

10-9-1980

## Volume 08 (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, October 9, 1980

*Weir, Hart*



KF  
228  
.C43  
1980

C 60200

KF 228 .C43 1980

Cleveland (Ohio),

City of Cleveland, plaintiff  
vs. The Cleveland Electric

1 THURSDAY, OCTOBER 9, 1980; 8:50 A.M.

2  
3 {The following proceedings were had in the  
4 absence of the jury.}

5 LAW CLERK SCHMITZ: The City of Cleveland,  
6 plaintiff, versus Cleveland Electric Illuminating  
7 Company, defendant, Case No. 75-560.

8 THE COURT: The following exhibits  
9 may be admitted: 2957, 3032, 3033, 3034, 3094,  
10 3095.

11 {The foregoing proceedings were had in the  
12 absence of the jury.}

13 - - - - -

14 {The jurors resumed their places in the  
15 jury box.}

16 THE COURT: Good morning, ladies  
17 and gentlemen. I think we are prepared to proceed.  
18 You may proceed, Ms. Coleman.

19 MS. COLEMAN: Thank you, your Honor.  
20 Dr. Wein, would you resume the stand, please.

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25



1           D R.   H A R O L D   H.   W E I N,  
2           a witness called on behalf of the plaintiff,  
3           having been previously sworn, resumed the  
4           witness stand and was further examined and  
5           testified as follows:

6  
7           DIRECT EXAMINATION OF DR. HAROLD H. WEIN {Cont'd}

8  
9       BY MS. COLEMAN:

10   Q     Dr. Wein, as we ended the day yesterday you were  
11           beginning to discuss your reasons for concluding  
12           the geographic scope of the regional power exchange  
13           market, and I would like to ask you again just to  
14           make sure we didn't miss something as we broke, what  
15           is your opinion as to the scope of the regional  
16           power exchange market?

17           THE COURT:                   I thought he  
18           testified to that yesterday. Let's proceed to  
19           something new and let's not be repetitious,  
20           Ms. Coleman.

21           MS. COLEMAN:                Your Honor, we broke  
22           off in the middle and I am trying to pick up  
23           the thread.

24           THE COURT:                   Well, place another  
25           question.

Wein - direct

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Q What is the basis for your opinion as to the geographic scope of the regional power exchange market?

A Well, the bases of my opinion are the following: First, the contractual relations between the CAPCO companies; secondly, the engineering facts as to their interconnection with each other and the interconnection of some of the CAPCO companies with companies which are not in the CAPCO pool. Those are the bases of my conclusion.

From these two facts I defined the regional power exchange market as being primarily within the area bounded by the CAPCO pool but not the CAPCO member.

THE COURT: Doctor, please don't go beyond the question.

THE WITNESS: I'm sorry.

THE COURT: Proceed.

MS. COLEMAN: Dr. Wein, I am having trouble hearing you and perhaps the jury is as well.

Q You mentioned yesterday that you looked at both the points at which the CAPCO companies were interconnected with others as well as the CAPCO pool in defining

Wein - direct

regional power exchange.

Does the regional power exchange market have definite geographic boundaries?

THE COURT: It seems to me that we have been through this before, too.

MR. LANSDALE: Yes.

THE COURT: I would request, Ms. Coleman, that you not be repetitious, please.

MS. COLEMAN: I am not intending to be repetitious, your Honor.

May the witness answer the question?

THE COURT: No, he may not.

Sustain the objection.

I am asking you not to be repetitious. We went over that quite extensively yesterday.

BY MS. COLEMAN:

Q Dr. Wein, as part of your assignment you indicated yesterday that you were requested to study the extent to which there was competition or market power in the markets which you identified.

Did you make a study to determine the existence of market power in the markets which you described yesterday?

A Yes, I did.

1 Wein - direct

2 Q What are the factors that economists consider in  
3 measuring market power?

4 A Well, there are two factors.

5 One is the control of supply. A company which  
6 has a substantial portion of the supply in a  
7 particular market will have market power.

8 And, secondly, the control of supply confers  
9 with it some control over price.

10 Q What tools do economists use to measure market power?

11 A Well, one basic idea is simply to see what proportion  
12 of a given market a particular company controls. So a  
13 company that has 1 percent of a market, it has very  
14 little power. If it has 80 percent of a market it  
15 has a considerable amount of power.

16 In addition to simply looking at the percentage of  
17 control, they also look to see how difficult it is to  
18 enter the market for a new company. If they judge  
19 that the barriers for new companies to enter the  
20 market are very high, that's another indication that  
21 the companies in the market have some substantial  
22 amount of market control.

23 The third thing they can look at, of course, is  
24 to see whether there are any legal restrictions to  
25 other companies entering the market.

1 Wein - direct

2 Q Dr. Wein, let's turn first to the question of shares  
3 of the market.

4 MS. COLEMAN: Mr. Schmitz, if you  
5 will please place on the easel Plaintiff's Exhibit  
6 2578. The posters I will be referring to, Mr.  
7 Schmitz, are up behind Dr. Wein in front of that  
8 small table to your left.

9 Your Honor, may I approach the bench?

10 THE COURT: Yes, you may.

11 - - - - -

12 {Bench conference ensued on the record as  
13 follows:}

14 MS. COLEMAN: While Mr. Schmitz is  
15 looking through there, I thought perhaps I could  
16 raise one point. We have stipulations as to the  
17 accuracy of the numbers stated on these exhibits,  
18 and I would ask you to read each of those  
19 stipulations as the exhibit is discussed.

20 THE COURT: Very well.

21 MS. COLEMAN: Those are Stipulations  
22 105 --

23 THE COURT: Just a moment.

24 MR. LANSDALE: I have no objection to  
25 that, your Honor. I know what it is. I have no

Wein - direct

objection.

THE COURT: 105, that's to be read in conjunction with what, Ms. Coleman?

MS. COLEMAN: 105 is to be read in conjunction with the instant Exhibit 2578.

THE COURT: Before or after?

MS. COLEMAN: I think before, your Honor.

If I may request it from the podium.

MR. LANSDALE: 2575 and 2578?

MS. COLEMAN: Right. 2579, we do not have a written stipulation. I conferred with Mr. Murphy and Mr. Lansdale this morning --

MR. LANSDALE: Is that the one with the number of customers?

MS. COLEMAN: They are agreeable that the numbers stated are accurate.

MR. LANSDALE: We are checking, but we can assume that they are correct. I am sure they are.

THE COURT: Stipulation 105 and what other?

MS. COLEMAN: Stipulation 106, your Honor, relates to Plaintiff's Exhibit 2580.

Wein - direct

Stipulation 106 also relates to Plaintiff's Exhibit 2577.

THE COURT: You just tell me when they are to be read, I will read them.

MS. COLEMAN: Stipulations 105, 106, 107, 108 and 109. They are all of the same nature.

MR. LANSDALE: We have no objection to the stipulations.

{End of bench conference.}

- - - - -

BY MS. COLEMAN:

Q Dr. Wein, was Plaintiff's Exhibit 2578 prepared under your direction?

A Yes, it was.

MS. COLEMAN: Your Honor, would you please read Stipulation 105 at this time?

THE COURT: Stipulation No. 105, ladies and gentlemen, reads as follows:

"The numbers of dollars identified on the following exhibits are accurate and they are what they purport to be," and the exhibits are Plaintiff's Exhibits 2575 and Plaintiff's Exhibit 2578.

Wein - direct

By Ms. Coleman:

Q What information does Plaintiff's Exhibit 2578 depict, Dr. Wein?

A Well, that shows the revenue from retail sales in the City of Cleveland and compares the three years, 1968, 1973, and 1977.

Q Revenues for what, Dr. Wein?

A For the sale of firm electric power at retail.

Q Whose sales are shown on the exhibit?

A Well, you have two companies, the only two there are in the City of Cleveland, CEI and MELP, and it shows the share of each company.

CEI, for example, received \$73.8 million, \$73,814,923, in that year.

MELP received \$10,534,000.

The share of CEI in that year was 87-1/2 percent and the share of the City electric company was 12-1/2 percent.

It then goes down to 1977, and the total sales, of course, have increased between 1968 and 1977, and CEI has a total sales at retail in the City of Cleveland of approximately \$192 million and the City electric system has retail sales or revenues of approximately \$24 million.



Wein - direct

1                   The share of CEI has gone up from 87-1/2 to  
2  
3                   88.9 percent of the total retail market.

4                   The share of the City electric company has gone  
5                   down from 12-1/2 to 11.1, approximately, from 1/8 of  
6                   the market to 1/9 of the market.

7                   Q   Dr. Wein, what conclusions do you draw from this data  
8                   that you put together?

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

11                   THE COURT:                   Approach the bench.

12                   - - - - -

13                   {Bench conference ensued on the record as  
14                   follows:}

15                   MR. LANSDALE:                   The first date given  
16                   is before the damage period. The second date  
17                   given is after the damage period.

18                   I object to it being under those dates. I  
19                   have heard nothing justifying the use of data  
20                   outside the damage period, and I object to it.

21                   MS. COLEMAN:                   I'm having trouble  
22                   hearing him. If he did not speak about 1973,  
23                   I will ask him.

24                   I will also ask him why he used information  
25                   from the three years.

Wein - direct

1  
2 MR. LANSDALE: Well, I object to  
3 the question asked now.

4 THE COURT: Sustain the objection.

5 MS. COLEMAN: What?

6 Well, where are we, then?

7 MR. LANSDALE: I object to the  
8 question. The Judge has sustained it.

9 THE COURT: He says the question  
10 is improper for the reasons stated.

11 MS. COLEMAN: The question is  
12 improper because there is 1968 data?

13 I'm sorry, I need to understand in order to  
14 understand where I'm going.

15 MR. LANSDALE: Well, one date is  
16 before the damage period and the last date is  
17 after. Only one date is within the damage period.

18 MS. COLEMAN: I will go back and  
19 approach it to meet your objection.

20 {End of bench conference.}

21 - - - - -

22 THE COURT: Rephrase your question,  
23 please.

24 BY MS. COLEMAN:

25 Q Dr. Wein, what information did you collect concerning

Wein - direct

the percent of sales in the retail market that you have identified by CEI and Muny Light in 1973?

A Well, the information is on the table. In 1973, according to the reports of both companies to the Federal Power Commission, in 1973 CEI had \$2,712,000 in sales and Muny had \$12,188,000 in sales.

The market share in 1973 was 89.4 percent for CEI, and for Muny it was 10.6 percent.

Q Dr. Wein, why did you collect information in three different years in performing your analysis?

A Well, I simply wanted to show whether there was an historical trend over this particular period of time and then to ascertain what the reasons for this trend were.

Q Did you conclude that there was a trend based on data that you collected?

A Well, if we go from 1968 to 1977, what we have is a slight increase between those two end points.

If we go from 1973 to 1977, what we have is a -- I'm talking about CEI -- a slight decrease between 1973 and 1977, and between 1968 and 1973, CEI increases slightly and Muny goes down. Because Muny is so much smaller than CEI, a small increase in CEI is a relatively large decrease in Muny.

Wein - direct

1 And then from 1973 to 1977, Muny goes up. It  
2 increases by -- oh, doing it in my head, roughly about  
3 7 percent, and CEI decreases approximately 1-1 1/2 percent,  
4 something of this sort.

5  
6 Q Dr. Wein, looking at 1973 and the information you  
7 collected for that year, did you come to any conclusion  
8 with regard to the question we began with as to market  
9 power based on that data?

10 A Well, I concluded insofar as market power is concerned  
11 that CEI has been consistently dominant in the City  
12 of Cleveland and has market power from 1968 right  
13 through 1977.

14 MR. LANSDALE:

I object, if your

15 Honor please.

16 THE COURT:

Approach the bench.

17 - - - - -

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

20 MR. LANSDALE:

The question is 1973.

21 He is answering about 1968 and 1977, and I object.

22 He is not answering the question.

23 THE COURT:

Very well. I will

24 instruct the witness.

25 {End of bench conference.}

Wein - direct

- - - - -

THE COURT: Mr. Parise, would you kindly read the question back to the doctor, please.

Doctor, listen to the question.

{The last question was read by the reporter as follows:

"Q Dr. Wein, looking at 1973 and the information you collected for that year, did you come to any conclusion with regard to the question we began with as to market power based on that data?"}

THE COURT: The question was related, Doctor, to the year 1973. Please do not go beyond the question.

A Well, in 1973, I concluded from a roughly 90 to 10 percentage that CEI is dominant in the retail sales of the City of Cleveland and has substantial market power.

MS. COLEMAN: Mr. Schmitz, would you place Plaintiff's Exhibit 2579, which is a similar poster, on the easel, please.

Q Dr. Wein, was Plaintiff's Exhibit 2579 prepared at your direction?

Wein - direct

1

2 A Yes, it was.

3 Q What was the source of your information for that?

4 A Well, these are the Form 1's and the Form M-1's,  
5 M-1's are the municipal forms, to the Federal Power  
6 Commission.

7 Q Dr. Wein, counsel has agreed that the data, the  
8 numbers on this poster, are correct.

9 THE COURT: Counsel, is this  
10 where I was supposed to read Stipulation No. 106?

11 MS. COLEMAN: There is no written  
12 stipulation for this one, your Honor.

13 THE COURT: I'm sorry.

14 Very well, you may proceed.

15 Q What conclusions did you draw based on this data,  
16 Dr. Wein?

17 A I concluded that question for 1973.

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

20 THE COURT: The question is now  
21 for 1973.

22 MR. LANSDALE: I'm sorry. I didn't  
23 hear the whole question, then.

24 Q What conclusions did you come to for the year 1973  
25 based on the data that you display on Plaintiff's

Wein - direct

Exhibit 2579?

A Well, I came to the conclusions for 1973 that CEI had approximately five times the number of customers, retail electric customers, in the City of Cleveland and that, as such, it had dominant power.

MS. COLEMAN:

Mr. Schmitz, would

you place Plaintiff's Exhibit 2580 on the easel, please? It should also be a vertical poster.

{The exhibit was placed on the easel by the clerk.}

Q Dr. Wein, please look at Plaintiff's Exhibit 2580, and if it is awkward for you to be looking at it from the witness chair, I think you may leave your chair.

THE WITNESS:

May I?

THE COURT:

Surely.

Q Was this poster prepared at your direction, Dr. Wein?

A Yes, it was.

Q What information does it show?

A Well, it is another measurement of the share. In this case it happens to be in megawatt hours rather than in number of customers or in dollars of revenue.

Q Is there a reason, Dr. Wein, you made measurements on different standards?

A Yes. The idea of market power has more than just one

Wein - direct

dimension. So you look to the revenues, you look to the customers, you look to the actual physical amount. When you compare them, that gives you some other kinds of information.

Q For the year 1973 what was your conclusion with regard to the megawatt hour sales made in the City of Cleveland?

A Well, there CEI had 91-1/2 percent of megawatt hour sales. The City had 8-1/2 percent. So that indicates that with regard to the actual physical commodity the dominance was larger, considerably larger, than with respect to the number of customers which, if you put those two facts together, indicates that on the average the sales of CEI per customer are very much greater.

Q Dr. Wein, the exhibits which we have been looking at concern the City of Cleveland. Did you also collect data concerning CEI's service territory?

A Yes, I did.

MS. COLEMAN: Mr. Schmitz, would you place Plaintiff's Exhibit 2575, which is a horizontal display, on the easel? And perhaps you might take the vertical posters down.

{The exhibit was placed on the easel by the



1 Wein - direct

2 clerk.}

3 MS. COLEMAN: Your Honor, would  
4 you please read Stipulation 105?

5 THE COURT: Which number, please?

6 MS. COLEMAN: 105.

7 THE COURT: I thought I read that.

8 MS. COLEMAN: You are right. You  
9 did. Excuse me.

10 THE COURT: 106?

11 MS. COLEMAN: No, your Honor. 105  
12 is the one applicable to this exhibit.

13 BY MS. COLEMAN:

14 Q Dr. Wein, was this exhibit, Plaintiff's Exhibit 2575,  
15 prepared at your direction?

16 A Yes.

17 Q What information does Plaintiff's Exhibit 2575  
18 display, sir?

19 A Well, it is showing the revenue from retail sales of  
20 electricity in the entire CEI service area.

21 Q For what companies is information displayed, sir?

22 A Well, it is shown for the three companies that exist  
23 in the CEI's service area, CEI, MELP and Painesville,  
24 the City of Painesville, and it shows this from 1968  
25 through 1977.

Wein - direct

1  
2 Q For the year 1973, Dr. Wein, what conclusion did you  
3 draw about the share of sales of retail power made  
4 in the CEI service area?

5 A Well, CEI had the overwhelming share, somewhat over  
6 95 percent of the total retail sales. The other two  
7 systems together have about 4-1/2 percent.

8 MS. COLEMAN: Mr. Schmitz, would  
9 you place Plaintiff's Exhibit 257b on the easel?

10 {The exhibit was placed on the easel by  
11 the clerk.}

12 MS. COLEMAN: Your Honor, would you  
13 please read Stipulation 109?

14 THE COURT: Stipulation 109 reads  
15 as follows:

16 "The numbers of electric customers identified  
17 on Plaintiff's Exhibit 257b are accurate and they  
18 are what they purport to be."

19 BY MS. COLEMAN:

20 Q Dr. Wein, what information does Plaintiff's Exhibit  
21 257b display?

22 A Well, this shows again for the CEI service territory  
23 another measurement of dominance, and this is in the  
24 number of customers.

25 Q Pardon me. Applying this measure of dominance, what

Wein - direct

was your conclusion for the year 1973?

A Well, that CEI was overwhelmingly dominant in terms of number of customers. It had over 92 percent of the total retail customers in the entire 1,700 square miles of its service territory. The other two systems, that is, MELP and Painesville, had about 7-1/2 percent.

Q Did you use the measure of megawatt sales in examining the CEI service area as you did in the City of Cleveland?

