

NUCLEAR REGULATORY COMMISSION

Regulatory Docket File



IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING
CO.

Docket Nos.

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

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

and

CLEVELAND ELECTRIC ILLUMINATING
CO., et al.

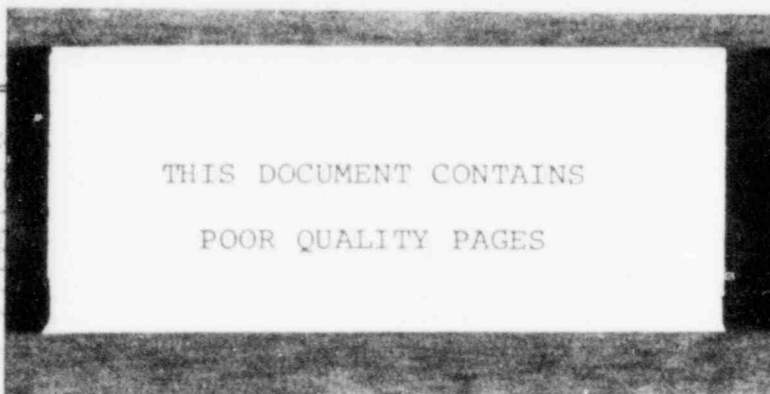
50-440A
50-441A

(Perry Nuclear Power Plants, Units 1 & 2)

Place - Silver Spring, Maryland

Date - Wednesday, 25 February 1976

Pages 5448- 5553



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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3 -----X
4 In the Matter of :
5 TOLEDO EDISON COMPANY and : Docket Nos.
6 CLEVELAND ELECTRIC ILLUMINATING CO. : 50-246A
7 (Davis-Besse Nuclear Power Station, : 50-500A
8 Units 1, 2 and 3) : 50-501A
9 and :
10 CLEVELAND ELECTRIC ILLUMINATING CO. :
11 et al. : 50-440A
12 (Perry Nuclear Power Plant, : 50-441A
13 Units 1 and 2) :
14 -----X

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

15 Wednesday, 25 February 1976

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

18 BEFORE:

19 MR. DOUGLAS RIGLER, Chairman

20 MR. JOHN FRYSIAK, Member (not present)

21 MR. IVAN SMITH, Member

22 APPEARANCES:

23 As heretofore noted.
24
25

C O N T E N T S

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	<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
1					
2					
3	Claude Eppard	5450	5484	5487	5488
4					
5					
6					
7					
8	<u>EXHIBITS:</u>		<u>FOR IDENTIFICATION</u>		<u>IN EVIDENCE</u>
9	DJ-316 (ltr dated July 9,		5459		5484
10	1971, from Mr. Eppard to				
	Mr. Jack.)				
11					
12	DJ-317 (9000006)		5460		"
13	DJ-318 (13000003)		5460		"
14	DJ-319 (13000010)		5461		"
15	DJ-320 (13000012)		5461		"
16	DJ-321 (draft of speech				
17	dated January 1963, by				
	Mr. O'Nan)		5491		5491
18	DJ 322 - (114753)		5514		
19	DJ 323 - (114741)		"		
20	DJ 324 - (114742)		"		
21	DJ 325 - (114731)		"		
22	DJ 326 - (00016420-421)		"		
23	DJ 327 - (00016715-716)		"		
24	DJ 328 - (015552)		"		
25	DJ 329 - (00016401-402)		"		

<u>Exhibits:</u>	<u>For Identification</u>	<u>In Evidence</u>
DJ 330 - (00016119-121)		3514
DJ 331 - (000161571-575)		"
DJ 332 - (00016166)		"
DJ 333 - (00016149)		"
DJ 334 - (00015982)		"
DJ 335 - (00016133)		"
DJ 336 - (00016608)		"
DJ 337 - (00016640)		"
DJ 338 - (0001647)		"
DJ 339 - (00016447)		"
DJ 340 - (00013713)		"
DJ 341 - (0004725-727)		"
DJ 342 - (002712-714)		"
DJ 343 - (0002710-11)		"
DJ 344 - (002906)		"
DJ 345 - (002968)		"
DJ 346 - (002231)		"
DJ 347 - (004731)		"
DJ 348 - (004745-748)		"
DJ 349 - (00016940-43)		"
DJ 350 - (00017388)		"
DJ 351 - (004683)		"
DJ 352 - (0004678-686)		"
DJ 353 - (002191)		3553

<u>Exhibits:</u>	<u>For Identification</u>	<u>In Evidence</u>
DJ 354 - (00014086)	3553	
DJ 355 - (002288)	"	
DJ 356 - (00006431)	"	
DJ 357 - (00017424)	"	
DJ 358 - (10017621-633)	"	
DJ 359 - (006164)	"	
DJ 360 - (00000669)	"	
DJ 361 - (00013314-15)	"	
DJ 362 - (00016173)	"	
DJ 363 - (0003623-642)	"	
DJ 364 - (002937-41)	"	
DJ 365 - (012596)	"	
DJ 366 - (002116)	"	
DJ 367 - (002117)	"	
DJ 368 - (003425)	"	
DJ 369 - (006404)	"	
DJ 370 - (006399)	"	
DJ 371 - (012761)	"	
DJ 372 - (00009987)	"	
DJ 373 - (15000167)	"	
DJ 374 - (00013740)	"	
DJ 375 - (004030)	"	
DJ 376 - (004029)	"	
DJ 377 - (004039)	"	

<u>Exhibits</u>	<u>For Identification</u>	<u>In Evidence</u>
DJ 378 - (005278)	3550	
DJ 379 - (00007325)	"	
DJ 380 - (003523-535)	"	
DJ 381 - (003545-550)	"	
DJ 382 - (0030605)	"	
DJ 383 - (00017067)	"	
DJ 384 - (00017141)	"	
DJ 385 - (00017118)	"	
DJ 386 - (00017264)	"	
DJ 387 - (0017324, 323, 322, 321)	"	
DJ 388 - (00017003)	"	
DJ 389 - (00015433)	"	
DJ 390 - (00015390)	"	
DJ 391 - (10017491-537)	"	
DJ 392 - (00014108)	"	
DJ 393 - (012306)	"	
DJ 394 - (012925)	"	
DJ 395 - (00014609)	"	
DJ 396 - (00014641)	"	
DJ 397 - (012927)	"	
DJ 398 - (00014645)	"	
DJ 399 - (00014638-640)	"	
DJ 400 - (006126-138)	"	
DJ 401 - (012337-340)	"	

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P R O C E E D I N G S

MR. MELVIN BERGER: The Department would like to call as its next witness, Mr. Claude Eppard.

Whereupon,

CLAUDE EPPARD

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

DIRECT EXAMINATION

BY MR. MELVIN BERGER:

Q Please state your name.

A Claude W. Eppard.

Q What is your business address, sir?

A I'm the manager of an electric utility in American Samoa. I also serve as a consultant to the government.

Q What is your business address, Mr. Eppard?

A I didn't understand you.

Q Is this better, Mr. Eppard?

A I can hear you better now.

Q Mr. Eppard, what is your business address?

A My business address?

Q Yes.

A It is Post Office Box H, American Samoa.

Q I believe you just gave us your job title. What

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1 do your duties consist of?

2 A My duties consist of managing the electric
3 utility for the government of American Samoa.

4 A How many years have you held this position?

5 A I have been in American Samoa three and a half
6 years.

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arl 1 Q And have you worked at this position -- at this
2 job since you came to American Samoa?

3 A Yes.

4 Q By whom were you employed prior to your
5 employment with American Samoa?

6 A I was employed by the Utility Board of the
7 City of Bryan, to manage the light and water utilities.

8 Q How many years did you work for Bryan?

9 A Approximately seven years.

10 Q And did you hold the same position throughout
11 those seven years?

12 A Yes.

13 Q When you first became employed by Bryan, how was
14 Bryan meeting its bulk power supply requirements?

15 A It was generating and purchasing power.

16 Q From whom was it purchasing power?

17 A Toledo Edison Company.

18 Q When you first became employed by Bryan, what
19 was Bryan's approximate peak load?

20 A I didn't hear you.

21 Q When you first became employed by Bryan, what
22 was Bryan's approximate peak load?

23 A About 15,000 kw.

24 Q Did this peak change materially during the time
25 you were at Bryan?

1 A Yes.

2 Q What was the peak load at the time you left?

3 A About the same.

4 Q Mr. Eppard, what percentage of Bryan's -- strike
5 that.

6 You indicated before that when you started at
7 Bryan, they were generating a portion of their requirements
8 and they were purchasing a portion of their requirements.
9 Approximately what percentage of their requirements were
10 they purchasing?

11 A About 40 percent.

12 Q During the time you were there, did they continue
13 to meet their bulk power needs in the same manner?

14 A Yes.

15 Q While you were at Bryan, Mr. Eppard, did you
16 consider the possibility of obtaining bulk power from
17 sources other than self-generation and purchase from Toledo
18 Edison?

19 A Yes.

20 Q Why?

21 A To hopefully improve quality of service and also
22 obtain energy at a lower price, if possible.

23 Q What do you mean by quality of service?

24 A Improvement in frequency and voltage regulation,
25 especially during transit conditions during storms.

1 Q Was Bryan having problems with frequency and
2 voltage regulation?

3 A Yes.

4 Q What type of problems was he having?

5 A During storm conditions, transit conditions
6 would be set up on the line, and this would cause the
7 voltage to fluctuate and the frequency to change.

8 Sometimes there would be outages of the line
9 caused by lightning and we were on the tail end of the line,
10 so to speak.

11 Q You have just referred to the line. What line
12 are you referring to?

13 A I'm talking to the line or interconnection
14 with the Toledo Edison Company.

15 Q Whose line is this?

16 A Toledo Edison's line.

17 Q How long a line is it, approximately?

18 A Approximately 70 miles long. We were on the
19 tail end of it, so to speak.

20 Q Is this a radial line or looped line?

21 A Yes, radial line.

22 Q Bryan was at the end of that line?

23 A Approximately at the end of the line. There
24 was another town or so a little further on, but for all
25 practical purposes we were at the end of the line.

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1 Q What alternate sources of bulk power supply --

2 A I can't hear you.

3 Q What alternate sources of bulk power supply
4 did you consider?

5 A The Buckeye power agreement, which was with
6 the part of -- or owned by the REA cooperatives in the
7 state. It was a state organization.

8 Q Did you make an effort to determine whether
9 this Buckeye power would be available to Bryan?

10 A Yes, I did.

11 MR. REYNOLDS: Mr. Chairman, may I make a
12 continuing objection on behalf of Applicants other than Toledo
13 Edison?

14 CHAIRMAN RIGLER: Overruled.

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1 BY MR. MELVIN BERGER:

2 Q Did you contact anyone at Buckeye to determine
3 if this power would be available to Bryan?

4 A Yes.

5 Q Who did you contact?

6 A We discussed it first with the manager of the
7 local REA cooperative there, which is Northwestern Electric
8 Cooperative.

9 The manager was Mr. Schweinhart. That was the
10 first contact.

11 Q Did you have contact with other people from
12 Buckeye after contacting Mr. Schweinhart?

13 A Yes, we discussed it with the Mr. Cummins,
14 who was the executive secretary of the statewide organization
15 and who handled the procedures for the REA co-ops.

16 There was another man also, Mr. Jack, who was
17 their engineer.

18 Q Do you recall having a meeting with Mr. Cummins
19 and Mr. Jack and Mr. Schweinhart?

20 A Yes, I do.

21 Q Do you recall approximately when that might have
22 been?

23 A Well, it must have been somewhere in around
24 1971, I would think. I'm not positive on that, but it is
25 in that general area.

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1 Q Do you recall inquiring about the availability
2 of Buckeye Power for Bryan?

