
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

7-13-1981

Volume 13 (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.R.I., et al.
Civil Action No. C75-560

Transcript

Monday, July 13, 1981



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1 MONDAY, JULY 13, 1981, 9:25 O'CLOCK A.M.

2
3 {The following proceedings were had in the
4 Court's chambers.}

5 THE COURT: I have considered
6 the plaintiff's request to alter my charge
7 concerning essential facility, and I think that
8 it should be kept in mind that this preliminary
9 instruction to the jury is not to be considered
10 as a full and complete charge. It is merely an
11 attempt to give some assistance to the jury in
12 understanding certain terminology and words
13 that will be used during the course of this
14 trial by witnesses, by lawyers, and by the
15 Court.

16 The Court's preliminary instruction has
17 been assembled with that in mind.

18 Now, I have reviewed Hecht and Byars as it
19 relates to essential facility, and I also have
20 reviewed the proposed charge as submitted by the
21 plaintiffs, together with the preliminary
22 instruction that I intended to give to the jury
23 at the outset of the case; and I have modified
24 the charge I intend to give at the outset by
25 inserting language which is intended to, and

1 will, accommodate whatever evidentiary testimony
2 and exhibits are introduced as it relates to
3 essential facility.

4 It would appear that the refusal to wheel
5 power from PASNY to the City, and the cost that
6 would be involved to duplicate that facility,
7 would come within the broad parameters of Hecht
8 and Byars since it is an essential facility in
9 the sense as it is defined by those cases.

10 The refusal to interconnect, however,
11 presents a different problem, and I must say that
12 I haven't fully researched at this juncture,
13 keeping in mind that this motion was -- more
14 modification was submitted late Friday. It
15 would appear that an essential facility is one
16 that cannot be duplicated or one that would be
17 economically unfeasible to duplicate under facts
18 and circumstances surrounding that issue.

19 The refusal to interconnect is, at least in
20 my mind at this juncture, questionable if you
21 take the facts as they were developed during
22 the last trial.

23 However, you had -- I should say here the
24 City had available and in place adequate
25 generating facility in the form of its generators.

1 The only reason that it was unable to utilize that
2 generating facility to supply its customers, as I
3 understand and recollect the facts of the last
4 case, is because it did not -- could not maintain
5 and operate the facilities for whatever reasons
6 the City claims that it couldn't because of the
7 action of the defendant.

8 Defendant claims that it couldn't -- the City
9 couldn't maintain those generators because they
10 were incompetent as a result of mismanagement and
11 lack of economic wherewithal.

12 Query: Are the generating facilities that were
13 available sufficient to take the interconnection
14 out of the essential facility doctrine?

15 I don't know at this juncture. But, in any
16 event, I have left the door open in the proposed
17 charge; and, needless to say, that the final
18 charge, after a research of the subject more
19 thoroughly and evaluation of the evidence as it
20 will have been developed during the trial may well
21 prompt the Court to change its final charge. And
22 I think other language, in the event -- here's the
23 charge as it now stands, and the change --

24 MR. LANSDALE: This is page 64,
25 your Honor?

1 THE COURT: Page 64, and the
2 change is really in the first sentence, and the
3 sentence now reads:

4 "In assessing the charges of the plaintiff's
5 complaint, including the charge that the
6 defendant wrongfully refused to wheel electric
7 power from PASNY to the City, you may consider,
8 in addition to the above instructions, certain
9 other principles which concern what is termed in
10 antitrust law the 'essential facility' doctrine."

11 And that was changed from the original
12 language which read:

13 "In assessing the plaintiff's charge that the
14 defense wrongfully refused to wheel electric
15 power from PASNY to the City, you may consider,
16 in addition to the above instructions, certain
17 other principles which concern what is termed
18 in antitrust law the 'essential facility'
19 doctrine."

20 So then, of course, the charge goes on to,
21 in broad language, define "essential facility",
22 and it goes on to say, as this Court has
23 previously instructed:

24 "The Sherman Act, as a general rule, imposes
25 no duty upon a successful business enterprise to

1 share with its competitor advantages achieved by
2 the development of a better product or service or
3 through superior planning, foresight, and
4 management. This general rule does not necessarily
5 apply, however, in instances where an enterprise
6 maintains control over a scarce or 'essential'
7 facility which cannot practicably be duplicated.
8 Under such circumstances, the Sherman Act may
9 impose upon the enterprise controlling such a
10 facility the duty to permit others fair and
11 reasonable access thereto.

12 "A particular facility, in order to be
13 considered 'essential', need not be indispensable
14 for the competitor seeking to avail of its use.
15 Rather, it is sufficient if duplication of the
16 facility would be economically infeasible and, in
17 addition, denial of its use would inflict a
18 severe competitive handicap upon the prospective
19 user thereof."

20 So that is what I intend to give.

21 MR. WEINER: Your Honor, I didn't
22 get the exact language of the new -- I wasn't able
23 to copy it down; but the City would submit that
24 after the phrase "refused to wheel electric power
25 from PASNY to the City", the Court would also put

1 in "and wrongfully refused to interconnect with
2 the City's electric power system."

3 THE COURT: You weren't listening
4 to what I said.

5 MR. WEINER: I heard you, but I
6 just wanted for the record to show that that is
7 the position of the City.

8 THE COURT: I'm sorry, Mr. Weiner.

9 MR. WEINER: Certainly.

10 THE COURT: Thank you, Mr. Weiner.
11 Mr. Lansdale?

12 MR. LANSDALE: Yes.

13 We have a few other comments on the proposed
14 instruction. May I make a proposal, your Honor,
15 respecting this; and we have a few comments too.
16 But I am not disposed to make a big deal out of it.

17 May I suggest, since I assume that these
18 items here, to the extent that we are not able to
19 persuade your Honor to change them, will be
20 included in the final charge to the jury and,
21 therefore, if your Honor would agree with us that
22 items contained in this charge which are
23 incorporated in the final charge, we may take
24 exception to them there without being taken to
25 have waived any objections to this charge?

1 Now, of course, you can't unring a bell
2 after it is given preliminarily, I appreciate that.
3 We have five or six things that we would rather
4 see another way, but we --

5 THE COURT: I think you better put
6 it on the record. We'll keep it orderly.

7 MR. LANSDALE: All right.

8 THE COURT: It may be more
9 expeditious the other way, but I think, for the
10 record, both parties ought to put it on.

11 MR. WEINER: Thank you, your Honor.

12 I assume you would like us to start first?

13 Page 30, under the purpose of the Sherman
14 antitrust law -- actually, we have a document
15 that might make it easier for the Court to follow.

16 {Documents handed to the Court and respective
17 counsel by Mr. Weiner.}

18 {The Court and respective counsel reading
19 silently.}

20 MR. LANSDALE: Can we comment from
21 our things?

22 THE COURT: Yes.

23 MR. WEINER: Could I just, Jack,
24 since the document I have just -- is not --
25 doesn't really explain the reasoning behind it

1 but only -- to simplify things, the problem with
2 this sink-or-swim language, as far as the City is
3 concerned, the sink-or-swim language -- and we
4 realize this is taken from a case -- it's just so
5 inflammatory and it's almost unlawlike and it has
6 that ring to it. It seems to inflame people
7 "sink or swim".

8 What does that mean, and what does it mean in
9 the law and the legal sense? We don't think it's
10 necessary. It just doesn't add anything to the
11 charge. The charge without that is correct.

12 I admit that some court did use that language
13 at one time, but I don't think it's appropriate.

14 If it was going to be used, we think the
15 other language suggested in the --

16 THE COURT: The U.S. Supreme Court
17 used that.

18 MR. WEINER: I understand that;
19 but, I mean --

20 THE COURT: If it's good enough
21 for the Supreme Court, it's good enough for me.

22 MR. WEINER: It has a lot of things
23 that we don't use in every charge.

24 We went through this once before. It does
25 seem inflammatory to us and just not -- and out of

1 context and --

2 THE COURT: I always like to
3 incorporate previously-approved language in my
4 charge, be it the Sixth Circuit or, preferably,
5 the Supreme Court; because, that way, I can always
6 say, "All I did was use the language of the Supreme
7 Court."

8 MR. WEINER: It's a nice safe
9 harbor, isn't it?

10 That's our position on that.

11 THE COURT: All right.

12 MR. WEINER: And if you do that,
13 will use that, I think the other language is
14 important to add at the end, which comes from --

15 MR. LANSDALE: Are you talking about
16 the end of this?

17 MR. WEINER: "This however does
18 not mean that injury to a competitor is not injury
19 to competition or that one competitor may put
20 another under by means other than by fair
21 competition."

22 THE COURT: I will leave my charge
23 stand as is.

24 MR. WEINER: Thank you.

25 The third point on the purpose clause comes

1 from the first trial at the close of the case
2 when you instructed the jury, you did have the
3 paragraph that's there as Number 3.