A I recall that I did.

MS. COLEMAN:

Mr. Schmitz, would

you place Plaintiff's Exhibit 2577 on the easel, please.

{The exhibit was placed on the easel by the clerk.}

Q What information does Plaintiff's Exhibit 2577 depict, Dr. Wein?

A Well, they show the retail electric power sales, in this case measured by megawatt hours.

Q What did you find when you measured retail power sales in terms of megawatt hours for the year 1973?

A Well, I found that CEI had approximately 96-1/2 percent of the total megawatt hour sales in the entire territory.

Wein - direct

The other two companies, of course, had the balance, approximately 3-1/2 percent.

Q Dr. Wein, did you measure the question of market shares in CEI's service area by any other measures?

A Yes. I looked at the generating capacity, I looked at the transmission miles. I looked at the physical things which are involved in the electric power business, that is to say, in generation, transmission and distribution.

Q Why are those appropriate measures for market power, Dr. Wein?

A Well, because they are one of the necessary foundations of being in a business to have appropriate capacity in each element of the business, and if it is difficult for newcomers to reproduce any of these elements as, for example, generation or as, for example, transmission or distribution, and if an existing company happens to have the preponderance of these elements of physical capacity, it is really the cornerstone of market power.

MS. COLEMAN:

Mr. Schmitz, would

you place Plaintiff's Exhibits 2504 and 2505,

perhaps one on each easel that you have standing

there.

Wein - direct

Thank you.

Your Honor, would you read Stipulations  
108 and 107?

THE COURT: 108 reads as follows:

"Megawatt nameplate capacity data identified  
on Plaintiff's Exhibit 2504 are accurate and  
they are what they purport to be."

107 reads as follows:

"The number of circuit miles identified  
on Plaintiff's Exhibit 2505 are accurate and  
they are what they purport to be."

BY MS. COLEMAN:

Q Were these exhibits prepared under your direction,  
Dr. Wein?

A Yes, they are.

Q What does Plaintiff's Exhibit 2504 show?

A That's the generation capacity --

Q I am sorry, Dr. Wein, we can't hear you.

A I was talking to myself.

2504 shows the generation capacity in the CEI  
service territory. There are three companies which  
have generation capacity: CEI, MELP and Painesville.

It shows the period from '68, '73 and '77, and  
it shows for each of these years the amount of the

Wein - direct

1 nameplate generating capacity and the proportion that  
2 each company had of the total in the CEI service area.

3  
4 Q What is "nameplate generating capacity"?

5 A Well, that's the -- actually a plate on a machine,  
6 the manufacturer who makes the machine gives it a  
7 rating of capacity and that is its nameplate  
8 capacity.

9 Q What was your conclusion for 1973 as to share of  
10 nameplate capacity in the CEI service area?

11 A Well, CEI had 3,880 megawatts of capacity, that  
12 includes 338 megawatts of pump storage capacity at  
13 its Seneca plant in Pennsylvania. That Seneca  
14 capacity is used for peaking.

15 MELP at 208.6 megawatts and Painesville had  
16 38 megawatts.

17 Now, if you take the percentages of that, the  
18 total adds up to 4,126.6 megawatts. If you take  
19 their percentages of it; CEI had 94 percent, MELP  
20 had 5 and Painesville had approximately 1 percent.

21 Q Dr. Wein, would you, while you are up there, go to  
22 Plaintiff's Exhibit 2505 and explain what information  
23 is placed on that exhibit.

24 A Well, that is showing the circuit miles of  
25 transmission capacity and, again, it is showing them

Wein - direct

for the three systems in the CEI service territory.

It shows the number of the miles, circuit miles and it shows the market share that each of the systems have.

It shows that CEI had approximately 96 percent of the transmission capacity as measured by circuit miles, which is only one measurement of it. And the others had the balance, which was 4 percent, 3.77 percent.

Q You may sit down, Dr. Wein.

Based on your review of the data about sales, customers, megawatt sales, capacity of transmission and generation, did you reach a conclusion about the existence of market power in the retail sales of power in the CEI service area?

A Well, I based my conclusions certainly on the percentages, but I based them on other things as well.

Yes, I did reach such a conclusion.

Q What was your conclusion?

A That the CEI had dominating market power in its entire service area in the retail sales of electricity, no matter which dimension one measures it on, and that its ownership and control of the basic

Wein - direct

ingredients, such as generating capacity and transmission capacity was equally dominant.

Q Dr. Wein, you have spoken about retail power sales.

Did you also make statistical studies regarding wholesale power sales?

A Yes.

MS. COLEMAN: Mr. Schmitz, would you place Plaintiff's Exhibit 2581 on the easel? That should be the last remaining poster.

MR. SCHMITZ: This is 2681.

MS. COLEMAN: My numbering is wrong. Thank you for the correction.

BY MS. COLEMAN:

Q Dr. Wein, was Plaintiff's Exhibit 2681 prepared under your direction and control?

A Yes, it was.

Q What information does Plaintiff's Exhibit 2681 show?

A Well, it is showing for the three existing systems in the CEI service territory the amount of wholesale firm sales and the share of each of the companies in that.

Q How did you calculate what the wholesale firm sales were?



Wein - direct

1  
2 A Well, essentially I took the Form 1's and looked up  
3 the amounts in 1973, for example, we took whatever  
4 CEI sold to Muny and whatever it sold to itself as  
5 a captive wholesale market, added those numbers  
6 together.

7 Essentially -- that's of course, how we get  
8 Muny and that's how we get Painesville, because  
9 each of those companies has their own captive  
10 wholesale market.

11 In addition, so far as CEI sold any other  
12 wholesale firm to, say, MELP, that would be added as  
13 well.

14 Q Based on the data which you collected here, did you  
15 reach an opinion about the existence of market power  
16 in wholesale sales in the CEI service area?

17 A Well, yes. It is fairly clear that CEI, in 1973 for  
18 example, had the wholesale market practically to  
19 itself. Part of that is because, of course, its  
20 captive market is so large. But it had 96 percent.

21 In 1977 --

22 MR. LANSDALE: I object to this,  
23 please.

24 THE COURT: Sustained. The  
25 question is limited to 1973.

Wein - direct

THE WITNESS:

I am sorry.

Q Dr. Wein, you mentioned that there were other factors which you considered as well as the statistics we have been looking at in deciding whether there was market power in the markets that you described.

Would you please explain what other factors you considered in reaching your conclusion.

A Well, they go to the barriers of entry of some other utility wishing to get into this particular 1,700 square mile service territory or some other utility wishing to build now a transmission line. It would be very difficult for another company to build a transmission line in this 1,700 square mile territory. It would have to get approval from the Ohio Siting Commission. The territorial laws would make it extremely difficult for any company to get into other territories already served by systems at this time.

The rapid inflation, particularly in the last three or four years, makes the acquiring of generating or transmission capacity no better than capacity acquired, say, five years ago. Practically twice as expensive.

So that there are all these barriers for other

Wein - direct

companies or other potential competitors who are not in the business to attempt to get into the business.

Given that plus the preponderantly enormous position of the Illuminating Company, I concluded that they do have dominating substantially monopoly power in this market area.

Q Did you give consideration to whether any of the participants in the markets had control of supply?

MR. LANSDALE: May I have that question read, if your Honor please?

THE COURT: Read the question back, please.

{The last question was read by the reporter.}

A By "these markets," you mean which markets?

Q The retail markets you have identified or the wholesale markets you have identified.

A In this 1,700 square mile service territory? I mean, we have had --

Q We have had several markets, I agree.

A Yes.

Q Let's begin with the retail market for electric sales in the City of Cleveland.

Did you give consideration to whether any of the participants in that market had control of supply

Wein - direct

when you reached your conclusion regarding market power?

A Yes, I did.

Q And what factors did you consider?

MR. LANSDALE: Isn't this ,  
repetitious?

THE COURT: It seems to me that  
we have just been over this step by step. That  
is what the exhibits disclosed.

Am I wrong?

MS. COLEMAN: There is other  
material, your Honor.

THE COURT: Well, approach the  
bench.

- - - - -

{Bench conference ensued on the record as  
follows:}

MR. LANSDALE: I object to the  
repetition.

It seems to me this is exactly what we went  
over a few minutes ago.

MS. COLEMAN: You haven't heard  
his answer yet.

MR. LANSDALE: What?

Wein - direct

1  
2 MS. COLEMAN: You haven't heard his  
3 answer yet.

4 THE COURT: Well, what is he  
5 going to answer?

6 MR. LANSDALE: I heard the question.

7 THE COURT: What is he going to  
8 answer?

9 MS. COLEMAN: He hasn't discussed  
10 all of the things that he considered.

11 THE COURT: Read the question  
12 back.

13 {The last question was read by the reporter.}

14 THE COURT: That is precisely what  
15 we went over before.

16 MR. LANSDALE: We have been over  
17 and over the fact that --

18 THE COURT: Maybe I'm missing it.  
19 I don't know.

20 MS. COLEMAN: Your Honor, --

21 THE COURT: But we went through  
22 all of these exhibits.

23 MS. COLEMAN: We went through the  
24 exhibits and we talked about statistical measures.

25 THE COURT: And it concerned

Wein - direct

retail sales --

MS. COLEMAN: I'm turning to other measures of dominance.

THE COURT: -- as to each of the markets.

MS. COLEMAN: That is correct.

THE COURT: And you also asked him "Did you take into consideration other factors as to each of the markets separately," and he answered that he did.

MS. COLEMAN: And I want to establish what those are.

THE COURT: Well, he already answered those questions.

MS. COLEMAN: There are others in addition, your Honor.

THE COURT: I just don't understand. I'm going to sustain the objection.

MS. COLEMAN: Your Honor, I take exception to that.

THE COURT: Well, you can take --

MS. COLEMAN: There is other material to be put forward on this subject.

THE COURT: Young lady, you may

Wein - direct

take your exceptions, and it is noted on the record.

Now, if you can tell me what he is going to testify to that he has not already testified to, I will certainly consider it.

MS. COLEMAN: All right.

THE COURT: Now, if you don't want to tell me, that is another thing.

I'm going to sustain the objection.

MS. COLEMAN: Well, may I tell you while Mr. Lansdale is seated?

THE COURT: Certainly.

MR. LANSDALE: What was that?

THE COURT: She doesn't want you present here. Apparently there is some secret that he is going to testify to.

MR. LANSDALE: All right. I will leave.

THE COURT: Step aside.

{Thereupon, Mr. Lansdale left the side bar.}

THE COURT: Now tell me.

MS. COLEMAN: He is going to testify as to CEI's control over the possibility of interconnection with Muny Light, the possibility

Wein - direct

of interconnection with Muny Light, the possibility for Muny Light getting to other power sources through an interconnection and through wheeling services. That matter is much related to what we have before us, and I think he should be able to discuss it.

THE COURT: Well, that certainly isn't the thrust of your question.

MS. COLEMAN: Well, perhaps my question was poorly phrased, your Honor.

THE COURT: Well, why don't you rephrase the question.

MS. COLEMAN: I will do so.

THE COURT: And I don't know what the big secret is that he can't hear. I mean, it is all going to come out right now anyway.

MS. COLEMAN: Right, your Honor.

THE COURT: Fine. Rephrase your question.

{End of bench conference.}

- - - - -

THE COURT: Please rephrase the question.

You may proceed, Ms. Coleman.



Wein - direct

BY MS. COLEMAN:

Q Dr. Weiner, in reaching your conclusion about market power, did you give consideration to whether CEI controlled access to any facilities?

A Yes, I did.

Q What information did you consider?

A The possibility of the Municipal Light Plant of the City of Cleveland obtaining other sources of power on the basis of what might have been available and if they could reach it. That led me to examine whether they had access through interconnection with any systems, and it turns out that the access that they have as of now and as of 1973 and before that depended upon having an interconnection with the system of CEI, which is the only system and nearest system to which they could be interconnected.

So insofar as they had no access during 1973, did not have a synchronous interconnection, then other sources of supply were denied to them.

Q Well, what influence did lack of interconnection have on the issue of market power?

A Well, what it meant is, then, that CEI had market power certainly in the wholesale area because it was able to deny the City of Cleveland from purchasing

Wein - direct

wholesale power from other companies simply by  
control of access. CEI is not the only company  
that sells wholesale power or has supplies of it for  
sale.

Q Dr. Wein, you have been describing market power in  
terms of control of supply.

Did you give consideration to whether there was  
control of price in any of the markets which you  
studied?

A Yes, I gave some consideration to that.

Q And what was your conclusion?

A I felt that they had substantial control over price.

Q And who was "they"?

A CEI.

Q In what manner?

A Well, CEI initiates and sets out its tariffs.

It determines its own rate designs.

It negotiates rate contracts --

MR. LANSDALE:

I object, if your

Honor please.

THE COURT:

Approach the bench.

- - - - -

{Bench conference ensued on the record as  
follows:}

Wein - direct

MR. LANSDALE: Your Honor, there is no evidence whatsoever to support this. As a matter of fact, the evidence, stipulations -- I have to get out the specific places -- are to the contrary.

All of these things are controlled either by the Public Utilities Commission of Ohio or by the City Council of the City of Cleveland, who participates vigorously, as the evidence shows, in addressing these various things.

For this witness to testify that we have control over it is contrary to the record and contrary to the law, and I object.

MS. COLEMAN: Your Honor, I don't believe it is contrary to the record. I think Mr. Bingham testified to the manner in which CEI prepares its rates and brings them to the attention of the PUCO.

I do not think that it is contrary to law. I don't think anything that has been said is contrary to law.

MR. LANSDALE: You do not think what? I can't hear you.

MS. COLEMAN: And I don't know of

Wein - direct

any stipulation to the subject.

I don't think he has said anything which is contrary to law, Mr. Lansdale.

MR. LANSDALE: I'm unsure of myself on the stipulations.

We do have stipulations about the power of the City to regulate in the first instance.

THE COURT: Why don't you go and check the stipulations.

My understanding is that rates are set by the Public Utilities Commission after hearings.

MS. COLEMAN: Your Honor, that is precisely why I wanted Mr. Eckhart to testify the other day, to clear what is the situation.

THE COURT: Well, that is what the law says.

MS. COLEMAN: We have a semantic problem here. Mr. Lansdale is trying to say there is setting by the PUCO and there is control by the PUCO, and we are attempting to bring out the fact that there is initiative which CEI has, there is discretion which CEI has, and there are ways in which what CEI does influences the price.

This isn't a question of law, your Honor.

Wein - direct

It is a question of fact and market practice.

THE COURT: Well, I assume that it is all embodied in the Public Utilities Act.

MS. COLEMAN: Like very law, your Honor, it sets up a scheme.

THE COURT: Like every law? It is a law?

MS. COLEMAN: It doesn't give detail as to what happens, and you can't tell from the law what happens or how it is administered.

THE COURT: Well, certainly you can't go beyond the law. Now, if there is a departure from the law, if the Public Utilities Commission doesn't enforce the law, that is one thing. But that is not an issue before us here.

MS. COLEMAN: I'm not addressing whether they enforce the law, your Honor. I'm addressing the question of the extent to which --

THE COURT: And we are going --

MS. COLEMAN: -- CEI may decide what the price may be.

THE COURT: Well, that is a conclusion.

MS. COLEMAN: There is fact evidence

Wein - direct

on that.

THE COURT:

That is a conclusion,

my dear.

MS. COLEMAN:

One must conclude that

from the facts, your Honor, and we are attempting  
to put those facts forward, and I think some of  
them are already in the record through Mr.

Bingham.

THE COURT:

We are not going to go

through a Public Utilities rate hearing here.

MS. COLEMAN:

I agree.

MR. LANSDALE:

Well, I can't find

the stipulation. It is in there.

Number 202 partly covers it and Number 78  
partly covers it.

In any event, I submit that it is very clear  
that CEI may not establish any rate other than  
any reduction of rates and no longer can establish  
even a reduction of rates without the specific  
approval of the Public Utilities Commission, and  
the Public Utilities Commission has complete  
control over our rate design, our rate level.

Moreover, it is subject to constitutional  
limitations.

Wein - direct

Moreover, the City of Cleveland has regulatory power in the first instance, which it has frequently exercised, subject to approval of the administrative appeals.

For this witness to testify that CEI has control over its prices other than by litigation with substantial and vigorous opposition by the City of Cleveland and others is to testify to a falsehood, and I object. It is unlawful.

MS. COLEMAN: Your Honor, the facts which the witness stated I don't think one can take exception to.

MR. LANSDALE: What facts?

THE COURT: Read the answer back.

{The record was read by the reporter as follows:

"Q Dr. Wein, you have been describing market power in terms of control of supply.

"Did you give consideration to whether there was control of price in any of the markets which you studied?

"A Yes, I gave some consideration to that.

"Q And what was your conclusion?

"A I felt that they had substantial

1 Wein - direct  
2 control over price.

3 "Q And who was 'they'?

4 "A CEI.

5 "Q In what manner?

6 "A Well, CEI initiates and sets out its  
7 tariffs.

8 "It determines its own rate designs.

9 "It negotiates rate contracts --"

10 MS. COLEMAN: What is exceptionable  
11 in those three statements, Mr. Lansdale?

12 MR. LANSDALE: Beg your pardon?

13 MS. COLEMAN: What is exceptionable?

14 MR. LANSDALE: What is exceptionable  
15 is that it has control over its rates, and it  
16 doesn't.

17 THE COURT: Read the answer.

18 MS. COLEMAN: He explained the  
19 basis for his conclusion. If, as an economist,  
20 that is his conclusion and those are the bases,  
21 it seems to me he should be permitted to testify.

22 THE COURT: Read the answer.

23 {The record was read by the reporter as  
24 follows:

25 "A Well, CEI initiates and sets out its



Wein - direct

tariffs.

"It determines its own rate designs.

"It negotiates rate contracts --"]

THE COURT: What about that?

