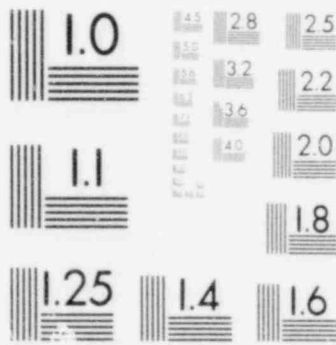


MICROCOPY RESOLUTION TEST CHART

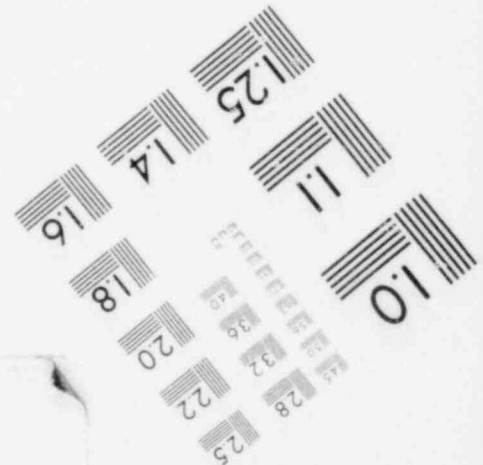
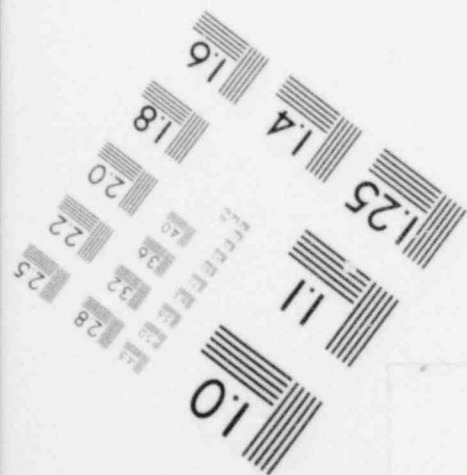




**IMAGE EVALUATION
TEST TARGET (MT-3)**



MICROCOPY RESOLUTION TEST CHART



CHAIRMAN RIGLER: Want to read into the record the handwritten note at the bottom of the page?

MR. CHARNO: Krogh, K-r-o-g-h, went to Columbus 3-17-71 to talk to Buckeye per ANG, and it is signed RGZ, 3-18-71.

CHAIRMAN RIGLER: Who is ANG?

MR. CHARNO: Anthony Goran, who is the division manager of Ohio Edison.

The Department would offer as DJ 427 for identification a one-page document numbered 213305. We have not yet been able to reach agreement as to the portion in the upper right corner.

Nobody has a perfectly legible copy. The author is being checked with as to the statement that is contained up there.

We would obviously offer it for that statement as well as the prior offers.

The Department would offer as DJ 426 for identification a three-page document numbered 213306 through 308, and would note the initials on the second page are those of A. N. Goran, per stipulation.

MR. STEVEN BERGER: May I have an offer of proof?

MR. CHARNO: This document is offered for the incidents reported at a meeting which is described in the document, specifically discussion of wholesale service

to Norwalk, the 10-year term of the contract, and the request for parallel operation and OE's response to that request.

The Department would discard 22592 through 611.

The Department would offer as DJ 429 for identification a one-page document numbered 21646.

CHAIRMAN RIGLER: What is the number?

MR. STEVEN BERGER: May I have an offer?

MR. CHARNO: The Department would offer this document to show a 1971 statement of position by Ohio Edison to Norwalk.

It is an extension of its earlier position. Here the company told the city that it would never buy the generating plant if it was shut down. This effectively precludes a system which wants to maintain capital or gain any degree of independence from becoming a wholesale customer and requires him to be a retail customer.

We have a stipulation that this document was written by J. F. Doering, D-o-e-r-i-n-g.

The Department would offer as DJ 430 a one-page document numbered 11652.

MR. STEVEN BERGER: Offer?

MR. CHARNO: The Department would offer this document to prove that Ohio Edison's response to the request for parallel operation which was chronicled in the

memorandum referred to previously, was thought by the City of Norwalk to be a refusal.

The Department would offer as DJ 431 for identification a three-page document numbered 22562, 22561, and 22563.

CHAIRMAN RIGLER: Hold on.

end 34

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MR. CHARNO: Let me note first we did not have an attached copy of Mr. Krough's of March 15, 1971. And we would be happy to supplement this exhibit by adding that if the Applicants can supply us with a copy.