3 A I didn't hear you.

4 Q Do you remember discussing with those gentlemen
5 at this meeting, the availability of Buckeye power for
6 Bryan?

7 A Yes, yes.

8 Q What were you told about the availability of this
9 power?

10 A They were not sure what they could serve us.
11 And due to the nature of the contract that they had with
12 their source of wholesale power.

13 Q Do you know why they were not sure they could
14 serve you?

15 A I never read the contract, but I was told that
16 there was a clause in the contract which prohibited them
17 from serving municipalities.

18 Q Who told you this?

19 A Mr. Cummins.

20 Q After that meeting, Mr. Eppard, did you continue
21 communicating with Buckeye in regard to the possibility of
22 obtaining power?

23 A Yes, I did.

24 Q Since they had told you that you probably could
25 not obtain that power, why did you continue

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1 communicating with them?

2 A Well, I thought maybe something might develop
3 wherein they might be able to get that restrictive clause
4 in the contract, to maybe renegotiate it or something to
5 that effect.

6 That was the only purpose for continuing on.

7 CHAIRMAN RIGLER: Contract with whom, Mr. Berger?

8 MR. MELVIN BERGER: Excuse me?

9 CHAIRMAN RIGLER: Contract with whom?

10 The Witness is referring to a clause in a contract.

11 BY MR. MELVIN BERGER:

12 Q do you know which contract you have been
13 referring to?

14 A Yes, it was generally called the Buckeye Agreement
15 Contract which the RBA within the State of Ohio negotiated
16 with, I believe it was the Ohio Power Company out of
17 Canton, Ohio.

18 Q Mr. Eppard, did you at one time send some charts
19 to Buckeye which related the loads of the Bryan system
20 and the Northwest Co-op?

21 A You will have to repeat it.

22 Q At one time did you send to Buckeye some charts
23 which related the loads of the Bryan system and those of
24 the Northwest Electric Cooperative?

25 A We furnished them with information relative to the

1 load on our system. We would not prepare the charts.
2 We furnished data for the charts.

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arl 1 MR. MELVIN BERGER: I would like to have marked
2 as DJ 316 a letter from Mr. Eppard to Mr. Jack, which
3 encloses two large charts.

4 I believe they may have actually been four
5 enclosures at the beginning, but we have taped half of each
6 of the charts together.

7 (The document referred to
8 was marked DJ Exhibit 316,
9 for identification.)

10 BY MR. MELVIN BERGER:

11 Q Mr. Eppard, are these the curves you just
12 referred to?

13 A Yes, these are the curves.

14 Q Did you receive a response from Buckeye --

15 A Repeat the question.

16 Q Did you receive any response from Buckeye,
17 that is in response to this letter and these charts?

18 A Yes. Yes, we did.

19 MR. RIESER: Excuse me, Mr. Chairman.

20 Could you ask Mr. Berger to identify what it is
21 he is talking about? We can't tell what document you are
22 referring to.

23 MR. MELVIN BERGER: It is the July 9, 1971 letter
24 from Mr. Eppard to Mr. Charlie Jack.

25 I would like to have marked for identification

1 as DJ 317 a letter from Howard Cummins to Claude Eppard
2 dated August 4, 1971, and bearing Department Internal
3 document number 90060066.

4 (The document referred to
5 was marked DJ Exhibit
6 317, for identification.)

7 BY MR. MELVIN BERGER:

8 Q Mr. Eppard, is this the response you just
9 had reference to?

10 A Yes.

11 Q Mr. Eppard, through the remainder of 1971, that
12 is after this August 4 letter, did Mr. --

13 A Can't hear you.

14 Q During the remainder of 1971, that is after
15 this August 4, 1971 letter, did Mr. Jack have occasion to
16 send you various rate schedules and sample calculations
17 on the cost of Buckeye power to Bryan?

18 A Yes. Yes, he did.

19 MR. MELVIN BERGER: I would like to have marked
20 for identification as DJ 318 an August 30, 1971 letter
21 from Charlie Jack to Claude Eppard bearing Department of
22 Justice Document No. 13000002 through 13000009.

23 (The document referred to
24 was marked DJ Exhibit
25 318, for identification.)

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1 MR. MELVIN BERGER: The first page of this should
2 be red-lined. The remainder should not be red-lined.

3 I would also like to have marked for identifica-
4 tion as DJ 319 a September 21, 1971 letter from Mr.
5 Charlie F. Jack to Mr. Claude Eppard, which bears
6 Department internal identification number 13000010 through
7 11.

8 (The document referred to
9 was marked DJ Exhibit
10 319, for identification.)

11 MR. MELVIN BERGER: And I would like to have
12 marked for identification as DJ 320 an October 5, 1971
13 letter from Charlie Jack to Claude Eppard, which bears
14 Department of Justice document number 13000012 through 13.

15 (The document referred to
16 was marked DJ Exhibit
17 320, for identification.)

18 BY MR. MELVIN BERGER:

19 Q Mr. Eppard, are these the rate schedules and
20 sample calculations you just made reference to?

21 A Yes.

22 Q During this time, that is when Mr. Jack was
23 sending you these calculations, did you make any further
24 inquiries of Buckeye as to whether or not Bryan would be
25 able to obtain Buckeye power?

1 A Not that I recall. I just remember looking
2 these over and that is all I can remember at this time.

3 Q Did you make more -- in your contact with
4 Buckeye did you make more than -- strike that.

5 In the time that you had contacted Buckeye,
6 did you discuss with them on more than one occasion whether
7 or not this Buckeye power could be made available to Bryan?

8 A I can't hear you.

9 Q Mr. Eppard, in the time period of 1970-71, when
10 you were contacting Buckeye, to determine the availability
11 of Buckeye power to Bryan, did you ever have occasion
12 to ask if circumstances had changed so that Buckeye power
13 would be available to Bryan?

14 A We discussed it off and on a little bit, but
15 there was nothing developed that would lead me to believe
16 that it would be available.

17 Q Did you eventually give up the hope of obtaining
18 Buckeye power?

19 A For the time being, yes, and I could see nothing
20 in the future.

21 Q Mr. Eppard, did you ever attend a meeting at
22 which the sale of the Bryan Municipal System was discussed?

23 A What?

24 Q Did you ever attend a meeting at which the
25 sale of the Bryan Municipal System was discussed?

1 A I still can't hear you.

2 Q Mr. Eppard, did you ever attend a meeting
3 at which the sale of the Bryan Municipal System was
4 discussed?

5 A Oh, yes. Yes.

6 Q Do you recall where that meeting was held?

7 A Veterans of Foreign Wars Hall in Bryan.

8 Q Do you know why that meeting was called?

9 A Presumably to put out public information by a
10 group of people in Bryan who apparently were sponsoring
11 the sale of the utility itself.

12 Q To whom was this sale being made?

13 A Toledo Edison Company.

14 Q Were there any Toledo Edison employees at this
15 meeting?

16 A Yes. Mr. Schwalbert was there, and I think
17 maybe one or two other people from the power company, but
18 I don't recall who they were.

19 Q Do you know what Mr. Schwalbert's position was
20 at that time?

21 A I think he was a vice president of the company.

22 Q Do you know who else was present at that meeting?

23 A Well, there was a representative from the consult-
24 ing engineer firm of Campbell, DeBall, which was employed by
25 the Board. He was there.

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1 Q Do you know who else attended that meeting?

2 A No, not in specific terms. There was probably
3 50 or 60 people there, but who all they were, I don't know.

4 Q Were these people from the town?

5 A What?

6 Q Were these 50 or 60 people, people from the
7 town of Bryan?

8 A Yes, they were from the town of Bryan. There
9 might have been some there from some place else, too. I
10 don't know.

11 MR. REYNOLDS: Mr. Chairman, I'm sorry to
12 interrupt. I wonder if Mr. Eppard could clear this up.

13 He said an engineer employed by the board.
14 Could we get an indication of what board he is talking
15 about at this particular juncture?

16 BY MR. MELVIN BERGER:

17 Q Mr. Eppard, you mentioned at this meeting an
18 engineer employed by the board was present.

19 A Yes.

20 Q Which board were you referring to?

21 A The utility board.

22 Q Is that the utility board of Bryan?

23 A Yes.

24 Q Mr. Eppard, was this meeting broadcast over
25 the radio?

1 A As I recall, it was.

2 Q Mr. Eppard, I would like to show you DJ 155.
3 I would like you to take a look at the first page of
4 this document, and I would like to ask you if the meeting
5 referred to on the first page of this document is the
6 meeting that you believe you attended?

7 A I believe it was.

8 MR. MELVIN BERGER: I believe that ends the
9 Department's questioning of Mr. Eppard.

10 I would now like to move into evidence DJ
11 316 through 320.

12 MR. BRILEY: I object to the admission into
13 evidence of all these documents because they bear no
14 relevancy whatsoever to the Toledo Edison Company, or
15 any of the issues in controversy in this proceeding.

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1 MR. MELVIN BERGER: I believe the Department has
2 alleged that the Toledo Edison Company is a party to the
3 Buckeye agreements which place certain restrictions on the
4 sale of Buckeye power to municipal systems, and I believe
5 that Mr. Eppard's testimony has demonstrated that one of these
6 provisions has prevented Bryan from obtaining Buckeye power.

7 I was going to add that the documents we have before
8 us show an interest in Bryan or by Bryan in obtaining
9 Buckeye power and buttresses Mr. Eppard's testimony of that
10 interest.

11 MR. BRILEY: I would certainly agree these documents
12 show an interest on the part of Bryan obtaining Buckeye
13 power, but there has been no testimony whatsoever by this
14 witness that that interest was ever communicated to the
15 Toledo Edison Company at any time.

16 MR. MELVIN BERGER: We believe that would not --
17 I'm sorry -- are you finished?

18 MR. BRILEY: Go ahead.

19 MR. MELVIN BERGER: We don't believe that
20 would be material, if Toledo Edison is a part of the
21 agreement which has these restrictive provisions in it.

22 CHAIRMAN RIGLER: Mr. Berger, refer for a minute
23 to Department Exhibit 318, to the first paragraph of that
24 exhibit in which Mr. Jack is setting forth the terms under
25 which Buckeye might make power available to municipalities

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1 and he specifically references customers owning and operating
2 generation, supplying 100 percent of their electrical
3 requirements.

4 I thought Mr. Eppard testified that 40 percent
5 of the Bryan requirements came from nonself-generating
6 sources.

7 MR. MELVIN BERGER: Yes. I'm sorry, are you
8 finished?

9 CHAIRMAN RIGLER: Is there any allegation that
10 any of the Applicants are responsible for 100 percent self-
11 generation requirement by Buckeye prior to the sale of
12 Buckeye power to a municipality?

13 MR. MELVIN BERGER: Mr. Chairman, I
14 believe the Buckeye contract states that if a municipality
15 is a customer of a utility, an investor-owned utility,
16 such as Toledo Edison, it cannot obtain Buckeye power.
17 Therefore, the only municipals which would be able to
18 obtain Buckeye Power would be those which are not
19 customers of investor-owned utilities and those which would
20 generate 100 percent of their electrical requirements would
21 fall into that category.

22 Therefore, they would not be prevented from
23 obtaining power from Buckeye under the terms of the
24 Buckeye agreement.

25 MR. REYNOLDS: Mr. Chairman --

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1 CHAIRMAN RIGLER: Do you have a reference
2 number for the Buckeye contract with other utility
3 companies?

4 MR. MELVIN BERGER: Yes, it is an NRC number.
5 Off-hand, I do not have the number of that contract.

6 MR. REYNOLDS: If I might for clarification,
7 there are a number of Buckeye contracts, some of which
8 Toledo Edison is not a party to, and at least one of which
9 it is a party to.

10 I'm not sure at all of the provision, Mr. Berger
11 refers to, but if it is a provision that exists in any one
12 of the Buckeye agreements and the Board is going to make
13 a ruling on the basis of his representation, I would like
14 him to indicate to us which Buckeye agreement he is talking
15 about, and where that provision exists, to make sure it
16 does have any relevancy whatsoever to Toledo Edison.