MR. LANSDALE: It makes application.

The stipulation covers this. The first stipulation I gave you says it is subject to the approval of the PUCO. The stipulation says, "With the approval of the Public Utilities Commission of Ohio, we have set uniform rates throughout our territory." That is the first stipulation.

THE COURT: Read the third item.

{The record was read by the reporter as follows:

"It negotiates rate contracts --"]

THE COURT: Well --

MR. LANSDALE: In former years, we negotiated rate contracts with municipalities, including the City of Cleveland.

THE COURT: Well, it would appear to me at this juncture, Mr. Lansdale, that the statement that he has made, "It initiates and sets out its tariffs," albeit it is an incomplete statement --

Wein - direct

1  
2 MR. LANSDALE: He says that we  
3 controlled our prices, and that is what started  
4 me up here.

5 THE COURT: Well, where does it  
6 say that? I don't find that. I thought that he  
7 said that some place. But apparently the  
8 transcript has that he did not say that.

9 Go back and read that again.

10 I agree with you if he said that you  
11 controlled your own tariffs, that is one thing,  
12 because you don't. But if he says, "It  
13 initiates and sets out its tariffs," you do  
14 initiate them.

15 MR. LANSDALE: We do initiate them  
16 usually.

17 THE COURT: As I say, it is an  
18 incomplete statement and it doesn't give the  
19 entire picture. But that is an issue for  
20 cross-examination.

21 And the second thing is, "It determines its  
22 own rate design."

23 MR. LANSDALE: It does not determine.

24 THE COURT: That is not a complete  
25 statement either. But you do at least initially

Wein - direct

attempt to do it, subject to the approval of  
the Public Utilities Commission.

MR. LANSDALE: Yes, that is right.

THE COURT: Again, that is a  
matter for cross-examination.

And "It negotiates rate contracts --"

I don't know what he is going to say after  
that.

Again, that is an incomplete statement. But  
that is subject matter that you have to bring out  
on cross-examination.

But what he has said is not objectionable,  
those facts.

MR. LANSDALE: I won't ask --

THE COURT: As I say, in the  
sense that they are presented, it is distorted.  
But that is the function of counsel.

MR. LANSDALE: I won't ask that it  
be read again. I still think he said "controls."

THE COURT: Go back.

{The record was read by the reporter as  
follows:

"Q Dr. Wein, you have been describing  
market power in terms of control of supply.

Wein - direct

"Did you give consideration to whether there was control of price in any of the markets which you studied?"

"A Yes, I gave some consideration to that.

"Q And what was your conclusion?"

"A I felt that they had substantial control over price."}

MR. LANSDALE: That is what started me over here.

THE COURT: That is just an outright misstatement.

MS. COLEMAN: Well, he is saying that based on those three facts. If Mr. Lansdale feels there are others, he would cross-examine.

THE COURT: No. No. Then when taken in context, it is a complete misrepresentation of what the actual procedure is, and it is going to be stricken.

Mark that business about "control," because I'm going to ask you to read the question and read the answer and I'm going to have it stricken and tell the jury to disregard it because it is not an accurate statement of the law.

Wein - direct

1  
2 MS. COLEMAN: He is not stating  
3 law, your Honor. He is stating from an economist's  
4 point of view.

5 THE COURT: Very well. Your  
6 statement is on the record.

7 Now, I know what he said.

8 We get into this same problem every time he  
9 departs and starts testifying about what the law  
10 is. Now, I have told him not to do that and he  
11 persists in doing it. I don't wish to admonish  
12 him before the jury, but I will.

13 Now, you are free to proceed to explore this  
14 in a proper fashion.

15 MS. COLEMAN: All right.

16 THE COURT: Let's go back and  
17 start all over again.

18 MS. COLEMAN: Note my exception.

19 {End of bench conference.}

20 - - - - -

21 THE COURT: Mr. Parise, would you  
22 read back the context of the questions and the  
23 answers that started this discussion?

24 {The record was read by the reporter as  
25 follows:

Wein - direct

"Q Dr. Wein, you have been describing market power in terms of control of supply.

"Did you give consideration to whether there was control of price in any of the markets which you studied?

"A Yes, I gave some consideration to that.

"Q What was your conclusion?

"A I felt that they had substantial control over price."

THE COURT: Starting right there.  
Go ahead.

{The record was read by the reporter as follows:

"Q And who was 'they'?

"A CEI.

"Q In what manner?

"A Well, CEI initiates and sets out its tariffs.

"It determines its own rate designs.

"It negotiates rate contracts --"

THE COURT: Beginning with  
"they had control" -- what is that?

{The record was read by the reporter as follows:

Wein - direct

"I felt that they had substantial control over price."}

THE COURT: That may go out together with everything that came subsequent to that because that is not an accurate statement.

Proceed.

BY MS. COLEMAN:

Q Dr. Wein, based on your review of the documents, testimony and other materials you looked at, did you find that CEI had any ability to affect the price charged for retail power in the City of Cleveland or in the CEI service area?

A Yes, they had the ability to do that.

Q In what manner, as an economist, did you conclude they had such ability?

A Well, I examined the kinds of things they do when they set rates, recognizing, of course, that rates which they set, which they initiate, which they design tariffs for or which they engage in contracts with other companies, all these rates are filed before two commissions. One is the Ohio Public Service Commission, or Public Service Commission of Ohio, and the other one is the Federal Power Commission.

These filings, of which I have seen numerous ones

Wein - direct

in both places, set forth their idea as to what it is that they wish to charge.

Any company that can do that I view, as an economist," has some power to set its rates. Whether its rates are going to be accepted by a public utility agency or are going to be changed in some respects depends on many questions.

Oftentimes the rates, particularly the rate designs at the retail level, are not changed at all. The level may be changed. Sometimes they may go down and sometimes they may go up.

MR. LANSDALE: If your Honor please,  
I object, and I wish to approach the bench.

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

MR. LANSDALE: If your Honor please,  
let me state it this way.

Before the Federal Power Commission one files a rate schedule which is either accepted or suspended and, if suspended, there are hearings concerning it. It may well be accepted.

Before the Public Utilities Commission of



Wein - direct

Ohio the procedure is totally different and this witness apparently doesn't understand it and I object to him testifying to it.

Rates do not go into effect as filed and there is no situation in which, under the Commission procedure and laws, rates are filed and accepted or rejected. No rate may go into effect, no matter what, without a hearing and without an affirmative determination that it is reasonable and lawful.

The situation is not as this witness described at all and I object to him testifying to it. And this is something I know something about.

MS. COLEMAN: Well, I would like to get into other matters on this subject rather than rate-making procedure, your Honor.

THE COURT: You are free to get into other matters, but we are confronted here with an objection as to the accuracy of his testimony.

MS. COLEMAN: Well, Mr. Lansdale knows more about that area than I do, and I am not going to be able to speak to the accuracy of

Wein - direct

what Mr. Lansdale said.

THE COURT: The objection will be  
sustained and the answer stricken.

{End of bench conference.}

- - - - -

THE COURT: The objection will be  
sustained and the jury will disregard the answer.

Proceed.

BY MS. COLEMAN:

Q Dr. Wein, are there features of market structure  
which you find gives CEI some ability to affect the  
price charged for retail power in the City of  
Cleveland or in the service area?

A Well, it seems to me that the mere size of the  
company, the fact that they are the major supplier,  
gives them some such power.

MS. COLEMAN: May I approach the  
bench, your Honor?

THE COURT: Yes.

- - - - -

{Bench conference ensued on the record as  
follows:}

MS. COLEMAN: I think the witness  
is failing, your Honor.

Wein - direct

1  
2 THE COURT: We have only been  
3 here about 45 minutes. It seems to me that these  
4 recesses are timed for conferences rather than for  
5 discomfort.

6 MS. COLEMAN: Your Honor, --

7 THE COURT: Let's proceed. May we  
8 proceed.

9 MS. COLEMAN: Dr. Wein has indicated  
10 to me he is not feeling well.

11 MR. LANSDALE: I can't hear you.

12 MS. COLEMAN: Dr. Wein has indicated  
13 to me he is not feeling well. I can tell that he  
14 is not. I would request a recess.

15 THE COURT: Very well. We will  
16 take a recess.

17 {End of bench conference.}

18 - - - - -

19 THE COURT: Ladies and gentlemen,  
20 we will take a short recess. Please adhere to  
21 my admonition during the recess.

22 {Recess taken.}

23 THE COURT: Is Dr. Wein ready to  
24 proceed?

25 MS. COLEMAN: Yes, your Honor, I

Wein - direct

thought he was here.

THE COURT:

You may proceed,

Ms. Coleman.

MS. COLEMAN:

Thank you, your Honor.

BY MS. COLEMAN:

Q Dr. Wein, I had asked you whether you found that there were any features of the market structure which gave CEI some ability to affect the price of retail power in any of the markets studied.

A Well, I have to distinguish time periods here.

Q During the period of '71 to '75.

A Well, during the period of '71 to '75, insofar as they were a supplier of wholesale energy to Muny Light Plant, the cost of wholesale energy which the Muny Light Plant bought from the CEI obviously was a part of their cost, a significant part of their cost, and that whatever the price was charged would affect the cost of Muny Light Plant and, therefore, would affect their ability to restrict their ability to determine their prices.

Q Were there any other factors affecting the price of the power which the Muny Light Plant purchased at wholesale?

A Well, insofar as, I believe I have mentioned this,

Wein - direct

insofar as CEI controlled access to other potential suppliers who may have been cheaper than the CEI, that also affected the cost of Muny Light's power and indirectly then restricted the scope of its price maneuverability and, obviously, influenced the cost of energy-purchased power, which is very substantial. Insofar as they could not get other power, that also affected it.

Q And in which markets, and which product markets would that have an effect?

A Well, the power would be a wholesale transaction, but simply by controlling wholesale you can also, insofar as you influence wholesale, you can also influence the retail prices. So your power to control access to wholesale suppliers also, of course, gives power to control retail prices to some extent.

Q Dr. Wein, we have spoken about two of the product markets you described yesterday.

What is your opinion with regard to market power related to the third market, the regional power exchange?

A Well, that also is something where the CEI, when Muny was a significant generating company, the CEI,

Wein - direct

by having control of access, controlling the superhighway, as it were, by which power flows, had dominant control, had substantial monopoly power to influence that market in the City of Cleveland.

Q Is it a question of market share in that market, Dr. Wein, or some other consideration?

A No, it is not a question of market share, particularly. It is not like selling wholesale power.

It is simply preventing access to another company in obtaining economical sources of bulk power when and if they arise. It is the shopping around thing. It is controlling the highway. If you can't get on the highway, you can't get on the highway, and it doesn't matter how many other people have access at some point down the highway.

Q Dr. Wein, turning to another subject, please, did you, in reviewing the documents, testimony and the other material that you looked at and applying your knowledge and background, come to any conclusions as to whether market power had been exercised in any of these markets?

A Yes, I came to a conclusion.

Q Did you come to any conclusion as to whether there were anticompetitive effects from that exercise of market

Wein - direct

1 power?

2 A Yes, I did.

3 Q For the period from 1971 to 1975 what did you identify  
4 as being an exercise of market power?

5 A A variety of practices.

6 Q Could you please identify the first?

7 A One, the refusal, when asked, to engage in a  
8 synchronous interconnection with the Municipal Light  
9 System and CEI only under the terms of having the  
10 city raise its prices to CEI level.

11 MR. LANSDALE:

I object, if your

12 Honor please.

13 THE COURT:

Approach the bench.

14 - - - - -  
15 {Bench conference ensued on the record as  
16 follows:}

17 MR. LANSDALE:

I object and I

18 seriously --

19 THE COURT:

Sh-h-h.

20 MR. LANSDALE:

21 This is an intelligent,  
22 very experienced witness. He knows full well he  
23 is talking about 1962 and 1966. Way outside the  
24 damage period. I submit that it wasn't any  
25 mistake that he did that, and I object.

Wein - direct

MS. COLEMAN: I take exception to  
your insinuation, Jack.

MR. LANSDALE: I'm not insinuating  
anything. I am claiming it.

MS. COLEMAN: Perhaps it would be  
best to reread the question to the witness.

THE COURT: Very well.

{End of bench conference.}

- - - - -

THE COURT: Read the question  
back to the witness, please.

The witness will kindly listen to the question  
and respond to the question, not beyond it.

The answer will be stricken.

{The record was read by the reporter as  
follows:

"Q Could you please identify the first?"}

MS. COLEMAN: Well, perhaps the  
prior question as well.

{The record was read by the reporter as  
follows:

"Q For the period from 1971 to 1975 what  
did you identify as being an exercise of market  
power?



Wein - direct

"A A variety of practices."

THE WITNESS: I'm sorry. I missed  
the 1971.

A The refusal to interconnect on a synchronous basis.

Q And you mentioned that there were several. What are  
the others?

A The refusal to wheel power, particularly in connection  
with the PASNY power.

Q What?

A Particularly in connection with the power from the  
State of New York Authority.

Q And were there any other practices which you looked at?

A Yes. I think that the Muny Displacement Program was  
such a practice.

Q Dr. Wein, did you conclude that the practices that  
you have identified had any anticompetitive effects  
as you defined them previously?

A Yes, I certainly did.

Q Have you prepared an exhibit displaying your conclusions  
on that subject, Doctor?

A Yes, I have.

MS. COLEMAN:

Mr. Schmitz, would  
you place Plaintiff's Exhibit 3097, which is  
leaning against the table and is the second one

Wein - direct

from the front?

MR. LANSDALE: What is the number?

MS. COLEMAN: 3097.

MR. LANSDALE: May I approach the bench, if your Honor please?

- - - - -

{Bench conference ensued on the record as follows:}

MR. LANSDALE: I take objection to this exhibit and the display of it to the jury.

It contains material that hasn't been proved. This is out of Mr. Wein's damage exhibit and it contains much material that has not been proved and he, of course, has no knowledge of.

MS. COLEMAN: What hasn't been proved?

MR. LANSDALE: Well, we have something called "predatory acquisition of customers."

MS. COLEMAN: Well, let's put up a label that says "Munby Displacement Program." Okay?

MR. LANSDALE: Well, I would object to that, too, because the Munby Displacement Program, there is no proof whatsoever that the

Wein - direct

1  
2 Muny Displacement Program was predatory and I  
3 submit there is not sufficient evidence to go to  
4 the jury on that predatory activity at this stage.  
5 It may come out but there has been no showing at  
6 all of improper action at the predatory level.

7 MS. COLEMAN: I have offered to put  
8 a different label on that.

9 MR. LANSDALE: I don't care whether  
10 you relabel it or not. It's listed by Mr. Wein  
11 as an anticompetitive act, whether you label it  
12 or not.

13 MS. COLEMAN: It's his opinion.

14 MR. LANSDALE: Beg your pardon?

15 MS. COLEMAN: That is his opinion.

16 We are getting into --

17 MR. LANSDALE: He has not supported  
18 this opinion.

19 MS. COLEMAN: Well, we are getting  
20 into that.

21 MR. LANSDALE: Beg pardon?

22 MS. COLEMAN: We are getting into  
23 that matter.

24 THE COURT: Is it the contention  
25 of the City that this gentleman is going to testify

Wein - direct

to whether or not any given act is predatory or unfair or --

I was under the impression that that is the ultimate issue for the jury.

MS. COLEMAN: Your Honor, he will testify as to whether these actions together, in light of the circumstances, are anticompetitive conduct in the nature that he's described that there are two different kinds of competition yesterday as part of his economic analysis.

THE COURT: Well, being anticompetitive is one thing but characterizing them as predatory, unfair, and unlawful is another thing.

MS. COLEMAN: Your Honor, I will put a different label on that box.

THE COURT: I don't know anything in the record that shows there was a decline in bond market rating and availability of -- I don't know if there was anything in the testimony as far as I can recollect.

MS. COLEMAN: Your Honor, I believe there is testimony on all of these.

THE COURT: There is nothing in on

Wein - direct

inability to engage in economical expansion of capacity and economical operation of existing capacity.

MS. COLEMAN: Yes, there is, your Honor.

THE COURT: You say there is. I don't recollect it, but that's all right.

As a matter of fact, we get back to that same argument then that we had a couple days ago where they had no plans for economic expansion, let alone the necessary legislation, and so forth.

MS. COLEMAN: Your Honor, in anticipation of Mr. Lansdale's objection I placed covers on the only conduct about which there might be some question at this time because we have been discussing it previously, and that's what this represents. This is a chart he prepared to display his conclusions.

THE COURT: Well, he can testify to his conclusions without the chart. Sustain the objection. You will have to take it on a question and answer basis.

MS. COLEMAN: Note my exception.

{End of bench conference.}

Wein - direct

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THE COURT:

Sustain the objection

and you may proceed to elicit from the witness his  
conclusions without the proffered exhibit,  
Ms. Coleman.

BY MS. COLEMAN:

Q Dr. Wein, what is the basis for your conclusion that  
the conduct which you mentioned reflected the use of  
monopoly power?

Looking first at the refusal to interconnect.

A The refusal to interconnect was an act of monopoly  
power because CEI was the only system for which it  
was feasible for the City to interconnect with. It  
was the natural system to connect with. It provided  
the access to all the other systems through its  
interconnections with CAPCO companies and others.

So that by controlling this, by refusing to  
interconnect, it represented a use of monopoly power.

Q Dr. Wein, you described yesterday two different  
classifications which economists give to methods of  
competition.

Have you come to a conclusion as to how you would  
classify this conduct that you are describing?

A Well, this is a conduct which is aimed at the company.

Wein - direct

it is aimed to weaken the company, in this case the Muny Light Plant. It is aimed to make its costs higher and its reliability lower.

That does not benefit either Muny Light customers or CEI customers, it simply weakens the Muny Light system and acts in the direction of eliminating it or weakening it severely.