We would further note that the stipulation of the handwritten notation on page 22561 which reads, "Gainesville FLA must interconnection," was stipulated to be the notation --

MR. STEVEN BERGER: There is no stipulation on that document. We are still checking it. We have narrowed it down to two individuals.

MR. AIUVALASIT: We misunderstood. Sorry.

MR. CHARNO: We would offer this document together with a stipulation to show that Ohio Edison recognized a legal obligation at this point to interconnect with the City of Norwalk.

The Department would discard 22567.

The Department would offer as DJ 432 a two-page document numbered 22559, 22560.

MR. STEVEN BERGER: May I have an offer of proof?

MR. CHARNO: The Department would offer 432 for identification to show that Ohio Edison did not regard itself as having previously refused on March 9, 1971 the City of Norwalk's request for parallel operation.

The Department would offer as DJ 433 for

identification a four-page document numbered 25637
through 690.

MR. STEVEN BERGER: Offer?

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1 MR. CHARNO: The Department would offer
2 DJ-433 for identification, as indicating the repeated refusal
3 of Ohio Edison to buy only generating units belonging to the
4 City without being able to purchase the remainder of the
5 system.

6 Would further offer the document for Ohio Edison's
7 statement that, in response to a question, they had no
8 information available on the company's policy
9 regarding wheeling.

10 Further offer the document to prove that they
11 refused to supply the City with the company's inventory
12 of the City system, that the company refused to consider
13 parallel operation at the time of the document -- at
14 the time of the meeting chronicled in the document.

15 Finally, to prove that Norwalk communicated
16 with Buckee in the summer of 1970 and this fact was
17 communicated to Ohio Edison.

18 CHAIRMAN RIGER: I have a question or two on this
19 document which begin on page 25689.

20 My copy is a little blurry, but the second
21 notation appears to be "Duncan," is that correct?

22 MR. CHARNO: Yes, sir, if you are talking
23 about the speakers.

24 CHAIRMAN RIGLER: Yes. That reference
25 reads, "It is also unfortunate that we were not in this
thing earlier. He asked if we had territorial agreements

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1 specifically with Ohio" -- and then a word I can't read --
2 "told him not to our knowledge."

3 MR. CHARNO: The word you cannot read, I
4 believe, is the three capital letters, "A.N.G."

5 We have a standing stipulation that that
6 stands for Mr. Goran.

7 CHAIRMAN RIGLER: What is the Department's offer
8 with respect to who he is in this? In other words who
9 the parties are? It must be more than Mr. Duncan in that
10 context.

11 MR. CHARNO: Mr. Duncan appeared at the
12 meeting in Norwalk, which is spelled out in the first
13 page.

14 CHAIRMAN RIGLER: Who was making the representation
15 that Ohio Power had no territorial agreements, I gather,
16 with Ohio Edison. Would those be the two parties?

17 MR. CHARNO: Yes, sir. That was an employee of
18 Ohio Edison that was making that representation to Mr. Duncan.

19 We do not offer that statement for the truth
20 of the statement, but simply that it was made.

21 MR. CHARNO: The Department would offer as
22 DJ-434 for identification a three-page document numbered
23 25684 through 686.

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MR. STEVEN BERGER: Offer of proof?

MR. CHARNO: Same offer as the prior document.

CHAIRMAN RIGLER: What is the difference between the two?

MR. CHARNO: We believe they were notes taken by different individuals.

The first is Mr. Doering's notes alone, and the second is a combined memorandum from three individuals.

CHAIRMAN RIGLER: Are their names stipulated?

MR. STEVEN BERGER: Are their names stipulated?

CHAIRMAN RIGLER: Yes, the authors of these two documents.

MR. CHARNO: They are indicated on the documents, on the first page of each document.

CHAIRMAN RIGLER: All right.

MR. CHARNO: The Department would offer as DJ 435 for identification a one-page document numbered 21683.

MR. STEVEN BERGER: Offer?

MR. CHARNO: The Department would offer this document to show that Ohio Edison believed that it needed to support a radial line in order to efficiently serve the City of Norwalk and that even when that line was supported, they might still have fluctuations and need correction equipment, and in order to provide firm service, they would need something more than a dual feed

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interconnection and construction of additional transmission.

The Department would offer as DJ 436 for identification a two-page document numbered 215426 and 27.

MR. STEVEN BERGER: Offer of proof?

MR. CHARNO: We would offer this document as evidence for the proposition that Ohio Power neither wished to sell power to the Town of Norwalk or to acquire the facilities belonging to the Town of Norwalk.