17 MR. BRILEY: Furthermore, I would like a minute
18 to review the contracts, but it is my understanding that
19 the contract being referred to here with this provision is
20 a contract between Ohio Power and Buckeye to which Toledo
21 Edison is not a party, and that is the basis of my
22 objection on the theory of relevancy.

23 MR. CHARNO: The Exhibit is NRC-133.

24 MR. MELVIN BERGER: I believe the two provisions
25 in question here or are applicable here in NRC-133 are

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1 contained in the definition section.

2 The first one is the definition of Buckeye
3 member, which appears on page 2 and continues on to page 3
4 of that exhibit.

5 And the definition of Buckeye power requirement,
6 which is contained on page 3 of that exhibit.

7 We would ask that both of these definitions
8 be red-lined at this time, although there are additional
9 provisions in this exhibit that we will want to red-line at
10 a later date.

11 CHAIRMAN RIGLER: Mr. Briley?

12 MR. BRILEY: Mr. Riger, I'm sorry, but I don't
13 see anything in either of these provisions that substantiates
14 the point the Department is trying to make.

15 All this says is that the cooperatives will
16 determine their own load and that they won't resell contrary
17 to state law.

18 I resubmit that the Toledo Edison Company was
19 never asked if they were willing to agree to this. I do not
20 see how this agreement would prescribe the transaction
21 considered.

22 MR. MELVIN BERGER: Well, if I might be given an
23 opportunity to explain this in more detail.

24 CHAIRMAN RIGLER: I think you had better.

25 MR. MELVIN BERGER: The definition of Buckeye

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1 member precludes municipals from becoming members of Buckeye.
2 In order to obtain Buckeye power you have to -- the Buckeye
3 load itself is defined by the term "Buckeye power requirements."

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2 And the Buckeye power requirement is the
3 power or the -- is the power that is subject to being
4 wheeled by the signators to this agreement.

5 Now the definition of Buckeye power requirement
6 states in the first sentence that it is the power that is
7 going to be required for sale and delivery to Buckeye
8 members.

9 Now if the Municipalities cannot become Buckeye
10 members, they obviously cannot have Buckeye power wheeled
11 to them by the signators to this agreement.

12 In addition, as you go down the definition or
13 further into the definition of Buckeye power requirement --

14 CHAIRMAN RIGLER: Let me have your last sentence
15 again.

16 (Whereupon, the reporter read from the
17 record, as requested.)

18 CHAIRMAN RIGLER: Can municipalities not have
19 power wheeled to them by the signators to this agreement?

20 MR. MELVIN BERGER: Under this agreement.

21 CHAIRMAN RIGLER: They could if they were not
22 customers of any of the signators of the Buckeye, because
23 your Buckeye power requirement clause contemplates resale
24 and delivery by the Buckeye members to customers in
25 the State of Ohio.

MR. MELVIN BERGER: Yes, perhaps again this is a

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1 fairly complication provision.

2 As I was going to say before, in the second
3 portion of this definition of Buckeye power requirement,
4 we have incorporated by reference a section of the Ohio
5 Revised Code, which is then made to apply to both whole-
6 sale and retail sale.

7 Now if you look at that section of the Ohio
8 Revised Code, that is the section that requires the 90-day
9 cut-off period. If a customer of an investor-owned
10 utility is attempting to obtain Buckeye power, he must
11 disconnect from that investor-owned utility for 90 days
12 in order to be able to obtain the Buckeye power under
13 the terms of this provision, and I believe that was the
14 case with Napoleon, that was the problem that Napoleon
15 had.

16 This Buckeye power requirement provision
17 would not apply to a situation where you had a municipal
18 which was self-generating, but the Buckeye member provision
19 would apply to that situation.

20 Perhaps I'm saying the prohibition on wheeling
21 without a 90-day cut-off would not apply to a municipal
22 which was self-generating, but it would apply to a
23 municipal which was purchasing at least a portion of its
24 power from an investor-owned utility.

25 MR. BRILEY: Mr. Rigler, I would suggest that

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1 the Department of Justice can't have it both ways on
2 this. They took the position with Napoleon that Toledo
3 Edison refused to waive the 90-day position.

4 Now they are taking the position here that it
5 doesn't make any difference if they waived it or not, or
6 had opportunity to waive it.

7 If it is a provision, they should have been
8 given an opportunity and they were never given the oppor-
9 tunity. There is nothing in this agreement that would
10 prohibit a utility from selling power to a municipality.

11 MR. SMITH: You mean a restrictive agreement
12 would not be restrictive unless the parties to it were
13 first given the opportunity to waive the rights under the
14 agreement?

15 MR. BRILEY: The point, Mr. Smith, is that
16 the agreement is not a restrictive agreement. It permits
17 resale to a municipality.

18 Now what Mr. Berger is saying is that the anti-
19 pirating Ohio statute could have prevented that resale, had
20 presumably Toledo Edison insisted it be enforced, but
21 Toledo Edison was never given that opportunity.

22 So the agreement is not restrictive by itself,
23 certainly.

24 MR. MELVIN BERGER: It is not our contention
25 that state law applies to wholesale sales. It is our

1 contention that it applies only to retail sales.

2 It is the provisions of this agreement that make
3 it applicable to wholesale sales.

4 MR. REYNOLDS: Mr. Chairman, this is beginning
5 overlap and affect all Applicants, and that is the only
6 reason I'm jumping in at this particular juncture.

7 The provision we are talking about is the very
8 provision that has been a matter of discussion before
9 this Board when a witness was on the stand relating to
10 Ohio Edison.

11 It is the provision inserted after consultation
12 with and business advice letter from the Department of
13 Justice, at which time the Department of Justice was
14 satisfied that the Ohio statute did pertain to the retail
15 and wholesale situation, and that there was no definitive
16 decision in Ohio to suggest otherwise, and I think the
17 Department has already conceded on the record that to this
18 day they don't know of any definitive determination in
19 Ohio that would suggest otherwise.

20 MR. STEVEN BERGER: Mr. Chairman, may I have a
21 moment to refer back to that discussion we had?

22 Mr. Charno and I had some discussion on the
23 record as to the additional facts which may have come to
24 the Department's attention which causes the Department to
25 bring into this proceeding a charge of anticompetitive

1 conduct, the very provision that the Department of
2 Justice stated at an earlier time they were satisfied
3 was not anticompetitive.

4 I'm standing at this point because the way
5 we left that conversation was that the Department --

6 CHAIRMAN RIGLER: Did they say it was not
7 anticompetitive, or did they say they would not attempt
8 to bring an antitrust proceeding alleging that that
9 provision violated the antitrust laws?

10 MR. STEVEN BERGER: The last time --
11 quoted from the brief. I don't have the advice letter
12 with me.

13 I believe this is the letter from Donald Turner
14 of the Department of Justice to Mr. Dickey. And it
15 states you have represented that the effect of the amend-
16 ment would be to restrict sales by Buckeye members to
17 municipalities only insofar as the present Section 4905.23.1
18 of the Revised Code of Ohio would restrict such sales.

19 On the basis of the information submitted,
20 and the representations which you have made in connection
21 with this matter, you are hereby informed that the
22 Department does not presently intend to institute
23 proceedings with respect to the Buckeye project contracts
24 as amended in the matter indicated above.

25 CHAIRMAN RIGLER: Yes. You see that is perhaps

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1 different from a determination that it is not anti-
2 competitive. Because in order to institute proceedings,
3 the Department would have to be satisfied that it would
4 prevail in establishing a violation of the antitrust laws.

5 Now we can go one step further beyond that because
6 the NRC statute relates to the policies underlying those
7 laws.

8 MR. STEVEN BERGER: Mr. Chairman, at the time
9 that I had this discussion with Mr. Charno, Mr. Charno agreed
10 to provide me with additional facts which have come to
11 the Department of Justice's attention causing them to
12 change their position.

13 Mr. Charno stated, and I'm quoting from
14 page 4629, and I said, "Is there anything the Department
15 is aware of today in the way of analysis of that statute
16 that they were not aware of in 1958, when the letters
17 were exchanged, that they are aware of now?"

18 Mr. Charno said, "We couldn't come to a
19 totally different conclusion to the extent it is totally
20 different without being aware of additional facts."
21 I asked for an early production of such additional facts.

22 You stated on 4630, "I suspect you can, Mr.
23 Berger," meaning you can get notice of it beforehand,
24 those additional facts.

25 CHAIRMAN RIGLER: Yes, the Board indicated the

1 Department should supply you with those additional facts.

2 MR. STEVEN BERGER: Now if the additional facts
3 are merely the application of the particular provision
4 of the Buckeye agreement in question to particular
5 factual situations, and that is what has changed it, I
6 don't see that as additional facts which would justify a
7 change in the Department's position.

8 Now with regard to your comment, and perhaps
9 a different construction than is contained in the letter
10 of advice from Mr. Turner, I didn't see a reservation
11 with regard to anything.

12 I think it was pretty clear that the intention
13 was that the Department of Justice did not believe such
14 conduct to be anticompetitive. That is the way I viewed it.

15 MR. SMITH: Wouldn't the Department, in making
16 its first determination as to whether they would proceed,
17 look first to see who was hurt, and then if they should
18 ultimately find that there is an effect which was not
19 anticipated in the business advice letter, they are certainly
20 not bound? They can proceed.

21 MR. STEVEN BERGER: Mr. Smith, the question was a
22 basic one. It was a question of law. An interpretation
23 of the law of the State of Ohio. And the question was
24 whether or not the antipirating statute applied to
25 wholesale as well as retail. There had never been a

definitive interpretation under Ohio law as to whether or not it did apply to wholesale.

A representation was made by Mr. Dickey that it did apply to wholesale, and that the Department accepted that with the reservation, I believe, that if at any time in the future there was -- and I think I'm quoting from Mr. Turner's letter now, since there appears to be no definitive judicial interpretation whether Section 4605.26.1 of the Revised Code of Ohio applies to wholesale sales, we would be required to reconsider our views if judicial decisions were to differ from the interpretation of the term "consumer" which we propose to incorporate in the agreements.

The precise provision that was included in the agreements we are talking about was at the suggestion of the Department of Justice.

MR. CHARNO: If I might reply.

On behalf of the Department, I think the factual context as suggested by Mr. Smith in which this contract was tendered to the Department for review is extremely significant.

If we are looking at municipal systems whose alternative bulk power supply sources are any of the investor-owned utilities in the State of Ohio, and that by virtue of this contract they are only going to

lose as potential sources of supply cooperative utilities, we are looking at the situation as it was presented by Mr. Dickey, Ohio Edison, Toledo Edison, and the others who are parties to the contracts.

When you are looking at the situation where there are agreements between the investor-owned utilities that they will not serve each other's customers, wholesale or retail, and in addition there is an agreement, the Buckeye agreement, that the cooperatives will not be allowed to serve these customers, you are looking at a totally different situation.

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1 I think without trying to second-guess Mr. Turner
2 that if he had been presented with what we believe now to
3 be the true situation at the time, there is no question
4 that this letter could not have gone out as written and
5 would not have gone out as written.

6 I believe the implementation of these contracts
7 has come about in a far more anticompetitive manner than
8 was initially expected.

9 It is on the basis of the change of fact that
10 the Department is now proceeding against them, keeping
11 in mind both of the Chairman's observations concerning the
12 wider scope or jurisdiction of this proceeding as compared
13 to an action directly under Section 1 of the Sherman Act,
14 against the contract and the fact that whatever anti-
15 competitive arrangement would appear on its face at the time
16 the contract was written, I think it is clearly demonstrable
17 today that it has had an anticompetitive impact and has
18 foreclosed competition.