Q Dr. Wein, you mentioned next refusal to wheel PASNY power.

What is the basis for your conclusion that that represents a use of market power?

A That is depriving a competitor of a resource which that competitor was able to obtain if it had access. If it could get on the highway, CEI stood at the gateway to this highway, and refused to allow the Muny Light system to obtain this power. This power was cheaper power. It was cheaper than Muny Light could produce and it was probably as low or cheaper than CEI could gain power at.

Q Do you have an opinion as to how you would classify this conduct as between the two types of competition that you described yesterday?

A This is destructive competition. It, again, is not aimed at capturing customers, it is aimed at

Wein - direct

1  
2 weakening the opposing competitive system. Its  
3 consequence would be to drastically weaken it,  
4 possibly eliminate it.

5 Insofar as the power would be cheaper, the  
6 preference power would be cheaper, then the Muny  
7 Light would have had a cheaper cost of power which  
8 would have made it more competitive.

9 Q Dr. Wein, you mentioned lastly the Muny Light  
10 Displacement Program. What factors did you consider  
11 in reaching your conclusion that this was an exercise  
12 of monopoly power?

13 A I considered the following factors.

14 One, the scope of the plan. This was a plan  
15 which had enormous scope. It was not simply the idea  
16 of a salesman. I have read documents which show this  
17 plant involving the very highest officials of the  
18 company. It was carefully thought out and pieces of  
19 it were given to each of the departments, marketing  
20 and so on and so forth.

21 Goals were set. The goal of 10 to 1. The  
22 goal of 10 to 1 is not the meeting of competition, it  
23 is something far beyond that. It was a plan which  
24 was, it seemed to me, to have inevitably the effect  
25 of eliminating competition because its presumed



Wein - direct

objective of recapturing customers could have been met by a simple lowering of the price to meet Muny Light's prices.

But as I explained yesterday, that would have had a very severe consequence.

MR. LANSDALE: I object.

A Therefore --

THE COURT: Approach the bench.

Just a minute, Doctor.

- - - - -

{Bench conference ensued on the record as follows:}

MR. LANSDALE: It seems to me he is launching into something else rather than the effect on the competitor, the effect of the competitor on the Muny Displacement Program. He is talking about something else.

THE COURT: Read the answer back.

{Record read.}

THE COURT: Overruled.

{End of bench conference.}

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THE COURT: Overrule the objection.

You can continue the answer.

Wein - direct

BY MS. COLEMAN:

Q Have you any more to add on the factors you considered with regard to the program?

A I wonder if you could read the last three or four sentences.

THE COURT: Read the last three or four sentences.

{Record read.}

A I view it as a form of cutthroat competition, which I had defined as a practice or a price which the company would not normally continue to have, it would not keep it as a consistent and ongoing form of its operation.

Well, in examining the evidence it was clear to me that the conversion program could not have been kept on as an ongoing practice and, in fact, it wasn't. No company could, it seemed to me, offer a quarter of a million dollars to a company to become a customer of it as a normal policy of that company applied to all its customers. These policies were not applied to its customers.

The planning of the campaign was in exquisite detail, at least in my opinion, it was, one document, for example, pointed out that 10 percent of the

Wein - direct

customers accounted for 10 percent of Muny Light's revenues and these customers were targeted. That is not the meeting of ordinary competition.

So for these reasons, scope, cost, anticompetitive effect, I concluded that that was an exercise of monopoly power and not simply an ordinary reaction of one competitor meeting the competitive efforts of another.

Q Did you give attention to the time period during which your studies showed the program was in effect?

A Yes, I did give attention to that time period.

Q And what weight did you give that fact?

A Well, the program was talked about quite --

Q Doctor, listen to the question. What weight did you give that?

A Read the question, please.

{The last question was read by the reporter.}

A Well, I gave it some weight together with all the factors that I have mentioned.

Q Why did you feel it was important?

A Well, because it was coinciding with certain problems that the Muny Light System was having productionwise, and the combination of outages, large outages, gave an added sales thrust, put it that way, to the program

Wein - direct

1 of conversion. It ended at a particular time after  
2 the interconnection had been ordered, and one knew  
3 that it was going to have to be made, be completed  
4 by about 1975. So the program ended, I believe -- at  
5 least I found no documents or evidence beyond 1973.  
6

7 Q Dr. Wein, you indicated yesterday that it can be  
8 difficult for an economist to distinguish between  
9 competition aimed at inducing buyers and competition  
10 aimed at sellers.

11 What approach did you use to come to your  
12 conclusions about the conduct that we have discussed  
13 here?

14 Q Well, it seemed to me, in the context such as I have  
15 described it and in the alternatives that were  
16 available, that this form of conduct was certainly  
17 not the normal conduct of one competitor against  
18 another meeting either better price or better service  
19 or factors of that sort.

20 Q Did you look at each of these practices in isolation  
21 because the documents I read started to add up to a  
22 fairly coherent picture. The refusal to interconnect,  
23 for example, means that cost and reliability of  
24 Muny Light are going to be higher. The wiring  
25 program is not lowering established rates, but is

Wein - direct

giving monetary compensation equal to or greater than the rates. These two things fit together.

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

THE COURT: Approach the bench.

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{Bench conference ensued on the record as follows:}

MR. LANSDALE: There is absolutely no testimony and this witness knows full well he has no basis for saying that these monetary considerations were equal to or greater than the weight. There is no support for that whatsoever, and he hasn't given any, and I object to this witness's continuing to testify to stuff for which there is no support.

MS. COLEMAN: There has been testimony.

MR. LANSDALE: Monetary considerations equal to or greater than the rate, is what he said, and it is not of whole cloth.

MS. COLEMAN: I would assume his reference is to do something on which there has been testimony; that is, you had a policy of

Wein - direct

one half of the annual revenue, an amount equal to that being applied to the cost of --

THE COURT: That isn't what he said.

MS. COLEMAN: Well, perhaps he misspoke or I misunderstood this.

MR. LANSDALE: This witness knows full well that a one-time capital expenditure is amortized over a reasonable period of time, just as your own people did the same thing, according to the exhibits, in the case of amoritizing over 10 years.

I just object to an experienced guy who claims to be an economist testifying as he did without any support. And he knows what he is doing.

THE COURT: Yes. He is an intelligent witness.

MS. COLEMAN: I agree.

THE COURT: It appears that he is doing it with a purpose.

MS. COLEMAN: I take exception to that, your Honor.

THE COURT: Well, that is not the

Wein - direct

first time that he has done it.

MS. COLEMAN: I take exception to the characterization of this.

THE COURT: Well, you may take exception to it, but the fact remains.

I'm going to have to sustain the objection and strike the entire answer.

If you would like to place another question, you are free to do it.

MS. COLEMAN: Your Honor, I think Mr. Lansdale has objected only to that last portion of the answer.

THE COURT: Read the answer back.

{The last answer was read by the reporter.}

THE COURT: First of all, he has gone way beyond the question. He answered the question in his first sentence.

MS. COLEMAN: And explained his answer.

THE COURT: Well, read that last portion.

{The record was read by the reporter.}

THE COURT: All right. That's enough. I will just strike everything.

Wein - direct

{End of bench conference.}

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THE COURT:                   The objection is sustained as to that portion of the answer commencing with "The wiring program is not lowering." Everything from there on may be stricken. The jury will disregard it.

And again, Doctor, I must remind you to listen to the question and respond only to the question, and please do not go into areas that are not related, and that way we will eliminate these trips to and from the bench.

THE WITNESS:                I will try to do that, your Honor.

BY MS. COLEMAN:

Q     Dr. Wein, would you explain why you concluded that there was a coherent plan to the actions which you examined?

A     Well, let me try to explain it this way. I start out with a hypothesis, as anybody who would be engaging in this kind of work or any other kind of scientific work would start out with.

          The situation is: Company A and Company B. Company A has lower prices than Company B. Company B,



Wein - direct

as a consequence of that, is losing a certain number of customers to Company A.

Question: What does Company B do?

Answer: It has various possibilities.

What possibilities does it have?

One. It has the possibility of meeting the prices.

Two. It has the possibility of giving better service or meeting the prices and giving better service.

Three. It has the possibility of attempting to induce the first company to raise its prices by offering them some inducements.

Fourt. It has the possibility of increasing the costs of Company A so that Company A would be forced to raise its prices.

Five. It has the possibility of reducing the reliability of Company A as an offset to the price advantage which Company A has.

Those are the logical possibilities I saw.

Now, I didn't know at the beginning what Company B would do. I examined documents. I examined literally hundreds of documents. I went through all sorts of things.

Wein - direct

1  
2 I came to the conclusion that the acts fitted  
3 together, that the acts of refusing to meet the price  
4 but offering certain other non-price inducements  
5 which buyers might find equally valuable or more  
6 valuable, known as the Muny Displacement Program,  
7 was one of the possibilities chosen.

8 The refusal to interconnect seemed to me to have  
9 the effect of raising costs and reducing the  
10 reliability.

11 The refusal to wheel had the effect of raising  
12 costs.

13 Well, if you then say Company A and Company B,  
14 and Company B had the possibility of meeting the  
15 prices by charging the same or lower prices, but they  
16 do not accept that possibility but instead do all the  
17 other things it seems to me, then, that they must  
18 fit together.

19 Now, I can't explain it any better than that.

20 MS. COLEMAN:

No further questions.

21 THE COURT:

Cross-examination.

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## CROSS-EXAMINATION OF DR. HAROLD H. WEIN

BY MR. LANSDALE:

Q Dr. Wein, in your testimony yesterday you referred to the physical attributes of transmission and the economies of scale possible in transmission, and one of the things, the item that you used to illustrate economies of scale was a 765 KV transmission system and you compared it to five transmissions, five 345's and I think it was 30 138's.

There is little, if any, 755 transmission in commercial use in the United States, is there?

A That's true.

Q And in point of fact there is only one such line in use?

A Yes.

Q And there is no line of this size in use in the area displayed on the map which reflects the CAPCO area, which I think is the colorful map we had up there on which you described the pathways and highways of transmission?

A No 765, no.

Q None that size on there?

A No.

Q And, similarly, I understood you to say that there

Wein - cross

were some distance limitations in this transmission.

You weren't intending to imply, were you, that 345 KV or even 138 KV was not a practical voltage at which to transmit things beyond 60 miles, were you? No, no, not at all.

Now, what you were really trying to tell us, Doctor, wasn't it, was that where economies of scale are available and where one line can serve for several that if you have the requirement to use such a size line, it is a waste of money and duplication, expensive duplication, to put two lines where one will do? Is this basically your theory about this story of your economies of scale in transmission?

Well, not quite. Not quite that way, Mr. Lansdale.

All right. You say it wasn't.

What I tried to show was that as the voltage increases, you get certain advantages, and what I was trying to do was to give the equivalences.

Now, I agree that if a company could satisfy its present needs and its future needs most economically with, say, a 345 rather than with five 138's, it would certainly be much better to do that.

Yes, indeed. But I am trying to find out what the point of all this was, Dr. Wein.

er.}

1 Wein - cross

2 THE COURT: That's a rather  
3 simple question, Doctor.

4 THE WITNESS: Let me answer the  
5 way I think it --

6 THE COURT: You can answer the  
7 question?

8 THE WITNESS: Yes.

9 THE COURT: All right.

10 A If the distribution system embraces a city, if you  
11 mean --

12 THE COURT: That's not the question,  
13 Doctor. Listen to the question. Your counsel  
14 will elicit from you any explanation that you are  
15 desirous of giving.

16 Read the question back, please. If you  
17 can't answer it you can say you can't answer the  
18 question.

19 THE COURT REPORTER: "In the distribution  
20 of electric energy, and I am referring,  
21 Professor, to a distribution system as you have  
22 used that term" --

23 THE COURT: As you have used the  
24 term period.  
25

Wein - cross

THE REPORTER: "-- it is

particularly wasteful, is it not, to build  
duplicating facilities particularly where a  
company already has them in place?"

A Yes, it may be wasteful.

Q It is wasteful, isn't it?

A Well, that depends.

Q Depends on what?

A Depends on what the citizens of that particular city  
decide.

Q What the --

A What the citizens of the city in which the  
distribution system is being built decide that they  
want.

Q Dr. Wein --

A The term --

THE COURT: Just a moment,

gentlemen. Let him finish.

A The term "wasteful" is not a term which has a  
significant meaning unless you decide what a purpose  
is. Now, if the purpose of the citizens of the city  
is to have two systems, if you are asking me the  
question, "Would it cost more to build two systems  
than one system?" the answer is yes.

Wein - cross

THE COURT:

Ask another question,

Mr. Lansdale.

BY MR. LANSDALE:

Q In point of fact, Professor, it is true, is it not, that if there is street-by-street competition, on one side we have the lines of one company and on the other street we have the lines of the other company and there is a drop on one side and a drop on the other, that is pretty expensive duplication to have, is that not true?

A It costs more to have two of those than to have one.

Q That is a pretty expensive duplication to have, is it not?

A I don't know the costs of that particular situation. It would cost more to have two than to have one.

Q I will ask you, Dr. Wein, if you did not testify in July of 1975 --

MS. COLEMAN:

Objection.

THE COURT:

I don't know what the question is going to be.

MS. COLEMAN:

May I approach the bench?

THE COURT:

Approach the bench.

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Wein - cross

{Bench conference ensued on the record as follows:}

MS. COLEMAN: I hear Mr. Lansdale commencing to refer to prior testimony, which in my understanding is not admissible unless there is some indication that it is a prior inconsistent statement. We don't even have a question before us.

THE COURT: I assume what he is going to do is try to impeach the witness's testimony with some inconsistent statement that he made under oath at some other time, which the City has been engaging in throughout the case, as you are aware, Ms. Coleman.

MS. COLEMAN: I am trying to identify which statement we are referring back to.

MR. LANSDALE: I will be perfectly glad to tell you. I am going to refer to the Alabama Power Case.

MS. COLEMAN: Which testimony that he gave?

MR. LANSDALE: I didn't understand you.

MS. COLEMAN: The question you just asked him?



Wein - cross

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MR. LANSDALE: Yes.

MS. COLEMAN: All right.

{End of bench conference.}

- - - - -

THE COURT: You may proceed with  
your question.

BY MR. LANSDALE:

Q I withdraw that question, Dr. Wein, and I will go to something else.

In point of fact, you regard action by one company in duplicating the facilities of another on a street-by-street basis to be a form of cutthroat competition, do you not?

A I don't recall ever having made that blanket statement. It might be. I don't recall ever saying that in all cases in which that takes place that is cutthroat competition.

Q I invite your attention to page 136 of your prepared testimony in the Alabama power case in which you designated as cutthroat competition:

"Engaging in cutthroat competition taking the form of duplication of distribution facilities on a street-by-street basis."

A Well, I think you have to --

Wein - cross

1  
2 Q Did you give that testimony in the Alabama Power  
3 case?

4 A Yes, I gave that testimony in the Alabama case.

5 Q Thank you.

6 A But --

7 THE COURT: That's the answer,  
8 Doctor. Your counsel will get into it.

9 THE WITNESS: It was quoted out of  
10 context.

11 THE COURT: Doctor, please, no  
12 extemporaneous statements.

13 Q Dr. Wein, yesterday in your testimony, yesterday  
14 afternoon, in point of fact, you referred to or you  
15 made the statement that, and I quote:

16 "In some streets the companies have duplicate  
17 facilites." Referring to Muny Light and CEI as  
18 "the companies."

19 Dr. Wein, have you examined the situation in  
20 Cleveland as to the degree of the duplication of  
21 facilities?

22 A No, not street by street.

23 Q Have you examined that situation in any degree?

24 A I have looked at statistics of it. I have looked at  
25 statistics, but not on a street basis.

Wein - cross

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Q What sort of statistics?

A Well, statistics on a census tract basis. Statistics on a ward basis.

Q You are referring to numbers of customers?

A Yes.

Q Which are served by one company or the other company?

A Yes.

Q That, of course, does not necessarily tell you anything about the degree of the duplication of facilities to serve those customers, does it?

A No, it does not.

MR. LANSDALE:

May we have on the

easel Plaintiff's Exhibit 2064, please? That's

the service area of Muny Light. The yellow map.

Q You have seen this map before, haven't you?

A Yes, I have.

Q Referring you to the dark-yellow area, I will ask you if it is not the fact that with the exception of small areas at the far easterly edge, which is up at the upper right-hand corner of the map, and a small area in the center, the southern part of the dark-yellow area, which is at the bottom of the map, that there is duplication of distribution facilities on each and every street throughout that area.

Wein - cross

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A I don't know.

Q You don't know.

All right. Now, you mentioned yesterday in your testimony that one of the most important factors in the cost of service was density, did you not?

A Yes, I did.

Q And density consists of two things, does it not, Professor; one, the number of customers per unit of facilities needed to serve them, and secondly, the quantity of energy taken by such customers; is this correct?

A Yes.

Q In point of fact, the 1964 National Power Survey to which you have made frequent reference made a prediction of the savings to be achieved by the policies they were advocating in that book, did they not?

A Yes.

Q And they attributed one half of the total expected savings to be achieved by increasing density, did it not?

A Yes, and distribution.

Q And an important aspect of achieving this density of

Wein - cross

usage is obtaining the optimum number of customers per unit of distribution facilities in place to serve them, is it not?

A Yes.

Q Whereas in Cleveland, there is duplication of facilities street by street, the shifting of customers between one set of facilities and the other has a marked effect, does it not, upon achieving such density of service?

A Yes, it would have an effect.

Q Well, for any given level of load, it would have a 50 percent effect, would it not?

A Well, assuming that the same line could handle it.

Q Beg your pardon?

A Assuming that the same line could double the load.

Q Yes. Yes. Now, you referred in your testimony yesterday to -- your exact words were "From time to time, the City tried to obtain customers in various portions of the City outside the area where it had distribution lines."