4 THE COURT: Right. And I intend
5 to incorporate that, at least at this juncture, in
6 the final charge. I don't believe we need to
7 modify it at this point.

8 MR. WEINER: All right.

9 MR. NORRIS: Your Honor, could I
10 just raise another point?

11 THE COURT: Sure.

12 MR. NORRIS: In view of Question
13 37 on the jury questionnaire and the emphasis on
14 the public utility view, I would submit that there
15 is enough awareness of that right now that your
16 Honor might want to balance that by including this
17 third item.

18 THE COURT: I'll take care of it
19 in the final charge; and that was one of the
20 reasons I permitted counsel during the course of
21 voir dire examination to go into the subject rather
22 extensively, and I think that that is impressed
23 upon the jurors at this juncture, and I will
24 further clarify it at the end and reassert it at
25 the time of the final charge.

1 You see, what I don't want to do, I don't want
2 to depart from my initial charge because I am
3 committed to that charge; and absent any
4 compelling reason why I should change that charge
5 or any part thereof, I intend to give the same
6 charge because it resulted from exhaustive research
7 prior to giving the charge in the last case.

8 MR. WEINER: Your Honor, that
9 paragraph does come from your charge.

10 THE COURT: I understand.

11 MR. WEINER: That's why I thought
12 you are not deviating at all from it.

13 THE COURT: I understand.

14 Go ahead.

15 MR. WEINER: Page 50.

16 THE COURT: All right.

17 MR. WEINER: That's the third
18 paragraph of the "Relevant Geographic Market".

19 {The Court reading silently.}

20 MR. LANSDALE: That just isn't it at
21 all.

22 THE COURT: Well, if that language
23 is pertinent after our research, I can always
24 include it in the final charge to the jury.

25 MR. WEINER: We recognize that the

1 principal test is the area of effective
2 competition, and it becomes a question how you
3 define that.

4 The City's position is that the language
5 "or would have competed for customers except for
6 any actions of the defendant" is too narrow a test
7 under that topic; and if you are going to have that
8 narrow test, you're also going to have the expanded
9 test of how the companies in question perceive or
10 are perceived by others to have competitive
11 influence on each other.

12 THE COURT: Are you desirous of
13 speaking to that, Mr. Lansdale?

14 I intend to read the charge as is.

15 MR. LANSDALE: If your Honor is
16 going to leave the charge as is; I see no point
17 in beating it to death. But I just -- the cases
18 and the law is so clear to me that your Honor's
19 charge is correct.

20 We even think the -- you go too far in saying
21 which we prevented them from going -- all of the
22 law that I know of has no reference to potential
23 competition perceived influence and the like,
24 relates to the product market; simply no authority
25 extending that basic principle to the geographic

1 market.

2 MR. WEINER: It's all cited right
3 there, some of it is cited there.

4 THE COURT: Let's not -- I see
5 the citations, and I'll review all the cases, and
6 I think what I am giving is more than adequate at
7 this juncture.

8 MR. WEINER: Your Honor, we have a
9 basic problem with getting the natural monopoly
10 charge at all in the preliminary instruction for a
11 couple of reasons:

12 One is, the City's always maintained we don't
13 think a natural monopoly is relevant in this case,
14 it's a legal matter.

15 2. It's anticipating a defense which may or
16 may not arise.

17 THE COURT: We don't anticipate a
18 defense. This is a defense; this is their defense
19 to the entire action. You got the charge on it;
20 natural monopoly is a part of the case.

21 MR. WEINER: There are a lot of
22 other defenses that weren't charged, and there are
23 a lot of other things that are not in here; there
24 is no damage charge.

25 THE COURT: Well, the damage charge

1 will be given at the conclusion of the case.

2 .But, certainly, we know that there is going
3 to be evidence on natural monopoly, and they ought
4 to have the definition of it. So I'm going to give
5 the natural monopoly charge.

6 Do you have anything further?

7 MR. WEINER: Yes.

8 Another problem with the natural monopoly
9 charge is that it is given twice.

10 It is given once under the heading of
11 "Monopolization", and given again as a whole
12 separate heading.

13 It seems to us to put an awful lot of undue
14 influence on one aspect of the case.

15 THE COURT: Anything further?

16 MR. WEINER: Yes.

17 We have suggested language that we suggest
18 should be added at page 59 if a monopolization
19 charge is going to be given -- excuse me -- a
20 natural monopolization charge is going to be
21 given there.

22 That comes from Union Leader indicated there.

23 {The Court reading silently.}

24 THE COURT: Well, I'll consider
25 that for purposes of modifying the charge at the

1 conclusion of the case.

2 MR. WEINER: Thank you.

3 Just for the purpose of the record, we have
4 taken exception to and continue to take exception
5 to the use of "conscious and wilful business
6 practices" and the use of the word "conscious"
7 in that charge, as we did at the close of the first
8 trial.

9 THE COURT: All right.

10 Anything further, Mr. Weiner?

11 MR. WEINER: Yes.

12 The last paragraph of the "Monopolization",
13 I do have that on the piece of paper I handed to
14 the Court.

15 MR. LANSDALE: What page are you
16 looking at now?

17 MR. WEINER: The bottom of 58 --
18 I'm sorry -- the bottom of page 59.

19 We would ask the Court to consider using the
20 words at the start of that paragraph:

21 "However, you should keep in mind" to
22 distinguish -- to make it clear to the jury that
23 there is two different elements here, you switched
24 another element and, at the same time --

25 THE COURT: I don't follow what

1 you are saying.

2 MR. WEINER: Okay.

3 In your monopolization charge, you have gone
4 through what monopolization is; then you talk
5 about it may not apply in instances where there is
6 a natural monopoly, then you go through what that is.

7 Then I would suggest to say:

8 "However, you should keep in mind that if a
9 monopolist abuses its monopoly power and acts in
10 an unreasonably exclusionary manner vis-a-vis
11 competitors or potential competitors, Section 2
12 of the Sherman Act is violated, irrespective of how
13 the monopoly power was acquired or achieved."

14 I think it would probably be more clear if
15 you put "However" there?

16 THE COURT: Where?

17 MR. WEINER: Right before the
18 word "You," the last paragraph on page 59.

19 THE COURT: If that makes you
20 feel better.

21 That's something I don't have to research.

22 MR. WEINER: That's true.

23 Also, I think, to be -- I think you have
24 always said -- when you say "unreasonably
25 exclusionary", you usually say "or unfair".

1 If you're going to be consistent, you might want
2 to do that there also; we would suggest you do
3 in the same paragraph.

4 THE COURT: "... in an unreasonably
5 exclusionary manner or unfair"?

6 MR. WEINER: Right.

7 {After an interval.}

8 MR. WEINER: We have --

9 THE COURT: Many of the latter
10 decisions are abandoning some of the language
11 that was incorporated in some of the previous
12 decisions.

13 MR. LANSDALE: I --

14 THE COURT: "Predatory" is one
15 of the --

16 MR. LANSDALE: I submit that the
17 later cases are abandoning the whole idea.

18 THE COURT: Well, that 1980 case
19 is interesting; I have read it but I haven't
20 fully digested it.

21 Anything further, Mr. Weiner?

22 MR. WEINER: "Essential facility",
23 we made our record on that.

24 One other thing, and that is the specific
25 intent, page 74.

1 THE COURT: That language, as I
2 recall, was also taken out of the case.

3 MR. LANSDALE: I'm not sure what
4 language you're addressing, your Honor.

5 THE COURT: Specific intent; I
6 don't know.

7 It seems to me, if my recollection serves me
8 correctly, I plagiarized that again.

9 MR. LANSDALE: What page are you on
10 now?

11 MR. WEINER: 74.

12 MR. LANSDALE: The one written in ink,
13 "specific intent" defined?

14 MR. WEINER: Yes.

15 MR. LANSDALE: All right.

16 THE COURT: Northeastern
17 Telephone Company versus American Telephone and
18 Telegraph Company and Associated Radio Service
19 Company versus Page Airways, Inc.

20 MR. WEINER: This charge was, of
21 course, given at the close of the last trial.

22 The Court has added a new sentence in this
23 charge that was not given in the new trial.

24 That's the second -- the third sentence,
25 starting, "Thus -- I guess it's the third and

1 fourth sentence, rather:

2 "Thus, in order to prevail on its attempt to
3 monopolize charge".

4 MR. LANSDALE: All right.

5 MR. WEINER: We don't see that that
6 is necessary.

7 It's different from the end of the charge at
8 the end of the case, seems redundant for the rest
9 of the charge, not appropriate.