19 CHAIRMAN RICLER: Mr. Reynolds?

20 MR. REYNOLDS: Mr. Chairman, I would like to maybe
21 bring us back to where we started.

22 If I understand what Mr. Charno said, it is now
23 the Department's position that by looking at the
24 implementation of the agreement, and, particularly this
25 provision in the agreement, that the Department believes it

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1 can establish an anticompetitive situation.

2 I would suggest if that is the Department's
3 intent, that for purposes of this proceeding the implementation
4 of the agreement by the Applicants would be what is
5 relevant here, and the only thing that is relevant to the
6 issues.

7 We have heard testimony this morning from a
8 gentleman that has been brought a very long way, and all that
9 he testified to was in conversations with somebody under a
10 "Buckeye contract," and I will remind the Board there are
11 a number of Buckeye contracts and Toledo Edison is not a
12 party to all of them -- in conversations with people other
13 than Toledo Edison with regard to a "buckeye contract," that
14 it was his understanding that the implementation of that
15 contract, by somebody, and we haven't got even any indication
16 that that somebody was Toledo Edison or that any effort was
17 made to check with Toledo Edison as to what its implementation
18 would be, would somehow preclude Bryan from getting Buckeye
19 power.

20 It seems if we are going to march down the
21 road that the Department of Justice has just indicated they
22 want to march down with regard to the implementation of the
23 Buckeye agreement and to establish that that implementation
24 somehow makes the situation different than it was when
25 the Department first looked at the state law and the operation

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1 of that state law as it was presented to them initially,
2 I think we ought to be very sure that the Department confines
3 its case to these Applicants and their implementation of
4 that agreement, and that we go along in that fashion,
5 rather than come in with some suggestion that because some
6 conversations under some Buckeye agreement might have
7 suggested to Bryan they couldn't get this Buckeye power, that
8 that is enough to meet the Department's burden on this
9 restrictive provision, analysis or theory that they are now
10 disussing.

11 MR. CHARNO: The Department is not alleging the
12 implementation of the contract, but rather the contract
13 itself constitutes the inconsistency.

14 The comments on implementation were directed
15 solely to Mr. Berger's point which was raised in the context
16 of an estoppel of the Department from raising any issue
17 relating to the Buckeye contract.

18 CHAIRMAN RIGLER: I tend to agree with what you
19 just said. the problem is that the Witness' testimony is
20 focused on implementation, that is, what the Applicant
21 companies would have done under the contract.

22 I agree that the present state of the record
23 is devoid of any connection between any action of the
24 Applicant, of any Applicant and the Buckeye refusal --
25 let's say, the Buckeye basis for refusal to serve the

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1 City of Bryan other than the contract provision.

2 MR. CHAPNO: I would agree with that assessment.

3 CHAIRMAN RIGLER: We will defer ruling
4 temporarily on this.

5 Proceed with your cross-examination.

6 MR. BRILEY: Mr. Riger, can I have a couple --

7 CHAIRMAN RIGLER: Excuse me. Is the Staff
8 going to have any questions?

9 MR. LESSY: I was going to have one or two.
10 Can we take five minutes?

11 CHAIRMAN RIGLER: Can we do yours before the
12 break?

13 MR. LESSY: I would prefer to do it afterwards.

14 CHAIRMAN RIGLER: Okay, take the five minutes.

15 (Recess.)

16 CHAIRMAN RIGLER: After a little discussion, we have
17 decided to accept Department Exhibits 316 through 325
18 into evidence, notwithstanding the objection posed by
19 Mr. Briley.

20 At the same time we can't help but take note that
21 some of his thoughts may have been quite well-taken and
22 may affect the way and the conclusions which the Board may
23 draw from these documents.
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1 (The documents heretofore
2 marked as Exhibits 316
3 through 320 for identification
4 were received in evidence.)

5 MR. REYNOLDS: I didn't get a chance to make
6 the continuing objection. I was thinking we would have
7 more discussion on this.

8 I would like to make the continuing objection
9 on behalf of other Applicants other than Toledo Edison, with
10 respect to those documents.

11 CHAIRMAN BIGLER: The continuing objection is
12 overruled.

13 CROSS-EXAMINATION

14 BY MR. LESSY:

15 Q Mr. Eppard, you testified that in 1970
16 or in 1971, that Bryan purchased 40 percent of its electrical
17 power needs; is that correct?

18 A That is approximately correct.

19 Q The other 60 percent approximately is
20 self-generated?

21 A Yes.

22 Q During that same time frame, 1970-71, could Bryan
23 have self-generated all of its electrical needs for a
24 given period of time, say 90 days?

25 A No.

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1 MR. LESSY: No further questions.

2 CHAIRMAN RIGLER: Has it been established that the
3 City of Bryan is in an area surrounded by the lines of
4 Toledo Edison or are there lines of other utilities contiguous
5 to the Bryan service area.

6 MR. MELVIN BERGER: That has not been established.

7 CHAIRMAN RIGLER: Did you hear my question?

8 THE WITNESS: I don't have any question. I can
9 answer it.

10 CHAIRMAN RIGLER: Mr. Briley, maybe can take
11 that up.

12 MR. REYNOLDS: Would you like to ask him?

13 CHAIRMAN RIGLER: Let Mr. Briley ask that
14 question during his examination.

15 You have no cross-examination?

16 All right.

17 MR. LESSY: Would you like me to ask the question?

18 BY MR. LESSY:

19 Q Mr. Eppard, the --

20 MR. REYNOLDS: I'm going to object to this.
21 I have no problem if the Chairman has a question asking it.

22 CHAIRMAN RIGLER: Off the record.

23 (Discussion off the record.)

24 MR. REYNOLDS: I was going to say I have an
25 ongoing objection to be distinguished from the continuing

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1 objection to the Staff cross-examining a witness that
2 the Department has called.

3 That was the reason that I was going to suggest
4 that I do have a problem with this.

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MR. SMITH: Are you aware that the Staff is asking this question at the request of the Chairman?

MR. REYNOLDS: That was not clear to me. If it is clear on the record, and we went off the record, and the Chairman explained it to me -- obviously the Staff can do that.

What I was trying to suggest to the Chairman was the reason I was saying anything was because of my ongoing objection on a regular basis to the Staff cross-examining a witness called by the Department.

It having been explained that the Chairman requested the Staff to ask this question, that puts it in a different light.

CHAIRMAN RIGLER: The record should reflect the basis of that request is that the witness has a hearing difficulty and the sole basis was to enable him to get the question from someone facing him.

Your continuing objection to any cross-examination by the Staff is overruled.

MR. LESSY: Since it is a simple one or two questions requested by the Board, maybe if Mr. Sawyer asked the question, the record would be clear.

REDIRECT EXAMINATION

BY MR. MELVIN BERGER:

Q Mr. Eppard, I believe you stated that Bryan.

from the time you were there, was served by Toledo Edison; is that correct?

A You will have to repeat the question.

Q You stated, I believe, that while you were at Bryan, Bryan purchased some power from Toledo Edison; is that correct?

A I didn't didn't get the last sentence.

RECROSS-EXAMINATION

BY MR. LESSY:

Q Mr. Eppard, the 40 percent of the power which Bryan purchased, is purchased from the Toledo Edison Company; is that correct?

A That's right.

Q Toledo Edison Company had transmission lines or distribution lines in the vicinity of the City of Bryan?

A They surrounded the City of Bryan.

MR. LESSY: No further questions.

MR. BRILEY: I have no questions on cross-examination of this witness, and I understand you have overruled my objection to the admission into evidence of DJ Exhibits 316 through 320.

However, for purposes of the record, I would like to move to strike the portions of this witness' testimony as they relate to DJ Exhibits 316 through 320

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on the ground that they are not relevant to the Toledo Edison Company for any matter in controversy in this proceeding.

CHAIRMAN RIGLER: All right. The objection will be overruled, or rather the motion to strike will be overruled.

Once again I think we had a fairly extensive discussion of this subject matter and the Board has already made its observations with respect to ultimate weight which may be accorded these documents or testimony related thereto.

Thank you very much.

(Witness excused.)

MR. REYNOLDS: I have no cross-examination, but I would like to renew my 105 motion with respect to Applicants other than Toledo Edison.

CHAIRMAN RIGLER: That ruling will be deferred.

Do you have any more witnesses today?

MR. CHARNO: No, we don't.

The Department would like to offer for identification as DJ Exhibit 321 a document bearing the internal identification number 00013976E through 770, and we would like to place in the record a stipulation concerning this document.

It was reached between counsel for the Department

and Duquesne Light Company.

This is the draft of a speech which was given in January 1968 in St. Louis, at a function of the Edison Electric Institute, by John W. O'Nan, a managerial employee of Duquesne Light.

The speech --

MR. RIESER: I don't know what managerial means.

MR. CHARNO: Manager of governmental sales.

The speech was given in substantially identical form to the draft which comprises Exhibit DJ 321 for identification.

Prior to being given, the speech was reviewed by Mr. Gilfillin, who was then and is now a vice-president of Duquesne Light Company.

Does that correctly state the substance of our stipulation?

MR. RIESER: That's correct, Mr. Charno.

MR. CHARNO: The Department would move DJ 321 into evidence.

MR. REYNOLDS: I will make an objection on behalf of all Applicants other than Duquesne Light Company, which is the continuing objection.

MR. RIESER: Duquesne Light Company has no objection.

CHAIRMAN RIGLER: Is there a date on this document?

MR. CHARNO: The speech was given in January 1968, but there is no date on the draft.

CHAIRMAN RIGLER: The containing objection will be overruled and we will receive 321 into evidence.

(The document referenced to was marked DJ Exhibit 321, for identification, and was received in evidence.)

MR. CHARNO: Before I proceed in order, I think I best back-track.

There were a group of documents which followed Department's Exhibit 277. This would be a good time to identify those.

Would it be the preference of the Board and parties that we do these as lettered additions to 277, so they can be kept in place collectively, or that they should be numbered sequentially from this point on?

MR. REYNOLDS: I object to that procedure. I think we should number them sequentially.

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1 CHAIRMAN RICLER: What was your preference?

2 MR. REYNOLDS: To number them sequentially,
3 whatever they happen to be, as separate documents.

4 They clearly are separate documents.

5 MR. CHARNO: Department has no objection.

6 The Department would offer for identification
7 as DJ-322, a one-page document numbered 114753.

8 The Document would offer as DJ-323 for
9 identification, a one-page document numbered 114741.

10 The Department would offer as DJ-324 for
11 identification, a multi-page document numbered 114742 through
12 752.

13 The Department would offer as DJ-325 for
14 identification, a multi-page document numbered 114731 through
15 740.

16 The Department would offer --

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

18 Could we have an offer of proof on the documents just
19 marked as Department of Justice Exhibits 322, 323, 324, 325?

20 MR. CHARNO: The offer of proof for these
21 documents would be the same as that for Exhibit 277, plus
22 we would note that DJ-322 indicates that Mr. Hauser --
23 proves that Mr. Hauser of CEI voted upon what the proper
24 matter to be included in a legal opinion should be.

25 Exhibit DJ-323 shows further input by

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1 Messrs. Lansdale and Greenslade and that there was a
2 consensual reworking of the opinion to meet the suggestions
3 made by certain Applicants.

4 The same offer on DJ-324.

5 And DJ-325 indicates discussion of the opinion
6 at a meeting on November 7.

7 MR. REYNOLDS: I have two just small points of
8 clarification, if I might.

9 When you say the same proof is with respect
10 to 277, is your reference to your offer of proof as revised
11 on 277?

12 MR. CHARNO: Yes.

13 MR. REYNOLDS: Mr. Chairman, maybe you can help
14 me out on this. I recall last week when Mr. Suchmann
15 made an offer of proof to establish a point, the
16 Chairman indicated that that was an inappropriate manner
17 to make an offer of proof.

