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Volume 03 (Part 1)

District Court of the United States for the Northern District of Ohio, Eastern Division

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

City of Cleveland v. C.E.I., et al.
Civil Action No. C75-560

Transcript

Thursday, September 18, 1980

Hinches

court room



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.C43
1980

C 60195

1 THURSDAY, SEPTEMBER 18, 1980, 9:50 A.M.

2
3 {At 8:45 A.M. the Clerk delivered folders of
4 exhibits for the jury to view in chambers, which
5 they concluded at 9:45.}

6 THE CLERK: The City of Cleveland
7 versus the Cleveland Electric Illuminating Company,
8 C75-560.

9 THE COURT: Mr. Norris, is it
10 imperative that I rule on the stipulations at this
11 point in time, or is there additional evidence that
12 you can elicit from this witness without the need,
13 of a ruling at this particular time?

14 I am in the process of reviewing and
15 Sheppardizing the citations contained in your
16 latest submission, which I received this morning.

17 MR. NORRIS: There is no need to
18 rule at this moment. We have more testimony from
19 Mr. Hinchee.

20 THE COURT: Very well. Do you
21 have something, Mr. Lansdale?

22 MR. LANSDALE: Yes, your Honor.

23 We were served with a brief a few minutes ago,
24 and I wish to invite your Honor's attention to the
25 last paragraph of Section 2452, Ohio Jurisprudence

1 Second, which was cited and quoted from by the
2 plaintiff, saying that the taxpayer could not
3 serve the private interest.

4 This is not as later things in the section
5 show, this is not the entire truth.

6 Moreover, the last paragraph shows that,
7 "Where the taxpayer is brought under the statute,
8 it is sufficient if the plaintiff qualify the
9 taxpayer, and if the Court will not inquire
10 further whether he has any further interest or is
11 exposed to any special injury."

12 And this action we are referring to was
13 brought under the statute.

14 THE COURT: Bring in the jury,
15 please.

16 Have you gathered all the exhibits?

17 THE CLERK: Yes, your Honor.

18 - - - - -
19 {Thereupon the jury entered the courtroom
20 and the following proceedings were had in their
21 hearing and presence.}

22 THE COURT: Good morning, ladies
23 and gentlemen.

24 THE JURORS: Good morning.

25 THE COURT: We're prepared to

1 proceed.

2 You may proceed, Mr. Norris.

3 - - - - -

4

5 W A R R E N D. H I N C H E E

6 resumed the stand and testified further as

7 follows:

8

9 DIRECT EXAMINATION OF WARREN D. HINCHEE {Resumed}

10

11 BY MR. NORRIS:

12 Q Mr. Hinchee, was one of your duties as Commissioner of
13 Muny Light to approve payment of bills for load
14 transfer service?

15 A Yes, it was.

16 Q Did it come to your attention that when you arrived on
17 the scene in March of 1971 that bills rendered prior to
18 your becoming Commissioner had not yet been approved for
19 payment?

20 A Yes, it did.

21 Q How did that come to your attention?

22 A Well, CEI had filed a lawsuit against the City for over
23 a million dollars -- a million and three hundred and
24 some thousand dollars, to the best of my recollection,
25 and Director Gaskill handed me the CEI complaint and

Hinchee - direct

asked me to investigate, find out whether the charges as set forth in the complaint had any substance and whether the bills had, indeed, not been paid.

Q Did you make a determination about that issue?

A Yes, I did.

Q Did you review the bills yourself?

A Yes, I did.

Q What did you do with respect to those bills?

A I summarized the findings in a memorandum to Director Gaskill.

MR. NORRIS:

Would the Court

attache give the witness Plaintiff's Exhibit 2137?

{The Clerk complies.}

Q Mr. Hinchee, I'm handing you what has been marked for identification Plaintiff's Exhibit 2137 and ask you whether or not that is a copy of the memorandum which you have just described?

A Yes, it is.

Q Did you do anything else with respect to these CEI bills?

A Well, I discovered errors and discrepancies in the -- both the projected meter readings and in the calculations in computing the bills, and I asked the staff to recompute and reassess the amount of the bill

Hinchee - direct

1
2 and give me a corrected figure.

3 Q Mr. Hinchee, yesterday in the testimony I asked you
4 whether or not you had ever had a meeting with CEI
5 subsequent to 1971 to discuss the matter of
6 engineering for the permanent interconnection and you
7 responded in the negative.

8 Do you recall that question and your answer?

9 A Yes, I recall the question. My answer was "No."

10 A Do you wish to supplement that answer in any way?

11 A Yes, I do.

12 I meant, no, there were no voluntary meetings.

13 After the FPC order in March of 1972 forcing
14 meetings between the two utilities, then our
15 engineering staff did meet with CEI, but only after
16 the FPC order.

17 MR. NORRIS: Would the court
18 attache hand Mr. Hinchee Plaintiff's Exhibit 48?

19 {The clerk complies.}

20 MR. NORRIS: May I approach the
21 bench, your Honor?

22 - - - - -

23 {Thereupon bench conference ensued on the
24 record as follows:}

25 THE COURT: All right, yes.

Hinchee - direct

1
2 MR. NORRIS: I would appreciate it
3 if the Court would read the CEI admissions made in
4 1976 with respect to this document, and they are
5 set forth in this document that you are being
6 handed, if I may, your Honor.

7 MR. LANSDALE: I have not been
8 advised whether they are going to deal with
9 admissions.

10 MR. NORRIS: This was similar to
11 the one we had yesterday.

12 I didn't think I needed to advise you.

13 MR. LANSDALE: Which one are you
14 talking about?

15 MR. NORRIS: 48, Jack, No. 48,
16 and the plaintiff's first request for stipulations
17 and admissions.

18 The document is C48, and CEI has admitted
19 that the document is a memorandum written to a
20 CEI employee on or about the date mentioned.

21 The "Muny" referred to there is the city,
22 and the document is a CEI business record, and
23 subsequently the CEI admitted the truth of the
24 facts stated therein, and there is one additional
25 stipulation that was entered into between Mr.

Hinchee - direct

Murphy and Mr. Zagrans of my office, and that is in the upper right-hand corner, the date which is identified as 1-14-69, and that is in error. It should be 1-14-70, in order to correspond --

MR. LANSDALE: We agree that "70" is the correct date.

MR. NORRIS: I request the Court read the admissions.

MR. LANSDALE: It is January 1, your Honor.

THE COURT: I am sorry, okay.

Now, I will read this {indicating}?

MR. NORRIS: No, sir. I request that you read the admissions that CEI has admitted 1, 2, 3, and CEI has admitted the truth of the fact stated.

We are talking about 48.

MR. LANSDALE: May I be sure I am clear in my understanding? My understanding is you want the Court to advise the jury that we have admitted the truth of the facts stated in C-48? You are not asking C-48 to be read?

MR. NORRIS: I want each request read to which you have admitted.

Hinchee - direct

1
2 MR. LANSDALE: We certainly admitted
3 to the truth of the facts.

4 THE COURT: All right.

5 {Thereupon bench conference came to a close.}

6 - - - - -

7 THE COURT: Are you going to
8 allude to this exhibit, No. 48?

9 MR. NORRIS: Yes, I am. I am
10 going to ask the witness a question.

11 THE COURT: All right.

12 Ladies and gentlemen of the jury, the
13 plaintiff is now going to utilize what has been
14 marked for identification as Defendant's Exhibit
15 48.

16 Defendant's Exhibit 48 is a document or
17 memorandum written by a CEI employee on or about
18 1-14-69.

19 MR. NORRIS: No, sir, your Honor.

20 THE COURT: 1970 -- I am sorry.

21 The term "Muny" as appears in that document
22 refers to the City of Cleveland or the City.

23 Exhibit 48 is a CEI business record, and
24 CEI admits the truth of the facts stated therein.

25 MR. NORRIS: Thank you, your Honor.

Hinchee - direct

1

2 BY MR. NORRIS:

3 Mr. Hinchee, do you have in front of you Plaintiff's
4 Exhibit for identification No. 48?

5 A I do.

6 Q What does the -- what do the engineering drawings set
7 forth in Mr. Gobler's January 14, 1970, memorandum,
8 Exhibit 48, show with respect to the 69 KV
9 synchronous interconnection between CEI and Muny Light?

10 A They show that there were three or four ways to
11 accomplish supplying 69 KV service to the municipal
12 system, and they show the simplest way is, and the
13 cheapest and the least equipment involved, and the
14 quickest method of connecting the two systems
15 together was by the vehicle shown in the drawing, by
16 the 69 KV interconnection.

17 Also it shows that the municipal system could
18 have furnished a minimum of 60 megawatts and a
19 maximum of 80 megawatts by the 69 KV system in
20 1970 and 1971.

21 Q Mr. Hinchee, had CEI been cooperative with Muny Light
22 in July of 1971, and had been willing to install a
23 69 KV interconnection such as is shown in Mr. Gobler's
24 drawings that you have just referred to, could that
25 interconnection in your opinion have been in operation

Hinchee - direct

by the spring of 1972?

A Yes, it could.

MR. LANSDALE: May I approach the bench?

THE COURT: Yes.

- - - - -

{The following bench conference ensued on the record and out of the hearing of the jury.}

MR. LANSDALE: I object to this.

The witness is making highly selective readings from this exhibit, and I ask the whole exhibit go in rather than this witness's selective readings.

THE COURT: Well, Mr. Lansdale, he is permitted to use the exhibit in whatever manner he is desirous of using it.

If on cross-examination you are desirous of bringing out that which was not alluded to, you are free to do so.

MR. LANSDALE: All right.

{Thereupon bench conference came to a close.}

- - - - -

THE COURT: Overrule the objection.

MR. NORRIS: Your Honor, may I have the last question and answer read by the

1 Hincree - direct

2 court reporter?

3 THE COURT: Yes.

4 {Last question and answer read by the
5 court reporter.}

6 BY MR. NORRIS:

7 Q Mr. Hincree, during what period, during what period did
8 Muny Light have Boiler No. 3 down for repairs after you
9 joined the business?

10 A I would have to refer to the operating drawings.

11 May I refresh my recollection -- or the operations
12 charts..

13 MR. NORRIS: Would you hand these
14 to the witness, please?

15 {The Clerk places an exhibit on the easel,
16 and the witness steps to the easel.}

17 A Would you repeat the question again?

18 Q The question was, Mr. Hincree:

19 During what period of time did you have Boiler No.
20 3 down for repairs following your coming to Muny Light?

21 A Boiler No. 3, as the chart indicates, is designated in
22 dark-green, and it was taken off the line for repairs
23 in the middle of March, about the same time as I
24 arrived at the --

25 Q In what year?

Hinchee - direct

1
2 A 1971. And it was down until the spring of 1972.

3 Q Would you please designate that on the 1972
4 operations chart for the benefit of the jury?

5 {The witness places another exhibit on the
6 easel.}

7 A This is the 1972 operations chart, and it shows the
8 Boiler No. 3 down until April of 1972.

9 Q Mr. Hinchee, were you able to complete the repairs on
10 Boiler No. 3 before it went back on line in April of
11 1972?

12 A Not completely.

13 Q Why was that?

14 A Because of the urgency of the situation in which
15 Boiler No. 6 and Turbine No. 11 had to be taken down
16 for maintenance and for some repair work. Because
17 something had gone wrong with those units, they had
18 to be taken off the line, No. 3 -- Boiler No. 3 had
19 to be returned to service, buttoned up and returned to
20 service to fill in this power supply gap here.

21 Q In the spring of 1972 when the 85 megawatt unit, the
22 No. 6 and 11 came off the line, could you have
23 completed the repairs on Boiler No. 3 without putting
24 it back into service before completion had there
25 been a synchronous 69 KV interconnection in operation?

Hinchee - direct

1

2 A Yes.

3 Q What was the effect on Boiler No. 3 of putting it
4 back on line before the planned rebuilding was
5 complete?

6 A Well, there were several effects.

7 One is that the boiler was not at its full rated
8 capacity. The repairs had not been completed; it
9 meant that at some future time the boiler had to be
10 taken down and that work completed; and it meant that
11 some of the work which had been done would have to be
12 redone because the boiler was not really in top-notch
13 operating condition when it was put back into service.

14 Q Mr. Hinchee, when did you complete the installation of
15 the gas turbines?

16 A The installation of the gas turbines was completed in
17 1972.

18 MR. NORRIS: You may be seated,
19 please.

20 {The witness resumes the witness stand.}

21 Q What was the intended use of the gas turbines?

22 A The intended use of the gas turbines, as I understand
23 it, was to meet the peak loads of the system.

24 Q Is that the way the gas turbines were utilized during
25 your tenure as Commissioner?

Hinchee - direct

1
2 A No, they were not.

3 They were used substantially as base load units.

4 Q Why was that?

5 A There simply wasn't enough steam generation to permit
6 them to be used as peak load. The circumstances forced
7 their use at base load. We were not able to purchase
8 any additional power supplies from CEI.

9 Q Had there been in operation during that period of 1972
10 and 1973 that you were at Muny Light, had there been
11 a synchronous interconnection in operation between
12 Muny Light and CEI's system, would you have been able
13 to use the gas turbines the way they were supposed to
14 have been used?

15 A Yes, I would.

16 Q Was there -- what was the impact upon the gas turbines
17 using them as base load equipment, as you were forced
18 to use them, rather than as they were intended to be
19 used?

20 A Well, you accelerated the wear and tear on the -- on
21 those type of units.

22 Their complete overhaul is required every 6,000
23 hours, and in meeting peak loads, you wouldn't
24 expect to put 6,000 hours of operation on those units
25 under two and a half or three years.

Hinchee - direct

Using them as base load, you could -- you could, and we did, actually put more hours than 6,000 hours on those units in one year.

Q Did you experience any operating problems with Boiler 6 and Turbine 11, the 85 megawatt unit, during the year 1973?

A Yes, we did.

MR. NORRIS: Would the court
attache kindly hand Mr. Hinchee the 1973
operations chart?

{The Clerk places the chart on the easel.}

Q Using the 1973 operations chart, Mr. Hinchee, would you show the jury what you are referring to with operating problems on the big unit, Boiler 6 and Turbine 11?

THE COURT: Approach the bench,
please, gentlemen.

{The Court and respective counsel conferred
off the record at the bench.}

THE COURT: Why is he having to
go over these things twice, Mr. Norris?

He testified, yes, they were down.

"Step down and show us on the chart that
they were down."

Is there any contest that they were down?

Hinchee - direct

MR. LANSDALE: No, sir, no contest at all.

THE COURT: Why all the duplication of effort?

MR. NORRIS: Because I want -- now that the jury has had a chance to understand those operations charts, I think they are in a position to understand the impact on the system.

THE COURT: What has the impact on the system got to do with going over it twice. Let's go over it one time.

Let's proceed.

MR. NORRIS: May I finish?

THE COURT: No, you may not.

MR. NORRIS: It's a different type of question.

I don't believe, your Honor, that I have asked the question -- I am asking the witness the following question:

If you had an interconnection with your system, would you have had the same difficulty in 1973?

I didn't ask him that.

THE COURT: I'm not adverse to your

Hinchee - direct

1 asking him that question, I'm not adverse to your
2 asking him any questions. All I'm asking is:
3 Don't ask it two or three times.