We would further offer it for the knowledge of these by Ohio Edison.

The Department would withdraw 25749.

We would further withdraw 22633 through 642.

We would further withdraw 215587 through 98.

The last one in the sequence is 691.

CHAIRMAN RIGLER: They all appear to be the same, question and answers.

MR. CHARNO: Yes.

The Department would offer as DJ 437 a 13-page document numbered 25730 through 25742.

The Department would offer DJ 437 for identification, to establish the overall competitive situation in 1970 between the City of Norwalk, the Ohio Edison system including the comparison of their rates.

We further offer it for the description of the physical facilities of the Norwalk system as of that date.

We offer it for the fact that Ohio Power's rates at that time were less than Ohio Edison's rates, and we would offer it for the values of interconnections which are set forth therein.

We note in passing the godfather's involvement in the middle of Ohio.

MR. GREENSLADE: I would like to have that remark stricken, please.

CHAIRMAN RIGLER: It will be.

MR. CHARNO: The Department would offer as DC 438 for identification a one-page document numbered 25403.

MR. STEVEN BERGER: Offer of proof, please.

MR. CHARNO: This document indicates Norwalk's search for alternative courses of bulk power and by viewing this document in conjunction with another, we can establish the meetings referred to in this document as occurred in 1971.

We offer it for the discussion of parallel operation.

MR. STEVEN BERGER: Your Honor, perhaps I can get a clarification in order to determine for my own preparation objecting to the documents, and in terms

of the preparation I must make.

So the Board knows I'm not engaging in a nuisance activity, the reason for asking for my offer of proof in regard to each document that the Department is introducing, it is my understanding from earlier colloquy I had with the Chairman in regard to offers of proof, that to the extent that an offer of proof is asked for, whatever is contained in that offer is mutually exclusive to everything else when the time comes for purposes of submitting findings and conclusions.

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1 It is my understanding, in effect, that if
2 I can't ask for an offer of proof as to each and every
3 document, that I was really prejudicing my client in
4 terms of ultimate findings and conclusions, and what may or
5 may -- be done at that time by the Department of Justice
6 or by the Staff or by the City, whoever it may be, with
7 regard to documents that were going to be affecting my
8 client.

9 Is that a correct understanding, that if I do not
10 ask for an offer of proof, it can be used for any purpose
11 at the time of findings and conclusions, but if I do
12 ask for an offer of proof, it is limited to that offer of
13 proof, and at the time of findings and conclusions they cannot
14 go beyond the offer?

15 CHAIRMAN RIGLER: For the correct statement of
16 the Board's ruling, we would do better to refer back to the
17 rather lengthy transcript discussion, at the conclusion of
18 which, the Board indicated how it intended to treat
19 unsponsored documents, subject to offer of proof. And I
20 think it would be helpful to have that reference in front of
21 us, before we engage in any discussions relating to
22 clarification.

23 MR. STEVEN BERGER: My other problem is this. In
24 asking for that, of course, in asking for offers of proof
25 as to each and every document -- we have a lot of documents

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1 and I raise it at this point, because I want to get
2 some clarification and direction from the Board.

3 I have mixed emotions about doing that. It
4 gives the Department a chance to espouse its own theory
5 of the case, as to what it would be doing in findings and
6 conclusions and what have you.

7 As to things stated in the offers of proof in
8 terms of trying to give the Board a prospective as to
9 what the document is about and arguing the connecting
10 links necessary for the Board to understand it when the
11 time comes for me to formulate objections. Is it incumbent
12 on me, as to each and every offer of proof that is made by
13 the Department to say, I hope the Board understands that that
14 is argument and not part of the offer and, if I'm not
15 objecting to it, that somehow I'm going to be held to a
16 stipulation of it.

17 CHAIRMAN RIGLER: The Department's offers are
18 understood to be in the nature of what they contend the
19 evidence reflected in that document should be taken to prove.

20 MR. STEVEN BERGER: My failure --

21 CHAIRMAN RIGLER: Obviously, other parties
22 have the right to challenge that contention.

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MR. STEVEN BERGER: My failure to object to an offer of proof comes with it what ramifications, if any?

Do you see my problem?

CHAIRMAN RIGLER: I'm not sure I do, but I'm thinking for a minute about your question.

Your failure to object might result in the documents being admitted into evidence and we would consider the content of the document as it supports the offer of proof in arriving at our findings of fact to the extent that those findings are relevant to an issue in controversy.