18 If we can make an offer of proof to assist
19 in establishing or go to establishing, but there was
20 some problem with an offer of proof to establish.

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I now hear, and I have heard, as a matter of fact, throughout with the Department's offers that we are offering this document to prove or to show or establish or demonstrate.

I wonder if there is some reason that that is appropriate in this context, and not appropriate in some other context, or if you can clarify it.

CHAIRMAN RIGLER: I think you know the answer, Mr. Reynolds, which is our rulings would be even-handed. That is if we receive offers as probative, that would apply to all parties.

MR. REYNOLDS: I'm not suggesting otherwise. I'm confused because I wasn't sure.

CHAIRMAN RIGLER: I recall the discussion with Mr. Buchmann and it seems to me his offer maybe went beyond a fair reading of the document.

It certainly supported his point. It tended to establish his point if we accepted his offer.

Whether it conclusively established his point, that was the question. That was the only reference I made. That would apply here, too.

Obviously the Applicant, with respect to these current DJ exhibits would be allowed to argue that a fair reading of the documents did not establish the point, and that other factors could lead to a contrary conclusion.

MR. REYNOLDS: The Board is making that judgment as it hears the offer of proof now.

CHAIRMAN RISLER: That would occur as we sit down to make our ultimate findings.

Proceed.

MR. CHARNO: The Department would offer as DJ 326 for identification a two page document numbered 60016420 through 421.

The Department would offer as DJ 327 for identification a two-page document numbered 60016715 through 716.

MR. REYNOLDS: May we have an offer on 327?

MR. CHARNO: The Department would offer DJ 327 for identification for the course of conduct which was contemplated within Cleveland Electric Illuminating following an interconnection with the City of Cleveland, and that this course of conduct included customer trading, customer allocation, and rate-fixing, both at that time and in the future.

1 MR. REYNOLDS: I would suggest that the
2 document on its face does not support that offer.

3 CHAIRMAN RIGLER: Read the offer back.

4 MR. REYNOLDS: It seems clear on its face
5 that the document does not support the offer as stated.

6 I think with a rephrasing of the offer which
7 would say that the document reflects a course of conduct
8 regarding negotiated matters between the parties, that
9 that would be a much more accurate statement as to what it
10 is the document does reflect.

11 As was stated, there was no reference at all
12 to the negotiation of the various matters that the
13 Department ticked off.

14 MR. CHARNO: The Department would discard
15 pages 00016257 through 264.

16 The Department would offer as DJ-328, a
17 document numbered 015552, which is three pages in length and
18 runs through 5554.

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The Department would offer as DJ 329 for identification a two-page document numbered 00016401 through 402.

The Department would offer as DJ 330 for identification a document of which the Department's copy was illegible and for which we have secured another copy that we are now distributing.

This is a three-page document. This document is identified in the upper left-hand corner as MELP Task Force, March 21, 1968 meeting.

CHAIRMAN RIGLER: What are the Department numbers on it?

MR. CHARNO: It does not have Department numbers on it. It has what I believe are the Cleveland Electric Illuminating identifying number on it --- Applicants have suggested we give it the Department's former internal number, which would be 00016112 through 121.

The Department would offer as DJ 331 for identification a multi-page document bearing the numbers 00013671 through 675. That contains attachment which is 00013676 and 77.

So the entire sequence would be offered as DJ 331 for identification.

The Department would offer as DJ 332 for

identification a one-page document numbered 000182565.

The Department would offer as DJ 335 for identification a one-page document numbered 00018149.

The Department would offer as DJ 334 for identification a two-page document numbered 00018982 through 933.

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1 The Department would offer as DJ-335 for identifica-
2 tion, a one-page document numbered 00016133.

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3 The Department would offer as DJ-336 for
4 identification, a multi-page document numbered 00016600
5 through 614.

6 The Department would offer as DJ-337 for
7 identification a one-page document numbered 00016540.

8 MR. REYNOLDS: Can we go off the record?

9 (Discussion off the record.)

10 MR. CHARNO: The Department would discard
11 00016584 and 35.

12 The Department would offer as DJ-338, a two-
13 page document numbered 0001647 through 648.

14 The Department would offer as DJ-339 for
15 identification, a three-page document numbered 00016447 through
16 449.

17 MR. SMITH: What is your latest exhibit number?

18 MR. CHARNO: 16447 was Exhibit DJ-339.

19 MR. REYNOLDS: Wait a minute. Can I get an
20 offer of proof on 338?

21 MR. CHARNO: We would offer this in support of
22 the contentions that CBI did not want a permanent
23 interconnection with the City of Cleveland and that the
24 City of Cleveland had requested standby power rather
25 than emergency power over a parallel interconnector, rather

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1 than a temporary, nonsynchronous interconnection.

2 MR. REYNOLDS: Could I have that back again,
3 please?

4 (The reporter read the record as requested.)

5 MR. CHARNO: The Department would offer as --

6 CHAIRMAN RIGLER: Isn't this a staff exhibit?

7 I beg your pardon. I'm looking at 339. Isn't 339

8 a staff exhibit already?

9 MR. CHARNO: We are unaware of it, if it is.

10 We will ascertain that over the lunch hour.

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MR. CHARNO: The Department would identify as DJ 340 a multi-page exhibit numbered 00013718 through 723.

We note the following stipulations with respect to pages 00013720 and 22, the tops of which were cut off:

The caption on the top of page 720 should read typical bills.

And the caption on the top of page 722 should read CEI percent over Muni.

MR. REYNOLDS: Can I have an offer of proof on Exhibit 340?

MR. CHARNO: The Department would offer DJ 340 for identification as a comparison of the rates which we maintain are one of the factors which are relevant to the competitive ability of the City of Cleveland and the Cleveland Electric Illuminating Company, and further are relevant to the competitive positions of the two utilities at the different times that we have alleged specific conduct by the Cleveland Electric Illuminating Company relative to the City of Cleveland.

For example, we would regard it as relevant that at the times CEI was requesting rate equalization, the City's rates according to this comparison which was prepared by CEI were lower than the CEI rates.

The Department would offer as DJ 341 a three-page document and the original was illegible, so we again

secured GBI's copy and have made a copy.

The document numbers that appeared on the Department's original were 0004725 through 727.

Attached to that should be 004728, which is on our original, but was not on the copy we got from GBI, apparently. It is a sheet of charts.

The Department would offer as DC 942 for identification a three-page document numbered 000712 through 714.

The Department would offer as DC 143 for identification a two-page document numbered 000710 through 711.

MR. REYNOLDS: Is there a reason to include 10?

MR. CHARNO: Merely to indicate the source of the document.

MR. REYNOLDS: That it came from GBI files?

MR. CHARNO: Off the record.

(Discussion off the record.)

MR. CHARNO: Can we reach a stipulation that the GLM initials are George Moore?

MR. GREENSLADE: We haven't, but we can.

MR. CHARNO: We can take it out.

CHAIRMAN RIGLER: Leave it in, since there is no good reason to take it out.

MR. CHARNO: We note that the initials GLM are

G. L. Moore, an employee of the Cleveland Electric
Illuminating Company, and this is a stipulation arrived
at between the Department and CEE.

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1 MR. CHABNO: The Department would offer as
2 DJ-344 for identification, a multi-page document numbered
3 002956 through 961.

4 We would offer as DJ-345 for identification,
5 a multi-page document numbered 002963 through 974.

6 We would discard 002975 through 77.

7 The Department would offer as DJ-346 for
8 identification a multi-page document numbered 002981 through
9 38.

10 The Department would offer as DJ-347 for
11 identification, a three-page document numbered 004731 through
12 733.

13 The Department would offer as DJ --

14 MR. REYNOLDS: Excuse me just a minute, Steve.
15 Can we back up to 346 and get an offer of proof on that
16 document?

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MR. CHARNO: Do you want all three?

MR. REYNOLDS: No, just 346.

MR. CHARNO: The Department would offer DJ 346 for identification to prove that CEI conducted periodic opinion surveys of the City of Cleveland's customers, and that they -- these surveys encompassed the opinions of the customers concerning competitive factors such as rates and service, and also covered the sale of the City system to the Cleveland Electric Illuminating Company.

We would offer both of these facts in support of interest in competing with the City of Cleveland and an interest in acquiring their system.

The relationship of the opinions stated in these surveys and requests made by the City of Cleveland to CEI for such things as stand-by support that would increase the City's reliability also becomes apparent in terms of tabulating responses.

MR. REYNOLDS: What was that last statement?

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

MR. CHARNO: I don't believe that latter is directly reflected in DJ 346, however.

The Department would offer as DJ 348 for identification a multi-page document numbered 004745 through 748.

The Department would offer as DJ 349 for identification a document numbered 00018940 through 43.

The Department would offer as DJ 350 for identification a one-page document numbered 00017333.

The Department would offer as --

MR. REYNOLDS: Wait a minute.

MR. GREENSLADE: Would you identify that document?

MR. CHARNO: 00017333. It is a memo from Mr. Maugans to L. C. Howley. It is dated January 13, 197 -- and the last digit is unreadable, but it says under that "received January 13, 1970," so I assume the last digit to be zero.

MR. REYNOLDS: All right.

As I understand the last series of documents, there is a relationship between 344 through 350. All relating to the same subject matter. You have already given an offer of proof on 346.

I would like offer of proof on 344, 5, 7, 8, 9, 50.

MR. CHARNO: The offer for DJ 344 would include the offer on 345 -- I'm sorry, for 346.

The same would be true with respect to 345.

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1 to show the existence of competition and to the extent
2 that you have a situation where the competitive position
3 of your adversary or your competitor can be weakened.
4 And say that he is known for having unreliable service,
5 and you go out and tell everybody that it is really even worse
6 than they thought, he has very bad service, and you call
7 every lapse to their attention.

8 Then you specifically take action which
9 will prevent him from improving the reliability of his
10 service, I think it has a direct bearing on the
11 competitive relationship between the two companies.

12 This is, indeed, a basis for refusing to
13 interconnect, as a desire to avoid improving the competitive
14 position of the City of Cleveland.
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1 MR. CHARNO: The same would be true with respect
2 to 346.

3 I'm sorry, with respect to 347.

4 349 we would offer, in addition, to prove the
5 effect of increasingly poor reliability upon MELP, City
6 of Cleveland system, in 1972, prior to a synchronous
7 parallel interconnection with the Cleveland Electrical
8 Illuminating Company.

9 We would offer DJ-350 in support of the proposition
10 that MELP's reliability problems directly resulted in
11 Cleveland Electrical Illuminating Company getting customers
12 and that the impact of an interconnection between the City
13 and CEI on reliability of the city system has a direct
14 relationship to the competition between the two systems
15 for customers.

16 We would offer the entire sequence further in
17 support of the company's knowledge that -- company's belief
18 that MELP secured customers through having lower rates,
19 although it had reliability and service problems; and that
20 the company, although it had higher rates, felt that it
21 could offer better service.

22 And these criteria were explicitly utilized in
23 the solicitation of business by the company.

24 CHAIRMAN RIGLER: So what?

25 MR. CHARNO: I think it is up to the Department

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CHAIRMAN RIGLER: Go ahead.

MR. REYNOLDS: Mr. Chairman, I don't want to argue the point. I do want to point out just because it is good to get on the record at one place, the observation, the material that the offer of proof related to on its face suggests surveys made by the company of the public, and does not in any way indicate that the company was going out and advertising any particular or advocating any particular attitude or point of view.

On its face it indicates it was going around and making a survey on a question-and-answer basis to probe the attitude of the public.

CHAIRMAN RIGLER: The offer of proof may be more extensive than documentary material.

One thing it indicates is that CEI was aware it was a price-sensitive market. That was included within the offer.

MR. CHARNO: The Department intends to introduce specific documentary evidence in support of the positions taken by CEI -- pardon me, the positions taken before the media and community in general concerning the City's reliability problem, as well as specific evidence going to its refusal to interconnect, and the reasons for that refusal.