4 You first asked him, "When was it down?"

5 He says, "It was down."

6 Then you say, "Step down and show us that it
7 was down."

8 MR. NORRIS: Okay. I understand.

9 THE COURT: All right.

10 {The foregoing proceedings were had at the
11 bench out of the hearing of the jury.}

12 - - - - -

13 THE COURT: You may proceed.

14 BY MR. NORRIS:

15 Q What kind of operating problems did you have with
16 Units 6 and 11 during 1973?

17 Don't bother with the chart, just tell us what kind
18 of operating problems you had with the units?

19 A Well, in 1973, the first part, the unit operated as it
20 should. But starting in the middle of the year, we
21 began to develop a need for shutdown and maintenance
22 which would require anywhere from 60 to 90 days; and
23 in the absence of that maintenance, the frequency of
24 problems and forced outages continued to multiply.
25

Hinchee - direct

forced outages happened quite regularly.

Q Do you remember what the operating problems were that occurred in the middle of 1973 with that unit?

A Well, there were a variety of operating problems.

There were troubles with the coal intakes; that was partly a design problem that had to be rectified.

There were problems in the tubes -- boiler tubes because there was a design problem there with the soot blowers --

Q The what?

A Soot blowers that were not properly located and allowed for excessive slagging and accumulation of debris around the boiler tubes causing them to rupture and fail.

Q Would you tell us what you mean by a "soot blower" that you just referred to?

A Well, a soot blower is a mechanical device to carry a stream of air or vapor and has some direction, you can do it remotely, because the boiler is closed, and you can direct that stream of air or vapor. It could be steam vapor into certain areas, and blow debris which is collected on the boiler tubes below the

so that you don't have to shut the boiler down.

Hinchee - direct

THE COURT: I think you would be more comfortable if you sat down, Mr. Hinchee.

THE WITNESS: Certainly, sir.

Sorry.

{The witness resumed the witness stand.}

Q Were you able to correct those operating problems with the 85 megawatt unit that you just described?

A No, we were not.

We had determined that these were the problems, but it would require, as I said before 60 to 90 days for actual corrections to be made.

Q Why couldn't you make those actual corrections?

A Well, in our mode of operation and under the stress of not having the cooperation of CEI and power supply for maintenance, we were being furnished power supply for emergency but not for maintenance. We could not take this boiler down, could not plan an outage and bring together all the people necessary and all the equipment necessary to do this kind of work.

Q Had there been a permanent synchronous interconnection in place in 1973, would you have been able to have taken the big unit down for these necessary repairs?

A Yes, sir.

Q Mr. Hinchee, during what period of time -- strike that.

Hinchee - direct

1 You mentioned maintenance power in your answer.

2 During what periods of time did you have
3 maintenance power available to you from CEI?
4

5 A CEI supplied maintenance power to the City in 1971.
6 From the period of time after Boiler 1 and Turbine 11
7 were returned to service, that was the end of an
8 emergency period and the beginning of maintenance
9 periods. And while Boilers 2 and 3 were taken out of
10 service so that precipitators could be installed for
11 pollution control devices on the stacks of Boiler 2
12 and 3.

13 Q Was there a period of time when you were no longer
14 able to get maintenance power from CEI?

15 A Yes. By December of '72, CEI had repeatedly tried to
16 discontinue the services to the city and were simply
17 under an order from FPC to continue services until
18 the FPC hearings would be held in 1972 and a decision
19 made by the Federal Power Commission.

20 MR. NORRIS: I believe that the
21 witness --

22 THE COURT: Approach the bench.

23 - - - - -

24 {The following proceedings were had at the
25 bench out of the hearing of the jury.}

Hinchee - direct

1
2 MR. LANSDALE: I object. The answer
3 is non-responsive. I ask that it be stricken.

4 THE COURT: Just a minute, now,
5 Mr. Lansdale.

6 MR. LANSDALE: I'm sorry.

7 MR. NORRIS: He misspoke.

8 He said -- obviously he said "December, '72",
9 and he made a reference to the March '72 hearing.

10 In fact, it was in December, '71 when CEI
11 said that they would no longer voluntarily continue
12 the load transfer service, which included maintenance
13 power. And then the FPC put an order on forcing
14 another five months' extension of that termination,
15 so that I don't know what --

16 MR. LANSDALE: We have a stipulation
17 on this, and --

18 MR. NORRIS: I'm going to ask the
19 Court to read it right now.

20 THE COURT: Gentlemen, one at a
21 time.

22 Poor Nick here has a hard time taking you
23 down when one person is talking; but when both of
24 you are talking, then he really has a problem, is
25 that correct?

Hinchee - direct

MR. CZOMPOLY: Yes, your Honor.

THE COURT: All right.

Now, Mr. Lansdale?

MR. LANSDALE: {a} We have a stipulation on this subject; {b} the last answer of the witness had nothing to do with the question.

We can handle it in one of two ways:

I can instruct the jury to disregard it and read the stipulation, or we can let the answer stand and you can bring it out as a credibility issue on cross-examination.

MR. LANSDALE: Let it stand.

THE COURT: I can order the jury just to disregard the entire answer.

You tell me how you want it handled.

MR. NORRIS: Well, your Honor, the question is not duplicative of the stipulation. My next question --

THE COURT: We are not concerned with the accuracy of the stipulation nor the question. We are concerned with an inaccurate answer.

MR. LANSDALE: That's right; and I will withdraw my objection.

Hinchee - direct

But I do object to this witness continually characterizing what the Federal Power Commission did. We spent a lot of time working on stipulations.

THE COURT: Yes.

Mr. Norris, that objection is well taken.

These gratuitous characterizations concerning "CEI was uncooperative," that is purely a conclusion.

He is certainly permitted to testify to the facts.

Now, if the facts reflect in the jury's mind an uncooperative effort, that's fine, that's for them to decide. But for him to characterize that and for you to characterize in your question, if they had cooperated, would something happen? It's purely a conclusory characterized question. There has been no objection to it but there is an objection now, and I would have to sustain that objection.

MR. NORRIS: Well, on the question of the stipulation, I am trying my best to avoid asking questions that track the language of the stipulations.

Hinchee - direct

THE COURT: There may be some overlap, gentlemen.

MR. LANSDALE: This witness knows exactly what he's doing, Mr. Norris, you know that.

MR. NORRIS: Now, come on.

MR. LANSDALE: So do you.

THE COURT: Mr. Norris, this is a sophisticated gentleman.

I have listened to his testimony and I have listened to his gratuitous answers.

I have had to admonish him not once but a number of times, so you can't tell me that this witness does not know what he's doing.

MR. NORRIS: Your Honor, --

THE COURT: I have tried many lawsuits and I have viewed many witnesses and --

MR. NORRIS: I assure the Court that, at the break, I will once again do the same thing --

THE COURT: Let me ask you: How are we going to handle this?

MR. NORRIS: Can I clarify the fact that he said "December, '72" when he meant "December, '71"? That is just a nonsensical answer. And my

Hinchee - direct

question went to -- here is what the question was:

From what point forward -- maybe we ought to
have the question read back.

THE COURT: If he can find it.

MR. NORRIS: I withdraw my

question.

THE COURT: Let's go on.

MR. NORRIS: I will rephrase the

question.

{Thereupon bench conference came to a close.}

- - - - -

Hinchee - direct

Q Mr. Hinchee, at what point in time did Muny Light --
I am sorry -- strike that.

At what point in time did Muny Light no longer
receive maintenance power from CEI; can you give me a
month and year?

A March of 1972.

Q All right.

MR. NORRIS: Would the Court kindly
read Joint Stipulation 196 and 197.

THE COURT: Stipulation No. 196,
ladies and gentlemen, reads as follows:

"No Federal or State regulatory commission
or agency has ever prevented CEI, by order or
otherwise, from offering to sell Muny Light firm
power, interchange power, economy interchange
power, maintenance power, emergency power,
economy power, or any other kind of power."

Now, how far am I supposed to read?

MR. NORRIS: 197 also, your Honor.

THE COURT: "No Federal or State
regulatory commission or agency has ever
prevented CEI, by order or otherwise, from offering
to share reserves with Muny Light."

Hinchee - direct

BY MR. NORRIS:

Q Mr. Hinchee, did Muny Light ever offer to assist CEI with a sale or exchange of power during the period of CEI's power shortage?

A Yes.

MR. NORRIS: Would the Court read Stipulation No. 111.

THE COURT: Stipulation 111 reads as follows:

"In 1973, when CEI was experiencing power shortages, CEI made public appeal to its customers to conserve electric power, stating that an increase in CEI's load of even 5 megawatts could contribute to a brown-out or a black-out in the Cleveland area.

"At this time Muny Light informed CEI that Muny Light had excess power and Muny Light offered to sell 5 megawatts of power to CEI on a short-term basis to assist CEI in the period of its power shortage.

"This offer was made in July, 1973, during which month CEI sold more than 1,500,000 kilowatt hours of electricity to Muny Light on emergency basis.

Hinchee -direct

"In August, 1973, more than 3,500,000 kilowatts of electric energy were sold by CEI to Muny Light on a similar energy basis. This offer was not accepted by CEI."

MR. NORRIS: Thank you, your Honor.

BY MR. NORRIS:

Q Mr. Hinchee, after March of 1972, when maintenance power was no longer available to Muny Light from CEI, did the load transfer service change in any way?

A Yes, it did.

Q Would you explain how it changed after March of 1972.

A Well, it became increasingly difficult to obtain load transfer service when it was needed.

MR. LANSDALE: I object, if your Honor please.

THE COURT: Approach the bench.

- - - - -

{Thereupon bench conference ensued on the record as follows:}

MR. LANSDALE: "It became increasingly difficult" -- he is not stating what happened.

Hinchee - direct

THE COURT: Yes. I will sustain

the objection to the form of the question.

"Difficulty" is conclusory.

He can state what happened.

MR. NORRIS: Okay.

THE COURT: What might be

difficult for one may not be difficult for another.

{Thereupon bench conference came to a close.}

- - - - -

THE COURT: I will sustain the

objection as to the form. You may proceed and

rephrase the question, and the witness will listen

to the question.

Mr. Hinchee, try to avoid any conclusory
statements in your answers.

THE WITNESS: Yes.

THE COURT: Just testify as to the
facts.

Please proceed.

BY MR. NORRIS:

Q Mr. Hinchee, after maintenance power was no longer
available to Muny Light from CEI, did that have any
effect upon the operation of the Muny Light plant?

A Yes, it did.

Hinchee -- direct

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Q Could you explain what those effects were?

A Well, maintenance could not be conducted, even the modest amount that had been previously undertaken could no longer be undertaken.

CEI required that all of the municipal generating units be in service before they would grant emergency service to us.

Q Mr. Hinchee, did Muny Light during your tenure ever recover from the deteriorating situation that you found when you arrived in March of 1971?

A Yes. There was a modest recovery taking place, beginning in 1971, and through 1972, because there was maintenance of power available in 1972, and a substantial amount of rebuilding took place, in which the capacity of the plant was increased from almost -- well, almost double from 75 to 125 megawatts, and still⁷ far short of the nameplate capacity of 200 plus megawatts.

That peaked -- the peak plant production occurred in 1973.

Most of 1973, as you can see from the charts, the municipal system was operating with substantially reduced service from the load transfer point, and

Hinchee - direct

almost entirely, and in many periods entirely on its own generation; however, that precluded any maintenance at all at that point.

Q Did you commence to have operating problems with the 85 megawatt unit in 1973?

A Yes. The unit should have been taken out of service for a period of two months in 1973, and we couldn't take it out of service at that period of time.

You can see the deterioration which began in the latter part of 1973 and concluded in 1974, the ultimate shutdown of the unit.

Q What kind of operating problems, if you recall, were you experiencing with the big unit in 1973?

Q Well, there were many problems; and they were aggravated because of a lack of ability to correct them.

I already cited the design problems, but these created boiler tube failures and created problems in boiler apparatus, and the fans needed attention, the draft fans, and it was a general deterioration of the apparatus.

Q Without any parallel interconnection between Muny Light and CEI during this period of 1973, how did you compensate for these operating problems causing

Hinchee - direct

your big unit to be down?

Q It forced us back into the mode of utilizing as much as we could the older plant and substantially base loading it on the gas turbines again.

Q Had a synchronous interconnection been in place during 1973, would it have been necessary to utilize the gas turbines the way you described?

A Not in the way that we used them.

Q Bringing your attention back to the April 23, 1971 meeting that you testified about yesterday where engineers from CEI met with you and others on your staff; following that meeting, did you attempt to obtain a parallel interconnection with any other utility company?

A Are you referring to the April 23 meeting of 1971?

Q Yes, and my question is, subsequent to that meeting, did you attempt to get an interconnection with any other utility company other than CEI?

A Yes.

Having been refused by CEI --

Q No, no, excuse me, just yes or no; is your answer yes?

A Yes.

Q My next question is, identify the company you attempted to get an interconnection with.

Hinchee - direct

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A The Ohio Power Company.

Q What did you do in attempting to get that interconnection with Ohio Power?

A Well, my assistant, Phil Matthews and I called the Ohio Power people in Canton, and we arranged a meeting -- Phil actually arranged it, and we drove down to Canton and discussed our problems and our needs with the officials there, and we asked them if they would sell us power.

Q What was the response that they gave you?

A The answer was affirmative, that they would sell us power, but they would not build transmission service into CEI territory, and it would be a problem of the City to find a place where we could connect into the Ohio Power system.

Q Did they give you a reason for not being willing to build into the CEI territory?

MR. LANSDALE:

Objection.

MR. NORRIS:

I will withdraw that

question.

Q Did you effect an interconnection with the Ohio Power Company?

A No.

Q Why not?

A Well, we made a staff investigation of the possibilities,

Hinchee - direct

the various possibilities, and we decided, after our staff investigation, that it was simply not feasible to try to build a transmission line to Ohio Power Company at that time.

Q Did you at any time consider interconnecting or trying to interconnect with the Ohio Edison Company?

A No.

Q Why did you not attempt to interconnect with the Ohio Edison Company?

A Well, I was familiar with the policies and practices of the Ohio Edison Company from my previous role as President of the Ohio Municipal Electric Association, and I knew in advance that it was against company policy to provide that kind of a service to a generating municipal.

Q Did Muny Light's inability to obtain interconnection during your tenure contribute to Muny Light's financial and service problems?

A Would you repeat the question.

Q Did your tenure -- during your tenure as Commissioner of Muny Light, did the absence of an interconnection contribute to Muny Light's financial and service problems?

A Yes.

Hinchee - direct

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2 Q In what respect?

3 A Well, in every respect.

4 It affected everything that we did. It forced us
5 into a more expensive mode of operation.

6 It delayed and prevented -- the lack of
7 interconnection delayed and prevented performance of
8 maintenance that would allow us to operate our units at
9 a better efficiency, and it substantially increased our
10 costs for preparing the units when they did come down,
11 because the normal routine maintenance could not be
12 made, and they were operated until breakdown.

13 Q Mr. Hinchee, had you reached an agreement on an
14 interconnection to be operational, as you said yesterday,
15 January 1, 1973, on that assumption, would that have
16 altered the maintenance that you actually performed in
17 the year 1972?

18 A Yes, it would.

19 Q Explain in what respects.

20 A Well, in about the middle of May or June of 1972, the
21 problems with No. 6 and No. 11 were apparent, and we
22 would have planned -- I am sorry -- in 1973.

23 We would have planned to take No. 6 and No. 11
24 out of service for the complete modification and
25 rehabilitation necessary in the spring, in March and

Hinchee - direct

April or April and May, so that -- and perform the --
perform all the maintenance yesterday so the unit
could run again for another year without problems.

Q I might have confused you --

MR. NORRIS: Could I have the
1972 operational charts put up so the jury is
able to see that?