It might be that for some of the documents we never refer to them in our opinion at all. They may be of marginal relevance.

But in the absence of an objection, we could take the document under consideration as evidence in support of the point set forth in the offer of proof.

MR. CHARNO: Do you reach the same point when you overrule an objection?

CHAIRMAN RIGLER: Yes.

MR. CHARNO: The Department would offer as DJ 439 for identification a two-page document --

MR. STEVEN BERGER: On 438, I would note that we don't even know -- I know the Department, when there is a 2 in front of their number, that means to them that they got that out of our files. I have no reason

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to doubt that at this point in time. I have no idea where that document came from. We are investigating it and trying to find out, but I don't know how authored it, and I can't be of any greater assistance at this point in time on the question of authentication of the document.

MR. CHARNO: The Department would offer as DJ 439 for identification a two-page document numbered 21560 and 61.

We note that the handwritten notation handed to JRW on 8-11-72, JRW being J. R. White, per stipulation, was written by Francis McGovern, an attorney for Ohio Edison.

MR. STEVEN BERGER: Can I have an offer of proof on this document?

I note this is an NRC exhibit already, and I take it the Department has a separate reason for introducing the document as part of its case?

MR. CHARNO: The existence of the handwritten notation, yes. This being the request by the WCOE that Ohio Edison wheel power among other things.

The Department would offer as DJ 440 for identification a six-page set of handwritten notes numbered 22487 through 492.

MR. STEVEN BERGER: Can we get an offer?

MR. CHARNO: We would first like to note the

1 stipulation that these are the notes of Mr. C. W.
2 Frederickson, general supervisor of systems operations
3 at the time of the document being executed.

4 We would offer DJ 440 for identification to
5 show that Ohio Edison refused WCOE's member participation
6 in any specific generating units not excluding the ones
7 that are the subject of this proceeding, and that Mr. J. R.
8 White stated that Ohio Edison was not going to let WCOE
9 pick and choose among units.

10 We offer this document to prove that Mr.
11 White eliminated from consideration WCOE's request that
12 Ohio Edison provide wheeling services.

13 CHAIRMAN RIGLER: My problem is that in many
14 places this is illegible.

15 MR. STEVEN BERGER: We are attempting to
16 provide a better copy of this, Your Honor.

17 CHAIRMAN RIGLER: If you can't, it may be
18 necessary to agree upon a retyped version of these
19 handwritten notes.

20 MR. CHARNO: I hope the Applicants have a better
21 copy since they have designated it as an exhibit and
22 hopefully have the original.

40
23 The Department would offer as DJ 441 for
24 identification a one-page document, a legible copy of which
25 has been passed out. It was supplied by Ohio Edison, and

1 therefore has our number 218661 written in pencil on
2 the document.

3 CHAIRMAN RIGLER: I need to know what is the
4 date.

5 MR. CHARNO: May 16, 1968.

6 MR. STEVEN BERGER: We will stipulate to that
7 date.

8 MR. STEVEN BERGER: Mr. Chairman, with regard
9 to our earlier discussions about offers of proof, and
10 what I regard to be somewhat of a Hobson's choice in
11 making a request for an offer of proof, I refer the Board
12 to colloquy that took place on transcript pages 4617-A
13 and 4618.

14 CHAIRMAN RIGLER: Referring to the colloquy
15 particularly at lines 21 through 25 on 2618?

16 MR. STEVEN BERGER: Yes, directly, Your Honor,
17 and indirectly that which led up to it on the prior page I
18 mentioned. It was in that context.

19 CHAIRMAN RIGLER: I believe that is consistent
20 with our discussion of a few minutes ago.

21 MR. STEVEN BERGER: I believe it is, too, and
22 it does present that problem for counsel as deciding
23 whether to ask for an offer of proof or not ask for an offer
24 of proof, does it not?

end 40

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1 CHAIRMAN RIGLER: I don't know. If you tell
2 me you have a problem I will accept your word you
3 have a problem.

4 I'm not going to go around with you on it, however.

5 MR. STEVEN BERGER: If I don't have a problem,
6 I would like to know it, and the only person I can get that
7 from is the Chairman.

8 CHAIRMAN RIGLER: I'm not sure we are tracking each
9 other.

10 MR. STEVEN BERGER: I'm saying if I don't ask for an
11 offer of proof, then the Department of Justice gets the
12 opportunity to use the document for whatever probative
13 value it thinks it has.