We would agree they are not contained in Exhibits

344 through 350.

MR. REYNOLDS: Well, that does bring up an important point. If we are going to have an offer of proof on a document, it seems to me that the Department should confine itself to the matter that it intends to prove with that document and not spill over and give an awful lot of other material that it then says it will come in with some other document at a later time and prove the point or.

CHAIRMAN RIGLER: We can save time if you limit the offer of proof. We have discussed what the Board will take out of this which is that it was a price-sensitive market, and that CEI was aware of that fact.

MR. CHARNO: I would say that our offer was broader than that. It is not only price-sensitive, but service-sensitive.

CHAIRMAN RIGLER: All right.

MR. CHARNO: The other was an argument going to the relevance of that offer rather than expanding that offer.

CHAIRMAN RIGLER: All right.

MR. CHARNO: The Department would offer as DJ 351 for identification a two-page document numbered 004665 through 664.

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The Department would discard pages 002646, 647 and 648.

MR. ZAHLER: 646 and 648?

MR. CHARNO: I'm sorry, 647 and 646.

The Department would offer as DJ 352 for identification a multi-page document numbered 0004676 through 686.

The Department would discard the following two pages, 00016847 and 011222.

CHAIRMAN RIGLER: Hold up there for a minute.

Let's talk about 351 for a minute. It relates to a program, as I see it, to ask customers to switch by providing greater safety assurance with respect to wiring notwithstanding, perhaps the higher cost of that service.

Is that a fair characterization of that document?

MR. CHARNO: Yes, and it sets forth limitation on the amount of revenues that may be so expended.

CHAIRMAN RIGLER: I can see a distinction between the reliability argument relating to the interconnection and the availability of power and safer wiring at the door of an installation.

It seems to me there may be nothing whatsoever anticompetitive in selling your service based on the fact that it is better wired or offers better quality assurance.

If companies refuse to compete on that basis

that the Department could come around and accuse them of failing to compete and approach anticompetitiveness that way.

MR. CHARNO: The Department would not offer that document for that portion --

CHAIRMAN RIGLER: It is included in the red-lined portion.

MR. CHARNO: The essence of that portion would be that CEI directly offers these inducements, not that there is any problem with the inducements, so NELP's existing customers.

CHAIRMAN RIGLER: Don't you want CEI to attempt to secure NELP's existing customers?

MR. CHARNO: We do. We are not suggesting it is inappropriate, but that it is being done.

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1 CHAIRMAN RIGLER: Don't you want NEMP to get
2 CEI customers?

3 MR. CHARNO: Indeed so.

4 CHAIRMAN RIGLER: And they compete on the basis
5 of price?

6 MR. CHARNO: Price and service both.

7 CHAIRMAN RIGLER: Right, and now here is service
8 competition, and I have great difficulty relating
9 this back to any situation inconsistent with the antitrust
10 law.

11 MR. CHARNO: I think what we are trying to do is
12 establish the underpinning that they are in serious
13 competition.

14 CHAIRMAN RIGLER: I think that is conceded,
15 isn't it?

16 MR. REYNOLDS: Yes, sir.

17 CHAIRMAN RIGLER: Come with me to Number 352.
18 To page 3, and you red-lined a portion there.

19 I see a substantive difference between the
20 competition being offered by CEI in Document 351, and a
21 reference maybe to the fact that CEI is able to obtain --
22 that should have been page 4.

23 To CEI stressing its ties to other utility
24 companies which, in this instances, include Ohio Edison.
25 In the context of our proceeding that may be significant.

1 Going back to 351 I have great difficulty
2 finding the anticompetitive act set forth in the red-lined
3 portion.

4 MR. CHARNO: We do not contend an anticompetitive
5 act is set forth in the red-lined portion.

6 MR. REYNOLDS: Why is it being put in there?

7 MR. CHARNO: As I tried to explain, for the
8 existence of competition for existing customers within
9 the City of Cleveland between the two systems, and that
10 the rate factor -- that the competition is rate-sensitive
11 as indicated by the third paragraph on that page.

12 Could we red-line DJ-352 more extensively.

13 I would like to underline page 3 of the
14 attachment, that would be 631, the bottom of page 4 of
15 the attachment, 631.

16 MR. SMITH: You mean the last paragraph?

17 MR. CHARNO: Last two paragraphs on page 4.

18 And the top two paragraphs on 633, which is page
19 5 of the attachment.

20 Finally, the third paragraph on page 6 of the
21 attachment, which is 634.

22 (The documents referred to were
23 marked Exhibits DJ-352 through
24 352 for identification.)

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CHAIRMAN RIGLER: How about the remainder of page
684?

MR. CHARNO: I'm sorry, the remainder of it
should be red-lined, as well as the first paragraph on 685.

CHAIRMAN RIGLER: Is that it?

MR. CHARNO: Yes, sir.

CHAIRMAN RIGLER: Let's go off the record.

(Discussion off the record.)

Whereupon, at 1:00 p.m., the hearing was recessed,
to reconvene at 1:50 p.m., this same day.)

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AFTERNOON SESSION

(2:20 p.m.)

CHAIRMAN RICLER: Before we resume with the identification of documents, since the parties have delivered the District Court and Appeal Court documents the Board requested, relating to the controversy over production of the CEI documents, the Board has determined that there is no necessity for additional oral argument, and the Board is now at work on its opinion on the motion to produce.

MR. REYNOLDS: Mr. Chairman, I would like to request that if the Board should decide the question in favor of an order to produce the documents, that it include in its order a stay of the effectiveness of that order until such time as the matter can be determined by the Court of Appeals, which I have been informed will be very promptly.

The Court of Appeals has indicated that the legal question before it that relates to this matter is not going to be heard and determined until such time as this Board rules.

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And if the Board should come out in favor of production, the request is that it include in its order a stay of the effectiveness of that to give the Court of Appeals to move on the legal question.

MR. CHARNO: Mr. Chairman, the Department would have no objection to that course of action upon two conditions: one, that the question to be ruled upon by the Court of Appeals was the one that is presently before it, and that is for a motion for injunctive relief, pending appeal.

The reason I make this distinction is because I feel a decision ultimately on the merits might come after the close of the record in this hearing.

Secondly, we would not object if it were also conditioned on the right of the Department to reopen its case for the limited purpose of presenting any evidence which might be appropriate to the limited issue raised by the CEI documents at that time.

CHAIRMAN RIGLER: Mr. Reynolds, in the event the Board's decision is adverse to Applicants' position, make your request at that time.

MR. REYNOLDS: Would you want it in writing at that time?

CHAIRMAN RIGLER: No, just renew your request. Call it to our attention in the event of an adverse

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1 decision.

2 MR. REYNOLDS: I have no problems with the Depart-
3 ment's two conditions.

4 I did not intend to indicate any kind of
5 lengthy delay or any other issues to be decided by the
6 Court, but I will at the appropriate time renew the request.

7 MR. CHARNO: The Department would identify as
8 DJ-353, a two-page document numbered 002191 through 192.
9 The Department would identify as DJ-354, a one-page document
10 numbered 00014036.

11 The Department would identify as DJ-355, a one-
12 page document numbered 002996.

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CHAIRMAN RIGLER: What is the relevance of this document?

MR. CHARNO: We would offer this as a study on the tax implications of acquiring the municipal system, and indeed in 1968 -- we offer it for the intent relative to acquisition that it was long-standing, and that it was a desire of CEI to acquire the municipal system.

CHAIRMAN RIGLER: Is that contested, Mr. Greenslade?

Is it contested that CEI had an interest in acquiring MELP and that interest extended back to 1968?

MR. GREENSLADE: It is clear we were studying that at that time, Mr. Rigler.

MR. CHARNO: It is one of a series of documents showing different types of studies at different times.

CHAIRMAN RIGLER: If they had an interest in acquiring MELP, they would make a series of those studies. The tax implications don't show anything magic.

MR. CHARNO: I don't think so, either. Counsel simply indicated they had conducted a study.

That is the only point that this is going in to prove. It conducted a study which we would argue provides support for --

CHAIRMAN RIGLER: You would argue that if they conducted a series of studies that indicates an interest?

CHAIRMAN RIGLER: Do you contest that, Mr. Greenslade?

MR. GREENSLADE: I guess I don't. I do not contest that.

CHAIRMAN RIGLER: All right, then we have eliminated some documents.

MR. CHARNO: Would counsel extend that to 1974, that stipulation?

MR. GREENSLADE: Mr. Charno, we are in the area now of confidentiality of documents. I don't think we should extend the stipulation that I referred to referring to 1968 in relation to these next series of documents which are under the confidential label.

CHAIRMAN RIGLER: The point is that you might never have to have those documents identified, let alone put into evidence if you extend your stipulation to 1974.

MR. GREENSLADE: I wonder if you could indicate for me precisely what you mean by the use of the word "interest."

In help you a bit here, our interest has varied from time to time, depending on the different pressures we have received from media, City Council members, et cetera.

I'm having a hard time stipulating until I have a better feel for what you mean by the word "interest."

MR. CHARNO: The documents which have not been introduced which relate to the time period 1973 to '74 present a rather detailed study of one aspect of information necessary for acquisition, and it would seem that prior to undertaking a study of that nature, there would have to be a somewhat serious interest in acquiring it and receiving the information, since that information is also of the type that changes from time to time.

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1 CHAIRMAN RIGLER: Could you stipulate that it is
2 information which would help to establish a purchase price
3 and that by considering a purchase price that is a reflection
4 of the degree of interest of CEI?

5 MR. GREENSLADE: I would stipulate that the studies
6 do reflect one measure of a purchase price and that at the
7 time they were conducted, there was either -- there was a
8 reaction by the Illuminating Company to proposals that had been
9 made from outside of the company, that the company purchase
10 the Municipal Light plant.

11 MR. CHARNO: Could you describe the nature of that
12 reaction?

13 MR. GREENSLADE: The studies that we were
14 considering is one reflection of the action.

15 In other words, the studies were put together in
16 response to those outside influences.

17 CHAIRMAN RIGLER: Off the record.

18 (Discussion off the record.)

19 (The reporter read the record as requested.)

20 MR. GREENSLADE: Could you change your request
21 for stipulation, Mr. Charno, to substitute the word
22 "concern" for the word "interest"?

23 MR. CHARNO: I don't think we should, no. We don't
24 believe that to be the case.

25 We would skip the pages numbered 012300 through
401.

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1 MR. SMITH: Are you deferring these or are you
2 done with them?

3 MR. CHARNO: We are discarding those.

4 The Department would offer as DJ-356 for
5 identification a two-page document numbered 00006431 through
6 32.

7 The Department would offer as DJ-357 --- I'm sorry.

8 We would discard the next page, 00014166.

9 We would offer as DJ-357, 00017429, 430, 420
10 and 421.

11 We would skip the next three pages, discard them,
12 002993, 992 and 987.

13 CHAIRMAN RIGLER: Those numbers again?

14 MR. CHARNO: 002993 --

15 CHAIRMAN RIGLER: 92 and 87.

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MR. CHARNO: Right.

We would offer as DJ 358 for identification a multi-page document numbered 10017521 through 632.

MR. ZAHLER: Mr. Charno, can I have an offer of proof on this? And also I wonder if this is already a matter of record, and is to be entered into evidence again?

MR. CHARNO: I wasn't aware it had been made part of the evidentiary record in this proceeding.

MR. ZAHLER: It was attached to an official filing in this proceeding; is that correct?

MR. CHARNO: That is my understanding.

The Department would offer this to prove that CEI did not lack transmission capacity, nor did it anticipate the lack of transmission capacity in the future sufficient to wheel power from originated and the power north of the State of New York to the City of Cleveland. That it was ready and able to do so.

The Department would discard the following two pages, 000008458 and 59, as well as a substantial portion of the following material numbered 006139 through 163.