{After an interval.}

BY MR. NORRIS:

Q Mr. Hinchee, I am going to rephrase the question. I am
addressing my question to the year 1972, and the question
is: in 1972, if you knew that you were going to have a
permanent parallel interconnection as of the first of
the year of 1973, would you have done your maintenance
any differently in 1972 than you actually did perform it?

A Yes.

Q In what respects?

A Well, we would have planned -- entered into some
planning and we would have performed maintenance on
support units preparatory to taking the No. 6 boiler
out of service in 1973.

Q When would you have taken it out of service? You said
in 1973?

A Yes.

Hinchee - direct

Q After the interconnection was in place; is that your testimony?

A Yes, sir.

MR. NORRIS: If the court attache would kindly put Plaintiff's Exhibit 2064 up on the easel. It is the transmission and distribution system map.

{After an interval.}

BY MR. NORRIS:

Q Mr. Hinchee, addressing your attention to Plaintiff's Exhibit 2064, please indicate on that map for the jury the location of the pole lines that were ultimately installed for the interconnection going from Muny Light's Lake Road station to the CEI's Lake Shore station.

A This point here is the Municipal Power Plant {indicating}, on the Lake Road side; and CEI's 53rd Street or Lake Shore generating station is approximately in the vicinity of about one mile northeast of the municipal plant {indicating}, and that connecting line would be and was built then between those two adjacent plants.

Q Mr. Hinchee, following the FPC's order in March of 1972, that there should be installed a temporary 69 KV

Hinchee - direct

interconnection, the plan was -- when was energy first transmitted across that interconnection?

MR. LANSDALE:

Objection.

THE COURT:

It is repetitious. He

has answered that three times. I will let him answer again.

A December of 1972.

Q Were there any delays that you experienced caused -- excuse me, strike that.

Were there any delays that you experienced in getting that service from CEI in December of 1972 over that interconnection?

A Yes.

Q What were the delays?

A They were largely administrative delays.

The need became apparent that we were trying to hold Boiler 6 on the line, and we had a substantial water loss there, a broken tube in the boiler --

THE COURT:

Approach the bench.

- - - - -

{Thereupon bench conference ensued on the record as follows:}

MR. LANSDALE:

The question was,

"What was the delay," and he is telling us about

Hinchee - direct

loss of boilers.

MR. NORRIS: I am not disagreeing with you on that.

THE COURT: I will sustain the objection. He answered the question.

MR. NORRIS: May I take these back, your Honor?

THE COURT: Certainly.

{Thereupon bench conference came to a close.}

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THE COURT: Read the last question and answer, please.

{Thereupon the last question and answer were read by the court reporter.}

THE COURT: Now, the jury will disregard everything beyond the statement, "administrative delays." And again, the witness will respond to the question. You respond to the question and don't go beyond.

BY MR. NORRIS:

Q I am interested in the administrative delays that you have identified.

Kindly tell the jury what administrative delays you are referring to.

Hinchee - direct

A CEI refused to make the interconnection until the City withdrew its objection to CEI's street light rating increase.

Q Did the City agree to CEI's requested street light rating increase?

A Yes.

Q Did service then flow over the 69 KV interconnection?

A Yes.

Q Was there any -- were there any other administrative delays that you experienced in putting that 69 KV temporary interconnection in service?

A Yes.

Q What were they?

A The City had purchased a very elaborate metering apparatus for the purposes of registering the current flow both in and out of the system over the 69 KV line, and CEI objected to this apparatus on the basis that they did not understand its function and had it removed and other apparatus of their choice installed.

Q Did you install other apparatus then?

A Yes.

Q And after that installation of the other apparatus, you got the current; is that right?

A Yes.

Hinchee - direct

Q Following March of 1972, did you make requests of CEI for a continuation of the maintenance power?

A Yes, we did.

Q Did you make requests for a continuation of emergency power?

A Yes, we did.

Q Did CEI ever agree to provide maintenance power during your tenure as Commissioner?

A No, they did not.

Q Mr. Hinchee, did Muny Light require any capital funds to accomplish the construction of the interconnection and the various maintenance rehabilitation programs that you have described?

A Yes.

Q And what would those capital funds -- strike that.

Would some of the funds that you used for repairs and rehabilitation come from operating revenues?

A Yes.

Q And would some come from capital funds?

A Yes.

Q All right.

What would the monies coming from capital funds typically be used for on either the interconnection or the rehabilitation?

Hinchee - direct

A Well, money from the bond funds would be used for either extending the life of existing capital equipment or adding new capital equipment.

Now, adding new capital equipment would be in the nature of building the interconnection, which we did not have before, and rehabilitation of a boiler turbine extending its life maybe another 10 years, would also be a capital investment on the existing equipment.

Q During the first -- strike that.

Did you make a recommendation in the spring of 1971 with respect to obtaining capital funds?

A Yes, I did.

Q Would the Court kindly read Joint Stipulation 118 to the jury.

THE COURT: Joint Stipulation

No. 118, ladies and gentlemen, reads as follows:

"On June 28, 1971, the Cleveland City Council passed Ordinance 1187-71.

"This ordinance authorized the issuance of \$5,000,000 of bond anticipation notes to be issued in anticipation of \$5,000,000 subordinated mortgage revenue bonds.

"The proceeds of these bonds and the bond anticipation notes were intended, in part, to

Hincbee - direct

finance a permanent parallel interconnection between CEI and Muny Light.

"In August, 1971, the City sold \$2,000,000 of the bond anticipation notes. The authority to issue an additional \$3,000,000 of bond anticipation notes was not exercised by the City.

"In December, 1972, the City prepared Ordinance 2104-72, which was intended to authorize the sale of 9.8 million of mortgage revenue bonds.

"The City intended to use the proceeds of these bonds to finance construction of the permanent parallel interconnection, to rehabilitate the City's generating plant, and to do other work on the system."

MR. NORRIS: Thank you, your Honor.

Would this be an appropriate time to take a break?

THE COURT: Yes.

MR. NORRIS: May I request the same?

THE COURT: Yes.

Ladies and gentlemen, we will take a short recess.

Please, during the recess, adhere to my

Hinchee - direct

admonition, and do not discuss the case among yourselves or with anyone else until such time as the matter is submitted to you for your final deliberations and judgment, and upon the instructions of the Court.

We will have a short recess.

{Recess taken.}

THE COURT: Please be seated.

Call in the jury.

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{Thereupon the jury was reseated in the jury box and the trial continued as follows:}

THE COURT: You may proceed, Mr. Norris.

BY MR. NORRIS:

Q Mr. Hinchee, I had asked you questions at the time of the five million dollars worth of bond anticipation notes in 1971.

Did the City obtain any funds from the bond anticipation notes in 1971?

A Yes, they did.

Q And how much was obtained in 1971 of capital funds?

A About two million dollars.

Q And the two million dollars were used for what purposes,

Hinchee - direct

unless you have already described them?

A The two million dollars were used for purchasing material and part of the construction costs of the connecting line between the two plants, and it was used for installation of precipitators on Nos. 2 and 3 boilers, and there were other minor capital improvements made that escape me right at the moment.

MR. NORRIS:

Would the court

attache kindly hand Mr. Hinchee Plaintiff's Exhibit for identification 2384?

{The clerk complies.}

Q Mr. Hinchee, I hand you what has been marked for identification Plaintiff's Exhibit 2384.

Can you identify that for the jury?

A Yes. The exhibit is a preliminary official statement of the City of Cleveland for subordinate mortgage revenue bonds.

Q In what amount?

A \$9,800,000.

Q Did you assist in any way in the preparation of that preliminary official statement?

A Yes. I employed the engineers to prepare the engineering report necessary for this type of official statement and participated with them in developing the

Hinchee - direct

information in that report.

Q Does Plaintiff's Exhibit 2384 identify the work that needed to be done to get the plant back into good operating condition?

A Yes, it was.

Q Was it the intention to repay, out of the \$9.8 million, the \$2 million worth of notes issued in 1971?

A Yes, it was.

Q Do you have any recollection as to whether or not a city ordinance was passed during your tenure as Commissioner with respect to the \$9.8 million bond issue?

A Yes, I believe an ordinance was passed just prior to my leaving the city in, I believe, either July or August of 1973.

Q Do you have any knowledge as to whether the bonds were ultimately sold? Do you have any knowledge in that area?

A Yes.

THE COURT: Are you objecting?

MR. LANSDALE: No.

THE COURT: When you stand up

like that, Mr. Lansdale, I see that activity out of the side of my eye and I get concerned.

Hinchee - direct

Q Were the \$9.8 million worth of bonds ultimately sold?

A Not at the first offering.

Q Do you recall approximately how many dollars were spent on plant repairs during the years 1972?

THE COURT: What year, '73?

MR. NORRIS: '72, your Honor.

A No, I don't.

Q Would the availability of additional bond monies have permitted the City to accomplish the utilization of its plant more rapidly?

A Yes.

Q Would that have been the only additional item that would have been necessary for accomplishing it in accordance with good utility practice?

A Yes.

Q Did you have an adequate amount of money available for maintenance during your period as Commissioner?

A I would say we had money for maintenance but not for rehabilitation and rebuilding.

Q When you came to Muny Light in 1971, Mr. Hinchee, did Muny Light have a sales program of any kind to get new customers?

A No, it did not.

Q How were you, as Commissioner, able to acquaint

Hinchee - direct

yourself with changes in the numbers of Muny Light customers from period to period?

A I received reports from the Meter Bureau.

Q What is the Meter Bureau?

A Well, the Meter Bureau is that part of the utility concerned with installation and removal of customer services and meters a customer's premises and, in some cases, actual meter reading.

Q Did you have operating -- ultimate operating responsibility over the Meter Bureau?

A Yes, I did.

Q What kind of information was set forth in the Meter Bureau reports?

A Well, various information.

Largely, the reports indicated the meters installed, the meters removed, and the reasons for removal.

Q Can you recall any kinds of reasons that were identified on a regular basis for removal of Muny Light meters?

A Yes.

Q What were representative examples of reasons for removal from Muny Light meters?

MR. LANSDALE:

Honor please.

I object, if your

Hinchee - direct

THE COURT: Approach the bench.

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{The following proceedings were had at the bench out of the hearing of the jury:}

THE COURT: State the reason for your objection.

MR. LANSDALE: The reason for my objection is that the material contained in the Meter Bureau reports are the purest kind of hearsay and do not come within the business records exception.

The plaintiff has not brought out how the Meter Bureau information is obtained, and --

THE COURT: If it comes within the business records exception, it certainly is --

MR. LANSDALE: It can, but it does not, your Honor, and we have briefed this question.

This is the -- the reasons were put down partly upon telephone information received by personnel of the Meter Bureau. It was not information known to the personnel in the Meter Bureau.

What this is is a report of what the Meter Bureau personnel were told by customers leaving or departing. This is not within the business

Hinchee - direct

records exception and it is clear hearsay.

MR. NORRIS: I disagree with that.

This is a record that is kept in the ordinary course of business, it's a monthly report.

The utility makes its day-to-day operating decisions on the basis of this report.

It goes to the Commissioner. Before Mr. Hinchee was the Commissioner, his predecessor got the reports. When Mr. Hinchee became the Commissioner, he got the reports.

He got them in the -- on a regular basis, so I think it's clearly a business record.

MR. LANSDALE: Certainly the document -- I don't say the document is not kept in the regular course of business --

THE COURT: He is saying that the source of material --

MR. NORRIS: Well, I don't think that matters.

THE COURT: It certainly does, Mr. Norris.

MR. NORRIS: If it's a business record, your Honor, if they're using this --

THE COURT: Just a moment.

Hinchee - direct

The whole underlying concept in any of this is to provide your adverse party a basis for effective cross-examination.

If there is no basis for effective cross-examination, then you have got problems.

MR. NORRIS: May I complete my comment?

We have a right, I think, to put these in to show that the statements were made, --

THE COURT: How is he going to contest it if he doesn't have the statements.

MR. NORRIS: He can --

THE COURT: This man doesn't know.

MR. NORRIS: But, your Honor, I am not putting them in -- it's a business record. They relied on the statements that were made. This was their procedure, this is what they followed, and they made their business decisions based upon the data that was gathered.

MR. LANSDALE: You're putting -- you're telling me you are not offering to show why the transfers were made? Of course you are. That's the ultimate information given here, and

Hinchee - direct

that is hearsay of the purest kind.

THE COURT: Well, let me look at these and see what they say.

MR. LANSDALE: This is not a surprise to Mr. Norris. We objected on this ground a long time ago.

MR. NORRIS: I thought your position might have mellowed.

MR. LANSDALE: What?

MR. NORRIS: I thought your position might have mellowed.

{The Court reading silently.}

MR. LANSDALE: We have briefed this, if your Honor please, and if there is any --

THE COURT: Have I got a copy of the brief?

MR. LANSDALE: I don't think you do.

I have prepared a number of trial memoranda in case questions come up.

MR. NORRIS: Excuse me, your Honor, I want to step away.

{Mr. Norris steps down from the bench area and confers off the record with Ms. Coleman.}

THE COURT: If you are going to be

Hinchee - direct

arguing, I don't want it done in front of the jury.

MR. NORRIS: I'm sorry.

THE COURT: You talk to your people at your table there.

MR. NORRIS: I'm sorry.

THE COURT: Now, are all of these the same?

MR. NORRIS: These are different months. This happens to be 1971.

THE COURT: As I view these, now, there may be something in here that I don't fully appreciate.

We have here a statistical breakdown for January of 1971, accounts as of January 31st, 1971, and we have service and meter installed, meter set on existing services, then removal of active and inactive meters.

MR. NORRIS: It's a statistical breakdown as to residential or commercial accounts, analysis of MELP and CEI customer replacement.

MR. LANSDALE: I have no objection to the statistical information. What I object to is the reasons for the disconnection --

THE COURT: There is nothing in

Hinchee - direct

here but the reasons.

{Exhibit handed to Mr. Lansdale by the Court.}

MR. NORRIS: I would like to put another comment on the record.

THE COURT: Just a minute. Let's take one thing at a time.

{After an interval.}

THE COURT: I don't see --

MR. LANSDALE: If I made a mistake as to what these are, we have elaborate plans in the prepared material, your Honor, to utilize the reasons given --

THE COURT: Why don't you read that first and tell me if that is objectionable.

MR. LANSDALE: Yes.

{Mr. Lansdale reading silently.}

THE COURT: I don't see any reasons set forth in there.

{Mr. Lansdale hands the exhibit back to the Court and points at a portion of the exhibit.}

MR. LANSDALE: The first part, that I have no objection to there.

The reports of the experts which have been

Hinchee - direct

explained to us make elaborate damage calculations based upon these comments here which are represented to be information received by people in the Bureau from these individual customers.

MR. NORRIS: We are prepared to bring in a person from the Meter Bureau to lay the foundation that this is the way it was done. We don't just rely --

MR. LANSDALE: And this -- the authorities are very clear that this is not a business record exception, and I have a prior memorandum on the subject.

{A document was handed to the Court and to Mr. Norris by Mr. Lansdale.}

MR. NORRIS: Do you have an extra copy, Jack?

MR. LANSDALE: Yes.

{An extra copy of the document was handed by Mr. Lansdale to Mr. Norris.}

MR. NORRIS: Excuse me.

{Mr. Norris leaves the bench area to confer off the record with Ms. Coleman.}

{The Court reading silently.}

Hinchee - direct

THE COURT: Mr. Lansdale, there is nothing in this -- this is the exposition of the existing law of business records and hearsay and the exceptions to the hearsay rule, and I am not contesting that, I'm in complete accord with it.

All I'm saying is I was not aware of this aspect of the --

MR. LANSDALE: Now, if that is excluded, --

THE COURT: May I finish, please?