Will you tell me with some preciseness, if you can, what you were referring to.

A I was referring to the pumping stations and the sewage stations.

Wein - cross

1  
2 Q When you used the term "from time to time," you were  
3 not referring to anything else other than those  
4 sewage stations; is that correct?

5 A Well, those stations. Also, apparently other  
6 solicitations, I think.

7 Q Tell me about them. Tell me about those other  
8 solicitations, Professor.

9 A Well, I think possibly the airport was at one time  
10 contacted.

11 Q What else?

12 A I don't have any in mind.

13 Q You don't have any others in mind.

14 Did you ever have any others in mind?

15 A Well, I'm not sure. I wuld have to look and check  
16 my notes on this.

17 Q Be my guest. Go ahead and look.

18 You have the notes with you, don't you?

19 A Well, not on all these matters, no.

20 Q Well, Dr. Weiner, you have produced for us your  
21 working papers, as I recall, and I found no such  
22 notes there.

23 THE COURT: Approach the bench.

24

25 {Bench conference ensued on the record as

Wein - cross

follows:}

MS. COLEMAN: What we sent you as it was described was the data and calculations relating to damages.

MR. LANSDALE: I'm sorry. I can't hear you.

MS. COLEMAN: We sent you the data and calculations relating to the damages.

MR. LANSDALE: Do you have them at the table?

MS. COLEMAN: I object to your characterization.

MR. LANSDALE: I'm sorry. I'm lost.

THE COURT: She said they sent you the data and calculations.

MS. COLEMAN: Relating to damages.

MR. LANSDALE: Will you read me what she said?

{Record read.}

MR. LANSDALE: Well, I'm sorry.

THE COURT: He says he has found no such indication in the documents presented to him.

MS. COLEMAN: There was no reason

Wein - cross

that there would be, your Honor, and the letter covering those documents so described.

I object to that implication.

MR. LANSDALE: I'm sorry. I didn't know whether --

THE COURT: Well, are they available?

MS. COLEMAN: Your Honor, his notes, his work product I don't think have any requirement to be turned over to Mr. Lansdale.

I was personally pleased to give him the data and calculations on the data subject.

THE COURT: Wait a minute. He is not asking that they be turned over. He is asking the witness now to produce them if he has them.

MS. COLEMAN: The witness testified he did not have them.

MR. LANSDALE: He didn't say that.

THE COURT: Will you stop interrupting me, Mr. Lansdale?

MR. LANSDALE: Yes, I will.

THE COURT: If you go back and ask him whether he has them or not, maybe we can clarify this.

MR. LANSDALE: All right.



Wein - cross

{End of bench conference.}

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BY MR. LANSDALE:

Q Do you have notes or data on this subject, Dr. Wein,  
if you know?

A Do you mean on the solicitation of customers from  
time to time?

A Yes. Yes.

A No, I don't have any on that. Some of my knowledge  
came from reading some exhibits or memoranda. Some  
of it came from talking with Mr. Hinchee.

Q That's all right, Doctor. I'm just trying to explore  
the breadth of your statement, "From time to time."

I understand now that you are talking simply  
about the sewage pumping stations and the airport.

A Yes.

Q Referring to Exhibit 2064, which you just looked at  
before, there are two purple or blue dots, anyway,  
they are dark-colored, on that. One of them is in the  
far northeast portion of it that I identify as the  
Easterly Sewage Disposal Plant.

You are aware, are you not, Professor, that that  
was at the time and had been served by the Municipal  
Light System?

Wein - cross

1

2 A Yes.

3 Q That is to say, no extension beyond existing area  
4 was required?

5 A {Nodding affirmative.}

6 Q The dot up on the lakefront is the Westerly Plant  
7 at which I believe, Mr. Hinchee testified that the  
8 Light Company was already supplying electric lights  
9 and small load. That also would not require  
10 extension of service beyond the then service area of  
11 Muny Light, would it?

12 A No.

13 Q However, it would require the construction of a 69 KV  
14 transmission line from two locations to serve that  
15 plant with dual service, would it not?

16 A Yes, it would.

17 Q And that, of course, would duplicate facilities of  
18 CEI already in place, would it not?

19 A Yes, it would.

20 Q Now, the dot in the far southern portion I identify as  
21 the --

22 A {Pointing.}

23 Q No, I'm talking right now of the more central one.

24 A I see. The southeast.

25 Q That is the so-called Southerly Plant?

Wein - cross

1

2 A Yes.

3 Q And that would, similarly, have required construction  
4 of a new transmission line for some considerable  
5 distance, would it not?

6 A Yes, I believe it would.

7 Q And I believe the testimony was that this would require  
8 it to be a major portion underground; do you recall  
9 that?

10 A I recall that discussion.

11 Q And this also would duplicate facilities already in  
12 place, would it not?

13 A Yes.

14 Q Now, the other dot down towards the airport which you  
15 first noticed that, of course, is outside of the  
16 service area of Muny Light as the southern one is?

17 A Outside its present, yes.

18 Q Beg pardon?

19 A You mean outside the city limits?

20 Q No, I don't mean outside the city limits. I mean  
21 outside the area which Muny Light served during the  
22 period 1971 to 1975.

23 A Yes, that is correct.

24 Q And that, similarly, would have required the  
25 construction of a transmission line from the plant of

Wein - cross

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2 Muny Light out to the airport, would it not?

3 A Yes, it would.

4 Q And that would duplicate facilities already in place,  
5 would it not?

6 A Yes, it would.

7 Q Dr. Wein, you testified as to various kinds of  
8 competition, and the first kind that you mentioned is  
9 franchise competition.

10 You mean by franchise competition, do you not, a  
11 situation whereby there exists the possibility that an  
12 electric company, a distribution company, whether  
13 vertically integrated or not, is serving a specific  
14 area which may for one reason or another be  
15 displaced by, in some manner, a new company entering  
16 that market and displacing it?

17 That is correct, is it not?

18 A Yes.

19 Q And the way in which it is possible, at least  
20 theoretically possible, for this to happen, since,  
21 as you noted, in the area we are dealing with we have  
22 no exclusive franchise, a theoretical possibility,  
23 anyway, is for a company to enter and duplicate the  
24 facilities of the company already serving that  
25 particular area. That is a theoretical possibility,

Wein - cross

is it not?

A Yes.

Q Would you agree with me that during the period of 1971 to 1975, at least, that such a theoretical possibility is not a practical possibility?

A You mean in the City of Cleveland?

A No, sir. I mean in any given area in what you have denominated as the relevant geographic market, which, I think, is the 1,700-square-mile --

A I see.

Q -- area of the service of the Cleveland Electric Illuminating Company.

A I don't know that that is not a practical possibility in the entire 1,700 square miles.

Q There are certain economies of scale, are there not, minimal though they be, in the size of a distribution area? Is this not so?

A Well, there may be.

Q There may be. That is to say that it may be practical to have a single distribution company in the city the size of Cleveland or even two in the City of Cleveland but it would not be practical or economical to have a distribution system covering a square block? Is this not so from an economic

Wein - cross

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standpoint?

A Do you mean one distribution system or two?

Q Yes, a separate distribution system all by itself in a one-block area. Would that be a viable company?

A No, I wouldn't think under today's conditions that that would happen.

Q No. It would have to be some larger area.

I am not trying to get into dialogue with you, Doctor, about how big the area is.

A Yes.

Q But it would have to be some large enough area to sustain the administrative and other overhead necessary to administer it?

A Yes.

Q And I am talking about that kind of an area in the area served by the Cleveland Electric Illuminating Company where there is no other electric company serving, and is it your testimony that it is practical for a new company to enter by duplicating the facilities there?

A Well, no, that would not be the way a new company would enter, through duplicating the facilities.

Q As an economist you would conclude that this was not a practical possibility?

Wein - cross

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- A No, I agree, I would not conclude that.
- Q All right. Another way in which this franchise competition could occur or the displacement of a company could occur, I believe, as you remarked, is that the community involved, if it were a municipality, could by legal action appropriate the franchises and the facilities of a private company existing and thus put the private company out of business and go into business for itself?
- A Are you asking me a question?
- Q Yes. This is a method in which franchise competition may be manifested, is it not?
- A Yes, this is a method, and it could take either all the property or some of it.
- Q All right.
- But you would not, as an economist, think it practical for them to take some of it unless it were big enough, as noted before, to sustain the administrative and other facilities required to administer it?
- A Yes. Take enough of it so that it would be profitable and sensible to do so.
- Q That's right.
- And a third way in which this franchise

1           Wein - cross

2           competition might be manifested is for another  
3           private company to acquire the existing company,  
4           whether it is a city-owned or privately owned, by  
5           purchase, would it not?

6    A     Yes.

7    Q     This you have referred to as horizonatl integration,  
8           I think was your term?

9    A     Yes.

10   Q     Now, you would agree, would you not, that the coming  
11          about or the manifestation of the competitive results  
12          of franchise competition is a slow and long-range  
13          process, would you not? It takes time?

14   A     The process itself will take some time, obviously, to  
15          accomplish it. If that's what you mean, yes.

16   Q     I am sorry, I didn't intend to interrupt you.

17   A     It wouldn't be any faster, for example, than building  
18          a new 500 megawatt generator. I mean, it may take  
19          five years, three years or ten years, depending upon  
20          what was at stake or it might be gone in one year.

21   Q     Outside of the actual process of making it work, it  
22          takes quite a while for the events which drive  
23          somebody to do this to manifest themselves; does it  
24          not?

25   A     Well, it depends upon the time and region of the



Wein - cross

country. I can recall the region of North Alabama, it didn't take very long at all in which the Alabama Power Company just decided to sell all its distribution equipment to the municipalities and it didn't take a great deal of time.

Q You mean the condition which made it willing to do so did not evolve over a long period of time?

A The condition -- that's a different question.

Q I don't think so.

THE COURT:

Just a minute. No

arguments, please.

A The conditions which made Alabama Power Company willing to do so obviously took a great deal of time.

Q Thank you.

A But the actual condemnation or the actual sale did not.

Q It did not, okay.

Now, the second kind of competition you mentioned was yardstick competition. I understood you to mean by that, and tell me if I am correct, Professor, that the comparison of rates or service or both between one discreet area and another discreet area may be such as to engender political activity or manifestation of public opinion in some other way, bringing pressure

Wein - cross

on the company which has the higher rates or the lesser service to bring its service and rates more in line with the company producing better service or lower rates; is that a correct understanding?

A That's part of it.

Q What is the rest of it?

A It also puts pressure on the executives of the companies themselves.

Mr. Cook, a former chairman of AEP pointed that out. He thought it was --

Q In any event, it is the imposition of comparisons and influence, whether it is directed to the executives themselves or whether it is outside pressure, to make the rates and services more equal?

A Yes, it is that.

Q Similarly, this is something that takes time to make effective, does it not?

A You mean the comparison?

Q No, sir. The making of such a yardstick competition work to actually make the rates or services more equal?

A Well, when you say it takes time, everything takes time. I think rate cases take time, an awful lot of time.

Q I agree with you there.

Wein - cross

A And I don't know that yardstick competition works any slower or faster than rate cases. Sometimes it is faster and sometimes it is slower.

Q In any event, both of these forms of competition work on entire discreet areas, do they not, that is to say, under franchise competition a company is either in the town or it is not, no halfway measures?

A No. In franchise competition it may be halfway in the town because the city may decide to condemn only part of it, not all of it.

Q If the city condemns only part of it, it is totally out of that area that is condemned are they not?

A That follows my definition.

Q I should think so.

A You mentioned the whole town, I tried to indicate it is not necessarily the whole town.

The second question was what, about yardstick competition?

A I haven't asked a second question.

THE COURT: No dialogue, please, gentlemen.

THE WITNESS: I thought there were two parts to the question.

THE COURT: Doctor, please, let

Wein - cross

him place another question.

BY MR. LANSDALE:

Q The third form of competition you mention is house-to-house competition, and that's what we have in the City of Cleveland, is it not?

A You have house-to-house competition in some areas, yes.

Q Professor, what areas?

A Both, where both systems are able to serve the customers along that particular street.

Q Are you intending to imply by the term "some areas" that this is not the situation throughout the service area of Muny Light?

A Head-to-head competition is not throughout the entire service area, so far as I know.

Q Tell me where it is not.

A Well, I have seen a grid study in which there are a few grids in which Muny Light has between 81 percent and a hundred percent of the customers. I assume that in those grids there is not head-to-head competition.

Q Let's talk about census. Are you talking about census tracts?

A No. I am talking about the grids which you yourself have made up, the 20 million square foot area, 4,000

Wein - cross

times 5,000. You have a whole list of them, in which Muny Light has a certain number.

There happened to be certain grids where Muny Light has between 81 percent and a hundred percent of all the customers, and that means you don't have -- if Muny Light has between 90 and a hundred, you would have the difference.

Now, in those areas I assume not every street has house-to-house competition in it.

Q I am referring, Dr. Wein, to the service area of the Municipal Electric Light Company as outlined in the dark-yellow area on Plaintiff's Exhibit 2064, which was established by Mr. Pofok to be the area in which, during the years 1971 to 1975 Muny Light rendered service.

Is it clear what we are talking about now?

A I take it you are talking about the dark yellow areas on the map.

Q That is the area that I am asking you about. I am asking you what part of that area, if you know, is there not house-to-house competition?

A Well, I just mentioned that insofar as the grids that you have brought up, that I have seen in your documents, show that in certain grids Muny Light has

Wein - cross

between 81 and a hundred percent. It must be somewhere, these grids must be somewhere in those yellow areas. If they are not in those yellow areas, then Mr. Pofok is wrong. Then if Muny Light has customers, 81 percent up to a hundred percent in a couple of grids, they have got to be in these yellow areas somewhere.

Q Is it your statement, Professor, that the grids, each grid, 4,000 feet by 4,000 feet --

A I thought it was 4 by 5.

THE COURT: Just a minute,

gentlemen, please.

Now, Doctor, let the lawyer finish the question. If you don't understand the question we will have it rephrased. If you would like it read back, I will have it read back for you.

THE WITNESS: Fine.

THE COURT: Let's not interrupt

each other. That gentleman down there has a hard time taking a single person's testimony down let alone when two people are trying to talk.

Let's proceed.

THE WITNESS: I am sorry.

Q Is it your testimony, Professor, that each grid, as

Wein - cross

those grids are defined as used by the Illuminating Company in its mapping of its service area, that each grid in which Muny Light has customers is co-extensive, that grid is co-extensive with the -- withdraw that because I have got myself mixed up.

THE COURT: Doctor, please, no extemporaneous statements.

THE WITNESS: I muttered to myself. I am sorry.

THE COURT: When you talk to yourself like that, Doctor, the microphone picks it up.

I admonished you before no extemporaneous statements. I heard you perfectly clear, what you said.

THE WITNESS: I am sorry.

BY MR. LANSDALE:

Q Is it your testimony that each grid of the Illuminating Company's grid system in which Muny Light has one or more customers is totally within Muny's Service area as depicted in the darkened yellow area on Plaintiff's Exhibit 2064?

A I don't know. I have no correlation between that map and your grid areas, because there were no definitions

Wein - cross

given in your grid areas, so I can't tell.

But everywhere that Muny Light has a customer, it seems to me it must be -- if Mr. Pofok's map is correct, he would have every area in which Muny Light has a customer.

Q Without attempting, Professor, to interpret the significance of the CEI document to which you had reference, I come back again to my question.

Where, if you know, in the service area of Muny Light is there no duplication of distribution facilities?

MS. COLEMAN: Objection.

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

MS. COLEMAN: This question has been answered at least once, perhaps twice, and possibly three times, your Honor.

THE COURT: When? He keeps evading the question.

MS. COLEMAN: The last 20 minutes. He stated what he knew, your Honor.

THE COURT: Well, he is evading



Wein - cross

the question.

This is cross-examination, young lady, and --

MS. COLEMAN: Your Honor, it is  
repetitious.

MR. LANSDALE: The question is  
repetitious. I agree.

THE COURT: Yes, the question is  
repetitious.

MS. COLEMAN: He has responded to  
this question three times.

THE COURT: I have ruled on it,  
young lady. Please return to your seat.

{End of bench conference.}

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THE COURT: Read the question back  
to the Doctor, please.

{The last question was read by the reporter.}

A I don't know the answer to that.

Q Fine. Professor Wein, economists suggest, do they  
not, or believe, do they not, that in the presence of  
constructive competition as you have defined it,  
prices for the same services or the same commodities  
will tend to equality in a competitive market? Is  
that not so?

Wein - cross

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2 A Yes, they will tend to equality.

3 Q And the reason that they tend to equality is that  
4 usually the same basic resources, the same basic  
5 costs are available to each of the competitors; is  
6 this a fair statement?

7 A No, it is not quite accurate.

8 Q Be accurate for me, please.

9 A Well, in the first place, tending to equality doesn't  
10 mean that they actually are the same. They could be  
11 different.

12 And secondly, when they do tend to equality,  
13 it is because the force of competition eliminates or  
14 requires a company to charge the same price whether it  
15 has the same resources or it doesn't have the same  
16 resources.

17 Q Well, all right. I was coming to that. I accept that  
18 correction, Professor.

19 If a company in this situation is not able to  
20 adjust its costs so that it can tend to equal the  
21 prices of the others in the market, then he normally  
22 becomes a casualty of the competitive war; is that  
23 true?

24 A He has a tough row to hoe.

25 Q He has a tough row to hoe.

Wein - cross

And this is what you mean when you stated somewhere in your testimony that the inefficient firms drop out of the market?

A Yes.

Q Now, it does happen, does it not, sometimes that this inability to compete results not necessarily from inefficiency but from things beyond a competitor's control, such as, for one reason or another one competitor does not have access to the same commodities that the other one does at the same price?

A Yes, location is an important part of competition.

Q Well, now, I am thinking of more than location. For example, one competitor may have a patent and the other may not?