We would offer as DJ 359 a one-page document numbered 006164.

MR. ZAHLER: Could we have an offer of proof on that document, please?

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MR. CHARNO: I offer it for the truth of the contents that CEI has offered an interconnection to the City, and offered to purchase the City's system as of 1966, and the interconnection offer was based upon rate equalization and that they were quite unhappy, would be quite unhappy to have the Federal Power Commission step in and order an interconnection.

Further, that they were seeking alternative methods of proceeding as evidenced by the existence of this correspondence.

The Department would discard 006165 and 006169 -- pardon me, 66 through 176.

CHAIRMAN RIGLER: Why are you discarding this?

MR. CHARNO: Pardon me?

CHAIRMAN RIGLER: I wonder why you are discarding this.

MR. CHARNO: Unless I went too far.

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2 MR. CHARNO: I think this material relates to the
3 period immediately prior to the discovery cut-off date,
4 and it deals with a course of acquisitions and a policy
5 of acquisitions which has no direct relevance to CRT for
6 1965, 66.

7 I believe there is an acquisition further back.
8 At any rate, to the extent that hasn't become part of
9 subject matter of this proceeding, there is no attempt
10 to support our allegations during that time period.

11 We have received no evidence yet as to the acquisi-
12 tion policies of any of the Applicants.

13 If appropriate, we can resubmit it on rebuttal.
14 Pardon me, the pre-1965 acquisition policies of any of
15 the Applicants.
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The Department would offer as DJ 360 for identification a one-page document numbered 00000659.

The Department would offer as DJ 361 for identification a two-page document numbered 00013914 and 15.

The Department would offer as DJ 362 for identification a one-page document numbered 00016173.

The Department would offer as DJ 363 for identification a multi-page document numbered 003628 through 642, and would request that all parties red-line 3642 in addition to the other pages that are red-lined.

The Department would offer DJ 364, a five-page document numbered 003937 through 41.

MR. GREENSLADE: Could we have an offer of proof on Document 364, please?

MR. CHARNO: We would offer DJ 364 in evidence in support of and intent on the part of CEI to acquire all or part of the load of the Painesville Municipal System, as well as for the consideration of the interconnection alternatives that were available to the municipal system if they were made available to the system by CEI.

This 1970 memorandum specifically is offered for CEI consideration of it being possible for negotiation with Painesville of an interconnection in exchange for customers as being a matter considered by virtue of the

face of this memo by Mr. Williams, Mr. Davison, Mr.
Howley, and Mr. Brockseiker, B-r-o-c-k-s-e-i-k-e-r.

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1 The Department would offer as DJ-365 for identifi-
2 cation, a two-page document numbered 012596 through 597.

3 The Department would offer as DJ-366 for
4 identification, a one-page document numbered 002116.

5 The Department would offer as DJ-367 for
6 identification, a one-page document numbered 002117 -- I'm
7 sorry, it is a two-page document, 117 through 118.

8 The Department would offer as DJ-368 for
9 identification, a one-page document numbered 003925.

10 We would discard the next two pages, 006397 and
11 98.

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1 MR. CHARNO: We would offer as DJ-369 a one-page
2 document numbered 006404.

3 We would offer as DJ-370, for identification,
4 a one-page document numbered 006399.

5 We would offer as DJ-371 for identification,
6 multi-page document numbered 012761 through 765.

7 The Department would discard 002169,
8 I believe is the next page.

9 MR. RIESER: Could you identify that a little
10 better?

11 MR. CHARNO: It is a memorandum on GEX letter-
12 head dated December 15, 1972 from --

13 MR. RIESER: Okay.

14 MR. CHARNO: We would discard document page
15 numbers 012843 through 48. And 009271 through 275.

16 The Department would offer as DJ-372, a
17 two-page document numbered 00009987.

18 MR. GREENSLADE: Could I have an offer of proof
19 on that, please.

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MR. CHARNO: The Department would offer DJ 372 for identification in support of its allegations that the CAPCO allocation and reserve formulas so penalized the smaller CAPCO systems that it was necessary for those systems to negotiate a new basis for allocation of capacity and reserves in order for CAPCO to continue in being.

CHAIRMAN RIGLER: What are the smaller CAPCO systems?

MR. CHARNO: Toledo Edison and Duquesne.

We would then argue from that, that it would at least equally disadvantage any small system proposing to come in in the future without being able to negotiate such a change.

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

MR. CHARNO: The Department was offer as DJ 373 for identification a two-page document numbered 15009167 through 168.

MR. GREENSLADE: Could I have an offer of proof on that document, Mr. Charno?

MR. CHARNO: I think this is offered in support of or in illumination of the Illuminating Company's intent behind its program of acquisition set forth herein and we would argue that that intent has never been

modified, and that is that its policies and acquisition of customers and only incidentally the properties, we believe that is substantiated by subsequently dated materials, though nowhere is the policy as clearly set forth as in this location.

The Illuminating Company has argued to the Department that it is not interested in acquiring the physical plant of the City of Cleveland.

But we have never received the argument that they are not interested in acquiring the customers of the City of Cleveland.

The Department would offer as DJ 14 a multi-page document numbered 00013740 through 748.

The Department would offer as DJ 375 for identification a multi-page document numbered 004030 through 4033.

CHAIRMAN RIGLER: Give me 375 again.

MR. CHARNO: 004030 through 4033.

CHAIRMAN RIGLER: Start over with 375.

MR. CHARNO: The Department would offer as DJ 375 a document bearing the internal numbers 004030 through 4033.

CHAIRMAN RIGLER: Can we have an offer of proof on that, please?

MR. CHARNO: The Department would offer this and the two following documents for the proposition that

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size in terms of generating capacity, number of interconnections, lends strength in bargaining with other utilities and that a utility with leverage provided by size and resources in the electric utility industry has a superior bargaining position, and further that this type of leverage is provided as one of the benefits of pool membership, specifically membership in the CAPCO pool.

The Department would offer as DJ 376 for identification a one-page document numbered 004029.

MR. GREENSLADE: Mr. Charno, my copy is completely incomprehensible.

MR. CHARNO: We would ask to have this document struck and if we can secure a better copy, we will attempt to introduce it at that time.

CHAIRMAN RIGLER: Since it has already been identified, I will mark it as withdrawn.

MR. CHARNO: All right.

It is an August 3, 1975 memo from Lester to Miller, entitled "Emergency Power Costs."

The Department would offer as DJ 377 for identification a two-page memorandum numbered 004089 through 090.

MR. GREENSLADE: Could we have an offer -- your earlier offer carries over to this document.

MR. CHARNO: Cover this, and the illegible

document.

MR. GREENBLADE: That's right.

MR. CHARNO: The Department would discard
005319 through 321.

CHAIRMAN NIGLER: You are discarding 005319
through 21; is that correct?

MR. CHARNO: That's correct.

end 29

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1 MR. CHARNO: The Department would offer --

2 CHAIRMAN RIGLER: Wait a minute.

3 MR. SMITH: Just a moment, please.

4 I need some help. I think I have some missing.

5 MR. CHARNO: Maybe we can take a break here,
6 so I can check these.

7 CHAIRMAN RIGLER: Fine.

8 (Recess.)

9 MR. CHARNO: The Department had just prior to
10 the break discarded 005019 through 321.

11 MR. SMITH: Is that all one document?

12 MR. CHARNO: No, it is only the first three
13 pages.

14 MR. SMITH: 321, does that begin Objective 3,
15 yes, sir.

16 MR. CHARNO: The Department would offer as DJ-378
17 for identification, a multi-page document, numbered 005278
18 through 284.

19 MR. ZANLER: Could I please have an offer of
20 proof on that document?

21 MR. CHARNO: The Department offers DJ-378 for
22 identification to indicate as of the end of December 1972,
23 that the publicity of the proposed interconnection stated
24 on page 4, between the City and CEI, had caused a decline
25 in the number of customers converting from the City to CEI.

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1 and that the individual making the report on behalf of the
2 commercial sales department believed that that trend would
3 continue to assert, to be asserted, pardon me.

4 We offer the document further for the red-lined
5 portions indicating that Muni displacements were a measure
6 of goal performance, were goals for the commercial sales
7 department and that for the statements concerning one
8 customer which appear on page 3 of the report, as they
9 impact upon price and service-sensitivity -- to the extent
10 that this is not a complete document, we will attempt
11 secure the missing pages.

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CHAIRMAN RIGLER: Do you really need to?

MR. SAHLER: I would have to look at the rest of the document. I don't believe it is necessary the rest of the pages be supplied.

CHAIRMAN RIGLER: I would certainly think not. Let's leave it in this form, and if you want to come back and offer the additional pages, we would let you.

MR. CHARNO: We would finally offer DC 378 for identification for the statements concerning objective No. 6 which appears on page 11, which states the objective, and we offer it for that, plus the degree to which that objective has been achieved as of the date of the report.

The Department offers 379 for identification, a multi-page document numbered 00007325 through 36.

MR. ZAHLER: Is the offer of proof similar to Exhibit 78?

MR. CHARNO: Our offer would be similar and would go to short-range objective No. 3 appearing on pages 2 and 3, and to the discussions of special opportunity and problems, items 1 and 2 appearing on page 1, which are the red-lined portions. And to the fact that CBI promotional payments were over budget as noted on page 11.

CHAIRMAN RIGLER: What is wrong with having promotional payments over budget?

MR. CHARNO: To the extent that the promotion is

a lawful promotion, absolutely nothing, would be indicative of a state of competition existing.

CHAIRMAN RIGLER: So why include it in your offer?

MR. CHARNO: I think we would like to demonstrate as broad a range of competition between these two entities, the City of Cleveland and CEI, as possible.

CHAIRMAN RIGLER: I'm sure Mr. Greenslade would stipulate as to that.

MR. GREENSLADE: Yes, sir.

MR. CHARNO: Then I would be happy to delete that last element from the offer.

CHAIRMAN RIGLER: I would imagine that Mr. Greenslade would stipulate that conversion of Muni customers was a continuing goal of CEI, and that they set up certain ratios and goals and tried to achieve those goals, wouldn't you, Mr. Greenslade?

MR. GREENSLADE: Yes.

CHAIRMAN RIGLER: Will that eliminate the next series of documents, Mr. Charno? But -- yes, it would have.

MR. CHARNO: I would like to withdraw 00007337 through 7345.

The Department would offer as DJ 380 for identification a multi-page document numbered 003523 through

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003535.

MR. GREENSLADE: Could I have an offer of proof on that, Mr. Charnc?

MR. CHARNO: The Department would offer this document, DJ 380 for identification, to show the Illuminating Company's willingness to transmit power on behalf of a non-municipal utility as indicated on page 5, and that this transaction which was initially conceived of in terms of a transmission of power we will demonstrate by the next document was turned into a purchase-and-sell to avoid typing that transaction as wheeling.

The Department would discard 003542 through 544.

We would offer as DJ 381 a six-page document numbered 003545 through 550.

The Department would offer as DJ 382 a one-page document numbered 0030605.

The Department would offer as DJ 383 for identification --

MR. GREENSLADE: Excuse me, Mr. Charnc. Could I have an offer of proof on Document 2837

MR. CHARNO: 382 and 383 show the ultimate form of the transaction plus the fact that it was effectuated involving a transfer of power from Ohio Edison to the PJM Pool through Cleveland Electric Illuminating Company and its purchase and sale form.

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1 The Department would offer as 383 for
2 identification a two-page document numbered 00017057 and 58.

3 The Department would offer as DG-384 for identifica-
4 tion a one-page document numbered 00017141.

5 We would note the existence of stipulation with
6 Counsel for CEI that the initials of the addressee "R.H.H."
7 are those of R. H. Herrick, H-e-r-r-i-c-k.