MR. LANSDALE: Yes, sir.

THE COURT: If this line here "reasons" or "reason" is excluded, the rest of this document certainly can go in.

MR. LANSDALE: Yes.

THE COURT: Now, in the event that the document is properly qualified as required by the Rules of Evidence, the document in its entirety may go in.

MR. NORRIS: Could I ask Ms. Coleman to comment on that, please?

MS. COLEMAN: We are prepared to respond to each one of the --

Hinchee - direct

THE REPORTER: I can't hear you.

MS. COLEMAN: -- establish all of the points Mr. Lansdale has raised in his memorandum, so --

THE COURT: If you can qualify it as a business record, it certainly is admissible.

MS. COLEMAN: The purpose here is to show that this operation -- this is how information came to Mr. Hinchee, by way of reports, which is normal in their business, and this is what he had in front of him.

THE COURT: You're even three steps or two steps or one step beyond the basics.

You're asking -- you're asking a gentleman to testify -- or a witness to testify to information that he received from a document that, at this juncture, has no validity, it's hearsay.

MS. COLEMAN: If a sufficient foundation has not been laid, we will do so.

THE COURT: There has been no foundation laid. All this is characterized to me as a business record.

MS. COLEMAN: We will take care of

Hinchee - direct

that.

THE COURT: He is saying this is not a business record predicated upon hearsay; and all I'm saying is if it can be qualified as a business record, it is admissible. If it cannot be qualified as a business record, your objection is well taken. It's that simple.

Certainly, at this juncture, there is nothing in it but --

MS. COLEMAN: Your Honor, we will respond to --

THE COURT: Certainly this man can testify from these records at this time.

MR. NORRIS: Thank you.

{The foregoing proceedings were had at the bench out of the hearing of the jury.}

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THE COURT: Please proceed, Mr. Norris.

BY MR. NORRIS:

Q Mr. Hinchee --

THE COURT: You are free to use that document within the parameters that you have agreed to or the Court has indicated.

Hinchee - direct

MR. NORRIS: Would the court
attache hand Mr. Hinchee Plaintiff's Exhibit 1827?

{The clerk complies.}

BY MR. NORRIS:

Q Mr. Hinchee, do you have in front of you Plaintiff's
Exhibit for identification 1827?

A Yes.

Q Will you please identify that for the Court and jury?

A This is January, 1971 Report of the Electric Meter
Bureau, City of Cleveland.

Q And are the other months of the year 1971 similarly
attached there?

{The witness leafing through the pages.}

A Yes, there appear to be consecutive reports through
the entire year of 19 -- through August of 1971.

Q Turn to the report for April of 1971, if you would,
please.

{The witness complies.}

Q Do you have that in front of you?

A Yes.

Q Your name is in the upper left-hand corner, is that
correct?

A Yes, sir.

Q Did you receive these reports on a regular basis?

Hinchee - direct

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2 A I did.

3 Q On the first page of the report for April of 1971,
4 there is statistical information set forth. Do you see
5 that?

6 A Yes.

7 Q What use did you make in your business of that -- of the
8 statistics contained in the first page of this
9 document?

0 A I was primarily concerned with the loss of or exchange
1 of customers and to evaluate the reasons therefor.

2 Q Turning to the next page of the April, 1971 Electric
3 Meter Bureau report, what is the information set forth
4 there?

5 A That's a statistical -- more statistical detail of
6 the information which was recapped on the first page
7 and gives more detail on the operation of the Meter
8 Bureau, such as turn on, turn off orders, et cetera.

9 Q Turning to the next page, read the caption at the top
0 of the page, please.

1 A "Meter Bureau Monthly Report of MELP Consumers Lost to
2 CEI for April, 1971."

3 Q And is it accurate that there then is set forth on that
4 page and the next page a series of addresses with
5 respect to customers that had switched from Muny Light

Hinchee - direct

to CEI?

A Yes, it is.

Q Would you please explain the procedure that was follows by a Muny Light meter man or woman following the -- strike that.

What procedure did a meter person at Muny Light follow in removing a meter from a customer who switched to CEI?

A Well, usually the CEI meter people would call our Meter Bureau and ask for a meter person to come out and pick up the Muny Light meter.

Our meter people were instructed to respond immediately, and to make inquiry directly of the customer at the time they picked up the meter as to the reason for the switch and the reason for the exchange, and report that to me.

Q Mr. Hinchee, when you arrived in March of 1971, was Muny Light doing anything to respond to CEI's efforts to gain customers from Muny Light?

A No, they were not.

Q Did Muny Light at that time have any personnel trying to get new business when you arrived in March of 1971?

A No.

Q Was Muny Light doing any advertising when you arrived

Hinchee - direct

in March of 1971?

A No.

Q Was CEI doing anything by way of advertising or sales promotion to get new customers at that time?

A Yes.

Q Did you attempt to do anything about that?

A Yes, we did.

Q What did you do after you arrived in an effort to combat or react to the activities that were causing Munny Light to lose customers?

A I reviewed the potential within the Department of sales people and discovered that I had only one or two people qualified in that direction; and I appointed them to the new duties and they became our customer contact representatives.

Q What was Munny Light's policy on getting new business after you became Commissioner?

A Well, I'm at a loss to determine "policy."

We felt that the drain of customers and the loss of revenues had to be stopped or we couldn't survive that kind of activity. And so any new business that we heard of coming into town or any new construction, our people -- our sales representatives were instructed to contact those people, and also to go

Hinchee - direct

back to customers who had been removed from our service and confer with them and urge them to come back to the Municipal System.

Q What was Muny Light's practice or program with respect to going after CEI customers that had never been Muny Light customers?

A We certainly didn't turn any down.

Usually there were requests from time to time for Muny Service, and we would go out and examine the premises and determine whether or not we could supply the service. If we could supply it, we did.

Q Were there any benefits to regaining from Muny Light the former customers who had previously been Muny Light customers?

A Well, certainly.

Lines had been constructed and services were already in place, and the expense of picking up a customer that we had served previously was very, very nominal, very small; it should be advantageous financially to get as many of our previous customers back as possible.

Q Do you recall whether you were successful in stemming the tide at all of customers switching from Muny Light to CEI?

Hinchee - direct

A Yes. I think we were successful.

Q What classes of customers -- was it Muny Light's desire to add all classes or different classes more than other classes?

A Well, we had preferred services because we had lower rates. Our philosophy was that residential and small commercials were preferred services. However, there was a need for industrial-type load such as the easterly and pumping stations and -- water pumping stations to give us a solid base for service around the clock.

Q Did you give consideration to serving customers in parts of Cleveland that were not already being served by Muny Light when you arrived?

A Yes.

Q Were there particular customers that -- strike that...

What was your reason for wanting to serve customers in parts of Cleveland not already being served by Muny Light?

A Well, I felt like that as many of the people in the City as possible should benefit from their municipal services.

Q Did you have any particular facilities in mind that you found were not being served by Muny Light that you would like to have as Muny Light customers?

Hinchee - direct

A Yes.

MR. NORRIS: Would the court
attache hand Mr. Hinchee the blue dots that I have
provided?

{The clerk complies.}

Q I would ask you, Mr. Hinchee, to step over to
Plaintiff's Exhibit for identification 2064, and let
me ask you, while you are standing next to the exhibit,
to identify any particular customers that you were
desirous of serving as an electric supplier that you
weren't serving when you first arrived here.

Just identify the customers, first.

A Do you want me to put --

Q I want you to identify the customers.

THE COURT: He has, Mr. Norris.

He said he wanted residential and small
commercial customers, and he also wanted large
industrial.

Hinchee - direct

MR. NORRIS: I am asking him,

your Honor, does he remember a particular customer that he can identify.

THE COURT: Individually? Okay, fine.

A I was very actively pursuing the services at the Easterly Pumping Station and the Westerly Pumping Station and the Southerly Pumping Station, and to an extent the airport.

Q Would you place a blue sticker on the acetate overlay, Plaintiff's Exhibit 2064, and mark the location of those facilities that you were seeking to add to the Muny Light customer list.

A That is the location of the Easterly Pumping Plant {indicating}.

This is the approximate location of the Westerly Pumping Plant {indicating}, and this is the approximate location of the Southerly Sewage Treatment Works {indicating}, and this is the southerly extremity of the airport.

Q Were there any others, Mr. Hinchee, that you would like to locate on the map?

A I can't think of any.

THE COURT: All right. You may

Hinchee - direct

resume your seat.

Now, the blue dot in the center of the exhibit, that represents the Westerly Sewage Pumping Station?

A Yes.

Q Was Muny Light providing service to the Westerly Sewage Pumping Station when you arrived in March of 1971?

A To the best of my recollection there might have been a lighting service or small power service, but not any large power service there.

Q What steps did you take to explore the possibility of Muny's trying to add the westerly pumping station as a customer?

A Well, the station was being electrified, and we met with the engineers doing the design, and we actually planned to reroute transmission lines and build a substation at that location, and we submitted those plans to the engineers who were working on the Westerly Substation.

Q You used the expression "the pumping station was going to electrify," and I believe you should explain that.

A Well, all these pumping stations, except the Southerly, was new construction and had been in

Hinchee - direct

operation serving the City for a number of years, but over in the past years they had had their own power facilities right on the premises, and they would have had steam boilers, a steam boiler plant and steam operations, and their pumps, some were run by electricity, but most of them were run by steam, so in the plant modernization they did away with their own boiler and own power production, and they decided to install all electric equipment and buy electricity to move the water through those pumping stations.

Q Were discussions concluded before you had left the City?

A No, I don't think so.

Q I may have missed it in your testimony, but what would Muny Light have had to have done to get that service out to Westerly?

A I will have to show you --

THE COURT: Go ahead.

A The plans were -- remember earlier I identified the red line as a 69,000 volt service line, and it goes to West 41st Street, and that is a double line, and the plans were to break one of the lines at this point and extend that line to Westerly, to a substation there, and then build a new line from West 41st Street

Hinchee - direct

looping back through the substation at this location
{indicating}, so you would have a dual feed going into
the pumping station.

Q Thank you, Mr. Hinchee.

Did your division make any plans for the
extension of those 65,000 KV cables?

A Yes, we did.

Q Turning your attention to the blue dot in the lower
right-hand corner of Plaintiff's Exhibit 2064, and
when you came to Muny Light, was Muny Light providing
service to the Southerly Sewage Treatment Plant?

A No.

Q Well, did you take steps to explore that possibility
of serving them?

A Yes.

Q Explain what the steps were, please.

A Well, again, as before, with Westerly, we talked with
the engineers for the Sewer Authority, and we had
several meetings with them, and we made some
preliminary plans for building a line out to the
Southerly and some tentative plans to build a
substation there.

Q What kind of a line extension would have been involved
to bring in Muny Light service to the Southerly

Hinchee - direct

Sewage Treatment Plant?

A For that distance, 69,000 volts.

Q Can you show the jury approximately where that extension would have taken place.

A Well -- this is the Southerly here {indicating}, and to the best of my recollection we would have tried to bring a direct route from our closest point which would have been 44th Street out to this location.

However, we were looking at the possibility of trying to bring service down from the main power plant as well, so there were a couple of alternates being explored at the time.

Q Now, is the Southerly Sewage Treatment facility located within the City of Cleveland or outside?

A It is located outside of the City of Cleveland, or it was at that time.

Q Do you happen to know what community or town or village it is located in?

A I don't remember that.

Q Had you been successful in acquiring the Westerly Sewage Treatment facility and the Southerly Sewage Treatment facility, of course you would have gotten revenue from those new customers; is that correct?

A Yes.

Hinchee - direct

Q Would there have been any other benefits to Muny Light other than the revenues to have had those customers on your customer list?

A Well, we would begin to extend and strengthen the total system, as I described, the loop service into Westerly, and we would have extended the 69,000 volts again from West 41st Street down to the Southerly, and then ultimately, at least at Phase 2 or Phase 3, back up to the power station, providing an additional 69,000 volt loop down in that direction.

Q What kind of a further expansion opportunity would those basic lines have permitted?

A Well, at Westerly we would have provided enough line capacity to then build a distribution substation in that area and pick up additional services in the future.

Q What about the same question with respect to Southerly?

A Yes; the same plan would apply to Southerly.

Q When you arrived in March of 1971, was Muny Light serving the Eastern Sewage Treatment facility?

A I believe they were.

Q What was your interest then, if you were already supplying Easterly, what was your interest in that from a new business standpoint?

A Well, the service was being substantially increased,

Hinchee - direct

and we wanted to share in that increase.

We wanted to supply the new equipment that they were putting in.

Q The facility was being expanded?

A Yes.

Q I see.

What steps did you take to explore the possibility of Muny Light's participating in the Easterly expansion?

A Well, we met with the plant manager and the engineers, and we worked out our own plans to assist in the expansion.

Q Were those discussions concluded before you left the City?

A I believe that they were.

Q And with what results?

A To the best of my recollection, we did get the service at the Easterly station.

Q Were the discussions concluded before you left the City with respect to the Southerly Sewage Treatment facilities?

A No, they were several months behind.

The old Easterly was underway, and Westerly was in the second stages of planning, and the Southerly was in the first stages of planning.

Hinchee - direct

Q Are there any particular benefits to a utility system associated with loads such as the pumping stations that you were describing?

A Well, we had lost enormous amounts of industrial base to CEI, and that would replace that base, the pumps operating around the clock, and in fact, in emergency conditions they can be substantially reduced in their operation and the pumps are using the electricity at night when you don't have other loads, and so it is quite an advantage to any utility to have that kind of a base.

Q Would the addition of those kinds of customers have permitted a more efficient operation of your big 85 megawatt unit?

A Yes, it would.

Q You put a fourth blue sticker on that map down by the airport.

Will you tell the jury what was in your contemplation with respect to the airport?

A Well, during the time that I was Commissioner, the General Service Administration announced that they were going to sell the old Cadillac Tank Plant down below the airport, and part of that property included a complete substation, transmission substation.

Hinchee - direct

I don't remember the exact size, but it would match at least two out of three other possibilities that we had, and I assigned one of my staff to pursue that and see if we could buy that substation.

Q Who was the person on your staff you assigned to that?

A George Pofok.

Q What benefits would have accrued to Muny Light had you been successful in getting the substation down at the airport?

A Well, there were a number of advantages to obtaining it. In the long-range future it would have been possible for us to run them additional transmission services out to that location and complete a peripheral loop around the city; and then the substation apparatus was quite a substantial investment, and with GSA selling it, we could save the City many hundreds of thousands of dollars by buying it.

Q How would you have gotten the power from the existing system down to the airport substation?

A Well, I don't know if while I was there we had worked out any routing. It would have been difficult and not easy.

Probably it would have to have been constructed under ground, but for underground construction there

Hinchee - direct

1 was some equipment that might have been used.

2 Q Was Muny Light successful in acquiring that?

3 A No.

4 Q Do you know what happened to it?

5 A No, I don't.

6 Q During your time as Commissioner, Mr. Hinchee, what
7 steps did you take to seek power from sources other
8 than either your own generation or CEI?

9 A Well, we contacted several entities.

10 We contacted Ohio Power -- I already described.

1 We talked to the Buckeye Power Group down in
2 Columbus, and we talked to the City of Richmond,
3 Indiana, and we talked to the Power Authority in the
4 State of New York.

5 Q With respect to the PASNY, the Power Authority of
6 the State of New York, that which you just mentioned,
7 did your hope with respect to these new pumping
8 stations, base load possibilities, was there any
9 relationship between wanting to have those base loads
10 and wanting to have other sources of power such as
1 PASNY power?