A Yes. And if there are reasonable royalties, then the competitor has access to the patent.

Q Has access to the patent.

Or one may have access to or be sitting on top of a coal mine or iron mine, if that's the commodity you want, and the other may be a far distance from it?

A Yes, that's possible.

Q So that one competitor's basic costs may be higher than

Wein - cross

the others and there is nothing that the other competitor can do about it; is that correct?

A Well --

Q This does happen, does it not?

A It happens very rarely but, yes, it does happen.

Q Now, one of the electric companies that you mentioned in your prior testimony was the TVA, which I believe you referred to as the largest electric company in the United States; is that a fair statement?

A Yes.

Q That is correct.

Now, the TVA is not under the need to make a profit, is it?

A Well, not in the same sense as, say, CEI.

Q That's right. And the TVA is enabled to borrow money to finance its activities at a lower rate of interest than an investor-owned company, is it not?

A Well, I'm not so sure of that. I think TVA paid as much money as OVEC did, if not more.

MR. LANSDALE:

May I have the question read, if your Honor please.

THE COURT:

Read the question back, please.

{The question was read by the reporter.}

Wein - cross

THE COURT: Can you answer that,  
Doctor?

THE WITNESS: I answered it, your  
Honor.

I said I am not sure TVA -- TVA, I said, paid  
at the time as much money as OVEC did, which is a  
private, investor-owned utility very close to it.  
TVA now has to go to the market like any other  
company and raise its funds. It has no particular  
Federal advantages in raising this money. Insofar  
as it gets a lower rate, it is because it is  
deemed by investors to be a very sound,  
well-managed system.

THE COURT: Ladies and gentlemen  
of the jury, it is five after the noon hour,  
so supposing we take our noon recess and return  
here at 1:30 and we will resume at that time.

Please, during the recess, do not discuss  
the case as I have admonished you.

{Court was in recess for the lunch period.}

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1 THURSDAY, OCTOBER 9, 1980; 1:30 P.M.

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3 THE COURT: Please be seated.

4 Call in the jury.

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6 {The jury was seated in the jury box and  
7 the trial continued as follows:}

8 THE COURT: Proceed, gentlemen.

9  
10 CROSS-EXAMINATION OF DR. HAROLD H. WEIN {Resumed}

11  
12 BY MR. LANSDALE:

13 Q Dr. Wein, is it not true in your view that when ~~a~~ *an*  
14 firm can satisfy total market demand at lowest total  
15 cost but more than one firm would result in higher *total*  
16 cost, a natural monopoly is said to exist.

17 Where a natural monopoly existed<sup>g</sup>, it is economically  
18 wasteful to have more than one firm in the industry?

19 A Yes; that is the definition of a natural monopoly.

20 Q Thank you.

21 To return to the matter to which we were at at  
22 the recess, Dr. Wein, I will abandon the TVA analogy  
23 I was attempting, and I will ask you directly:

24 In considering the competitive conditions and  
25 whether in a particular market competition can or

Wein - cross

does exist, it is important, is it not, to examine the factors affecting the market to determine whether or not conditions are such that competition should result in a tendency toward equality of prices?

A I am not sure I understand the question. Would you please read it back.

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

A Yes. It is important to examine the factors affecting the market conditions.

Q That wasn't quite my question.

I inquired also, Dr. Wein, whether or not it was important to ascertain whether or not those conditions were such that a tendency toward price equality in the presence of competition should exist or does exist.

A Well, it is important to examine the factors to determine whether or not the factors will lead the firms to eventually come close to each other in their prices or whether these factors are such that the firms may not come close but stay within a given distance apart.

In any case, it is important to examine what makes this market behave the way it does.

Wein - cross

The only time prices tend to equality, as I tried to explain, is when you have many sellers in a market. When you have few sellers in a market, they may not tend to equality. They may stay a particular distance apart, they may be close, but you wish to examine the factors which explain these various phenomena.

Q Well, Professor Wein, whether or not there are two competitors or more than two competitors, if free market forces are in operation, prices should tend to equality, should they not?

A Well, you have just got a contradiction because where there are only two competitors in a market, they are not free competitive forces in the sense when you have very many competitors in a market. When you have two competitors in a market, that's a presence, generally, of monopolistic forces.

MR. LANSDALE: May I have the answer read back, please?

THE COURT: The answer?

MR. LANSDALE: Yes.

THE COURT: Read the answer back, please.

{The answer was read by the reporter.}



Wein - cross

BY MR. LANSDALE:

Q Dr. Wein, I didn't ask whether free market forces operated with the same freedom or to the same degree in a two-competitor market as in a market where there were numerous competitors.

I asked you whether or not in a market in which there were two competitors and free market forces were in operation there should be a tendency toward price equality.

A I can't answer your question unless you define for me what you mean by "free competitive" and "free market forces" in a market in which we have two competitors.

Q Dr. Wein, will you tell me what "free market forces" consist of?

A I think I have explained that. I will be glad to explain it again.

THE COURT: Just answer the

question, Doctor, please, if you can.

A When you have a market with many sellers and there are no barriers to entry and the sellers are not in collusion and the buyers have choices to buy from any seller, then you have free market forces operating.

Q Thank you. Will you presume a market in which two people compete and they are not in collusion with

1 Wein - cross

2 one another, they have equal access to raw materials  
3 and the other materials of their competition, they  
4 are not restrained by artificial government regulations.  
5 Should their prices tend to equality?

6 A That depends upon the relative sizes and objectives  
7 of each of the companies and whether there are  
8 barriers which keep others out.

9 Q Is it your statement that you can't answer the  
10 question?

11 A No. I believe I have answered the question.

12 Q Is it your statement --

13 THE COURT: Just a moment, Mr.  
14 Lansdale. Obviously the Doctor believes that he  
15 has answered the question. Place another  
16 question.

17 MR. LANSDALE: All right.

18 Q Dr. Wein, you testified, I believe, that in the  
19 Cleveland retail market for electric energy in the  
20 areas in which the Municipal Electric Company and  
21 CEI are in competition, that the users of electric  
22 energy in accordance with a survey commissioned  
23 by you were very conscious of price.

24 Is my recollection correct?

25 A Yes.

Wein - cross

Q And what are the factors in your opinion, Dr. Wein, where a customer has a choice of electric suppliers, a present choice of electric suppliers, what in your opinion as an economist, are the factors which govern the decision by the user of electric energy as to which of the suppliers he will choose to give his patronage to?

A All other things being equal, most of them will choose to give their patronage to the company which has the lower price.

Q Which has the lower price.

And when you say "all other things being equal," what are the things you are talking about?

A I am talking about such things as reliability of service, and I am talking about the nature of the service, which means such things as the frequency of billing and the amount of deposits that have to be put on, and whether the company gives free electric bills, and a whole variety of other ancillary services which customers take into account.

Q Now, in electric business, when you talk about reliability, what are you referring to?

A The frequency of outages.

The more frequent the outage, the less reliability.

Wein - cross

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Q Would you also include the quality of service in the sense that the voltage doesn't vary?

A Yes, I think that I would.

Q And you would, I take it, that you would believe that a municipal system in general or the municipal system of the City of Cleveland in particular would be able to render the other qualities that you mentioned; that is to say, appropriate frequency of billing and courteous service and the like?

A Yes; I think they have that capability.

Q And do you have an opinion, Doctor, as to how wide the price differential should be, thinking about the level of electric rates in general that were existing in the 1971-1975 period?

Would you have any view as to the approximate rate differential which should, as you have measured surveys, which should induce such a shift by a material number of customers?

A Well, the facts indicate that where customers are free to shift, the differentials did induce shifting; that is to say, the differential changes, and they were different for different classes of customers during the time period one is talking about, but between 1971 and 1975, of roughly, say, 7 or 8

Wein - cross

percent induced customers to shift, customers who felt that the reliability and the service was approximately the same or good enough for them.

Q Well, of course, this depends somewhat upon the income level of the customer, doesn't it?

I mean, how much of a differential is meaningful to him?

A Well, my survey showed that really it wasn't all that sensitive to income.

Q Now, in your view -- in your view then is a differential of 7 to 8 percent -- and how big a portion of the universe of possible shifts do you include in this group to induce the 7 or 8 percent?

A Well, of course, in terms of the historical data, 71 to 75, all I had, and all that is available, are the number of people who did shift.

That, of course, is restricted by many other confounding factors.

We are not asking, and the data doesn't show, how many would shift if they could shift.

Many of them, of course, many of the people who would shift couldn't. They couldn't because they had no way of shifting. They were served by either one or the other, and they couldn't shift.

Wein - cross

Q Dr. Wein, how many customers are served by only Muny Light?

A Approximately 20 percent of them -- well, roughly -- 1971 to 1975?

Q Yes.

A Somewhere -- well, it varied, say 50,000.

Q Professor, I don't think you really mean that.

My question was, how many customers were served only by Muny Light; that is to say, could not -- I didn't ask the question correctly, Doctor, I apologize.

How many customers were there in the City of Cleveland served by Muny Light or served by the -- did not have a choice of electric suppliers?

How many customers served by Muny Light did not have a choice of electric suppliers?

A I don't know that exact figure.

Q Do you know that approximate figure?

A I can only tell you that Muny Light served in 139 out of 200 census tracts, and those 200 census tracts accounted for 70 percent of the population.

I made no study of each house in the City of Cleveland to see whether the electric company or Muny Light could serve.

Q Professor Wein, how many customers served by the

Wein - cross

Cleveland Electric Illuminating Company in the area on Plaintiff's Exhibit 2064 have -- of the darkened yellow, which comprises the service area in the period that we have mentioned of Muny Light, do not have a choice of electric suppliers?

A Well, again, as I said, I don't know.

Q You don't know.

A I just don't know that fact.

Q Now, did your research of your documents disclose to you, the documents which showed that within the yellow, the darkened yellow area on Plaintiff's Exhibit 2064, during the period 1971 to 1975, CEI served approximately 57 percent of the customers, and Muny Light served approximately 47 percent. You say that in the documents that you studied, did you not?

A No, I did not.

Q You did not.

A No.

Q I wonder if you have an opinion, Dr. Wein, as to the rate differential between Muny Light and CEI which, all other things being equal, would induce a substantial number of the customers served by CEI to shift to Muny Light?

A Yes, I can tell you what they answered in the survey

1 Wein - cross

2 that I took in 1980.

3 MR. LANSDALE: May I have the  
4 question read, if your Honor please?

5 THE COURT: Yes. Read the  
6 question.

7 {The previous question was read by the  
8 reporter.}

9 BY MR. LANSDALE:

10 Q Is your answer yes?

11 A My answer is yes, I could tell you what that was  
12 according to the survey that I made in 1980.

13 Q Well, Professor, I am not really asking you what the  
14 survey showed. If you wish to rely on the survey for  
15 your opinion, I have no objection.

16 My question is: What is your opinion as to the  
17 differential which would require a substantial  
18 number of CEI customers within the Muny service area  
19 to shift their service to Muny Light?

20 A Now, the first question I understood was how many CEI  
21 customers --

22 THE COURT: Doctor, please.

23 THE WITNESS: I'm trying to  
24 understand the question.

25 THE COURT: Listen to the question



1 Wein - cross

2 and answer it if you can.

3 Read the question back.

4 If you don't understand it, Doctor, as I  
5 told you before, I will have it rephrased or I  
6 will have it read back to you, and if you can't  
7 answer it, all you have to say is either, "I  
8 don't know" or "I can't answer." Let's stop  
9 this colloquy between counsel and the witness.

10 Do you understand that, Mr. Lansdale?

11 MR. LANSDALE: Yes.

12 THE COURT: Do you understand  
13 that, Doctor?

14 THE WITNESS: I do.

15 THE COURT: Well, please adhere  
16 to it.

17 THE WITNESS: I will.

18 THE COURT: Let's proceed. Read  
19 the question back.

20 {The question was read back by the reporter.}

21 THE COURT: If you have an opinion,  
22 Doctor, you may express it. If you don't, you  
23 don't have to.

24 A I have an opinion on that.

25 THE COURT: Let's proceed.

Wein - cross

A I think a differential of \$2 a month or less would have approximately 50 percent of the customers switch, all other things equal.

Q I am not fast enough on my feet to know what percentage \$2 a month is. Is that approximately the 7 to 8 percent you mentioned?

A Well, no. The 7 to 8 percent I mentioned was in response to your question, the period of 1971 to 1975, what the differentials generally were.

The \$2 a month now refers to the period in March, 1980, when we took this survey and its percentage will vary depending on the -- It wasn't asked what percentage would you switch depending on CEI's bills as against your bills. Customers don't reason that way. They reason, I think, as to how much money is involved and if you save \$2, would you switch, if you saved a dollar and a half would you switch, if you saved 50 cents a month, would you switch. That is the meaningful way to ask the question and that, of course, is a different percentage of bill for each customer.

Q Dr. Wein, my question relates to the years 1971, beginning July 1, to July 1, 1975. Do you have an opinion --

1 Wein - cross

2 A My opinion is based on the facts of record.

3 THE COURT: Doctor, please let him  
4 finish the question. I don't know how many times  
5 I have to remind you.

6 THE WITNESS: Well, I'm sorry. I  
7 thought he did.

8 THE COURT: Well, he didn't.  
9 When he's talking, that means he hasn't finished  
10 the question.

11 I don't know why we have to go through this  
12 with each question. The rules are rather simple,  
13 gentlemen.

14 Please, Doctor, respond to the questions.  
15 Listen to the question and respond.

16 Proceed.

17 BY MR. LANSDALE:

18 Q Do you, Dr. Wein -- not somebody else, Dr. Wein -- have  
19 an opinion, referring to the years 1971, beginning  
20 July 1, to July 1, 1975, do you have an opinion as to  
21 the size of the differential in electric rates which  
22 would induce a substantial number of CEI customers  
23 within the service area of Muny Light to shift to  
24 Muny Light service, all other things being equal?  
25 Do you have such an opinion?

Wein - cross

THE COURT: Yes or no, Doctor.

A I have an opinion.

THE COURT: Ask your next question.

Q Would you state what that opinion is?

A My opinion is that the differentials that prevailed during that period were significant enough to cause substantial switching.

Q And that differential was on the order, depending on the years in that stretch, from 15 percent to 7 or 8 percent, was it not?

A Depending on the class of customers you are talking about.

Q And depending on the class of customers, yes.

A And depending on whether it was winter or summer.

Q Well, 15 percent and 7 or 8 percent give the outside limits of the differential we are talking about?

A No, they don't.

Q What does?

A There are smaller limits at certain times of the year.

Q Beg your pardon?

A There are smaller limits at certain times of the year.

Q Well, what are they?

A Well, as I recall, for some classes they were less than 7 or 8 percent.

Wein - cross

Q Now, Dr. Wein, the Municipal Light System pays no property taxes, does it?

MS. COLEMAN: Objection.

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

THE COURT: State your objection.

MS. COLEMAN: Object to the relevance of the question, your Honor. I don't see how it is germane.

MR. LANSDALE: Well, I will connect this up. I assure you it is relevant.

Is it disputed?

MS. COLEMAN: I don't think so.

MR. LANSDALE: I don't think so.

You want to know where I am going?

THE COURT: Yes.

MR. LANSDALE: Where I am going is to show that, all other things being equal, Muny Light costs are substantially below those of CEI and that this will result in, as Dr. Wein says, inevitable shifts of customers.

THE COURT: Do you have anything

Wein - cross

further, Ms. Coleman?

MS. COLEMAN: I thought we just had questioning at the beginning of the afternoon that indicated that he didn't feel their costs were the determining factor.

MR. LANSDALE: Well, what's that got to do with it?

THE COURT: Overrule the objection. You may proceed.

{End of bench conference.}

- - - - -

THE COURT: Read the question back, please.

MS. COLEMAN: Your Honor, may I approach the bench?

THE COURT: Sure.

- - - - -

{Bench conference ensued on the record as follows:}

MS. COLEMAN: I am reminded that there is a stipulation on that.

MR. LANSDALE: Beg pardon?

MS. COLEMAN: I am reminded that there is a stipulation on that.

Wein - cross

MR. LANSDALE: Which one is it, do you know?

MS. COLEMAN: 184.

MR. LANSDALE: It's all preliminary. I don't need a stipulation -- If it says so. I am really not trying to --

Do you know what it is?

MS. COLEMAN: 184, I believe.

MR. LANSDALE: Yes. I am satisfied to read that rather than asking the witness.

THE COURT: Very well.

{End of bench conference.}

- - - - -

THE COURT: Ladies and gentlemen, I am requested to read Stipulation No. 184.

"Muny Light is a part of the government of the City of Cleveland which is not, as such, subject to taxes on its property or its income but is exempt therefrom under the Constitution and the laws of Ohio and of the United States."

BY MR. LANSDALE:

Q I don't have to ask you.

THE COURT: Let's proceed, Mr. Lansdale.

Wein - cross

Q Similarly, Dr. Wein, Muny Light may inquire from investors, that is to say, may borrow the capital funds with which to construct its system at an interest cost, money cost, substantially lower than the Illuminating Company, may it not?

A For certain purposes, yes.

Q Well, is there any purpose in connection with the building of its system that its money costs would not be substantially less than CEI's?

A Well, if CEI and Muny for example -- not Muny, but the City -- if CEI were to engage in some anti-pollution abatement equipment, it could, in fact, get the money by means of the City of Cleveland raising money and you would pay it back, and so your interest would be lower. This is very common in the electric utility industry.

Q All right, I stand corrected.

That does not have anything to do, however, with the distribution system, does it?

A No, it doesn't have anything to do with the distribution.

Q And what proportion of the costs of the transmission and generation system would you say such a thing would embrace, if you can say.



Wein - cross

1

2 A Well, if you tell me which system you are talking  
3 about, I can say it.

4 Q CEI.

5 A Oh, well, I think the distribution system of CEI is,  
6 in terms of the assets, a much smaller part of its  
7 total assets than its generation and its transmission.