10 That's the sentence beginning, "Thus", and the
11 next one beginning, "Rather."

12 THE COURT: Okay. I'll delete
13 that.

14 MR. WEINER: Thank you, your
15 Honor.

16 Those are the only comments of the City.

17 THE COURT: What are your comments,
18 Mr. Lansdale?

19 MR. LANSDALE: Yes.

20 I do not basically propose to argue these,
21 your Honor, but I want to make the record.

22 On page 45, we object to the portion of the
23 charge which defines monopoly power as the power
24 to control prices, because we submit that it's a
25 matter of law, we do not have the power to control

1 prices; and I would cite to your Honor the article
2 by Landers and Blausner, Market Power and
3 antitrust cases, 94 Harvard Law Review, 937.

4 THE COURT: That is one thing
5 that I've read.

6 MR. LANSDALE: 45, sir.

7 Page 45. You have got it?

8 THE COURT: Predatory pricing --

9 MR. LANSDALE: Market power and
10 antitrust cases, 94, 937 -- page 937 --

11 THE COURT: What --

12 MR. LANSDALE: Volume 94.

13 {After an interval.}

14 THE COURT: I have a different
15 one.

16 MR. LANSDALE: And we think, also,
17 that this is the basic thrust of the Northeastern
18 Telephone case, that most recent decision.

19 Secondly, we object to that portion --
20 potential competition portion of the relevant
21 market charge on page 50. We have already filed
22 a brief on that.

23 Thirdly, we object to that portion of the
24 charge, page 58, which says:

25 "This element of monopolistic intent may

1 normally be inferred from proof that the
2 defendant has engaged in conscious and wilful
3 business practices that inevitably result in the
4 exclusion or limitation of actual or potential
5 competition. Stated differently, monopolistic
6 intent may, in appropriate instances, be inferred
7 from conscious business practices that naturally
8 and inevitably produce or maintain monopoly power.

9 We believe that the decisions in Berkey Photo
10 and Northeastern, which specifically hold even a
11 monopolist can compete to the fullest extent --
12 possible extent that is available to any
13 competitor. Maybe this old law your Honor has
14 stated here is the pre-Berkey Photo law.

15 We object at page 59 to the charge on --
16 relative to natural monopoly market that, "you may
17 find the element of monopolistic intent satisfied
18 only in the event you conclude that monopoly power
19 was acquired or maintained by the defendant through
20 exclusionary, unfair, or predatory means."

21 We have -- this is repeating something I have
22 just said, that where there is a natural monopoly
23 market and the elimination of competition is
24 inevitable, we think that charging us with unfair
25 means is the same as the common law action for the

1 same and doesn't belong in an antitrust case.

2 On the sixth from the last page, which is an
3 unnumbered page, the Court reiterates the
4 exclusion there of unfair predatory tactics, the
5 same point.

6 At page 64-65, we object to the essential
7 facility charge for the reason that, in our view,
8 it applies only to a conspiracy to hold an essential
9 facility by two or more competitors to keep a third
10 or other competitors from using it.

11 I keep thinking about the case of a man with
12 some new item or some new idea or discovers a
13 natural -- a mine of specially pure material that
14 is not available to his competitors; I submit that
15 there is no instance in which a monopolist has been
16 compelled to share a facility with another
17 competitor under the essential facility doctrine,
18 essential or unique or not.

19 Two or more competitors may not get together
20 and keep additional competitors out of essential
21 facility; but essential facility by a monopolist,
22 in our view, is not within that same scope.

23 We -- lastly, we have an objection to page 97
24 and 98 to that portion of the predatory practices
25 charge which suggests that predatory conduct may be

1 found "which not only have a significant effect
2 to eliminate competitors unfairly, but confer no
3 net benefits of superior efficiency on the public
4 in the process."

5 We submit this entire clause should be
6 deleted.

7 The Northeastern case deals with this specific
8 question, and that the fact of that -- that the
9 practice adopted does not benefit the customer
10 but is a competitive device, does not necessarily
11 mean that it is an unfair method of competition,
12 and we submit that it simply isn't so.

13 That's all.

14 MS. COLEMAN: Your Honor, may we go
15 back to Mr. Lansdale's first point on the power to
16 control prices?

17 THE COURT: Yes.

18 MS. COLEMAN: Page 45.

19 I don't know if Mr. Lansdale plans, if anything,
20 to argue about this in his opening statement, but
21 we thought we ought to bring this up at this
22 point before he starts arguing about it.

23 The plaintiff intends to offer proof on the
24 question of power to control prices. Part of that
25 proof was not permitted in the last trial,

1 Mr. Eckhart's testimony; and we have to take
2 exception to a situation where Mr. Lansdale is
3 going to be permitted to argue CEI has no power
4 to control prices but the City is foreclosed from
5 putting on evidence to rebut his claim.

6 That seems to be.

7 THE COURT: Yes; but predatory
8 pricing, as such, as I recollect was taken out of
9 the last case.

10 MS. COLEMAN: I'm speaking on the
11 regulation question, if you will, your Honor,
12 rather than the predatory pricing.

13 THE COURT: Well, you know, it
14 goes back to what is going to evolve during the
15 course of the evidence.

16 I can't look into the minds of the parties as
17 to what they intend to prove and develop through
18 the evidence. For the remaining issues as precedent
19 has established, we start all over, so the parties
20 may introduce evidence or may not introduce
21 evidence as to issues that were joined in the last
22 trial, and this question is one that concerns the
23 Court.

24 I know what your argument -- their argument is
25 that, "We are a regulated industry; consequently, we

1 cannot be charged with unfair pricing or unfair
2 actions through pricing"; and this goes to the
3 whole issue of -- what did we call that, the sales,
4 the advantages that both sides were given as
5 inducements?

6 MR. LANSDALE: Muny conversion
7 program.

8 THE COURT: Muny conversion
9 program.

10 MS. COLEMAN: I have to say, your
11 Honor, the fact that they could engage in that
12 program exactly proves our point they did have the
13 power.

14 THE COURT: That is your theory.

15 I mean, your theory is since they are
16 regulated, it doesn't make any difference because
17 the regulation is ineffective, consequently, you
18 should be permitted to put on the testimony of
19 Eckhart and the rest of these -- or Eckhart, or
20 whoever it was, to show that the regulation was
21 ineffective.

22 I don't know how you would do that. I assume
23 that you would do it through the use of
24 statistical -- I mean certainly he cannot express
25 an opinion -- at least, I don't think he can --

1 but to counter that, as I understand the arguments,
2 their argument is that that's not so at all; but
3 the action of the Public Utilities Commission
4 only reflects that which we offer as pricing and
5 rate changes are right, and they hate to pass upon
6 them, so there you are.

7 You know, again, if I let yours in, I'm going
8 to have to let theirs in, and it becomes a question
9 of issue -- it becomes a question for the jury to
10 decide; but there has to be a balancing, so I
11 don't know where you're going to go on that.

12 MR. LANSDALE: I know where I'm going
13 if I have to try the issue, but I don't know if
14 it's in the case.

15 MS. COLEMAN: The latest -- are you
16 going to allude to that in your opening statement?

17 MR. LANSDALE: I hadn't thought of it,
18 but it depends upon what the plaintiff says in his
19 opening statement.

20 I did not have in mind -- I did not have in
21 mind at this stage dealing with it; at least, it's
22 not on my outline.

23 But my opening statement depends to a major
24 degree upon what the plaintiff says.

25 THE COURT: The regulation was --

1 the PUCO regulation was taken out of the last
2 case for all effective purposes --

3 MR. LANSDALE: May I make --

4 THE COURT: -- as it relates to
5 rate --

6 MR. LANSDALE: I just want to make
7 this point on this thing.

8 This was dealt with in the Northeastern case
9 very recently, and then they made a very pertinent
10 point: that if whoever is contending they didn't
11 like the way the Commission was handling it, they
12 go down to the Commission.

13 And this is very, very pertinent to this case,
14 because the City is very used to going to the
15 Public Utilities Commission. They're there all
16 the time, as I well know personally.

17 But they never once went to the Commission
18 about our so-called practices in the Muny
19 Conversion Program, which went on for a very
20 extended period of time, and --

21 THE COURT: Berkey is rather
22 explicit on that.

23 MR. LANSDALE: Berkey is very
24 explicit on the point, and I just --

25 THE COURT: That's one of the

1 things that has been troubling me since I read
2 Berkey -- this is the way I reacted to it early
3 on -- that these are areas that we should address
4 ourselves to before we undertake the instruction
5 and testimony; because Berkey, as I -- I don't
6 know the exact language, but the language of Berkey
7 is that the action of the Public Utilities
8 Commission or the regulatory agency is a rebuttable
9 presumption that its action was right.