2 A Well, to meet any commitments of the type that we
3 were talking about here, we would need additional
4 firm supply of power, and if we were able to purchase
5

Hinchee - direct

30 megawatts of power from PASNY, then that would have allowed us to take on 30 megawatts of additional customer service.

MR. NORRIS: Your Honor, I do have short additional lines of questions, but I am afraid I can't complete them before the luncheon break.

I wonder if this would be a good time to break?

THE COURT: Certainly.

Ladies and gentlemen of the jury, it is now time for the luncheon recess, so why don't we go to lunch, and we will come back here at 1:30 and resume.

Please, don't discuss the case with anyone, not even among yourselves, until such time as I have submitted the case to you for your final determination and judgment, and upon the instructions of the Court.

We will be in recess. You may go to lunch.

{Luncheon recess taken.}

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THURSDAY, SEPTEMBER 18, 1980; 1:35 P.M.

{The following proceedings were had before
the jury entered the courtroom:}

THE COURT: Please be seated.

Yes, Mr. Norris?

MR. NORRIS: Your Honor, we
inadvertently dropped some language in Joint
Stipulation 119, and Mr. Lansdale is aware of
this; and we have now found the eight lines in
our machinery that was inadvertently dropped out,
and I would propose that the revised 119 be put
in your Honor's possession because I will be
asking that that be read into the record this
afternoon.

THE COURT: I have a copy of it.

MR. LANSDALE: We are agreed.

THE COURT: Bring in the jury.

- - - - -

{Thereupon the jury entered the courtroom
and the following proceedings were had in their
hearing and presence.}

WARREN D. HINCHEE,

resumed the stand and testified further as follows:

DIRECT EXAMINATION OF WARREN D. HINCHEE {Resumed}

BY MR. NORRIS:

Q Mr. Hinchee, during the period of time that you have been working with me in the preparation of your testimony, have you been receiving compensation?

A Yes, I have.

Q What is your present business?

A I'm a consulting engineer and management adviser.

Q What have been the arrangements that you and I have entered into with respect to your compensation for the time spent preparing for this trial?

A I'm being paid my regular consulting fee of \$50 an hour and expenses.

Q This morning you asked me questions with respect to the \$9.8 million bond issue --

MR. NORRIS:

Your Honor, may I

request that the Joint Stipulation 119 be read to the jury at this time?

THE COURT:

Ladies and gentlemen

of the jury, Stipulation 119 reads as follows:

Hinchee - direct

"Ordinance 2104-72 was introduced into City Council on December 13, 1972, authorizing the issuance of \$9,800,000 in revenue bonds.

"The City intended to use a portion of the proceeds of these bonds to finance the 138 KV interconnection.

"When introduced, Ordinance No. 2104-72 called for the bonds to be sold to the City Treasury Investment Account, sold to the Sinking Fund Account, or sold by private sale.

"The proposed ordinance, 2104-72, was amended to call for the bonds to be sold on the open market, and the ordinance was passed with this amendment on July 2nd, 1973.

"In May, 1974, the City prepared an offering estimate for the bond as was required by sale on the open market.

"When the bonds were offered for sale in the spring of 1974, the City was unable to sell the bonds.

"In November of 1974, Ordinance 2104-72 was amended to delete the requirement of sale on the open market and to permit the bonds to be sold to the City Treasury Investment Account, sold to the

Hinchee - direct

Sinking Fund Account, or sold by private sale.

"On July 21, 1975, Cleveland City Council authorized the sale of \$1.1 million of bonds to the City, which sale was subsequently made.

"On December 17, 1975, Cleveland City Council authorized the sale of \$500,000 worth of bonds, which sale was subsequently made.

"On April 5, 1976, Cleveland City Council authorized the sale of \$2,412,500 of bonds, which sale was subsequently made."

MR. NORRIS:

Thank you, your Honor.

BY MR. NORRIS:

Q Moving into a new area --

MR. NORRIS:

I would ask the Court to read Joint Stipulation 166 to the jury.

MR. LANSDALE:

May I approach the bench?

THE COURT:

Yes.

- - - - -

{Thereupon bench conference ensued on the record as follows:}

MR. LANSDALE:

This is the first venture into the CAPCO area, and I wish to point out that this is not a conspiracy charge, and

Hinchee - direct

unless this is offered simply for background purposes I object, because I think that CAPCO is out of this case, and I object to testimony concerning accessibility to CAPCO or any question of admission or any description of it for the purpose of the City getting coordinated on that operations which this begins to get into.

This is a very basic objection.

MR. NORRIS: Our position is that a single firm monopolization theory, under that theory that we are proceeding, that we are proceeding on the basis of another denial, a forced denial, if your Honor please; namely, the denial of access, and what the parties did is important to the jury's ability to weigh and to determine whether or not there has been a denial of access.

THE COURT: Denial of access to what?

MR. NORRIS: To the interchange transaction.

CAPCO said to CEI, "You deal with the City."

It was true at the time the requests were made, true that there were requests for

Hinchee - direct

membership, and requests for purchase of a piece of a nuclear facility, and there was speculation as to "Well, maybe this is illegal and maybe it can't be done."

The point that the City wants to make, your Honor, is that if there had been any kind of commercial good faith, that that would not have been just closed off at the pass, and that the fourth denial is a denial of affording an option.

The City wanted to participate in as many options as they could.

MR. LANSDALE: The first complaint charged denial of access to the group.

That case has been settled and dismissed with a general release.

I submit that that matter of access to CAPCO is moot.

THE COURT: Well, Mr. Lansdale, it appears to the Court at this juncture that denial of access could be an issue in this case.

If you want to talk to him -- or do you want to be a part of this, Mr. Hjelmfelt, then come on up here. Don't be bashful.

MR. LANSDALE: My point --

Hinchee - direct

THE COURT: I only have a one track mind, fellows, and I get these interruptions.

I was saying that denial of access could very well be an issue in this case.

I don't know what the evidence in this case will show, but assuming arguendo that there was a right, or there was an authority for the City to participate in CAPCO, albeit that initially the complaint was a conspiracy complaint which has now been eliminated from this case, and if the evidence that develops shows that CEI, acting in bad faith, prevailed upon other people to keep the City, who was entitled by law or whatever, to participate, that certainly would be an indication of its predatory intent.

MR. LANSDALE: Perhaps so, but it sounds like a Texas conspiracy to me.

THE COURT: Well, it could be a conspiracy insofar as other people are concerned, but if you perform an overt act of prevailing, that reflects upon your intent, and I am going to have to overrule your objection, Mr. Lansdale, and in the event that you lay a proper foundation, you are going to have to show, number one, that you

Hinchee - direct

are entitled to do it; and number two, that you undertook affirmative action, and you are going to have to show that it was CEI that kept you out.

MR. NORRIS: May I say that I don't think we have the burden to show that they necessarily prevailed on the other CAPCO people.

I think we will carry our burden if we demonstrate that the other CAPCO members, membership, says, "Hey, CEI, you deal with the same."

Now, we are brought back to the same monopolization claim. This is another exercise of monopoly power to put the little guy under the thumb.

THE COURT: Well, you know, what you are saying may be true in a certain sense, that, yes, if you were going to show that the other people said, "We will do anything that CEI said we should do," then you have to take the next step and say then that it was CEI's policy that prevented us from getting in there, it was an overt act, that they did something to these people that prevailed upon them, CEI did something to the CAPCO members that prevailed upon the other members to keep them

Hinchee - direct

out.

MR. NORRIS: Well, it is a monopoly situation and you don't need specific intent.

THE COURT: All you need for monopoly is a general intent and knowledge to do it knowingly.

MR. NORRIS: It doesn't have to have anything to do with CAPCO.

They have got power of access.

THE COURT: Where do you make the differentiation between attempt and actual monopolization?

MR. NORRIS: My point is, your Honor, that they hurt us competitively just as much by denying power exchange opportunities.

THE COURT: What is the opportunity? You are talking in general terms.

My ruling -- my ruling is this, that, yes, you will be permitted to go into this, providing you lay the proper foundation.

Now, I have laid broad general parameters in which you can proceed, and Mr. Lansdale, I will overrule your objection at this point in time, and you will reserve the right to object at any

Hinchee - direct

time along the line for whatever reason, and you are free to proceed to develop this, and if you can lay the proper foundation, okay; but you are not going to get testimony in unless the foundation is laid.

MR. NORRIS: I am not going to attempt to prove that they prevailed on the other people. I am proving --

THE COURT: Well, I mean, I don't know what you are going to prove.

All I have done, I have ruled on the objection before me. This appears to me to be a preliminary question.

{Thereupon bench conference came to a close.}

- - - - -

THE COURT: The objection is overruled. Stipulation 166, ladies and gentlemen of the jury, reads as follows:

"CAPCO Power Pool was formed by an agreement between CEI, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, and Toledo Edison Company, to effect coordinated development of generation and transmission facilities in coordinated operations to assure greater reliability

Hinchee - direct

of interconnections, back up in case of emergencies, and better economies of operation."

MR. NORRIS:

Thank you, your Honor.

BY MR. NORRIS:

Q Mr. Hinchee, did you ever discuss with CEI the matter of the City's participating in CAPCO?

A Yes, I did.

Q In addition to what you testified about the interest in additional sources of power supply, was the City -- was Muny Light at that time also looking for additional generating capacity?

A Yes, we were.

Q What did you do along this line of trying to find additional generating capacity?

A Well, we made overtures to CEI and to, also, the members of the CAPCO power pool, Toledo Edison specifically, for participation in the nuclear generating stations that they were planning to build.

Q Did you do anything else along this same line?

A Well, of course, we made inquiry of PASNY for -- Power Authority of the State of New York, and sought various -- participation in various regional sources.

Q With respect to your overtures on trying to get into the CAPCO power pool in some way, were you doing that

Hinchee - direct

directly through the City or were you doing it through some other organization?

A Well, we did it -- Cleveland did it both ways.

As I testified earlier, we were a signatory member in the formation of American Municipal Power of Ohio, and these requests -- City requests were paralleled by almost identical requests for the same type of participation by AMP-0 Ohio.

Q Can you tell the jury what the discussions were that you had with CEI about these matters?

A Well, they were, at first, inclined to take our requests very lightly; and then later on they did become more serious about it and realized that we were -- our intent was serious and we were approaching it on a business-like basis.

Then Mr. Howley suggested to the City that we write a proposal to CEI and outline conditions under which we would like to participate.

Q Did you make such a proposal?

A We had some difficulty with that, because then we asked for information --

MR. LANSDALE:

Objection, your Honor.

THE COURT:

Sustained.

Mr. Hinchee, would you kindly answer the

Hinchee - direct

question?

Read the question back to the witness.

{The last question was read by the reporter.}

THE COURT: Did you make such a proposal?

It is a simple question requiring a simple answer.

A Yes.

Q What did you do in preparation for making that proposal?

A Well, we made inquiry back to CEI for information relating to the expense of the construction and to what degree participation might be available to the City.

Q Did you do anything else in connection with preparing your proposal?

A Well, we didn't get that information.

So then we went to the Nuclear Regulatory Commission where the application had been filed and examined the records in the files of the Nuclear Regulatory Commission for the information that we needed to make a proposal to CEI.

Q Did you then make a proposal?

A And we did make a proposal.

MR. NORRIS:

Your Honor, I would

Hinchee - direct

request the Court read Joint Stipulation No. 179.

THE COURT: Stipulation 179 reads
as follows:

"The City sent copies of its letter of August 3, 1973 requesting admission to CAPCO directly to each CAPCO member."

MR. NORRIS: Thank you, your Honor.

BY MR. NORRIS:

Q Mr. Hincbee, was there any person at AMP-0 that was taking the lead more than others in trying to get the PASNY power for the City of Cleveland?

A Yes. John Engle was President of AMP-0 and conducted all of the meetings and negotiations.

Q While you were Commissioner of Muny Light, was AMP-0 able to secure the PASNY power for Cleveland?

A No.

Q Do you know why it was unsuccessful?

A Well, yes.

There was a condition by the PASNY, Power Authority of the State of New York, that they would have to know that we had transmission facilities available to serve the power before they would make a final action on our application for that power.

Hinchee - direct

MR. NORRIS: I'd ask the court
attache to hand to Mr. Hinchee the large chart
that's to his rear, Plaintiff's Exhibit 2066,
and the overlay on top of it is 2493. And if I
might request that the exhibit should be put up
with the base exhibit only and the acetate overlay
placed behind.

May I assist him?

THE COURT: Pardon?

MR. NORRIS: May I assist him?

THE COURT: He can do it.

{The clerk places the exhibit on the easel
and flips the acetate overlays behind the main
exhibit.}

BY MR. NORRIS:

Q Mr. Hinchee, I hand to you what has been marked for
identification Plaintiff's Exhibit 2066.

Can you tell the jury what that represents?

{The witness steps to the easel.}

A I believe that this represents geographic locations
of, first of all, the Division of Light and Power
Service territory within the boundaries of the City of
Cleveland, the adjacent City of Painesville, the
Cleveland Electric Illuminating Company's service

Hinchee - direct

territory boundary, and Ohio Edison territory service boundary, and Pennsylvania Power Company service boundary.

Q Would you kindly flip down the first acetate? It's just a partial piece of acetate, not the big one but the small one.

{The witness complies.}

Q Could you kindly identify for the jury what is now represented on that exhibit?

A Well, this appears to be the 69 KV transmission services described earlier on the larger map between the City -- Municipal Power Station and Collinwood Substation and West 41st Street Substation.

Q Now, would you kindly flip down the large piece of acetate which bears identification of Plaintiff's Exhibit 2493?

{The witness complies.}

Q Can you tell the jury what that represents?

A Yes. This represents CEI's transmission services into and surrounding the area.

There are some of the CEI power plants along -- well, maybe all of them are depicted here, I don't know, Eastlake, Avon Lake, Lake Shore, and Ashtabula.

This is the City of Painesville still in the

Hinchee - direct

background, large substation there, and interconnection points with Ohio Power Company down at Canton, and with Ohio Edison -- I don't know the geographic location -- there are two points there; and several points of interconnection at the west of Avon Lake with Ohio Edison Company.

In the east side, there is a point of interconnection with the Pennsylvania Electric Company.

Q Mr. Hinchee, what was the route that PASNY power would have taken coming from Niagara Falls to Muny Light had that power been available at that time?

A Well, geographically, Niagara Falls is at the northernmost extremity of Lake Erie, and Niagara Mohawk, I believe, carries the power to the border of New York; and then about 80 miles or so across Pennsylvania, the Pennsylvania Electric Company would transmit power, and the balance then would be by CEI transmission lines.

Q Was there any way for Muny Light to get the PASNY power into Muny Light's generating station except across the transmission facilities of the City -- of CEI?

A No, sir.

Q Mr. Hinchee, why didn't the City build its own transmission lines out to the Pennsylvania border to

Hinchee - direct

obtain the PASNY power?

A Well, it simply wasn't feasible. There were several reasons why not.

One was that the amount of power was very small.

The other reason would be that the major problem in establishing a corridor that would not conflict in many ways with the existing -- duplicate the existing transmission lines, and the expense of building a transmission line for that small amount of power would simply not be justified.

Q What experience have you had in your career in building transmission lines in the utility industry?

A Well, I've built transmission lines for Tampa Electric Company, and I've built transmission lines for Columbus, Ohio.

Q What were the circumstances -- strike that.

Would you describe the experience that you had in building transmission lines for the Columbus Municipal System when you were Assistant Superintendent there?