14 CHAIRMAN RIGLER: It is subject to a red-line
15 rule and moreover, most of these, I think, are fairly
16 self-evident in terms of what the offer of proof would be

17 I will agree that there is a certain judgment
18 factor called for by Counsel in deciding when to
19 ask for the offer of proof, but I'm not overly sympathetic
20 to that problem, because I think, in most cases, it is
21 quite apparent.

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1 MR. STEVEN BERGER: And the Board does recognize
2 the problem on the other side, when one does ask
3 for an offer of proof.

4 CHAIRMAN RIGLER: No.

5 MR. STEVEN BERGER: You don't. To the extent
6 I don't object to the offer, it constitutes on my part an
7 agreement that the document has probative value?

8 CHAIRMAN RIGLER: I don't follow that. You are
9 free to attack the weight of any evidence to be derived
10 from that document.

11 MR. STEVEN BERGER: Fine, thank you, your Honor.

12 MR. CHARNO: The department would offer as
13 DJ-442 for identification a one-page document numbered 218560
14 and note that the author of the document as indicated by
15 the initials in the lower left-hand corner, is stipulated
16 to be "C.B. Olds," O-l-d-s, division manager of the company.

17 MR. STEVEN BERGER: One second.

18 MR. CHARNO: The Department would discard
19 218527 and would offer as DJ-443, a four-page document
20 numbered 218623 through 626.

21 MR. STEVEN BERGER: I would like an offer on that.

22 MR. CHARNO: The Department would offer
23 DJ-443 to establish the following facts: the barriers to
24 entry into generation which exist for a small municipal
25 system, which would be operating isolated and without the

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1 benefits of coordinated operation and development. The
2 fact that in the context of a 1966 attempt to discourage
3 formulation of a municipally-owned generating system, Ohio
4 Edison is able to offer a specific high voltage discount
5 rate, whereas, years later, without that inducement, it is
6 unable to offer the availability or even the amount of such
7 rate.

8 The Department would offer as DJ-444, a two-page
9 document, number 217168 through 69.

10 The author is indicated on it.

11 MR. STEVEN BERGER: Could I have an offer.

12 MR. CHARNO: The Department would offer this
13 document in support of its contention that Ohio Edison
14 had a continuing interest in an ongoing program of acquisition
15 of utilities and note that this utility, the acquisition
16 of which was under consideration, would be a wholesale
17 customer of yet another utility, another municipal
18 utility located within Ohio Edison's service area.

19 The department would discard 218820 through 826 and
20 218804 through 806.

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1 The Department would offer DJ 445 for
2 identification, a two-page document numbered 206865
3 through 866.

4 MR. STEVEN BERGER: I would like an offer on 445,
5 please.

6 MR. CHARNO: The Department would offer DJ 445
7 to demonstrate that in 1971, representatives of the
8 Hiram Electric System were exploring the availability of
9 bulk power alternatives from Ohio Edison and that they
10 had explored specifically or questioned specifically
11 with regard to the three numbered items, appearing on the
12 first page of the document.

13 We would offer it for the absence of a response
14 by Ohio Edison on parallel operation, and for the
15 indications contained therein that the City would prefer
16 to retain its generation if possible, and maintain some
17 degree of independence.

18 The Department would offer as DJ 446 for
19 identification a two-page document numbered 206864 and 206863.

20 MR. STEVEN BERGER: Can I have the offer of
21 proof?

22 MR. CHARNO: The offer would be the same as the
23 prior document, absent the portion concerning parallel
24 operation.

25 We offer as DJ 447 for identification a 37-page

1 document numbered 22226 through 261.

2 I'm sorry, 262.

3 MR. STEVEN BERGER: May I have an offer?

4 MR. CHARNO: The Department would offer DJ 447
5 for identification as the response to DJ 446 to prove that
6 Ohio Edison was openly critical of wholesale power service
7 as an alternative at that point in time, and offer it to
8 show Hiram's need for greater capacity to attract industry.

9 We would offer it to show Ohio Edison's
10 presence in competition for industrial customers, and
11 we would offer it to show that the wholesale service
12 alternative as of that date contained an allocation
13 clause which we have alleged to be illegal.

14 We would discard 206790.

15 We would offer as DJ 448 a one-page document
16 numbered 206816.

17 The Department would offer this as evidence of
18 1958 and 1963 and 1971 offers for the Hiram
19 Electrical System.

20 The Department would offer as DJ 449 a two-
21 page document numbered 218851.

22 MR. STEVEN BERGER: I would like an offer on
23 that.

24 MR. CHARNO: The Department would offer this to
25 show the existence of an allocation agreement which was

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1 the forerunner of that which is presently in evidence in
2 this case between Wadsworth Municipal System and Ohio
3 Edison.