10 I'm just paraphrasing; it's rather strong
11 language.

12 But you're not going to allude to it?

13 MR. LANSDALE: I have no present
14 intention of alluding to it --

15 THE COURT: You are not going --

16 MR. LANSDALE: Unless the plaintiff's
17 opening argument --

18 THE COURT: I would request that
19 neither party do until we have a more adequate time
20 to research this problem and reading this other
21 Law Review article which bears upon this subject.

22 It's Predatory Pricing, its Volume 88,
23 Harvard Law Review, February, 1975.

24 MS. COLEMAN: '75?

25 THE COURT: Yes; and it's at page

1 1977, and it appears that some of the more recent
2 authority is adopting the principles that were
3 enunciated back in '75. It seems that that is the
4 trend.

5 Anything further, Ms. Coleman and gentlemen?

6 MR. NORRIS: Your Honor, I want to
7 ask Jack if he would consent to the use of this --
8 this is similar to the exhibit that was admitted
9 into evidence before.

10 The only difference is that some of the
11 practices on this exhibit, which is --

12 MR. LANSDALE: 3099.

13 MR. NORRIS: -- 3099 -- thank you --
14 are shown extending back beyond 1972, and I think
15 that the generation history chart that was
16 accepted into evidence happened -- that has these
17 bar charts on it -- happened to be the one for the
18 period 1972 to 1977.

19 And the purpose of using this is to demonstrate
20 that some of these practices that occurred during
21 the 1971 to 1975 period had their origin prior to
22 that time, and the jury ought to be permitted to
23 know that fact so that they can give consideration
24 to the prior conduct as explaining and
25 characterizing the acts during the damage period.

1 And all of the labels down the left side are
2 in the case, so we would request the right to use
3 that during opening statement.

4 THE COURT: Well, I don't know what
5 my rulings were and what the evidence was concerning
6 the testimony that I permitted into evidence
7 pre-statute period, and I don't know if this
8 reflects that evidence on which the Court ruled.

9 MR. NORRIS: Well, this is the only
10 exhibit that --

11 THE COURT: I'm not going to
12 permit it only because I haven't had a chance of
13 knowing what the evolution of the evidence will be.

14 It may very well be a permissible exhibit and
15 it may develop that you can use it during the
16 course of the trial; but until such time as I can --
17 this is the first time I've seen it -- until such
18 time as I can relate it to what has transpired or
19 what did transpire during the last trial, I'm
20 reluctant to permit you to use it.

21 MR. NORRIS: Well, your Honor, I
22 raised it because I didn't want to have the orderly
23 presentation of the opening statement interrupted,
24 and the other exhibits are all those that have
25 been --

1 MR. LANSDALE: It would have been
2 interrupted, I assure you.

3 MR. NORRIS: That's why I raised it.

4 THE COURT: All right, fine.

5 Why don't we set this aside; and if there is
6 serious objection to that which it reflects, and if
7 what it reflects is inconsistent with my rulings
8 during the previous trial, and absent a compelling
9 reason why I should change my rulings, I will not
10 permit it.

11 However, if it is consistent with what my
12 rulings were during the last trial, the evidence
13 that I permitted in, I see no reason why it can't
14 be used during the course of the trial.

15 MR. LANSDALE: This exhibit was
16 identified at the last trial but plaintiff didn't
17 use it.

18 MR. NORRIS: That's right; and we
19 didn't offer it.

20 THE COURT: I don't think this is
21 the time to go into it.

22 MR. LANSDALE: What would your
23 scheduling look like now?

24 THE COURT: I don't know. I'm
25 going to read this charge, and I'm going to see

1 what time it is, and then I'm going to give the
2 jury maybe a ten-minute break after I read this
3 instruction to them, and whatever time it is, we
4 can start, and I will tell them that we will
5 finish your opening statement even if it goes --
6 I will hold them over, I'll say I have decided to
7 hold them over, not you.

8 So you can give your statement, and then we
9 can send them to lunch; we should be finished by
10 12:30.

11 MR. NORRIS: Chances are, your
12 Honor, that's going to take an hour to read, isn't
13 it?

14 THE COURT: No, it won't take an
15 hour, maybe 45 minutes.

16 All right.

17 {The foregoing proceedings were had in the
18 Court's chambers.}

19
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1 {The following proceedings were had in
2 the courtroom but in the absence of the jury:}

3 LAW CLERK SCHMITZ: The City of
4 Cleveland, Plaintiff, versus the Cleveland
5 Electric Illuminating Company, Defendant. This
6 is Civil Action C75-560.

7 THE COURT: Ms. Coleman and
8 gentlemen, are we ready to proceed?

9 MR. NORRIS: We are, your Honor.

10 MR. LANSDALE: Yes, your Honor.

11 THE COURT: Mr. Weiner --

12 MR. WEINER: Yes, your Honor.

13 THE COURT: -- I have reviewed
14 my notes and the language appearing in the
15 specific intent charge is modified as language
16 taken from Northeastern Telephone Company v.
17 American Telegraph and Telephone Company which
18 was decided by the Second Circuit on May 22nd,
19 1981.

20 MR. WEINER: I knew where it came
21 from. I just didn't think it was necessary.

22 THE COURT: If we are prepared to
23 proceed, have the jury come in, please.

24 {The foregoing proceedings were had in the
25

1 absence of the jury.}

2 - - - - -

3 {The jurors entered the courtroom and took
4 their places in the jury box.}

5 THE COURT: Please be seated,
6 ladies and gentlemen.

7 Good morning, ladies and gentlemen of the
8 jury. On behalf of the parties and myself, we
9 appreciate your indulgence. I don't want you to
10 think that we have been idle during the period
11 that you have been waiting. We have not. We have
12 resolved many things and I think we are prepared at
13 this juncture to proceed.

14 As I indicated to you, generally the first
15 order of business in a civil trial like this is
16 opening statements. Before we proceed with the
17 opening statements of counsel and the taking of
18 evidence, the Court wishes to define certain
19 words, phrases and terminology which will be
20 used by the lawyers and witnesses during the
21 course of the trial. These preliminary
22 definitions and instructions are given to you by
23 the Court at this time so that you, the jury, can
24 better understand and evaluate the evidence as it
25 is developed.

1 The Court shall, in addition to the
2 definitions and instructions which follow,
3 advise you in a more complete and comprehensive
4 manner of the legal principles you are to apply
5 in this case following the close of all evidence
6 and the arguments of counsel for both sides at
7 the conclusion of the case.

8 The evidence to be presented in this case
9 will include the testimony received from
10 witnesses, the exhibits accepted as evidence by
11 the Court and all admissions made for and during
12 this trial.

13 The evidence in this case shall also include
14 the stipulations which are read to you by the
15 Court during the course of the trial for the
16 purposes of your deliberations at the conclusion
17 of the case.

18 You are to consider the facts contained in
19 the stipulations proven by a preponderance of the
20 evidence as that term shall hereinafter be defined.

21 The evidence does not, however, include any
22 statement of counsel made during the trial unless
23 such statement constitutes an admission or
24 agreement admitting certain facts. Thus, as I
25 have already indicated to you, opening statements

1 and closing arguments of counsel are designed to
2 assist you but are not evidence except to the
3 extent that they may contain admissions of fact.

4 Statements that are ordered stricken by the
5 Court and which you the jury are instructed to
6 disregard are not evidence and must be treated
7 as though you have never heard them.

8 You must not speculate as to why an objection
9 is sustained to any question or what the answer
10 to such a question might have been, because these
11 are questions of law and rest solely with the
12 Court. You must never assume or speculate on the
13 truth of any suggestion or insinuation included
14 in a question put to a witness by counsel unless
15 it was confirmed by the witness.

16 Evidence is either direct or circumstantial.

17 {Beeping noise.}

18 THE COURT: We're going to have
19 to eliminate that, whatever that is.

20 Direct evidence is a recital of facts by
21 witnesses who have actual knowledge of the
22 incidents. Circumstantial evidence is evidence of
23 facts or circumstances from which the jury may
24 infer other connected facts which immediately and
25 reasonably follow according to common experience.

1 I have used the term preponderance of the
2 evidence. Preponderance of the evidence as herein
3 used simply means the greater weight of the
4 evidence.

5 The greater weight of the evidence is evidence
6 that outweighs or overbalances in your minds the
7 evidence opposed to it. It means evidence that is
8 more probable, more persuasive and of greater
9 probative value.

10 It is the quality of the evidence that must
11 be weighed by the jury and quality may or may not
12 be identical with the quantity; that is, with the
13 greater number of witnesses.

14 In determining whether or not an issue has
15 been proved by a preponderance of the evidence,
16 you should consider all of the evidence bearing
17 upon that issue regardless of who produced it.

18 If the evidence is equally balanced or in
19 equal poise or if you the jury are unable to
20 determine which side of an issue has been or has
21 the preponderance, then the party who has the
22 burden of proof has not established such issue
23 by a preponderance of the evidence.