A Well, in order to obtain an interconnection with the utilities that I talked about yesterday, South Central Power Company, it was necessary for the City to build, I think, approximately 14 to 16 miles of transmission lines to reach a point where it could interconnect with

Hinchee - direct

the REC company.

Q Had Muny Light attempted to build a transmission line from Cleveland out to the Pennsylvania border, do you have -- strike that.

What has been your experience with respect to building transmission lines through units of local governments, towns, villages, townships; have you got any experience in building transmission lines through communities?

A Yes.

Q What kinds of difficulties are normally encountered in building transmission lines through local communities?

A Well, it varies; but in the case here, when we were investigating the feasibility of building a transmission line, our staff talked to many of the officials in the surrounding communities that we thought we might have to put the line through those particular boundaries, and there was substantial resistance to any overhead construction.

It was quite apparent that if we did not want to spend many years in litigation, that the only feasible thing that could be done if we elected to build a transmission line would be to underground the biggest part of it.

Hinchee - direct

MR. NORRIS: Would the court
attache kindly hand Mr. Hinchee the following
Plaintiff's Exhibits for identification:

2855, 2141, and 1528.

{The clerk complies.}

{After an interval.}

MR. NORRIS: Excuse me, your
Honor, I may have the wrong number. May I just
check my file?

{After an interval.}

THE COURT: You may proceed,
Mr. Norris.

BY MR. NORRIS:

Q Can you identify Plaintiff's Exhibit for identification
2855?

A Yes. That is a draft letter to the Department of
Public Utilities to Director Gaskill from CEI, Lee
Howley, Vice President, and is the letter which
intended to describe an agreement or potential
agreement between the City of Cleveland and CEI for
payment of the monies that were talked about yesterday,
\$400,000 I think, in July; \$400,000 in August, and the
balance in October.

This was the letter that was discussed earlier in

Hinchee - direct

the meeting -- first in the meeting, and then --

Q In what meeting?

A In the July 8th meeting, 1971 between CEI and the City, and then rejected as not being responsive to the needs of the City or to CEI.

MR. NORRIS: If it please the Court,

in the testimony yesterday Plaintiff's Exhibit 1513 was used by the witness and, without objection, it went into evidence yesterday; and counsel represents that Plaintiff's Exhibit 2855 was the final version of Plaintiff's Exhibit 1513 which was actually utilized in the July 8th, 1971 meeting.

BY MR. NORRIS:

Q Mr. Hinchee, would you kindly address your attention to Plaintiff's Exhibit for Identification 2141?

{The witness complies.}

Q Please tell the jury what that is?

A That is -- this exhibit is a letter from the City of Cleveland dated August 13th, 1971 to Mr. Howley of CEI, and the letter is from John F. Dolan, Special Counsel for the City of Cleveland.

Q And what do you find attached as the second page of this exhibit?

Hinchee - direct

A The letter is a letter of transmittal, and the attached document is a photostat of the check for \$400,000 which was transmitted to the Cleveland Electric Illuminating Company.

Q And that was the second payment that you have testified about due on August 13th, 1971?

A That is correct.

Q Address your attention kindly to what has been marked for identification as Plaintiff's Exhibit 1528.

{The witness complies.}

Q Can you tell the jury what that is?

A This is a letter from the City of Cleveland to Lee Howley, Vice President of CEI. It transmits a check in the amount of \$692,376.06 to CEI; and it is also a request for CEI to proceed with engineering meetings that had not taken place at this point per the agreement.

Q What response did you get to that request for engineering on the interconnection?

A Well, we were told it would take place, but we could never make the arrangements for it to take place.

Q Mr. Hinchee, if the City had obtained an additional bulk power source during your tenure as Commissioner, would it have -- would you have tried to obtain

Hinchee - direct

additional customers?

A Yes, sir.

Q In seeking additional retail customers, did you consider that Muny Light was limited to the area in which it already had distribution lines?

MR. LANSDALE:

I object.

THE COURT:

Sustained.

Don't lead the witness. I'm not precluding you from this type of testimony, but you're leading the witness, Mr. Norris.

Q In seeking additional retail customers, Mr. Hinchee, in what area would you have intended to seek such customers?

MR. LANSDALE:

I object.

THE COURT:

Approach the bench.

{The following proceedings were had at the bench out of the hearing of the jury:}

THE COURT: State the reason for your objection.

MR. LANSDALE: My reason for the objection is that his intention, unbuttressed by any plans, by any capability of doing so, by any concrete evidence of contemporaneous intent to do

1 Hinchee - direct

2 so is wholly irrelevant and is not -- he does not
3 show any potentiality of existing. Besides that,
4 you are simply asking for a conclusion.

5 THE COURT: Sustain the objection
6 unless you can lay a proper foundation.

7 The law is clear that it has to be more than
8 intent, it has to be intent coupled with overt acts.

9 MR. NORRIS: He's testified to
10 meetings with the Easterly and the Westerly and
11 the Southerly Sewage people; those are overt acts.

12 He sent people out to make investigations --

13 THE COURT: He hasn't testified
14 to the -- what he has done to -- what overt acts
15 it was, capability of doing this --

16 MR. NORRIS: Well, --

17 THE COURT: Well, it's a great
18 thing to intend to do something, but --

19 MR. NORRIS: Your Honor, he
20 testified to the route for the 69 KV cables, and
21 that's more than just a dream. I thought he
22 testified --

23 THE COURT: Mr. Norris, you are
24 free to proceed with this line of questioning
25 if you lay a proper foundation, but don't lead

Hinchee - direct

the witness.

I thought you instructed your witness not to talk in conclusory characterizations. Obviously he doesn't understand your explanation.

MR. NORRIS: I'll drop this area.

THE COURT: You're free to go on.

{The foregoing proceedings were had at the bench out of the hearing of the jury.}

- - - - -

Hinchee - direct

Q One more question, Mr. Hinchee:

If the City had obtained an interconnection in 1971, and if it had been able to obtain the wheeling of PASNY power, would the City of Cleveland Electric System have been able to solve its financial and service problems?

A Yes.

MR. NORRIS:

Your witness. _____

- - - - -

CROSS-EXAMINATION OF WARREN D. HINCHEE

BY MR. LANSDALE:

Q Mr. Hinchee, it is the fact, is it not, that during your tenure as Commissioner of Light and Power, that you had no plans for extending the service area or lines of the Cleveland Municipal Light Plant for the service of any private customer beyond the territory in which you were then serving; is that correct?

A That is not correct.

MR. LANSDALE:

Please hand the

witness his deposition taken in our city.

THE COURT:

What are you handing

him the deposition for?

Hinchee - cross

Q Is it not a fact --

THE COURT: If you are going to use the deposition, use it in the proper fashion.

Q Is it not a fact, Mr. Hinchee, that on July 24, 1975, at a deposition given in Universal City, California, contained the following question that was asked and the following response.

THE COURT: What page?

MR. LANSDALE: 151.

Q The question is as follows:

"Q In response to a question by Mr. Reynolds earlier today that the City did not or MELP did not have a plan to extend service to areas where MELP facilities did not already exist; is that not correct?

"A Yes.

"I would like to qualify that. There was no plan. There was discussion of the possibility of extending the municipal electric power to any of its plants that it owned or operated, which would be water and sewer plants; and whether they were in or out of the city, and some of these plants were at the design stage, and there was a discussion along that line, whether you would call that a plan or not, but there was a discussion and that was limited to facilities

Hinchee - cross

owned or maintained by the City."

Was that question asked and did you give that answer to that question under oath, Mr. Hinchee?

A Yes, I believe I did.

Q Thank you.

Now, Mr. Hinchee, you referred to and placed dots on the map showing what the various existing and proposed sewage pumping stations owned and operated by the City of Cleveland were or were planned to be.

One of them was the Easterly Sewage Disposal Plant out east of Collinwood, east of the Collinwood area.

That plant was served by Muny Light at the time of your tenure, was it not?

A I believe so.

Q And it had been for many years?

A Yes.

Q You also put on the map a Southerly Disposal Plant down south of the city, and that plant had not been built, had it?

A No.

Q At the time that you were there; is that correct?

A That is correct.

Q And you similarly put a dot on the westerly side for

Hinchee - cross

the Westerly Plant, and that had not been built either, had it?

A No.

Q Now, with reference to the Southerly Plant and the Westerly Plant, did I understand correctly that you or your staff under your direction made what you termed an investigation of the feasibility of Muny Light servicing those loads when as and if they developed?

A Yes.

Q And what form did that investigation take, if you recall?

A The staff contacted the engineers for Southerly and made some determination of what the Southerly requirements would be, and they made a preliminary investigation of the equipment necessary to furnish the service, the equipment necessary to furnish the service.

Q Are you through? -- I am sorry.

A Yes.

Q And directing your attention to the Southerly Plant, what was that load, if you know?

A I don't recall.

Q What if any determinations were made as to the

Hinchee - cross

character of the transmission lines that would have been required to reach that load?

A I don't think we got that far.

Q Did you make any determinations as to the cost of the line?

A No.

Q Did you reach any determination as to whether it would be good economics for Muny Light to build the line?

A No.

Q Would Muny Light have built the line if it had not been economic for it to do so?

A No.

Q I will ask you the same question with reference to the Westerly Plant.

Did you make any determination of the possible cost of building out to the Westerly Plant?

A Yes.

Q And did you make any determination of what the load would be?

A Yes.

Q And what was the load and what was the cost?

A I can't answer that.

There are documents available to tell you that.

MR. LANSDALE:

I ask that those

1 Hincbee - cross

2 documents be produced, Mr. Norris.

3 MR. NORRIS: Yes.

4 Q Did you make a determination that it would have been
5 economically feasible to construct that line?

6 A Yes.

7 Q How was it to be constructed; underground or overhead?

8 A The best recollection, underground.

9 Q How many miles was that -- withdraw that.

10 Where was the easterly terminus of that line to be?

11 A I think I described the answer to all your questions
12 earlier.

13 THE COURT: Just answer the question.

14 There is another question, and answer it if you
15 can.

16 A Not without referring to the previous document.

17 THE COURT: All right. Put it up,
18 please.

19 {After an interval.}

20 THE COURT: Which exhibit would
21 you like to have?

22 THE WITNESS: I would like to have
23 the one showing the transmission line, sir.

24 Q What is that?

25 THE CLERK: 2064.

1 Hinchee - cross

2 THE COURT: You may proceed,

3 Mr. Hinchee. ..

4 A There was an underground 60,000 volt line, two lines
5 actually, going from the power plant for, from West
6 41st Street substation.

7 One of those circuits was to be open at this
8 location.

9 Q You have to describe it. The record can't get it
10 otherwise.

11 A Well, the print is so fine that I can't read the
12 location.

13 THE COURT: That is not unusual.

14 THE WITNESS: Someone who is
15 familiar with that area could help me identify
16 the streets.

17 THE COURT: What area of the
18 city is it, Mr. Hinchee?

19 THE WITNESS: West of the plant,
20 and it is west of the power plant and past the
21 main part of the city and over near one of the
22 parks on the west side of the city.

23 THE COURT: Would you go over
24 there and take a look, Mr. Norris.

25 MR. NORRIS: I was going to give

Hinchee - cross

him another blue sticker, and he could put it up there.

I will try to read it, your Honor. I am not saying I have good eyes.

{After an interval.}

I pass, your Honor. I can't see it.

MR. LANSDALE: May I describe it this way:

And looking at Exhibit 206 -- 2064, the easterly terminus of the lines which the witness is referring to is at the northwest point of the red 65 KV line where it turns south.

THE COURT: Is that satisfactory?

THE WITNESS: Yes. That describes it. That helps.

THE COURT: All right. Let's proceed.

A {Continuing} The line would proceed down the Lake Shore Drive to the westerly, and then from the westerly location -- this blue dot on that map {indicating}, back down and following the pattern somewhat like this {indicating} to the West 41st Street substation.

Q Indicating south to the green 11 KV line?

Hinchee - cross

A Yes, south.

Q And that was the 69 KV line parallel to the 11 KV line going east?

A In some instances, and that would be approximately 3-1/2 to 4 miles of transmission lines.

Q And the determination was made, was it not, Mr. Hinchee, that this would have been an economic investment in view of the load involved?

A Yes, sir.

Q And the City records from the studies will show the estimated costs as related to the estimated revenue?

A I believe they do.

Q All right.

Now, Mr. Hinchee, I understood you to testify that you investigated the possibility of building transmission lines in connection with obtaining PASNY power.

What if any economic studies did you make as to the feasibility of building such lines?

A Would you repeat the question, please.

THE COURT: Read it.

{Thereupon the pending question was read by the court reporter.}

A We did not make an economic study.

Hinchee - cross

Q You have no idea then what the cost of any such construction would be?

A Oh, yes, I do.

Q And what do you base that idea on?

A On my personal experience.

Q On your personal experience.

Did you make any investigation as to the actual cost, the estimate of actual cost that would be involved in any such interconnection lines for Muny Light at the time that you were considering it?

A Yes.

Q Tell me what they were? You just told me you made none. Tell me what they were.

THE COURT: Ask one question at a time.

Rephrase your question and start over.

Q My question is, what if any study did you make of the construction, of constructing any interconnection line to get at PASNY power during 1971, 1972, or 1973?

A I didn't make a study. I made an investigation and discussed the matter with my staff and other people involved.

Q Did you put anything in writing?

A I don't think so.

Hinchee - cross

Q Did you make any calculations?

A Yes.

Q Are they evidenced anywhere?

A No.

Q All right.

Mr. Hinchee, for an interconnection line such as to be economical, you say you have experience in this, what if any relationship is necessary between the capital costs of such a project and the return or earnings expected to be realized by it, whether in the form of savings or in the form of additional profit; is that something you can answer in any shorthand way?

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

MR. LANSDALE: Is that something you can answer in any shorthand way.

MR. NORRIS: I didn't hear the language prior to that.

THE COURT: Mr. Lansdale, you have a tendency of dropping your voice. I am having difficulty hearing your questions.

I reminded you of this yesterday, and I am sure that we could expedite matters if you would keep your voice up or you may raise that lectern

Hinchee - cross

so the microphone is closer to where the words
are coming out.

MR. LANSDALE: I feel hemmed in.

THE COURT: Read the question.

{Thereupon thepending question was read by
the court reporter.}

A No, I can't answer that the way the question was
asked.

Q Tell me how to ask the question.

THE COURT: Now, let's ask the
question again, Mr. Lansdale.

You are the lawyer and he is the witness. He
is answering and you are asking.

Q Mr. Hinchee, when you expend capital funds for
constructing facilities for an electric plant, this is
only reasonable for you to do if you can justify from
an economic standpoint the expenditure; is that not
correct?

A That is correct.

Q And for an expenditure to be justified, you must be
able to get back from the use of that facility over
its expected useful life, first the actual cost of it;
is this not so; I am taking this step by step.

A That is correct.

Hinchee - cross

Q And we call that depreciation, do we not, the accounting device that is used to evidence that return of the capital costs?

A You call that depreciation.

In our business we issue bonds and finance the expenditure, and then we pay the bond indebtedness off.

Q The result is the same, you borrow money to build an asset, and you pay back the capital borrowed plus interest on it over the life of the bond, the bonds, which are hopefully adjusted to the life of the facility; is this correct?

A That is correct.

Q And you must earn from that facility the money to pay back the bond; right?

A That is correct.

Q And you must get both the original purchase price and the interest on the borrowed money; right?

A That is correct.

Q Now, if the capital -- if the expected revenue from building the facility will pay off both the capital and the interest, do you consider that expenditure to be justified?

A That would be part of the justification.

Q What is the additional part of the justification?