8 Q The only place we are concerned with pollution  
9 abatement financing is in generation, is it not?

10 A Yes.

11 Q And the proportion of the total cost of the generation  
12 involved in pollution abatement is what, if you know?

13 A I am not sure I got that question.

14 THE COURT: Please read it back.

15 {The pending question was read by the  
16 reporter.}

17 A Pollution abatement, that is, total generation?

18 Q Yes.

19 A That varies. Could be as high as 20 percent, 25  
20 percent.

21 Q All right. And Muny Light is not under the necessity  
22 of earning a profit, is it?

23 A No, it is not under the necessity of earning a profit.

24 Q Do you have any view, Dr. Wein, as to what proportion  
25 of its total cost, compared to a similar private

Wein - cross

utility would Muny Light save by reason of its exemption from property and income taxes and its saving on not having to make a profit, if it operated without profit?

A I don't understand that question. I mean it is just not properly posed. If you give me --

THE COURT: Doctor, if you don't understand the question, just say so.

THE WITNESS: I just don't understand that question.

THE COURT: Rephrase your question. Please, no colloquy, gentlemen.

Q Are you able to imagine, Dr. Wein, an investor-owned company of the same size located in the same place and doing the same thing as Muny Light; are you able to imagine such a thing?

A Yes; I certainly can imagine that.

Q And can you imagine that such a company would be an investor-owned company and would have to pay property and income taxes?

A Yes, I can imagine that.

Q -- and would have to pay the full market price for the money which it borrows?

A Yes.

Wein - cross

1

2

Q And if it had shareholders, it would have to make a profit to stay in business?

3

4

A Yes.

5

Q My question is:

6

Can you estimate for me in terms of the

7

percentage of the hypothetical private company's

8

total cost, the amount by which Muny Light's total

9

cost would be less by reason of its not sustaining

10

the costs which we have mentioned?

11

A Well, I don't know the property taxes, so you will

12

have to give me that.

13

The others, I can estimate.

14

Q Roughly 2 percent of the valuation, net evaluation.

15

A 2 percent of the net assets?

16

Q Yes.

17

A I see. Okay.

18

Now, are you talking about current conditions today,

19

1980?

20

Q No. I am really talking about our period 1971 to 1975.

21

A 1971 to 1975?

22

Q Yes.

23

A And it would receive the rating of say, Double A or

24

Triple A, or what?

25

Q Well, take CEI, and that is about an A, isn't it?

Wein - cross

1 A CEI I believe was Double A at that time, maybe even  
2 Triple A.

3 Q It wasn't Triple A, I know that.

4 A Well, anyway, well, this makes a difference, of course.

5 Q Sure it does.

6 A 2 percent. Well, roughly I would say about 10-1/2  
7 or 11 percent.

8 Q All right.

9 Now, if Muny Light is interconnected with CEI  
10 and receives -- buys its power as it does -- withdraw  
11 that.

12 If Muny Light was interconnected with CEI during  
13 this period that we are referring to, 1971 to 1975,  
14 and is able to purchase firm power from CEI or  
15 alternate sources, such as the Power Authority for  
16 the State of New York, do you have an opinion as to  
17 whether or not its total cost -- I will call  
18 production -- and you understand I include in that  
19 not alone production, but all sources of energy  
20 used to sell to the customer -- would you have an  
21 opinion as to whether its total cost of production  
22 would be lower or higher than that of CEI in the  
23 same period of time?

24 A I fell off the track there somewhere, Mr. Lansdale.  
25

Wein - cross

Would you read the question.

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

THE COURT:                   The question is  
whether or not you have an opinion.

MS. COLEMAN:               Objection.

THE COURT:               Approach the bench.

- - - - -

{Bench conference ensued on the record as  
follows:}

MS. COLEMAN:               It seems that we are  
in a realm beyond the scope of the direct, and I  
am not sure what realm we are in, but I don't  
think that was opened up by the direct questioning.

THE COURT:               It is quite obvious  
what the thrust of the examination is.

MR. LANSDALE:             I think I am entitled  
to determine whether the competitive conditions  
existed. That is the whole subject of his  
testimony.

THE COURT:               Certainly. He  
testified at length.

MS. COLEMAN:             Okay. Thank you.

{End of bench conference.}

Wein - cross

- - - - -

BY MR. LANSDALE:

Q Do I understand that you can't answer that question?

A Well, I don't understand it fully, Mr. Lansdale.

THE COURT: Read the question.

A Well, there are some ambiguities in it.

THE COURT: I am asking to have

the question read back, and I will see if there  
are ambiguities.

{The pending question was reread by the  
court reporter.}

A Well, assuming --

THE COURT: Doctor, the question

is, do you have an opinion or don't you?

A Well, I have an opinion under certain conditions.

Q All right.

Give me your opinion, and then the conditions.

A Well, my opinion is that it would perhaps be quite  
close to CEI's cost of production if we define these  
in the same way; and secondly, if you are assuming  
that since there is now a synchronous interconnection,  
so that the City plant would have been able to obtain  
wheeling at reasonable rates, and also that it would  
have been provided reserve sharing with CEI, and also

Wein - cross

that it would have received emergency power when its units went down, and all those sorts of conditions, and that makes a considerable difference on it.

But if you take the one piece of reality and modify it with saying, "Well, you can have the wheeling condition and the interconnection," so that you can buy PASNY power, but I'm not sure as to whether all the other things would take place.

Q I see your problem.

I wish you to assume that Muny Light would have in this period, would have a synchronous interconnection, and the full panoply of things which you have stated that CEI should have given to Muny Light at Muny's request.

A Yes.

Q And in that view, do you have an opinion as to the relative cost of energy?

A The total cost counting everything?

Q Yes.

A Okay -- not just production operations, but everything involved?

A I am sorry, sir, I beg your pardon.

I was talking about its energy costs. I classify that as production, and if I am wrong -- I am talking

Wein - cross

about total energy costs, capital and -- fixed and variable.

Q And by including taxes and interest and profit, is that correct?

A Yes.

All right. Now that we can get the thing out -- well, I think probably Muny might have been somewhat higher, not all that much.

Q I wonder how you get to the higher cost?

Is not PASNY power, even with the long transmission from Niagara to Cleveland, is it not substantially less in cost than a similar amount of firm power from any other source within reasonable reach of the City of Cleveland?

A Well, I am not sure. I don't recall what PASNY would have cost at that time, reaching the City of Cleveland.

I don't know what the wheeling rate would have been, so I have no way of knowing.

Q Professor, I am sorry --

A Yes.

I did look up to see what the costs of CEI was just counting production and maintenance, and not counting taxes and interest and depreciation, and so



Wein - cross

on, in 1972, to get some sense of what it was, and as I recall, CEI showed a cost per kilowatt hour of sales of approximately 9 mills or so, and I don't know whether, when you take PASNY power, plus the different systems intervening, and adding up the losses and the wheeling charges, what it would come out to. I just don't know.

Q Dr. Wein, adopt this one thing:

I have in my possession a rather elaborate exhibit by you dealing rather extensively with the cost of PASNY power to the City of Cleveland, what it would have been during this period.

I merely remind you of that. I don't want to get into that subject, so you do have some information about the cost of PASNY power during the relative period that we are discussing?

A Yes.

Q And are you able to tell me what that is?

A Right now, I don't remember. I would have to refresh my recollection and look over the calculations.

Q You don't remember.

Dr. Wein, I show you what has been marked for identification as Defendant's Exhibit 1102.

MR. NORRIS:

We haven't seen that.

Wein - cross

Q {Continuing} -- and my question is; I merely show you this to refresh your recollection. Is this among the documents --

MS. COLEMAN: Your Honor, --

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

MS. COLEMAN: Your Honor, I haven't seen that before. I don't know whether Dr. Wein has seen it or not.

MR. LANSDALE: Come on. This is among your exhibits that were transmitted to you. Look in your book.

MS. COLEMAN: I would like to look in my file and compare it if I may be excused, your Honor.

THE COURT: Go ahead.

{After an interval.}

{Bench conference continuing as follows:}

MS. COLEMAN: Jack, I apologize. I do have that.

With the colors, it was not familiar.

MR. LANSDALE: I see. The colors

Wein - cross

threw you off. All right.

MS. COLEMAN: I do object to the assertion in the title. There is no substantiation of that claim, and I object to its being displayed to the jury in that form.

MR. LANSDALE: Well --

THE COURT: Let's see it.

MS. COLEMAN: It is argumentative.

THE COURT: What is the objection?

MS. COLEMAN: The objection is to the caption. There is no proof that that caption is true.

THE COURT: I thought we admitted the accuracy and authenticity on September 2nd or 3rd or 4th or 5th.

MS. COLEMAN: As to some documents, but this was not among them.

MR. LANSDALE: Well, in any event, he testified as to the thousands of documents that he examined. I want to find out if he looked at this.

THE COURT: Let's proceed. I will overrule the objection.

{End of bench conference.}

- - - - -

Wein - cross

BY MR. LANSDALE:

Q Dr. Wein, is Defendant's Exhibit 1102, which is on the screen, is that one of the voluminous documents furnished to you by counsel and which you examined in your preparing for this case?

A Well, I didn't see that particular map.

I did see a numerical data which was slightly different, a different class limits than you have there.

Q What kind of limits?

A Your ranges there range from zero and from 1 to 20, and so forth, and I saw data which was different than that. The ranges were narrower.

THE COURT: Read the question.

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

THE COURT: Do you understand that question?

THE WITNESS: Yes.

THE COURT: Now, the answer is either yes or no.

Did you see that document, and if you didn't, just say so.

THE WITNESS: No; I didn't see that

Wein - cross

particular document.

THE COURT:

All right. That

concludes that -- instead of the colloquies that we are constantly getting into.

THE WITNESS:

I am sorry, your

Honor.

BY MR. LANSDALE:

Q When you say "that particular document," Dr. Wein, were you referring to the fact that this is a slide and in color?

Would you have seen the same document not in color and in the form in which your counsel has it, which is the same map, but it is not colored?

A No.

Q All right. Thank you.

Dr. Wein, would you agree with this definition:

"That constructive competitive behavior involves attempts by firms to increase their market share.

"Not all firms can increase their market share and insofar as some do, it is by way of increases in efficiency, permitting lower prices and rendering of better service and improved quality and reliability, product or process innovation, and taking of entrepreneurial risks, and timely expansion of capacity,

Wein - cross

and development of new products and new geographic markets, and so forth.

"Constructive competition also has its casualties. Some firms fail because of serious errors in some important aspect of their business.

"Constructive competition thus eliminates the inefficient firms, those whose prices, quality, service, or product are inferior to their competitors, as judged by buyers."

A Yes. I recognize that statement. I wrote it.

Q You wrote it?

A Yes.

Q And you agree with it?

A Yes, still.

Q Now I want to refer somewhat to power pools.

By the way, you made reference in your testimony to something you referred to as the Indiana-Michigan pool. What is that?

A Did I say the Indiana-Michigan pool?

Q You certainly did.

A I misspoke.

Q All right.

A I meant the Michigan pool and I was thinking of an interconnection between the Michigan pool and Indiana.

Wein - cross

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Q All right.

MR. LANSDALE: Will you, Mr. Schmitz,  
give the witness Plaintiff's Exhibits 3094, -95  
and -96?

THE COURT: I'm sorry. Will you  
repeat that? 3095? I didn't hear the exhibits,  
Mr. Lansdale.

MR. LANSDALE: 3094, 3095 and 3096.

{Documents were handed to the witness by  
the clerk.}

MR. LANSDALE: Is it fair to ask you  
for your slides?

MR. WEINER: What?

MR. LANSDALE: Loan me a slide, please.

Those are the demonstration of the efficiency  
interconnection, reserve sharing, and the like.

Let me see if I can get along without the  
slides.

BY MR. LANSDALE:

Q Those are the exhibits in which you demonstrated the  
benefits to be derived by two companies or two  
generating entities associating together in order to  
reduce the total generation or enlarge the size of  
the plant that each could do that they could not do

Wein - cross

separately?

A Yes.

Q And from an economic standpoint, Dr. Wein, and from the standpoint of efficiency from an economic standpoint, is it material whether the firms, whether the generating stations that are put together in order to accomplish these benefits are owned by separate companies who operate together and coordinate by being in a pool or otherwise agreeing, does it make any difference whether you do it that way or whether they were to merge and become one firm?

A No. The importance is that they are interconnected and they do share their reserves whether they are within one firm or separate firms.

Q All right. Now, when you do not have this economic equivalent of horizontal integration but have, rather, bilateral arrangements between two companies that are interconnected, do you accomplish the same results from an economic standpoint as the pools or is it somewhat less than optimal?

A Well, assuming that the two companies had as much resources as the pools, it wouldn't matter.

The only thing that you get from adding more companies is that the principal of large numbers



Wein - cross

takes over and the principal of insurance takes over.

Q The bilateral arrangements, however, are more common than the pools, are they not?

A Yes, I believe they are.

Q By the way, while we are on that, these bilateral arrangements are all governed, are they not, by similar contracts entered into between separate companies and filed with appropriate regulatory authorities?

A Yes, they are.

Q So I mean it's not like going to the grocery store and buying something off the shelf; you have to have a prior arrangement?

A Yes.

Q Now, Dr. Wein, directing your attention to wholesale markets that you have discussed and directing your attention to the year 1971, was there, as you have defined it, a wholesale market in Cleveland?

A Yes.

Q And this wholesale market consisted of what you have called the captive sales by CEI to itself and the similar captive sales by Muny Light to itself?

The record can't get a nod of the head, Doctor.

A Oh. Yes. I'm sorry.

Wein - cross

1

2 Q And thus, the quantity of the wholesale sales was  
3 precisely the same as the quantity of retail sales,  
4 less any line losses there might be in the distribution  
5 system?

6 A Yes.

7 Q Is that correct?

8 A That's right.

9 Q And what were the prices, if there were any, at which  
10 such wholesale sales were made?

11 A Well, these are imputed prices which the companies  
12 themselves charge. That is to say, the impute, they  
13 cost to production, they impute a cost to transmission  
14 and they impute a cost to distribution.

15 MR. LANSDALE: May I have that  
16 answer read?

17 {The answer was read by the reporter.}

18 Q What does the word "impute" mean as you are using it  
19 in this context?

20 A Well, companies in electric power business are always  
21 keeping track of different parts of their cost, for  
22 one thing to show in rate cases.

23 If they are in a wholesale rate case, they  
24 have to be able to say what the cost of wholesale  
25 power is and, in doing this, they must charge and

Wein - cross

allocate along each one of these major areas the cost. So if a company were defending itself against the price squeeze charge, they would have to say, "These are my wholesale costs and these are my distribution costs and there's a difference between the two and, see, there is no price squeeze," or "See, there is a price squeeze."

And every company is able to do that and always does that for rate-making purposes.

Q Dr. Wein, in the period in which I refer, neither the City of Cleveland nor the Cleveland Electric Illuminating Company had a wholesale rate, did they?

A No, they didn't have a wholesale rate but they had an imputed cost.

Q And neither company had any regulatory occasion to compute such a cost, did they?

A No, they didn't.

Q And no sale in the sense of purchase and sale, at least as it is understood in common parlance, took place, did it?

A As it is understood in common parlance, it didn't take place.

Q All right. Now, is it not true, Doctor, then that what you are saying is that each performed what you

1 Wein - cross

2 witness instructed to answer the question and  
3 confine himself thereto?

4 THE COURT: Read the question  
5 and the answer.

6 {The previous question and answer were  
7 read by the court reporter.}

8 THE COURT: Please limit your  
9 answer to the question.

10 THE WITNESS: I thought I am. I  
11 hadn't finished.

12 THE COURT: Read the question  
13 back.

14 {The question was read by the reporter.}

15 THE COURT: The answer to that is  
16 either yes or no, and if counsel is desirous of  
17 making further inquiry, he will make such an  
18 inquiry, Doctor.

19 If you know.

20 A They were unable to get PASNY power.

21 Q All right. Now, Dr. Wein, the wholesale function, as  
22 I understand it, in your view is the reduction in  
23 voltage from transmission level -- withdraw that --  
24 for the change in voltage from generation level to the  
25 level at which a consumer may utilize it; is that

Wein - cross

correct?

A Well, it is the change also from transmission level as well. Transmission may come into a substation at a very high level.

Q Well, Doctor --

A But in any case it is a change to the voltage at which an ultimate consumer can use it.

Q Well, Dr. Wein, electricity in the generator is generated at about 11,000 volts, isn't it?

A Yes.

Q Then it goes through a transformer, and if it is necessary to transmit any large quantities of energy for any great distance, it is stepped up to a higher voltage, is it not?

A Yes.

Q And from that higher voltage then it is stepped down to usable voltage, right?

A Right.

Q And I am trying to find out whether you start the wholesale function at the generator or at the transmission level or at the end of the transmission level.

A At the end of the transmission level.

Q At the end of the transmission level.

Wein - cross

Now, given customers take energy at different voltages, do they not?

A Yes.

Q And do you have any information as to the several voltages at which either CEI or Muny deliver energy to their customers?

A Well, to some customers CEI delivers energy at high voltage levels, industrial customers, very large ones.

Q I submit to you that CEI has a minimum of nine different voltages at which it delivers energy to consumers.

A Yes.

Q And in this wholesale market, if I may put quotation marks around that time that you have defined, are there also different imputed wholesale prices?

A No, there aren't nine different imputed wholesale prices, because the wholesale price is the price at which you sell to a distribution system.