24 You must determine the probability of the
25 truth of each issue. If an issue may reasonably

1 be determined either way or in two or more ways,
2 you cannot resort to guesswork, conjecture or
3 possibility.

4 Generally a witness may not express an
5 opinion; however, one who follows a profession or
6 special line of work is permitted to express his
7 opinion because of his education, specialized
8 knowledge and experience.

9 The purpose of such testimony is to assist you
10 the jury in arriving at the just verdict.

11 You the jury must consider whether the facts
12 upon which the expert bases his opinion are or
13 have been established by a preponderance of the
14 evidence as I have defined that term for you.
15 If you find that any of the facts upon which the
16 expert bases his opinion are not so established,
17 then the value of his opinion may diminish
18 accordingly.

19 The weight of expert testimony is to be
20 judged by you the jury. One of the most important
21 factors for the jury to consider in weighing the
22 value of expert testimony is the qualifications
23 of the witness as determined by his education,
24 training and experience in the particular field
25 with reference to which he is testifying, as well

1 as the reasons given for the opinions he has
2 expressed.

3 Opinions of expert witnesses are valuable only
4 when formed and based upon intelligent and careful
5 observations under favorable opportunities.

6 You, the jury, are not bound to take expert
7 opinions for more than you consider them to be
8 worth. Expert opinion, like everything else,
9 varies in value.

10 One of the chief elements in the value of an
11 expert opinion is the knowledge which the expert
12 witness has of the subject matter of which he
13 testifies; not necessarily the knowledge which he
14 professes, but the knowledge which he actually
15 possesses. If the witness has no more knowledge
16 of the subject than men generally possess, or
17 jurors possess, then the expert opinion is no
18 better.

19 You, the jury, are, therefore, in the case
20 before you to examine well the foundation of the
21 opinion of each and every witness that testifies as
22 well as the means each witness has of knowing the
23 subject of his testimony.

24 As I have previously stated to you, ladies
25 and gentlemen of the jury, this is a civil action

1 initiated by the City of Cleveland against CEI
2 pursuant to Sections 4 and 16 of the Clayton Act,
3 which is Nos. 15 U.S.C. Sections 15 and 26; and
4 the action seeks damages for alleged violations of
5 Section 2 of the Sherman Antitrust Act which
6 provides that it shall be illegal for any person
7 to monopolize or attempt to monopolize any part of
8 the trade of commerce of the states or with
9 foreign nations.

10 Title 15 U.S.C., and Section 15, Section 4 of
11 the Clayton Act, authorizes any person who shall
12 be injured in his business or property by reason
13 of anything forbidden in the antitrust laws may sue
14 therefor and shall recover the damages by him
15 sustained.

16 Section 2 of the Sherman Antitrust Act thus
17 defined two separate and distinct offenses:
18 {1} Monopolization and {2} Attempt to monopolize. The
19 Court will subsequently instruct you with respect
20 to the particular elements of each of these two
21 offenses.

22 The purpose of the Sherman Antitrust Act is to
23 preserve and advance our system of free competitive
24 enterprise, to encourage, to the fullest extent
25 practicable, free and open competition in the

1 marketplace and to prevent the accomplishment of a
2 monopoly in any business or industry, all to the
3 end that the consuming public may receive better
4 goods and services at a lower cost.

5 Stated differently, the purpose of the Sherman
6 Antitrust Act is to preserve competition and the
7 competitive process for the benefit of the public.
8 It is concerned primarily with the health of the
9 competitive process, not with the individual
10 competitor who must sink or swim in competitive
11 enterprise.

12 Ladies and gentlemen of the jury, in order to
13 establish a violation of Section 2 of the Sherman
14 Antitrust Act, it must be shown that the conduct
15 complained of involves interstate commerce,
16 directly or substantially affects interstate
17 commerce.

18 The Court at this time instructs you as a
19 matter of law that the interstate commerce
20 requirement of the Act has been satisfied and
21 will be satisfied in this case and that,
22 therefore, you need not concern yourselves with it
23 in your consideration of the evidence.

24 The issues which you, the jury, will be
25 called upon to resolve in the course of your

1 deliberations may be broadly stated as follows:

2 {1} Did the defendant, CEI, monopolize any
3 part of the trade or commerce of the states, as
4 those terms are used in Section 2 of the Sherman
5 Antitrust Act, and/or

6 {2} Did the defendant, CEI, attempt to
7 monopolize any part of the trade or commerce of
8 the states, as those terms are used in Section 2
9 of the Sherman Antitrust Act, and

10 {3} Did the defendant's activities
11 approximately cause damage to the plaintiff's
12 business and property?

13 You will also have for your determination the
14 issue of damages, should you, the jury, eventually
15 find that the plaintiff is entitled to prevail.
16 I shall instruct you upon that subject during the
17 course of the Court's final jury instructions which
18 shall be given to you at the conclusion of all of
19 the evidence, the closing arguments of counsel.

20 Now, ladies and gentlemen of the jury, in
21 civil actions such as this, the person, firm or
22 corporation who asserts that certain facts exist
23 must prove those facts by a preponderance of the
24 evidence as I have defined that term for you.

25 This obligation is known as the burden of proof.

1 Thus, in this case the burden of proof is
2 upon the plaintiff to prove by a preponderance of
3 the evidence if assertions that the defendant,
4 CEI, monopolized part of the trade or commerce
5 of the states, as those terms are used in Section
6 2 of the Sherman Antitrust Act, and/or the
7 defendant, CEI, attempted to monopolize part of
8 the trade or commerce of the states, as those
9 terms are used in Section 2 of the Sherman
10 Antitrust Act; {3} that the defendant's
11 activities proximately caused damage to the
12 plaintiff City's business and property and

13 {4} Should you be called upon to decide,
14 damages.

15 The offense of monopolization, ladies and
16 gentlemen of the jury, has two elements, both of
17 which the plaintiff must prove by a preponderance
18 of the evidence in order to prevail on its
19 monopolization charge.

20 The specific elements the plaintiff must prove
21 are:

22 {1} The possession of monopoly power in the
23 relevant market, as those terms will be more
24 fully defined; and

25 {2} The wilful acquisition or wilful

1 maintenance of such monopoly power as distinguished
2 from growth or development as a consequence of a
3 superior product, business acumen or historic
4 accident.

5 The term "monopoly power," which is the first
6 element of the offense of monopolization, is defined
7 as power to control prices or exclude competition
8 within a relevant market.

9 Thus, in determining whether monopoly power
10 exists, it is not essential that prices have
11 actually been controlled or that competition has
12 actually been excluded. Rather, all that is
13 required is that the power exists to control prices
14 or to exclude competition when it is desired to do
15 so.

16 Charges of monopolization and attempt to
17 monopolize can only be assessed and appraised in
18 terms of a relevant market. Accordingly, before
19 it can be decided if the defendant has monopolized
20 or attempted to monopolize the field of competition
21 in a particular line of trade or commerce, the
22 existence and identification of what is termed in
23 antitrust law as the relevant market must be
24 determined.

25 The term "relevant market" has two aspects or

1 dimensions:

2 {1} The relevant product market, and

3 {2} The relevant geographic market.

4 With respect to the first aspect, namely, the
5 relevant product market, the Court instructs you as
6 a matter of law that the relevant product market,
7 for purposes of this case, is the sale of retail
8 firm electric power.

9 Accordingly, for purposes of your later
10 deliberations, you need only concern yourselves with
11 determining the relevant geographic market.

12 The relevant geographic market is an issue of
13 fact to be judged by the jury by applying a
14 pragmatic, factual approach and not by applying
15 a formal or legalistic one.

16 The relevant geographic market selected to
17 provide a framework for the consideration of the
18 conduct charged in the complaint must, therefore,
19 correspond to commercial realities and, moreover,
20 comprise an economically significant market.

21 Specifically, the relevant geographic market
22 as used in the Sherman Antitrust Act means the area
23 where the sellers involved effectively compete and
24 to which the purchases involved can effectively turn
25 as a source of supply. That is to say, the

1 overriding consideration in determining the
2 relevant geographic market is the identification of
3 the appropriate area of effective competition.

4 In determining the relevant geographic market,
5 the area of effective competition, the jury shall
6 take into account the geographic area of actual as
7 well as potential competition. That is to say, the
8 geographic area in which the plaintiff actually
9 competed with the defendant for customers or
10 would have competed for customers except for the
11 alleged actions of the defendant during the
12 relevant period which is involved in this case,
13 that being between July 1, 1971 and July 1, 1975.

14 In determining whether the defendant possesses
15 monopoly power in the relevant market -- that is,
16 the power to control prices or exclude competition
17 within such market -- one of the matters which you
18 the jury must consider is the defendant's market
19 share.