8 MR. GREENSLADE: I'm lost.

9 MR. ZAHLER: What is the document number?

10 MR. SMITH: I think you have skipped some document
11 numbers.

12 CHAIRMAN RIGLER: Maybe we should discuss
13 this subject matter on the record.

14 Do you have an offer of proof with respect
15 to 384, Mr. Charno?

16 MR. CHARNO: The entire sequence, beginning
17 with 383, provides evidence of CEI continually providing,
18 at the very least, information concerning WELP's weak
19 point to the media.

20 At the most, writing speeches for, and
21 soliciting the publication of these articles.

22 These are materials that I was talking about
23 earlier when I said that if you start out with telling
24 your salesmen to note up the deficiencies and then you
25 bring those same deficiencies to the attention of the media,

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and, as you can see from some of these, that the media were
unaware of them, and convince the media to rely upon them and
then you accentuate those by refusing to interconnect,
in assessing the reliability under those circumstances,
you are being anticompetitive.

GERMANN RIGLER: What if I made breakfast
cereals and I point out the deficiencies of another breakfast
cereal manufacturer in order to show that my cereal is
better. Do you think that is anticompetitive?

MR. CHARNO: It is depending on the way you go
about it. If the making of breakfast cereal required access
to a large jointly owned facility and you made worse
breakfast cereal without it, and you brought it to
everyone -- making his breakfast cereal required access
to a large jointly owned facility, and your competitor
didn't have that access, and you went out and informed
the buying public that your competitor's product was
worse than yours, which the buying public didn't realize
or didn't see and did not grant access to that facility,
you are exacerbating the fact of denying access to that
large jointly-owned facility, and I think it is an anti-
competitive.

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CHAIRMAN RIGLER: You argued that the Cleveland market was a price-sensitive and service-sensitive market. You have introduced evidence that supports that conclusion.

Then you have argued if it is a service-sensitive market, access to alternate sources of power would play an important role in the municipal system's ability to compete on the basis of service; is that correct?

MR. CHARNO: Yes, sir.

CHAIRMAN RIGLER: If that is the present state of the evidence, I simply don't understand how the fact that they go to the media, they meaning CEI, and indicates service deficiencies of the municipal system adds to your prove in any way whatsoever.

Let me put it this way:

It would be the Board's inclination in the interest of saving time to entertain a motion denying the offer of proof with respect to these documents as non-probative as to any of the issues in this proceeding.

MR. CHARNO: If I may make one brief addition before you do so, sir.

We would indicate that at the very least, the material which touches upon interconnection would indicate CEI awareness of the impact of its denial upon MELP.

CHAIRMAN RIGLER: I have seen some documents

that you introduced earlier today that suggest that, and we didn't have any question about those, which isn't to say that Applicants may not make an objection at the time that document is offered into evidence, but we are not trying to foreclose the Department from arguing that interconnections, access to CAPCO and to the nuclear facilities, have an impact on service.

Where we depart is in making some assessment that CEI is engaged in anticompetitive conduct by calling MELP deficiencies to the attention of the public.

MR. CHARNO: I think what we are saying is that it doesn't really come in that order. Rather that the deficiencies are brought about by CEI action, and then CEI publishes the deficiencies which it has caused.

CHAIRMAN RIGLER: Mr. Charno, we have a great deal of difficulty with any offer of proof relating to CEI efforts to persuade the media to attack the municipal system or to encourage taxpayers or voters to attack the municipal system.

The only reservation we have would relate to a campaign to deceptively or with deceit indicate that the volume of dissatisfied voters was greater than it was.

That might fall into the category of an unfair or deceptive trade practice, but the bulk of the material which appears to be coming up seems to us to be quite

straightforward in its attempt to raise legitimate competitive concerns affecting the municipal system, and as to that I doubt we would accept your offer of proof.

MR. SMITH: Some of these documents do suggest that CEI -- they suggest that CEI faked letters to the paper, wrote them for people, faked them to influence voter pressure upon counsel, perhaps.

That may be protected by Noerr-Pennington.

We might also consider the possibility here that it goes to the believability of CEI in the various negotiations that have surrounded this problem.

MR. ZIEGLER: Mr. Chairman, for the record I would at this time, in light of the Board's comments, object to the receipt of Exhibit 363 and 364 as not relevant and as First Amendment activity clearly protected under Noerr-Pennington.

CHAIRMAN RIGLER: If that objection is made at the time these documents are offered into evidence, it is our preliminary view with respect to these two documents that the objection would be sustained.

MR. CHARNO: For the purpose of keeping a clear record, I will go ahead and identify the remaining items in the set.

We would offer as DJ 385 a document numbered 00017118 through 124.

MR. GREENSLADE: Could you identify the contents of 384?

MR. CHARNO: 384 would be 000174171.

The Department would offer as DJ 386 a one-page document numbered 00017264.

The Department would offer as DJ 387 a multi-page document numbered 0017324, and then 323, 322, and 321.

The Department would offer as DJ 388 a one-page document numbered 00017003.

We would offer as DJ 389 for identification a one-page document numbered 00015438.

We would offer as DJ 390 for identification a three-page document numbered 00015390.

CHAIRMAN RIGLER: Does that go backwards, 389 and 388?

MR. CHARNO: Yes, it does. I am sorry.

We would offer as DJ 391 for identification a multi-page document numbered 10017491 through 537.

MR. SMITH: Are you done with that series relating to the publicity campaign?

MR. CHARNO: Yes.

MR. SMITH: How about 0017116?

1 MR. ZAHLER: Can we an offer of proof on

2 Exhibit 3917

3 MR. CHARNO: We would offer that to show the
4 corporate positions of CEI and men who held those positions
5 on or immediately prior to the date indicated thereon
6 which, in most cases, is a date in March 1975.

7 The Department would offer as DJ-392 for
8 identification a one-page document numbered 00014108 and
9 note that this is a document for which confidential treatment
10 has been requested by Cleveland Electrical Illuminating
11 Company.

12 CHAIRMAN RIGLER: It will be treated as
13 a sealed exhibit.

14 MR. CHARNO: The Department would offer as DJ-393
15 for identification a one-page document numbered 012306.

16 The Department would offer as DJ-394 for
17 identification a two-page document numbered 012925 through,
18 926.

19 MR. GREENSLADE: Could I ask for an offer of
20 proof related to this document, please?

21 MR. CHARNO: The Department would offer DJ-394
22 for identification for the contents of the conversation that
23 it was what we would characterize as a reaffirmation of
24 the official request by AMP Ohio that the Cleveland
25 Electric Illuminating Company requested certain information

1 set forth in the memorandum and that any meeting was to be
2 held after that information had been received.

3 The Department would offer as DJ-305 for
4 identification, a one-page document numbered 00014009.

5 CHAIRMAN RIGLER: Okay, is that final group
6 of initials "G.P.U."?

7 MR. CHARNO: "G.P.U" on my copy, yes, sir.

8 CHAIRMAN RIGLER: Which stands for?

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MR. GREENSLADE: That stands for General Public Utilities Corporation, Mr. Chairman.

MR. CHARNO: We would also stipulate that Pennsylvania Electric Company or PENELEC is a subsidiary of GPU.

We would offer as DJ 395 for identification a one-page document numbered 98014641, and note the stipulation of counsel that the initials contained thereon are as follows:

The author is H. E. Caruso, C-a-r-u-s-o, and the copies indicated at the bottom are to Messrs. Hauser, Davidson, and Sener, S-e-n-e-r.

MR. GREENSLADE: Could I ask for an offer of proof on this document?

MR. CHARNO: We would offer this to prove that CEI was aware of a meeting taking place between AMP-Ohio and PENELEC where AMP-Ohio requested that PENELEC wheel power originating from PASNY to the inter-connection between PENELEC and CEI systems. And that GPU or PENELEC had agreed in principle to wheel that power.

The Department would offer as DJ 397 --

MR. GREENSLADE: Excuse me, Mr. Charno.

Going back to 395 and your offer of proof that you stated, I'm not sure what that does. Could you supplement your response?

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MR. CHARNO: Going outside the scope of this document, it has been demonstrated through testimony that is in the record that there were several preconditions necessary for -- which must be met in order to get power from the Power Authority of the State of New York to the City of Cleveland.

One such sequence involved wheeling by parties other than CEI.

This we would put in the record as confirming evidence that it was possible to get the power wheeled to CEI across the PENNELEC system; and further that CEI was aware of this prior to the time at which it refused to wheel this power, and indeed that CEI ultimately, we hope to demonstrate -- we hope to demonstrate that CEI was aware that every precondition excepts its wheel of power had been fulfilled prior to the time it refused to wheel.

But as I indicated, that is not on offer on this document. We don't believe this document in and of itself would prove that.

The Department would offer as DJ 397 a three-page document numbered 012927 through 929. And we note for the record the stipulation that this memorandum was prepared by Mr. Greenslade of CEI.

We would offer as Exhibit DJ 398 for identification a document numbered 00014645 with an attachment

numbered 012930 through 955.

MR. ZAHLER: Could I have a second to read this?

MR. CHARNO: Certainly.

CHAIRMAN RIGLER: How did this document come into the hands of the Department?

MR. CHARNO: On discovery.

CHAIRMAN RIGLER: Was this one of the privileged documents ruled upon by the Special Minister?

MR. GREENSLADE: I believe this was privileged originally. Whether this was a document on which we later waived privilege or whether the Master determined it was not privileged, I don't have an answer as to that.

MR. ZAHLER: Is the Department submitting this for the truth of the statements contained herein, or for the legal opinions and conclusions?

MR. CHARNO: We regard the factual assertions as admissions and they are red-lined. We are submitting it for the factual assertions rather than the legal conclusions.

MR. ZAHLER: When you say admissions, admissions by whom? This was prepared by outside legal counsel.

MR. CHARNO: It was prepared by counsel for CEI.

MR. ZAHLER: Does that make counsel a party?

CHAIRMAN RIGLER: He stated his position. We are

not going to argue that.

MR. CHARNO: The Department would offer as DJ 399 for identification a three-page document numbered 00014638 through 640.

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1 MR. CHARNO: The Department would discard
2 Document 00000925 through 32.

3 Your next volume I think I put up there.

4 The Department would offer as DJ-400 for
5 identification, a multi-page document numbered 006125 through
6 138.

7 MR. GREENSLADE: Could I ask for an offer of proof
8 on this document, DJ-400?

9 MR. CHARNO: DJ-400 for identification would be
10 offered to demonstrate CEI evaluation of the MELP system as of
11 the date of the document, and we would call the Board's
12 attention to the fact that the overall condition of the
13 nongenerating portions of the MELP system are found by
14 CEI in this document to be comparable or better than CEI's
15 own system, and we would suggest that from this could be
16 drawn the inference that reliability problems in the
17 MELP system were due not to their transmission and
18 distribution facilities which were reviewed herein,
19 but rather their generation facilities. It is specifically
20 these facilities that MELP had secured or sought an
21 interconnection, in order to help alleviate its problems.

22 The Department would discard the next two
23 pages which are newspaper clippings. These are numbered
24 012332 and 33.

25 We would offer as DJ-401 for identification, a

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1 four-page document numbered 012337 through 340 and note that
2 CEI has requested confidential handling of this document.

3 CHAIRMAN RIGLER: It will be sealed and treated
4 as confidential.

5 (The documents referred to were
6 marked DJ Exhibits 353 through
7 401 for identification.)

8 MR. CHARNO: I think the Department would suggest
9 that this might be an appropriate place to break for
10 the day.

11 I think we can probably eliminate the next document,
12 based upon a stipulation with Counsel and after that we will
13 be going into Ohio Edison.

14 We have finished Cleveland Electric
15 Illuminating.

16 CHAIRMAN RIGLER: Okay. 9:30 a. m.,

17 (Whereupon, at 4:45 p.m., the hearing was
18 adjourned, to reconvene at 9:30 a. m., on Thursday,
19 February 26, 1976.)
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