You are selling to very large industrial customers and you are selling it to them with a prohibition, and the prohibition is that they cannot resell it. So if you sell it to some customer at 11,000 kilovolts or 69,000 kilovolts, or whatever the customer requires, he is not a wholesale market

Wein - cross

1 because you do not allow him to sell that energy. If  
2 he were to resell it, he would be a wholesale  
3 customer just as anyone else would, just as Muny would  
4 be.  
5

6 So it isn't only a question of reducing the  
7 voltage. What I had in mind was primarily residential  
8 customers, most customers, the great majority, 50,000  
9 of Muny and the 250,000 customers you have. I wasn't  
10 thinking of the 128 large industrial customers or  
11 13 or 9 who buy large volumes of power at high  
12 voltages and do not resell it because the contract  
13 in your tariff does not permit them to resell.

14 So there are two things involved.

15 Q Have you finished your answer, Doctor?

16 A I think it's obvious that I have finished.

17 Q Where does the wholesale function begin, Dr. Wein?

18 A I have answered the question.

19 Q Where does the wholesale function begin?

20 A I said it begins at the point at which the power comes  
21 off the transformer and goes into the substation --

22 Q Are we dealing with --

23 A -- to be

24 Q Are you aware of --

25 A -- and --

Wein - cross

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THE COURT: Just a moment.

THE WITNESS: I haven't finished.

THE COURT: Let the lawyer  
finish his question.

THE WITNESS: I haven't finished  
my answer.

THE COURT: Would you kindly read  
it back to me.

{The last several questions and answers  
were read by the reporter.}

THE COURT: Are you desirous of  
answering further?

THE WITNESS: Yes.

A And the contractual provision, which is important, is  
that the power cannot be resold by the consumer. If  
it comes in at high voltage, it cannot be for  
resale.

I am perfectly aware that there are industrial  
customers who take power at high voltages. I am  
talking essentially about the total number, 50,000  
from Muny, a quarter of a million for you, in the  
City of Cleveland of which a very small fraction  
takes it at very high voltages and subject to that  
prohibition.



1 Wein - cross

2 Q Dr. Wein, you have told me that the wholesale function  
3 begins at substation. There are various kinds and  
4 variety of substations, are there not?

5 A Yes, there are.

6 Q Which one does it begin at?

7 A It depends on the customer.

8 Q And there are --

9 A For most customers --

10 THE COURT: Just a moment, Doctor.

11 You said it depends on the customer. You have  
12 answered. Let him ask another question. You  
13 will be permitted to make another answer.

14 Q Then do I understand that there is more than one  
15 point at which the wholesale function begins?

16 A If you mean there are more than one substation, yes,  
17 there are more than one substation.

18 Q Does the wholesale function begin at each and every  
19 substation on the system, Doctor?

20 A The phrase "where the wholesale function begins" I  
21 have defined. It begins, essentially, at the point  
22 where you have gotten power from your generator, you  
23 have transmitted it to some particular point.

24 Depending on the kind of customer you have, your  
25 wholesale function begins. It begins when you sell

Wein - cross

it to a wholesale customer and, essentially, a wholesale customer is one who is performing the kinds of functions I have described.

So the wholesale function begins when you sell to a wholesale customer.

Q Dr. Wein, I'm trying to find out here what a wholesale customer is in the City of Cleveland in the year 1971 and 1972 and 1974 where there were no other wholesale sales except the imaginary captive sales that you are referring to.

Who are the wholesale customers?

MS. COLEMAN: Objection, your Honor.

THE COURT: Overruled. You may answer, Doctor.

A I have already stated that the customers were CEI and the Municipal Light Company. If you choose to call them imaginary, that is your term and not mine. It is not imaginary to me.

Q CEI is the seller and CEI is the customer; is that your statement?

A Yes.

MR. LANSDALE: I have no further questions on this point.

THE COURT: Suppose we take a

Wein - cross

short recess. Perhaps everybody can relax.

Please during the recess do not discuss the case, ladies and gentlemen, and keep in mind the Court's admonition.

{Recess taken.}

THE COURT: Please be seated.

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

MS. COLEMAN: Your Honor, pardon me, but may I approach the bench?

THE COURT: Yes.

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{Bench conference ensued on the record as follows:}

MS. COLEMAN: I tried to sit by, but I must take exception to the -- to Mr. Lansdale's yelling at the witness. It is uncalled for and unnecessary.

THE COURT: I hadn't noticed it.

You know, you have a very difficult witness, and it is obvious that he is being evasive.

MS. COLEMAN: I take exception to that.

THE COURT: You are perfectly free

Wein - cross

to take exception to my remarks.

I am just telling you my impression.

My impression is that I can comment in my charge if I am desirous of doing it, and I am telling you my impressions of this witness's testimony.

Now, you are perfectly free to take exception, but you know, I might say this, Mr. Lansdale: Your questions have something to be desired. They are so involved that it is difficult to follow, number one, and number two, if the witness would listen to the questions and answer the questions, I think that the entire proceeding would move along.

And if you have any objections to questions, you are free to make them, but if you don't make objections, then your associates shouldn't complain.

MS. COLEMAN: I am speaking for myself, and the questions have been convoluted and he characterized the "wholesale market."

THE COURT: I understand that your colleagues are taking exceptions to certain questions that were asked of the witness, to which there were no objections, and which were obviously

Wein - cross

objectionable questions, so all I am telling you is that if your colleagues are desirous of making objections, they should convey it to you and not complain to my clerk.

MS. COLEMAN: I can't speak to that, but I maintain my exception to the other matter.

{End of bench conference.}

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THE COURT: I trust that everyone is relaxed now and we are prepared to proceed, so let's do it.

BY MR. LANSDALE:

Q Dr. Wein, you referred in your testimony yesterday to TVA as only a wholesale customer.

I ask you if it isn't a fact that nearly 40 percent --

MS. COLEMAN: I object to the question.

THE COURT: I don't know what the question is. Let's wait and see what the question is, and if there is an objection, everyone may approach the bench.

MS. COLEMAN: I object to the part I have already heard.

1 Wein - cross

2 THE COURT: The Court will  
3 reserve its ruling until I have heard the whole  
4 question.

5 BY MR. LANSDALE:

6 Q I will ask if it is not a fact that TVA sells  
7 approximately 40 percent of its megawatt hours at  
8 retail, as you have defined that here in this case.

9 MS. COLEMAN: May we approach the  
10 bench?

11 THE COURT: Yes.

12 - - - - -

13 {Bench conference ensued on the record as  
14 follows:}

15 THE COURT: Do you have an objection?

16 MS. COLEMAN: Yes. Well, I have to  
17 obtain a clarification.

18 Did you drop the first part of your  
19 question, because I think it mischaracterized his  
20 testimony.

21 MR. LANSDALE: Perhaps I improperly  
22 reminded him that yesterday he testified that TVA  
23 was a wholesale customer -- did I say "customer"?  
24 I apologize. I misspoke, Ms. Coleman.

25 MS. COLEMAN: I just wanted to get

Wein - cross

the characterization properly. Thank you.

{End of bench conference.}

- - - - -

Q I will withdraw that question.

In yestrday's testimony, Dr. Wein, you testified that the TVA produces and sells electric energy at wholesale and you cited it as a "wholesale-only utility generating company," and I believe the only one in the United States.

My question is, is it not the fact that TVA sells approximately 40 percent or nearly 40 percent of its megawatt hour sales to retail customers as you have defined that term?

A If that is the fact, I am not aware of it.

Q The statistics on this are readily available in publications of the Federal Power Commission, are they not?

A Yes; I could certainly find it.

Q And the sales at wholesale of TVA are to various distribution companies, principally utility or REA's, principally municipalities, I mean?

A Yes.

Q And the sales are made under long-term contracts, are they not?

Wein - cross

1

2 A Yes.

3 Q And these contracts give the TVA control over the  
4 retail rates of its wholesale customers, do they not?

5 A I am not sure that all of them do.

6 Q Well, substantially all of them, you would agree,  
7 isn't it?

8 A I know that there are such contracts. I never made a  
9 count.

10 Q You never made a count.

11 And from an economic standpoint, from the  
12 economy standpoint, Dr. Wein, such a customer at  
13 wholesale whose retail rates are controlled by the  
14 seller is not economically distinguishable from what  
15 you have referred to as a captive customer; that is,  
16 the wholesale sales of a generating utility to  
17 itself?

18 A Well, it is distinguishable insofar as the municipality  
19 always has a choice of curtailing its contract with  
20 TVA and taking it from somebody else; whereas, if it  
21 is a captive customer -- you can't secede from CEI,  
22 but if you sign a contract with TVA and you find that  
23 their price conditions are onerous, then you can refuse.

24 Q How many years?

25 A It depends on the length of the contract and how many



1 Wein - cross

2 years they are to run.

3 The purpose of those -- of course there are good  
4 reasons for them.

5 Q The good reasons being to assure a market for TVA's  
6 heavy investment, is it not?

7 A Well, that is one reason.

8 Q All right. Thank you.

9 MR. LANSDALE: I have no further  
10 questions.

11 THE COURT: Redirect examination.

12 - - - - -

13

14 REDIRECT EXAMINATION OF DR. HAROLD H. WEIN

15

16 BY MS. COLEMAN:

17 Q Dr. Wein, you indicate that the assurance of the  
18 market was one reason for the restrictions in the TVA  
19 contracts.

20 What are the other reasons?

21 A The TVA, when it started, had many municipalities who  
22 really didn't know very much about the power  
23 business, and TVA had to teach them a lot about the  
24 power business, and they did not wish the  
25 municipalities to set high rates because the purpose

Wein - redirect

of TVA was essentially to bring low rates in order to encourage industry and in order to bring electricity to the farms and things of that sort, and so they set these contracts so that the cities would not raise the rates beyond what TVA thought was reasonable.

Now, a lot of these cities became much more sophisticated, and many of the contracts are now different.

Q Dr. Wein, are you familiar with the term "transfer pricing"?

A Yes.

Q What does that mean?

A Transfer pricing is a term which refers to the practice that very many large organizations that are vertically integrated -- that is to say, they make components which are then given to another division which does some work on it, which is given to another division and, finally, an end product comes out and it is sold -- many companies have found that it is very efficient to attach a price at each stage of this particular proces. So that at the end of Stage A, if it happens to be some set of components, the company will add up the price and they will attach a price and the next division will get it. It is

1 Wein - redirect  
2 sometimes known as profit centers.

3 So that you will have these prices where, in  
4 effect, the company recognizes that there are  
5 different functions performed by its entire corporation  
6 and they wish to be able to keep track of the costs  
7 and they wish to put responsibility on each of these  
8 particular profit centers or costing divisions and so  
9 they set prices.

10 Many other companies making the same thing don't  
11 do it that way, and what you have is simply one final  
12 price for the product.

13 Q Is the concept of transfer pricing an unusual concept  
14 in the industry?

15 A It is very common.

16 Q This morning Mr. Lansdale asked you about testimony  
17 you gave in another proceeding concerning the Alabama  
18 Power Company and he referred to prepared testimony  
19 concerning whether cutthroat competition could be  
20 applied to door-to-door competition.

21 When you were speaking in that proceeding, Dr.  
22 Wein, were you talking generally or were you talking  
23 about a specific instance?

24 A I was talking about the specific instance.

25 Q What instance were you talking about?

Wein - redirect

1  
2 A Well, it's a small city in Alabama, the City of  
3 Samson, a very small city, small enough so that it  
4 could be served by a rural electric cooperative.

5 This rural electric cooperative had been  
6 serving the city for a long time, and what happened  
7 was -- and it was being operated by a generating  
8 rural electric company somewhat analogous to  
9 Buckeye here in Ohio. And the Alabama Power Company  
10 decided it was going to go into that city in  
11 competition, essentially not with the local, the  
12 distribution cooperative, but it wanted to get that  
13 market because of its competitive rivalry with the  
14 generating cooperative.

15 So it went into that city which had been  
16 served for a long time by this small rural electric  
17 distribution cooperative and simply built  
18 distribution -- and got a franchise from the city and  
19 simply built distribution on every street in that  
20 little city.

21 Now, in the context of that case, I called this  
22 a form of cutthroat competition and, indeed, it was.

23 Q Dr. Wein, you responded to questions from Mr.  
24 Lansdale concerning costs which CEI may have and  
25 Muny may not have.

1 Wein - redirect

2 Are there costs that CEI incurs other than the  
3 ones that you identified from Mr. Lansdale?

4 MS. COLEMAN: Withdraw the question.

5 Q Does CEI incur costs other than taxes and dividends  
6 which Muny Light does not incur?

7 A Well, it has a great deal of advertising, it has a  
8 great deal of promotional expenses.

9 Q Now, as an economist, is it your opinion that those  
10 kinds of costs have a relation to CEI's efficiency  
11 in providing product to the consumer?

12 A Well, it may induce some people to switch to CEI or  
13 it may induce some people in CEI not to switch to  
14 Muny, but insofar as the efficiency of the operation  
15 I find it hard to see that these costs would be  
16 terribly important in proving --

17 Q Dr. Wein --

18 A -- efficiency.

19 Q Excuse me. Are you finished?

20 A Yes.

21 Q Mr. Lansdale asked you questions this morning about  
22 yardstick competition and franchise competition and  
23 head-to-head competition.

24 In the market that you defined as the City of  
25 Cleveland and CEI's service area, do you find there

Wein - redirect

is one type of competition or more than one type of competition?

A There is yardstick, there is franchise and there is head-to-head.

MS. COLEMAN: Your Honor, may I approach the bench, please?

THE COURT: Yes.

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{Bench conference ensued on the record as follows:}

MS. COLEMAN: I would ask at this juncture to be read Stipulations 173, 180, 181, 182, and 183.

MR. LANSDALE: No objection to 173. 180, no objection. 181, no objection. 182, no objection. 183, no objection.

THE COURT: All right.

MS. COLEMAN: Thank you.

{End of bench conference.}

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THE COURT: Ladies and gentlemen of the jury, Joint Stipulation No. 173 reads as follows:

"The technology for nuclear generating plants

Wein - redirect

and nuclear fuel which is used by CEI and its CAPCO partners was initially developed by the United States Government at taxpayer expense."

Stipulation 180: "CEI is an Ohio corporation, is organized for profit, is subject to property taxes and income taxes and miscellaneous other taxes imposed by taxing jurisdictions in which it owns property and/or does business. CEI is also subject to the income tax imposed by the Federal Government."

Joint Stipulation No. 181: "CEI tried to pay as little Federal income tax as the law permits. The amount of Federal income tax which CEI is required to pay in any given year depends upon the extent to which CEI is entitled to avail itself of various tax benefits including investment tax credits and accelerated depreciation."

Stipulation 182: "Investor-owned utilities are permitted to reflect taxes in their cost of services and rate base to the extent capitalized and thus, when new rates are set in a rate case, these costs are, to the extent permitted by regulatory authority, passed on to the customer."

Wein - redirect

Stipulation 183: "CEI utilizes industrial revenue bonds to finance construction of certain pollution control facilities. The interest from these bonds is exempt from the payment of Federal income taxes by the holders of the bonds. Financing costs to CEI are lowered in such cases and if interest to the bondholder were taxable as is the case in other bonds issued by CEI, and such lower cost is used by regulatory authority in calculating the cost of money to CEI and thus its rates. Muni Light, as a government entity, may and does issue tax-exempt bonds for all its capital needs financed by borrowing."

MS. COLEMAN:

Thank you.

BY MS. COLEMAN:

Q Dr. Wein, Mr. Lansdale asked you some questions this morning concerning whether there was waste involved in having two distribution lines on a street.

Do you have an opinion about what the greatest waste in the electrical industry is?

A Well, I can give some examples of what I consider to be --

THE COURT:

Are you objecting?

MR. LANSDALE:

No, sir. I am trying



Wein - redirect

to move around so I can see the witness.

THE COURT:

All I see is movement

over there.

A I don't know that I would characterize them as the greatest waste, but I can give some examples of waste.

Q What do you feel are examples of waste in the electrical industry, Doctor?

A Well, one waste comes about because of the long-term refusal of the electric power industry to put in certain kinds of rates which other countries have had for a very long time.

Q What type of rates are those?

A These are peak load rates. A peak load rate is essentially a rate which charges users who contribute to the peak --

MR. LANSDALE:

Object, if your Honor

please.

THE COURT:

Are you objecting now?

MR. LANSDALE:

Yes.

THE COURT:

Approach the bench,

please.

- - - - -

{Bench conference ensued on the record as follows:}

Wein - redirect

MR. LANSDALE: We are dealing here with comparative costs of competition between CEI and Muny Light. If it were contended that Muny Light was using some fort of rate design which produced savings, or what have you --

THE COURT: Produced what?

MR. LANSDALE: -- as compared to CEI --

THE COURT: That produced what?

MR. LANSDALE: -- that produced some benefit or cured waste as compared to CEI as being wasteful, I could see some relevance to this. But I submit the long-term refusal, if any there was, of the electric industry generally to put in any kind of fancy rate design the witness may think is better hasn't anything to do with this case and I object to it.

MS. COLEMAN: Your Honor, I am trying to put in contrast or proportion the question of waste which Mr. Lansdale raised.

His implication is that this is the only thing wrong with the industry, that sometimes there is competition, and I think the witness ought to be permitted to testify there are other

Wein - redirect

instances of waste so that the jury understands --

MR. LANSDALE: If you think I was suggesting that, I am not conscious of it. I was suggesting that there are certain comparative costs between Muny Light and CEI and I think that's as far as I went.

I object to this as not proper redirect.

THE COURT: If you can reduce it to the comparative between CEI and Muny Light, which is the issue here, you are free to go into it, but to go beyond and try to generalize as to the industry as a whole, I certainly think is beyond -- first of all, it's beyond the cross examination and I don't see where it is relevant to the issues of this case.

MS. COLEMAN: Well, I felt the cross-examination was asking for general opinions, your Honor, and that we just follow up on that. If that is your ruling, I will proceed.

MR. LANSDALE: I submit I asked no general questions about general industry costs, only about these two companies.

MS. COLEMAN: Well, I think the record will show otherwise, but I will proceed.