Hinchee - cross

A Well, it must be able to provide enough power and additional resources to justify its operation over the years.

Q Well, how would one get revenue from the use of that facility unless it was doing exactly what you said; do you understand my question?

A I don't know how your question relates to what I said.

Q You told me that in addition to sufficient revenue to pay the capital of the bonds, the principal of the bonds and the interest on them, in addition to that revenue from the use of the facility, you must get something else.

What is that something else?

A I stated that. It is the cost of operations and maintenance of the facility.

Q All right; and if you get back the cost of operating and the maintenance plus the revenue to pay back principal and interest; is the expenditure justified?

A Not entirely.

Q What else do you have to have?

A Well, you don't build a facility simply because you want to build a facility and have it pay for itself. You must have a purpose for that facility, and it must be able to fulfill that purpose over and above

Hinchee - cross

the cost of operating that facility.

Q Right.

Well, getting PASNY power would certainly be justification, wouldn't it?

A Not in a small quantity.

Q Well, wouldn't it be a justification if the savings or revenue were sufficient to do all these things that we have been talking about?

A If the quantity were large enough to do that and provide other services for the utility, then it would be justified.

Q Mr. Hinchee, it would be justified if the savings achieved were sufficient, be it power, big or little, would it not?

A No.

Q So even though the savings were sufficient to pay all the operating expenses and pay the principal of the bonds and pay the interest on them, it would not be justified if the power was small in place of big; is that what you are saying?

A It would not be justified if there were other ways to receive that power without making that kind of expenditure.

Q You mean it would not be justified if there was a

Hinchee - cross

cheaper way to do it; is that right?

A That is correct.

Q All right.

Now, in connection with your discussion of investing these transmission lines, you said something about duplicating facilities.

Is it your position that duplicating the facilities owned and operated by another utility is somehow wrong or wasteful or should be avoided?

A If there is sufficient capacity on the facilities, existing facilities, I think duplication should be avoided until such time as that capacity is exceeded.

Q Well, if it is exceeded, and you needed additional service, it really would be duplication?

A Well, as a step in between then the two utilities ordinarily get together and increase the capacity of the line rather than build a duplicate facility.

Q All right; and it is your view that where there are two or more companies involved in one facility and one facility can provide the service, there should be no duplication, is that your position?

A I don't feel like I have established a position in that regard.

Q Well, what is your view?

Hinchee - cross

1
2 A My view is that it would be extremely difficult in
3 this environment to build duplicate facilities as
4 long as you couldn't justify those facilities, as
5 long as the duplication was not serving a separate
6 purpose, and transmission of power from one utility
7 to the other is recognized as done daily between your
8 utility and all other utilities, and the City
9 certainly is entitled to that same kind of work.

10 Q That is not the question I asked.

11 THE COURT: Mr. Lansdale, please
12 address your exceptions to the answers to the
13 Court.

14 MR. LANSDALE: I object to the
15 witness's answer and ask that it be stricken.

16 THE COURT: Approach the bench.

17 - - - - -

18 {Thereupon bench conference ensued on the
19 record as follows:}

20 MR. NORRIS: I simply object to
21 Mr. Lansdale's constantly interrupting the
22 witness until the witness is finished.

23 THE COURT: Well, this certainly
24 was a justifiable interruption.

25 Here the man is -- I told him time and time

Hinchee - cross

again to listen to the question and respond to the question and not throw in gratuities and self-serving statements.

That is the purpose of the rules. If we didn't have these rules, witnesses could get on the stand and testify to anything and everything.

Now, he is either going to do that or at the appropriate time I am going to comment upon his credibility, and I have refrained from doing that, and let's proceed, and I don't want you interrupting the witness, Mr. Lansdale.

MR. LANSDALE: Yes, sir.

{Thereupon bench conference came to a close.}

- - - - -

THE COURT: Proceed. Read the question.

{Thereupon the pending question was read by the court reporter.}

THE COURT: Do you understand the question, sir?

THE WITNESS: I would have to have time to think about it.

THE COURT: Very well, fine. Take all the time that you need.

Hinchee -cross

MR. NORRIS: I object to the question. I think it is not an understandable question.

THE COURT: Overruled. If he doesn't understand the question, he may say so.

A There are times when duplication of facilities is required in the conducting of anybody's business.

Q Mr. Hinchee --

MR. LANSDALE: If your Honor please, may we request that Stipulation 246 and 247 be read to the jury?

THE COURT: Yes. This is Stipulation 246, ladies and gentlemen of the jury:

"On December 6, 1971, the City filed a motion with the FPC requesting the Commission to order a temporary emergency interconnection and to order the load transfer service extended for an additional five-month period."

Stipulation No. 247 reads as follows:

"On December 16, 1971, the Federal Power Commission issued an order stating in part:

"The company in its notice of termination and cancellation states that the effective date

Hinchee - cross

of such notice should be June 20, 1971, or such earlier date as may be ordered by the Commission.

"Through a series of extensions of this effective date filed by the company, the present effective date as requested by the company is now December 17, 1971.

"During this period in which the company extended the effective date, the parties entered into certain negotiations concerning the sums owed to the company by the City for electric energy delivered pursuant to the January 1970 agreement as supplemented.

"According to the information supplied by the party to the Commission, the City had paid the company before July of 1971 approximately \$527,545.25 for this electrical service.

"In July, 1971, the City paid the company \$400,000.

"In September, 1971, it paid another \$400,000, and on November 4, 1971, it paid \$692,367.06, representing a total payment by the City of \$2,019,812.13 for services rendered through August 13, 1971.

"Thus, during the period of negotiations, the

Hinchee - cross

City paid the company a total of \$1,492,367.06.

"However, there remains a disputed figure of approximately \$350,000 which the company claims it is owed resulting from the dispute over the rate and the payment of an Ohio gross receipts tax representing approximately \$85,000.

"During these negotiations, the company refused to discuss the question of a permanent interconnection between the City's isolated system and its own system until it was reimbursed for the sums which it believes is owed, notwithstanding a disputed figure of \$350,000.

"The company continues to maintain this position.

"The City of Cleveland states in a letter to the Commission dated November 22, 1971, that modification of boilers in its generating station required to meet pollution control measures has been delayed for causes beyond its control and will not be completed until June 1, 1972, according to current estimates.

"This denies the City the use of the full output of the generators supplied by those boilers and confronts it with inadequate generating

Hinchee - cross

reserve capacity without a continuing supply of energy from the company through its existing five interconnections and about the same level of supply as before.

"These existing interconnections are the direct result of an agreement entered into in January, 1970, by the parties.

"The City, on September 7, 1971, and again on November 13, 1971, suffered blackouts on its isolated system due to outages from some of its generating units.

"Thus the City's generating system may not be sufficiently operational to provide system reliability without continued temporary service provided by the company under the agreement of January of 1970 as supplemented.

"We are informed by the company that the facilities of the company will not be burdened by the continued delivery of temporary service until its expected summer load of 1972.

"In addition, the City is expected to bring current its monthly payments for services rendered previous to the date of this order, and further, to pay on a current monthly basis for the services

Hinchee - cross

rendered by the company during the suspension period provided for herein.

"It is recognized that among the issues to be heard is the matter of the proper rate schedule of the company.

"In its December 16, 1971 order, the Commission ordered that the 11 KV load transfer service continue until May 17, 1972.

"In this same order, the Commission also denied a request the City had made 10 days earlier for emergency interconnection with CEI.

"The Commission did however consolidate all of these proceedings for a hearing at a later time."

BY MR. LANSDALE:

Q Mr. Hinchee, the amount of money owed to CEI for indebtedness accumulated from when you arrived on March 15, 1971 and thereafter, until those payments were made, at least in part payments it is a fact, is it not, that you withheld those payments because you wanted to use the debt as leverage to get CEI to the bargaining table?

A It is a fact, sir, that the schedule of payments was made in the manner in which it was made to test the reliability of CEI's promises to come to the bargaining

Hinchee -cross

table for an interconnection.

MR. LANSDALE: May I have the question read to the witness. May I have the question and answer read.

{Thereupon the question and answer were read by the court reporter.}

MR. LANSDALE: I request that the answer be stricken.

THE COURT: - That is responsive, that is his answer.

BY MR. LANSDALE:

Q Mr. Hinchee, I will ask you if it is not a fact that on March 21, 1972, at a hearing before the Federal Power Commission you did not at page 308 of the record, testify as follows under oath.

This was in an interchange between you and counsel for the CEI.

Counsel asked about the question of payments for services rendered, and then this shifts back and forth:

"We don't have the money to pay for this and that and the other thing, or to pay your Cleveland Electric Illuminating Company bill promptly.

"What I am trying to ascertain, is there a

Hinchee - cross

difference between out-of-pocket expenses revenue which is to come in -- and I am getting an answer that puzzles me, and I am not just saying that in jest when I refer to Parkinson's law.

"Mr. Hinchee, could you explain how precisely these expenses went up between 1970 and 1971. That would help me, and then I would like to have the same explanation as to revenue, " and did you not respond under oath:

"First of all, I never stated to you or any person in CEI that we did not have the money to pay our indebtedness to you. I said we have withheld that money to bring leverage to bear to bring about an interconnection or try to do it.

"Apparently this was not the proper way to do it. At this point I am willing to concede that that was not the proper way to get at the animal, but at that point there had never been a statement on my part that we didn't have the money to pay our bills or that we were pleading financial inability to handle that matter. That has been somebody else's statement but not mine, and not any official of the City insofar as I know."

Did you give that answer under oath, Mr. Hinchee?

Hinchee - cross

A Yes.

MR. LANSDALE: Now, would you please
hand the witness Exhibit No. 60.

{After an interval.}

Q This is a two page, two and a half page letter of Mr.
Hinchee's, two and a fraction pages, and I want to
give you an opportunity to refresh your recollection
about it.

A To refresh my recollection, sir?

Q Yes. You have seen that letter before, haven't you?

A I am not sure.

Q You are not sure.

Will you please take a look at it.

A I have to take a look at it very carefully.

THE COURT: Mr. Lansdale, while
he is reviewing this, maybe it would be the
appropriate time to take our recess.

Ladies and gentlemen of the jury, we will
take a brief recess. Please do not discuss the
case among yourselves or with anyone else until
the matter is submitted to you and upon the
instructions of the Court. Until such time,
please keep an open mind. We will now take a
short recess.

Hinchee - cross

{Recess taken.}

THE COURT:

Please be seated.

Bring in the jury.

- - - - -

{Thereupon the jury was reseated in the jury box and the trial continued as follows:}

THE COURT:

You may proceed,

Mr. Lansdale.

BY MR. LANSDALE:

Q Mr. Hinchee, yesterday you testified that had CEI been cooperative in July of 1971, a 138 KV interconnection could have been made operational in 18 months.

My question, Mr. Hinchee, is: 18 months from what time?

A 18 months from the time that the two utilities agreed to install the interconnection.

Q All right.

After the two utilities agreed to install, then what has to be done?

A A determination of the voltage and the size of the connection and the impact on the two systems and the apparatus to be delivered and installed.

Q And I gather thatn the 18 months period of time which you referred to was the lead time, and I believe you

Hinchee - cross

stated for a transformer?

MR. NORRIS: May I approach the bench?

THE COURT: Yes.

- - - - -

{Thereupon bench conference ensued on the record as follows:}

THE COURT: Go ahead.

MR. NORRIS: I don't want to be obstructionist, but that is such a clear misstatement. It is a clear misstatement of what the witness testified to.

MR. LANSDALE: I was reading from the record. I have the transcript.

THE COURT: All right. Get the transcript. I was going to look through my notes.

MR. LANSDALE: I quote from the record.

"Q Now, how long would it have taken, assuming CEI had been cooperative in July of 1971, to have had a full 138 KV interconnection; would it have taken a longer period of time?

"A 18 months.

"Q It would have taken 18 months?

Hinchee - cross

"A Yes.

"Q So at what time would it have been operational?

"A As soon as the transformer could be purchased and delivered. All other work could have been accomplished ahead of the delivery of the one major item of apparatus."

MR. NORRIS: That is not what you said in your question.

THE COURT: Just a moment. He is permitted to -- this is cross-examination. If you want to rehabilitate the witness, you are free to do so, but he is taking an answer that was given under oath to a question on page 1046.

{Thereupon bench conference came to a close.}

- - - - -

THE COURT: Now, read the question.

{Thereupon the pending question was read by the court reporter as follows:}

"Q And I gather that the 18 month period of time which you referred to was the lead time, and I believe you stated for a transformer?"

THE COURT: You may answer the question.

Hinchee - cross

A I am not sure what the question is, your Honor.

THE COURT: Rephrase the question.

BY MR. LANSDALE:

Q Mr. Hinchee, yesterday you testified after having answered Mr. Norris that, "Had CEI been cooperative, you could have a 138 KV interconnection operational in 18 months."

And a further question:

Q So at what time would it have been operational?

A As soon as the transformer could be purchased and delivered. All other work could have been accomplished ahead of the delivery of the one major item of apparatus."

That means to me, and I am asking you, that you were stating that it would take 18 months from the time of ordering to get delivery on the necessary transformer, and that the other work could be proceeding in the meantime; is that a correct understanding?

A I think it is.

Q All right; and tell me, Mr. Hinchee, could the necessary equipment have been ordered prior to the doing of the detailed drawings and work covering the

Hinchee - cross

work to be done to install such a 138 KV interconnection?

A Certain items of apparatus could be ordered almost immediately without the completion of working drawings and specifications, yes.

Q Could all of the apparatus which had the longest lead times have been ordered in advance of such work?

A Yes.

Q And this apparatus was a transformer.

Was there anything else that would have such a lead time?

A There would be appropriate protective relays and switch gear.

Q Circuit breakers?

A Yes.

Q And those also would be included in this long lead time, would they not?

A It has been my experience that the lead time on those items is usually shorter than the lead times on a power transformer.

Q So the transformer is the controlling item on time?

A Yes. That is my experience.

Q Now, what did you base your estimate of 18 months delivery time made here in your testimony yesterday -- what did you base that on?

Hinchee - cross

1 A It has been my experience that for a transformer of
2 this size, that there are occasions when they can be
3 manufactured or purchased and manufactured on shorter
4 lead times than that, but that is the normal expected
5 lead time.

6 Q Is that currently, or are we talking about back in
7 1971 now?
8

9 My question really goes to 1971, the period of
10 time that we are talking about.

11 A That would be in 1971.

12 Q All right.

13 Now, I will ask you if on March 21, 1972, you did
14 not give this question and this answer, -- did you
15 not give this answer under oath:

16 "Q Would you see any problems in acquiring the
17 necessary equipment for the construction of a 138
18 KV synchronous permanent interconnection?

19 "A Yes, sir. It would be a 19 to 24 months
20 delivery time involved for circuit breakers, major
21 switch gear items and transformation would have to be
22 purchased and manufactured and delivered."

23 Was that question asked and did you give that
24 answer?

25 MR. NORRIS:

Objection.

1 Hinchee -cross

2 THE COURT: Overruled.

3 MR. NORRIS: He hasn't given the
4 citation.

5 MR. LANSDALE: Pardon me, page 267.

6 MR. NORRIS: Thank you.

7 THE COURT: Just a minute. Are
8 you desirous of checking the record?

9 MR. NORRIS: No, sir. That is
10 fine. I just wanted a citation.

11 MR. LANSDALE: I apologize. I
12 should have given him one.

13 THE COURT: Very well. Mr.
14 Hinchee, was that question asked?

15 MR. LANSDALE: He answered, "Yes."

16 THE COURT: Okay. I am sorry.

17 BY MR. LANSDALE:

18 Q Now, Mr. Hinchee, in the construction of a 138 KV
19 interconnection between the CEI and Muny Light, the
20 transformation and the circuit breaker equipment that
21 you were talking about would have to be acquired by
22 and installed by Muny Light, would it not?