20 In assessing the defendant's market share, you
21 may, for purposes of this case, take into account
22 the following; one, CEI's percent and share of
23 the total retail electric customers in the relevant
24 geographic market as you the jury shall find it;
25 two, CEI's percent and share of the total revenues .

1 earned from retail electric sales in the relevant
2 geographic market as you the jury find; and three,
3 CEI's percent and share of the total quantity of
4 electric power distributed at retail in the
5 relevant geographic market.

6 In undertaking to consider market share, the
7 jury should keep in mind that as a general
8 proposition the larger defendant's market share,
9 the greater the likelihood that the defendant
10 possesses the power to control prices and/or
11 exclude competition.

12 Conversely, as a general rule, the smaller
13 the defendant's market share, the lesser the
14 likelihood that defendant possesses the power to
15 either control prices or exclude competition.

16 In determining whether the defendant
17 possesses monopoly power in the relevant market,
18 the jury in addition to assessing the defendant's
19 market share, should consider, one, the number
20 of competitors which compete in the relevant
21 market and, two, the extent to which entry
22 barriers if any exist in the relevant market
23 and serve to discourage potential competitors
24 from entering such market.

25 The jury may further consider whether the

1 defendant possesses monopoly power by virtue of its
2 control over any essential or bottleneck facility
3 as those terms will be subsequently explained to
4 you.

5 The Court has previously stated the second
6 element of the offense of monopolization is the
7 wilful acquisition or maintenance of monopoly
8 power. In short, monopolistic intent.

9 The Court instructs you in this regard that
10 the mere acquisition or possession of monopoly
11 power is not sufficient to support a charge of
12 monopolization within the meaning of Section 2 of
13 the Sherman Antitrust Act. That is to say, a
14 person who acquires monopoly power through normal
15 growth and development as a consequence of
16 superior products or services, foresight,
17 business acumen or through historic accident
18 cannot be faulted for monopolization under the
19 Sherman Act.

20 In order to sustain a charge of
21 monopolization, then, the plaintiff must prove by
22 a preponderance of the evidence that the monopoly
23 power in question was wilfully acquired or
24 maintained. This element of monopolistic intent
25 may normally be inferred from proof that the

1 defendant has engaged in conscious and wilful
2 business practices that inevitably result in the
3 exclusion or limitation of actual or potential
4 competition.

5 Stated differently, monopolistic intent may
6 in appropriate instances be inferred from
7 conscious business practices that naturally and
8 inevitably produce or maintain power. Accordingly,
9 the plaintiff ordinarily is not required to
10 establish that the defendant acquired or
11 maintained his monopoly power by means of
12 exclusionary, unfair or predatory acts; however,
13 the foregoing principle may not apply in
14 instances where the relevant market in issue is a
15 national monopoly as that term will be more
16 fully defined.

17 Thus, should you determine in accordance with
18 the Court's instructions that the defendant has
19 proven by a preponderance of the evidence that the
20 relevant market as you the jury shall find it is
21 a national monopoly market, you may find the
22 element of monopolistic intent satisfied only in
23 the event you conclude that monopoly power was
24 acquired or maintained by the defendant through
25 exclusionary, unfair or predatory means.

1 In other words, the jury should resolve that
2 the area of effective competition for purposes of
3 this case is a national monopoly market. You cannot
4 in the absence of exclusionary, unfair or predatory
5 conduct infer the element of monopolistic intent
6 simply from conscious business practices engaged in
7 by the defendant that inevitably produced or
8 maintained monopoly power.

9 You should keep in mind that if a monopolist
10 abuses its monopoly power and acts in an unreasonable
11 exclusionary or unfair manner, vis-a-vis competitors
12 or potential competitors, Section 2 of the Sherman
13 Antitrust Act is violated irrespective of how the
14 monopoly power was acquired or achieved.

15 As I have already indicated to you, the
16 plaintiff's allegations and charges in this case
17 include the allegation that the Defendant, one,
18 unlawfully refused to wheel or allow the
19 transmission of electric power from other suppliers
20 to the City over transmission lines owned or
21 maintained by CEI and, two, unlawfully refused to
22 interconnect with the City's electric power system.

23 In assessing these particular contentions,
24 you must consider the following principles: As a
25 general rule, the Sherman Antitrust Act places no

1 duty upon a successful business enterprise to
2 share with its competitors the advantages
3 achieved by the development of a better product or
4 service by or through superior planning and
5 management.

6 Thus, unless the successful business
7 enterprise possesses monopoly power, the Sherman
8 Antitrust Act imposes no duty upon it to deal
9 with a competitor.

10 However, if a successful business enterprise
11 possesses or maintains monopoly power, added
12 obligations are imposed upon it which would not
13 attach in the ordinary refusal to deal context.

14 Accordingly, a monopolist cannot refuse to
15 deal with a competitor if the refusal is
16 specifically designed and calculated to foreclose
17 competition or to remove or exclude a competitor
18 by unfair, unreasonable or predatory practice
19 or conduct.

20 In other words, a monopolist is generally
21 free to deal or refuse to deal with whomever it
22 pleases so long as it has no wilful purpose to
23 create or maintain a monopoly.

24 In considering whether any refusal to deal
25 was specifically designed to remove or exclude a

1 competitor by unfair, unreasonable or predatory
2 practices or conduct, the jury is instructed that
3 a practice may be deemed unfair or predatory only
4 if it is under the facts and circumstances
5 presented unreasonably anticompetitive.

6 In making this determination, you must assess
7 the overall market impact of the conduct under
8 scrutiny.

9 In ascertaining whether any refusal to deal
10 was unreasonably anticompetitive in nature and
11 effect, you may also consider the extent to which,
12 if at all, the refusal to deal was justified by
13 valid business reasons.

14 In assessing the charges of the plaintiff's
15 complaint, including the charge that the
16 defendants wrongfully refused to wheel the electric
17 power from PASNY to the City, you may consider in
18 addition to the above instructions certain other
19 principles which concern was termed in antitrust
20 law the Essential Facility Doctrine.

21 As this Court has previously instructed, the
22 Sherman Act as a general rule imposes no duty
23 upon a successful business enterprise to share
24 with its competitor advantages achieved by the
25 development of a better product or service or

1 through superior planning; foresight and
2 management.

3 This general rules does not necessarily apply,
4 however, in instances where an enterprise maintains
5 control over a scarce or essential facility which
6 cannot practicably be duplicated.

7 Under such circumstances, the Sherman Act may
8 impose upon the enterprise controlling such a
9 facility the duty to permit others fair and
10 reasonable access thereto.

11 A particular facility in order to be
12 considered essential need not be indispensable for
13 the competitor seeking to avail of its use;
14 rather, it is sufficient if duplication of the
15 facility would be economically infeasible.
16 In addition, the denial of its use would inflict a
17 severe competitive handicap upon the prospective
18 user thereof.

19 So plaintiff has also claimed that the
20 defendant attempted to monopolize the relevant
21 market. An attempt to monopolize the relevant
22 market is a separate offense under Section 2 of
23 the Sherman Act.

24 The four elements that the City must prove
25 by a preponderance of the evidence to establish

1 an attempt to monopolize are:

2 {1} The existence of a relevant market;

3 {2} A specific intent on the part of the
4 defendant CEI to monopolize the relevant market;

5 {3} Performance of some act or acts by CEI
6 in furtherance of the specific intent to
7 monopolize, even though such act or acts are
8 insufficient to accomplish the intended
9 monopolization; and

10 {4} That both elements, the intent and the
11 act, must appear and together result in a
12 dangerous probability that monopolization will
13 sooner or later occur.

14 In deciding the question of whether there has
15 been an attempt to monopolize, you are instructed
16 that the phrase "specific intent" means more than
17 merely an intention to engage in any acts.

18 Specific intent, as used in the Sherman
19 Antitrust Act, is an intent to commit the
20 practices forbidden by the Act itself.

21 Thus, in order to prevail on its attempt to
22 monopolize charge, it is not enough for the City
23 to demonstrate only that CEI wanted to win the
24 competitive struggle; rather, it is incumbent upon
25 the City to prove by a preponderance of the evidence

1 that CEI specifically intended to remove its
2 opposition by unfair or unreasonable means.

3 Stated differently, since preservation of
4 competition is at the heart of the Sherman Antitrust
5 Act, the specific intent required to be proved by
6 the City in connection with its attempt to monopolize
7 charge is an intent by CEI to attempt to remove or
8 exclude competitors from the field of competition
9 by practices that were and are unreasonably
10 anticompetitive and thus unlawful.

11 The term "dangerous probability" as used in
12 this charge means the implementation of conduct,
13 business practices and procedures which would, if
14 successful, accomplish monopolization and which,
15 though falling short, nevertheless approached so
16 close as to create a dangerous probability of
17 monopolization; that is to say, the employment of
18 conduct, business practices and procedures which
19 present a substantial and real opportunity of
20 success in achieving a monopoly in the relevant
21 market.