4 And these are offered for the proof of the
5 proposition that these allocation clauses did not spring
6 into being in 1965, but preexisted that time.

7 We would like to make an offer of proof with
8 respect to three documents presently in evidence, or we
9 can offer the documents separately. They are NRC
10 exhibits.

11 CHAIRMAN RIGLER: Are these documents that came
12 in through a witness?

13 MR. CHARNO: No, they came in subject to offers
14 of proof.

15 CHAIRMAN RIGLER: The Department's offer is
16 more extensive than the Staff's offer?

17 MR. CHARNO: At this point I can say definitely
18 that it is different.

19 The Department would like to make --

20 MR. STEVEN BERGER: Excuse me, Your Honor.
21 I'm not nitpicking here or trying to keep from the Board
22 offers of proof with regard to documents unnecessarily.

23 I have a vague recollection that when an offer
24 of proof was made by the Staff at one point in time, and the
25 Department was unsatisfied with it, you indicated that

1 the Department would have to make their offer of proof
2 with it, I thought at that time.

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1 Maybe I'm incorrect, and you said that is up to you
2 to do, whenever you put on your case. I don't recall, but I
3 know this matter came up with regard to Staff making an offer
4 or proof and Justice making an offer of proof as to the same
5 document, and the timing of it.

6 MR. CHARNO: I believe the correct statement of
7 what you said is we could either make an offer of proof or
8 we could reintroduce the document as part of our case.

9 I'm not trying to avoid that. I will be happy
10 to reintroduce a duplicative document, if that is necessary.

11 I thought it would make a cleaner record.

12 MR. STEVEN BERGER: Do you have a citation
13 page where the problem arose?

14 MR. CHARNO: No.

15 CHAIRMAN RIGLER: Unless one of the parties shows
16 the Board that it would be inconsistent with an earlier
17 ruling, we will permit the Department to enlarge upon
18 the offer of prove, by relating it to a previously-
19 introduced Staff document.

20 MR. CHARNO: With respect to NRC Exhibit 38, the
21 Department would make the following offer: that the
22 document supports the Department's allegation of unlawful
23 allocation agreements between Ohio Edison and its municipal
24 wholesale customers.

25 Specifically this document concerns the

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1 agreement between Ohio Edison and Wadsworth and a discussion
2 of customer exchanges pursuant to the allocation agreement
3 contained in their wholesale power contract.

4 The Department would make the following offer
5 of proof with respect to NRC Exhibit 36, that the document
6 demonstrates a request to serve a new customer, in fact,
7 a series of new customers --

8 MR. STEVEN BERGER: Could you identify the
9 document more for us? I don't have the NRC exhibits with
10 me.

11 MR. CHARNO: NRC-36 is DJ internal number 218866.

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1 MR. CHARNO: We would use the document to
2 prove the operation and implementation the territorial --
3 the customer allocation agreement contained in the
4 wholesale power contract between Wadsworth and Ohio Edison.

5 We would make the following offer with
6 respect to NRC 37; that this document demonstrates the
7 existence and operation of the allocation agreement con-
8 tained in the wholesale power agreement between Wadsworth
9 and Ohio Edison.

10 MR. STEVEN BERGER: Your Honor, as to all three
11 offers of proof, and I know Mr. Charno is not trying to mis-
12 lead the Board in any way -- no date was put on the whole-
13 sale power contract in question and the effective date of it.

14 Mr. Charno and I have earlier agreed to agree
15 upon -- and you can correct me if I am wrong, Mr.
16 Charno -- the date upon the wholesale power contract which
17 you do make reference to in your offers of proof on NRC
18 36, 37, 38 will be stipulated on.

19 That is the date that the provisions you
20 allege to be restrictive went out of the wholesale
21 arrangement between the parties.

22 MR. CHARNO: That is not my understanding. My
23 understanding is that they went out somewhere in '73.

24 To the degree that I indicated that we are
25 asserting that these exhibits prove the operation of a

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1 contract which is in effect today, I misspoke.

2 (The documents referred to
3 were marked DJ Exhibits
4 402 through 449 for
5 identification.)

6 CHAIRMAN RIGLER: All right, I think we can
7 resume on Tuesday morning at 9:30.

8 (Whereupon, at 4:40 pm., the hearing was
9 adjourned, to reconvene at 9:30 a.m.,
10 Tuesday, March 2, 1976.)

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