23 A I would presume so.

24 Q You would presume so?

25 A Yes.

Hinchee - cross

Q And what was your experience in 1971 and 1972 and 1973, Mr. Hinchee, with respect to the lead time required for the City of Cleveland to actually place an order for such equipment from the time that the Commissioner of Light and Power determined that such equipment should be ordered, where it is for a capital expenditure?

A I am not sure I recall the exact time on the purchase of that transformer. It would be a matter of record with the city.

Q Mr. Hinchee, whether it was a transformer or whether it was some other piece of equipment, that was an addition to the plant of the Muny Light Company, and you had a good deal of experience, did you not, during your tenure in the securing of authority and the writing of contracts and the placing of orders for major pieces of electrical equipment, did you not?

A Yes, I did.

Q And my question is, what was your experience as to the time it took you to even place an order for equipment of the kind that we are talking about, transformers and circuit breakers and the like, from the time that you determined that such a purchase should be made?

A Well, the time would vary.

Hinchee - cross

Q Give me some times.

A I can't give you any times unless we are to go back to the record.

The counsel would be very cooperative if I went to the Utilities Committee and the Finance Committee and stressed to them the urgency and the need to move expeditiously, and I didn't do that on every item, and if I didn't, then the lead time for their consideration would be longer.

Q Mr. Hinchee, you from time to time wrote a report or made a statement for the City Council Public Utilities Committee, did you not?

A Yes.

MR. LANSDALE: I ask that Exhibit 284 -- pardon me -- 285 be handed to the witness, if you please.

Pardon me, it is 284. That is correct, but leave that there. I am going to use that one in a minute anyway, but now just 284.

{After an interval.}

Q Will you please -- do you recognize this as one of your reports to the members of City Council?

A Yes, I believe it is.

Q This one is dated June 29, 1972.

Hinchee -cross

I now invite you to --

MR. NORRIS: Excuse me. I don't seem to have the right exhibit. You said 284?

THE COURT: Yes.

MR. NORRIS: My 284 is dated 1971. Could I just view yours -- show me the exhibit.

MR. LANSDALE: All right.

{After an interval.}

MR. NORRIS: Thank you. All right.

I have it now.

BY MR. LANSDALE:

Q I now invite your attention to page 7, Mr. Hinchee, and you stated there, did you not, "The question had been raised regarding the plant's inability to produce 100 megawatts of power with 206 megawatts of installed capacity. The answer is red tape, strangulation, purchasing procedures are so antequated and obsolete that one must wait years for delivery of items available to industry on a 30-day delivery basis."

Were you making a true statement in your report to counsel in that report of 1972?

A I was.

Q And was the situation any different in 1971?

1 Hinchee - cross

2 A They are not two comparable situations. You are
3 comparing apples and oranges here.

4 Q Which is the apple and which is the orange, Mr.
5 Hinchee?

6 A Well, I found counsel to be cooperative in setting
7 aside the red tape rules that provided the
8 strangulation when I pleaded a case to them and
9 asked them for an expeditious action.

10 That did not change the fact that the rules of
11 the City were very cumbersome, and much more complex
12 than those you would encounter in private industry,
13 and I am appealing in this statement to the counsel
14 to modify that procedure and allow the utility to
15 operate as a business and not as another division of
16 the City.

17 Q And did you ever get counsel to permit the utility to
18 operate as a business and not as a division of the
19 City?

20 A There was an ordinance introduced to create a
21 separate Board of Utilities to direct the activities
22 on a more business-like basis at a later time.

23 THE COURT: Read the question.

24 {Thereupon the pending question was read
25 by the court reporter.}

1 Hinchee -cross

2 Q The answer is no, isn't it, Mr. Hinchee?

3 A I gave the answer, sir.

4 THE COURT: You will answer yes or
5 no. Did you ever get counsel to do that? It is a
6 simple question and requires a yes or no answer.

7 THE WITNESS: I got the counsel to
8 take the first step.

9 THE COURT: The question is, did
10 you ever accomplish that end?

11 THE WITNESS: No, sir, I did not
12 accomplish it.

13 THE COURT: All right. It is that
14 simple. Now, please answer the questions.

15 BY MR. LANSDALE:

16 Q Now, Mr. Hinchee, how long would it take you in your
17 experience as to what actually happened with the
18 ordering of major equipment in 1971, how long did it
19 take you to get an actual contract let and an order
20 made between the time that you decided to do so and the
21 time that you placed the order?

22 A I simply don't recall.

23 Q You simply don't recall.

24 Well, now, how long did it take you, Mr. Hinchee,
25 in the case of the actual construction of the 69 KV

Hinchee - cross

temporary interconnection which was ordered by the Commission on March 8, 1972; how long did it take you to enter into a contract with the Westinghouse Corporation for the equipment, for the terminal end of the line at Muny Light, including the relays and the controls for the operation of that line and the metering?

A It took several months.

Q It took, as a matter of fact, it took you from March the 8th until after you left the City's employ, did it not? You never did get that contract let while you were there, did you?

A That is correct.

Q And was that typical of your difficulties in getting material ordered for major construction, emergency interconnections, or was that unusual?

A Your Honor, I can't answer that question without qualifying it.

THE COURT: Answer as best you

can, and then you can ask further questions.

A The delay was created by CEI's continuously changing their requirements at their end of the business.

Q Oh, it was CEI's fault, was it; is this your testimony?

A Yes.

Hinchee - cross

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Q All right.

Do I understand it to be your testimony that because for CEI's interference, the 69 KV interconnection could have been built and put into service substantially earlier than December, 1972?

A With their cooperation, yes.

Q All right; and do I understand it to be your testimony that with the cooperation of CEI this line could have been completed in 60 days?

A The 69,000 volt interconnection could have been completed in 60 days.

Q Yes; and this is 60 days from March the 8th of 1972?

A Yes, sir.

Q Now, what had to be done after March the 8th, 1972 in order to start construction of the line?

A We actually started construction of the line as soon as we had the permit to go ahead, as soon as we had the order to go ahead.

Q Well, didn't any plans have to be drawn?

A Well, CEI required negotiations on a right-of-way that they had not informed the City of prior to the issuance of the order.

THE COURT:

Please, read the

question.

Hinchee - cross

question.

{Thereupon the pending question was read by
the court reporter.}

Q. Did any plans have to be drawn by anybody in order to
construct and complete the construction of this line?

A. CEI required the City to complete construction plans
in minute detail and submit for their approval.

Q. Did the City have to draw any plans?

A. Yes. --

Q. When did the City start drawing plans?

A. After they found out what CEI was going to require
before they would consider the interconnection.

Q. And is it your statement that CEI did not have to do
any planning for this line?

A. They had to do some.

Q. They had to do some.

MR. LANSDALE: Would you please
show the witness CEI Exhibit 72.

{After an interval.}

Q. Have you seen that letter? Have you seen that
letter before, Mr. Hinchee?

A. I think so.

Q. And that is a letter from Harold Williams of the
Illuminating Company to you, is it not?

Hinchee - cross

1 A That is correct.

2 Q And it refers to meetings among the engineers of the
3 Muny Light and CEI; is that correct?

4 A Yes, that is correct.

5 Q And by the way, Mr. Hinchee, you said that no meetings
6 between the engineers were had until such meetings were
7 ordered by the FPC.
8

9 Did you mean that literally, or did you mean only
10 that the interconnection had been ordered, and then
11 meetings were necessary with respect to the
12 interconnection?

13 A I was referring to the meetings on the interconnection.

14 Q You know of no instances in which the FPC specifically
15 ordered meetings of engineers; do you?

16 A I thought they specifically ordered the engineers'
17 meetings, meetings of the engineers, and CEI didn't
18 comply.

19 Q Didn't comply.

20 Tell me the place and location of the order of
21 the FPC for the meetings of engineers.

22 A Well, I think in the earlier document written by the
23 Court it refers to the, for the need for the two
24 utilities to work out an interconnection.

25 Q This is what you were referring to --

Hinchee - cross

MR. NORRIS: Objection.

THE COURT: Let him finish the
answer.

Q Go ahead. Is there anything else?

A To the best of my knowledge, it came close, we came
close to having meetings from time to time, but
meetings never materialized.

Q CEI Exhibit 72 is a letter to you from Mr. Williams,
which refers to meetings between the engineers at
Mun Light and CEI, does it not?

A Yes; that is correct.

Q And that letter transmits a substantial number of
drawings relating to the interconnection, does it not?

A Yes, it does.

Q Were those the drawings and the details that you had
to have in order to enable the city to go forward?

A To the best of my recollection, yes.

Q All right; and what did CEI do to hold up the
interconnection from that point on if anything?

A Well, for one thing, this letter refers to the cost
of installation of \$69,000 on CEI's part, and as I
recall that amount of money was set aside and a
purchase order issued directly to CEI, and they would
not accept the purchase order to proceed with their

Hinchee - cross

end of the work and insisted that a full contract be executed.

Q And you will agree that CEI had some experience heretofore and difficulty in getting paid; is that not so?

A It is so.

Q And in addition to that, and in addition to that you had -- withdraw that.

How long did it take you, Mr. Hinchee, to get the City Council to authorize the contract for this \$69,000 to be paid to CEI?

A Well, again, the delay -- a substantial delay was encountered in getting together with CEI and working out the details of that contract, the bill of materials were changed, and the scope of the work was modified from time to time, and the final resolution was delayed substantially.

Q Mr. Hinchee --

THE COURT: Just a moment.

Read the question back.

Listen to the question and answer the question.

{Thereupon the pending question was read by the court reporter.}

A I don't recall the specific time frame relating to this

Hinchee -cross

issuance of the contract.

Q Well, it took you until June 26, did it not, from April 17?

MR. NORRIS: What year?

MR. LANSDALE: What year?

MR. NORRIS: What year are you talking about -- 1972?

MR. LANSDALE: 1972.

MR. NORRIS: All right.

A I believe that to be correct.

Q All right.

Now, Mr. Hinchee, in addition to arranging for -- and by the way, the City failed to pay that \$62,000 after the completion of the work; isn't that so?

A Not to my knowledge.

Q Not to your knowledge.

Now, Mr. Hinchee, there was a gentleman who was employed by the Federal Power Commission named E. J. Fowlkes?

A Yes.

Q Do you remember him?

A Yes.

Q And -- pardon me a minute.

MR. LANSDALE: Would you hand the

Hinchee - cross

witness, please, Defendant's Exhibit 549.

MR. NORRIS: May I approach the
bench?

THE COURT: Yes.

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{Thereupon bench conference ensued on the
record as follows:}

MR. NORRIS: I object on the ground
of hearsay.

MR. LANSDALE: I thought that this
was accepted.

MR. NORRIS: I am not aware that
I ever waived the hearsay objection.

MR. LANSDALE: Well, this is an
official Federal Power Commission communication.

THE COURT: I thought we stipulated
to the accuracy and authenticity of the document,
and we reserved relevancy and materiality.

Certainly you are not going to use it unless
you can qualify it beyond this.

MR. LANSDALE: I was going to ask
him -- all I have done is ask him -- is hand him
the exhibit.

MR. NORRIS: I have no authenticity

Hinchee -cross

objection, just hearsay.

MR. LANSDALE: Since this is a Government document, I don't think we have a hearsay problem. It is a government report.

THE COURT: One moment, please, gentlemen.

What is the basis for the hearsay objection?

MR. NORRIS: He is offering it for the truth of the matters asserted, and I do not think that this witness is competent to identify this, and I don't think there is any exception to the hearsay rule that permits this in.

MR. LANSDALE: My intention --

THE COURT: Gentlemen, I don't know what your intentions are, but I will overrule the objection at this time, and please stay alert, Mr. Norris, and at the appropriate time I will reconsider it if he doesn't qualify it, and if there is a basis for sustaining the objection, I will.

{Thereupon bench conference came to a close.}

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BY MR. LANSDALE:

Q Have you had a chance to look at CEI Exhibit 549,

1 Hincbee - cross

2 Mr. Hincbee?

3 A Yes.

4 Q You have seen this document before, have you not?

5 A Probably so.

6 Q And you received this document, you first saw this
7 document when you were still in the employ of the City
8 in May or June of 1972; isn't that so?

9 A I would presume so.

10 Q And this document is entitled, "Progress Report on the
11 Emergency Interconnection Between the City of Cleveland
12 and the Cleveland Electric Illuminating Company."

13 Mr. Fowlkes invited the City of Cleveland in
14 April -- to be specific, April 27, 1972 -- and
15 conferred with a number of people, including you, did
16 he not?

17 A Yes.

18 Q And according -- were you present -- withdraw that.

19 According to the last page, the people he saw at
20 Muny Light were yourself, Mr. Matthews from the
21 Division of Utility Engineering, the Chief Electrical
22 Engineer and Mr. Erickson, Chief Electrical Engineer
23 of Muny Light, and Mr. Bednauer, and Mr. Phillips and
24 Mr. Whectel, and were all these people technical
25 people with the exception of Mr. Matthews?

1 Hinchee - cross

2 A I am sorry, I haven't been able to find --

3 Q It is the last page.

4 THE COURT: It is after the
5 signature. Do you have it?

6 THE WITNESS: Yes. The answer is
7 yes.

8 Q And were you all present together at a meeting, or
9 did he go around and talk to each one of you
10 individually?

11 A To the best of my recollection it happened both ways.

12 There was a general meeting, and then there was
13 specific work by different individuals.

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Hinchee - cross

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2 Q And you, I presume, reported to him accurately to the
3 best of your ability at the time?

4 A I'm sure I did.

5 Q And you would assume that your people would do the
6 same?

7 A I would think so.

8 Q Now, Mr. Hinchee, did you complain to Mr. Fowlkes at
9 this time about the interference of the
10 Illuminating Company and the difficulties that they
11 were presenting to you in completing the 69 KV
12 interconnection?

13 A I do not recall.

14 Q You do not recall.

15 Do you have any feeling that -- do you not think,
16 Mr. Hinchee, that had CEI been seriously interfering
17 with the progress of your installation of this
18 interconnection, that you would have complained to the
19 official of the Federal Power Commission sent out
20 for the purpose of investigating the progress of the
21 interconnection?

22 A I did complain to Mr. Phillips.

23 Q Beg pardon?

24 A I did complain to Mr. Phillips.

25 Q Who is Mr. Phillips?

1 Hincbee - cross

2 A He was Mr. Fowlkes' boss.

3 Q I see a Mr. H. T. Phillips on this list. That's not
4 who you're talking to?

5 A That's a different Phillips.

6 Q That's a different Phillips.

7 And my question is -- relates to Mr. Fowlkes who
8 was on the spot investigating.

9 A Mr. Phillips also made an on-the-spot investigation.

10 Q Do we have a report from him?

11 A I don't know.

12 Q Was he with Mr. Fowlkes?

13 A At one time; another time he was on his own.

14 Q And was he with Mr. Fowlkes on this trip, or was he
15 with Mr. Fowlkes on the next trip?

16 A From this report, it does not appear that he was with
17 Mr. Fowlkes on this trip.

18 Q Well, I see that.

19 You don't have any recollection?

20 A I don't know whether this purported to report that
21 trip or a different trip.

22 MR. LANSDALE: Show the witness,
23 please, CEI Exhibit 79.

24 {Mr. Leo complies.}

25 Q You have seen this document before, have you not?