22 A dangerous probability of monopolization is
23 established if plaintiff has demonstrated by a
24 preponderance of the evidence that {1} the
25 defendant possesses sufficient power to create a

1 reasonable likelihood that it can establish a
2 monopoly and {2} the defendant has performed overt
3 acts in furtherance of that goal.

4 Ladies and gentlemen of the jury, before the
5 plaintiff may recover for any injury claimed, it
6 must prove by a preponderance of the evidence the
7 nature and extent of its injuries and that such
8 injuries, if any, were proximately caused by the
9 acts or omissions of the defendant as the
10 plaintiff has charged in its complaint.

11 The term "proximate cause" means that cause
12 which directly produces an injury or damage. It
13 is an active as distinguished from a remote cause
14 or condition.

15 Proximate cause is not necessarily the cause
16 nearest in point of time nor in point of distance,
17 but it is that cause which, either alone or in
18 conjunction with other causes in a natural and
19 continuous sequence, unbroken by any efficient
20 intervening cause, produces the injury or damage,
21 without which it would not have occurred.

22 A particular result may have only one
23 direct or proximate cause or it may have more than
24 one direct and proximate cause. Where several
25 direct causes combined to produce a single result,

1 injury or damage therefore may be the result of a
2 single direct and proximate cause or may result
3 from several direct and proximate causes which
4 combine to produce a single result.

5 Accordingly, in order to establish that its
6 injuries were proximately caused by the
7 defendant's acts or omissions, plaintiff must prove
8 by a preponderance of the evidence that the
9 charged acts or omissions were a substantial factor
10 in bringing about or actually causing the injury
11 or damage.

12 Plaintiff is not required to demonstrate that
13 the defendant's acts or omissions were the sole
14 cause of the plaintiff's injuries. It is sufficient
15 that the plaintiff prove by a preponderance of the
16 evidence that the acts or omissions charged
17 constituted a material contributing cause of the
18 plaintiff's injuries, if any proved.

19 The plaintiff cannot recover by merely showing
20 that it is possible for the acts or omissions of
21 the defendant to have caused plaintiff's injuries
22 or damages.

23 In order to recover, therefore, the plaintiff
24 must prove by a preponderance of the evidence that
25 its injuries probably were a direct and proximate

1 result of the defendant's violation of the
2 Sherman Antitrust Act, if any were proved.

3 The defendant in this case has denied that
4 it monopolized, attempted to monopolize or maintained
5 a monopoly power within the relevant geographic
6 market.

7 The defendant has affirmatively asserted that,
8 if it has a monopoly or if it possesses monopoly
9 power, such monopoly is a natural monopoly which
10 was thrust upon it as a result of normal growth
11 and development, as a consequence of superior
12 product, superior service, superior business
13 acumen, such as better management or better
14 planning than that possessed or exercised by its
15 competitor, the City, and not through conduct,
16 activities or means which were exclusionary,
17 unfair or predatory.

18 In considering the issue of monopolization and
19 attempted monopolization, it does not necessarily
20 follow that the possession and/or maintenance of
21 monopoly power by a defendant is conclusive that it
22 unlawfully monopolized or attempted to monopolize
23 the relevant market.

24 The defendant may not have unlawfully achieved
25 monopoly power. Such power may have been thrust

1 upon it. Thus, the origin of monopoly power, if
2 it is found to exist, may be critical in
3 determining its legality.

4 Although monopolistic intent may be inferred
5 from conscious business practices that inevitably
6 produce or maintain monopoly power; there are
7 nevertheless situations in which an inference of
8 monopolistic intent, absent a showing of specific
9 unfair practices, would be improper. One such
10 situation is where a defendant has a natural
11 monopoly, that is, where a market is so limited
12 that it is impossible to produce it all and meet
13 the costs of production except by a plant large
14 enough to supply the whole demand.

15 In the economic sense, natural monopoly is
16 monopoly resulting from economies of scale, a
17 relationship between the size of the market and
18 the size of the most efficient firm such that one
19 firm of efficient size can produce all or more
20 than the market can take at a remunerative price
21 and can continually expand its capacity at less
22 cost than that of a new firm entering the business.

23 Accordingly, the characteristics of a natural
24 monopoly make it inappropriate to apply the usual
25 rule that success in driving competitors from the

1 market is evidence of illegal monopoly. In short,
2 the natural monopolist does not violate the Sherman
3 Antitrust Act unless it acquired or maintained its
4 power through the use of means which are
5 exclusionary, unfair or predatory.

6 Stated differently, ladies and gentlemen of
7 the jury, in a two-firm industry, the exclusion of
8 one firm necessarily results in a monopoly. This
9 result does not necessarily mean that the survivor
10 violated the antitrust laws. A person, firm or
11 corporation does not necessarily violate the
12 Sherman Act merely because it foresees that a
13 market is only large enough to permit one
14 successful enterprise and intends that its
15 enterprise shall be that one and that all other
16 enterprises shall fail.

17 To prove that an individual, firm,
18 corporation violates the Sherman Antitrust Act in
19 competing in a natural monopoly market, there must
20 be evidence that said individual, firm or
21 corporation which foresees a fight to the finish
22 intends to use or actually does use exclusionary,
23 unfair or predatory tactics.

24 Thus, a natural monopoly market does not, of
25 itself, impose restrictions on one who actively

1 but fairly competes for it any more than it does
2 on one who passively acquires it.

3 The defense of natural monopoly having been
4 affirmatively asserted by the defendant CEI
5 against the plaintiff's charges of monopoly
6 and/or attempted monopoly, the burden of proof
7 as to this assertion is upon the defendant by a
8 preponderance of the evidence.

9 The terms "predatory" or "unfair," as used to
10 describe the conduct or activity which violates
11 the Sherman Antitrust Act, have no well-defined
12 meaning. However, the conduct or practices of
13 the defendant should be deemed predatory or
14 unfair only if such acts or conduct or the
15 overall impact of such acts or conduct are
16 unreasonably anticompetitive and, thus, unlawful.

17 Predatory or unfair conduct is characterized
18 by an attempt to triumph in a relevant market,
19 regardless of the competitive merits of the
20 basis of artificial restraints on the
21 competitive process which not only have a
22 significant effect to eliminate competitors
23 unfairly but confer no net benefits of superior
24 efficiency on the public in the process.

25 Now, in concluding, ladies and gentlemen of

1 the jury -- and I appreciate your patience and
2 your attentiveness and interest in listening to
3 these definitions -- I again wish to instruct you
4 and cannot overemphasize for you the following:

5 I instruct you that during the course of
6 this trial and when the matter is submitted to you
7 for your ultimate consideration and judgment that
8 in your consideration of this case you are to
9 completely disregard any information about the
10 case derived or received from sources outside of
11 this trial.

12 If any of you have had occasion in the past
13 to have read any newspaper articles or heard any
14 radiobroadcasts or telecasts relative to this
15 case, you are, as you promised that you would, to
16 disregard entirely such information in the
17 consideration of this case, and you are and you
18 will confine your considerations solely to the
19 evidence adduced during the course of this
20 trial. And, hopefully, recognizing that this is
21 somewhat of a technical case, the definitions
22 which I have given you will assist you in
23 following the development of the evidence that was
24 presented to you through the testimony of the
25 witnesses and and the physical exhibits that

1 will ultimately be introduced.

2 Now, ladies and gentlemen of the jury, it
3 is now 11:15. The next order of business will be
4 the opening statements of counsel.

5 The Court is desirous of permitting counsel
6 to address you in opening statement and to
7 maintain a continuity of the context of the
8 opening statement without interruption, and since
9 counsel have agreed and the Court has approved
10 that each side shall have up to one and a half
11 hours for opening statement, and since the noon
12 hour is only 45 minutes away, we have one of two
13 options. We can commence the opening statements
14 of the plaintiff, which will take us beyond the
15 noon hour -- let's see, that would be quarter to
16 1:00 -- go to lunch at that time, come back and
17 have the opening statement of the defendant, or
18 we can go to an early lunch and return early.
19 If we would leave now, we could possibly be back
20 at 1:00 o'clock, at which time plaintiff would
21 present its opening statement, we would have a
22 short recess and we would have the opening
23 statements of defendant.

24 Counsel have deferred to the Court and I
25 defer to you. Perhaps it would be more advisable

1 to go to an early lunch than keep you.

2 What are your wishes? Early lunch? Early
3 lunch.

4 Very well, ladies and gentlemen of the jury.
5 We will return here at 1:00 o'clock -- make it
6 1:15 -- and we will resume with opening statements.

7 Again, ladies and gentlemen of the jury, the
8 Court again admonishes you, during the course of
9 any recess or adjournment you are not to discuss
10 this case, either among yourselves or with anyone
11 else. You are to keep an open mind throughout
12 these proceedings until all of the evidence has
13 been introduced, the Court has instructed you on
14 the law, the application of the law to the facts,
15 and the matter is submitted to you for your final
16 deliberation and judgment.

17 I cannot overly impress upon you this
18 admonition, coupled with the fact that you are not
19 to read anything about this case, listen to any
20 radiobroadcast or view any television program
21 concerning this case. Should this happen and it
22 ultimately surfaces that this has happened. The
23 protracted time that this case will require will
24 be of no significance because the case could very
25 well have error. I'm sure none of you would want

1 this to happen. Counsel does not want this to
2 happen and certainly the Court does not want this
3 to happen.

4 Please, scrupulously adhere to this
5 admonition, and I shall be constantly reminding
6 you of the admonition so that it shall not for a
7 moment be out of your minds.

8 So until 1:15, ladies and gentlemen of the
9 jury, you are free to go to lunch. And thank you
0 again.

1 {Court was in recess for the lunch period.}

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1 MONDAY, JULY 13, 1981, 1:30 O'CLOCK P.M.

2
3 MR. NORRIS: Your Honor, may we
4 approach the bench?

5 THE COURT: Yes.

6 MR. NORRIS: They will sit there
7 during the proceeding.

8 THE COURT: I hope that you make
9 the necessary selections for who is going to sit
10 at counsel table. I don't want all those people
11 sitting at counsel table throughout this trial.

12 MR. NORRIS: Oh, they won't be,
13 your Honor. It is going to be just like it was
14 the last time. This is just for today.

15 THE COURT: Okay. Let's proceed.
16 And get rid of that beeper.

17 MR. NORRIS: It is off, your
18 Honor.

19 - - - - -
20 {Thereupon, the jury entered the courtroom.}

21 THE COURT: Please be seated,
22 ladies and gentlemen.

23 Instead of starting at 1:15 we are starting
24 at 1:30. Hopefully I have resolved your plight
25 and the temperature will be reduced so that it is

1 comfortable in the jury room as well as in the
2 courtroom. We don't want anybody going to sleep.

3 I have instructed the General Services
4 Administration to maintain a reasonable temperature.

5 With that, you are free to proceed, Mr. Norris.

6 MR. NORRIS: If it please the
7 Court, ladies and gentlemen of the jury, this
8 afternoon I'm going to give you an overview of the
9 events that has caused the City to bring this
10 antitrust case against CEI.

11 I'm going to describe some of the evidence.
12 I'm going to show you some of the evidence. I'm
13 certainly not going to try to show you all of the
14 evidence.

15 We are looking at a 20-year period. CEI has
16 been trying to eliminate Munny Light from the
17 Cleveland marketing area for at least the last
18 20 years.

19 CEI has admitted the fact that they have
20 attempted to eliminate Munny Light, but CEI's
21 admission states that they tried to do it by
22 competition, by agreement, by acquisition.

23 The evidence that the City will bring before
24 this jury goes far beyond acquisition or agreement
25 or vigorous competition.

1 The evidence that we will bring before this
2 jury is evidence of various kinds of business
3 practices by CEI to maintain its own monopoly in
4 the Cleveland market and to foreclose Munny Light,
5 to exclude Munny Light, to prevent Munny Light from
6 continuing as a competitor.

7 CEI possesses enormous market power. This
8 will be detailed for you, ladies and gentlemen of
9 the jury, with statistics and with market share
10 information.

11 The City contends that the market power of
12 CEI was so great as to constitute monopoly power,
13 as that term was defined this morning by Judge
14 Krupansky.

15 The period of time during which the conduct
16 took place that the City is complaining of is from
17 the middle of 1971 to the middle of 1975, and the
18 evidence that will be brought before you, ladies
19 and gentlemen, will be evidence of conduct during
20 those years, and it will also consist of evidence
21 of conduct prior to that time to the extent that
22 conduct prior to July 1, 1971, will help characterize
23 or explain the conduct happening during the 1971
24 to 1975 period of time.

25 Intent, as Judge Krupansky has told you this

1 morning, is a central element in this lawsuit.
2 One of the questions that you are going to have to
3 decide is what was the intent with which CEI
4 committed the various business practices that we
5 will be telling you about.

6 There are four business practices that the
7 City is, for the most part, complaining about.

8 The first is called, for want of a better
9 name, the Muny Displacement Program. This was a
10 massive marketing program by means of which CEI
11 paid outside electrical contractors to provide
12 free wiring to Muny Light customers.

13 Now, this was terminated at the end of 1973.
14 It might have hung over just a bit to 1974 but, for
15 the most part, by the end of 1973, the free wiring
16 program, the Muny Displacement Program was over.

17 The evidence will show that the reason this
18 was terminated was that the Public Utilities
19 Commission of the State of Ohio prohibited
20 promotional activities of this kind for all
21 utility companies that were under its jurisdiction.

22 Now, the Muny Displacement Program was a
23 secret program. It was not spelled out in the
24 public tariffs that CEI filed in Columbus. And
25 during the period of time from 1971 to the end of

1 1973, CEI paid close to \$700,000 to electrical
2 contractors to supply the free wiring that
3 resulted in a substantial number of Muny Light
4 customers being switched to CEI.

5 Now, this was a program that was not uniform
6 throughout the CEI service area; this was a program
7 that was aimed specifically at Muny Light, and it
8 was not something that was carried on outside of
9 the area where CEI was competing with Muny Light.

10 The evidence will show that this program
11 went beyond normal competition, and this program
12 was also extremely successful. It resulted in
13 reducing Muny Light's revenues, raising Muny
14 Light's costs, and this is a chart that was taken
15 from a CEI memorandum.

16 Now, many of the charts that you're going to
17 see this afternoon and also during the length of
18 the trial are memoranda charts, and so forth, that
19 were obtained from CEI's files with respect to
20 litigation.

21 Now, in litigation, there are devices --
22 discovery devices and other things where a litigant
23 is compelled to turn over internal memoranda,
24 secret memoranda, so that the other litigant can
25 have an opportunity to get at the bottom of things

1 and get at the truth.

2 So it was this -- it was through this process
3 that the City came into possession of many of the
4 pieces of paper that you are going to be seeing.

5 Now, this is a blow up -- and this is PTX
6 2639 for the record -- and this shows a graph that
7 was prepared by Mr. -- or, at least, it was attached
8 to a memorandum from CEI's Mr. Zimmerman to CEI's
9 Mr. Halliday; and there is a two-page memorandum
10 that goes along with this, but rather than read that
11 all to you now, I would like to just summarize it.

12 Mr. Zimmerman is describing the CEI Muny
13 conversions involving Muny displacement.

14 In the electric power business, a meter is --
15 can be thought of like a customer, because
16 sometimes you can have two meters with one
17 customer, or you can have two customers with one
18 meter. But, for our purposes this afternoon, a
19 meter displacement, I'm referring to as a customer
20 displacement.

21 And Mr. Zimmerman's memorandum states that
22 starting in 1957 -- that's the number which is way
23 over on the left of the chart, and the number on
24 the right of the chart is 1971 -- Mr. Halliday's
25 memorandum, when you see it, you will see that he

1 describes the losses from CEI to Muny Light and
2 the losses from Muny Light to CEI' he states that
3 it was about a standoff until we got to the middle
4 of 1965, right here [indicating].

5 And in the middle of 1965, Mr. Zimmerman
6 states that both companies changed their policies
7 at that point.

8 Muny Light, according to Mr. Zimmerman's
9 memorandum, reduced its solicitation of CEI
10 customers.

11 CEI, on the other hand, according to Mr.
12 Zimmerman, and accurately, increased their
13 activity with respect to getting customers back
14 from CEI -- from Muny Light, excuse me. And so,
15 the Muny Displacement Program really had its
16 beginning in mid-1965.

17 This is another chart from CEI's internal
18 files. There is a confidential stamp on this
19 chart and another one over here, and this is a
20 chart going from 1956 on the left to 1974 on the
21 right.

22 Now, remember I stated that this program
23 ended for all practical purposes at the end of
24 1973. Now, this particular chart -- I know it is
25 too far away from you, you can't see the detail --

1 but there are four lines here and these four
2 lines indicate the total number of Muny Light
3 customers switched to CEI.

4 The bottom line indicates the industrial
5 customers. The next line indicates the
6 commercial customers. The next line, residential
7 customers and then the top line indicates the
8 total of all customers, and this shows that during
9 the period of time that the Muny Displacement
10 Program was in operation, in excess of 4,400
11 customers were switched from Muny Light to CEI.

12 Now, there is another internal CEI memorandum
13 that states that these payments that were made for
14 the free wiring.

15 In the case of the residential switches,
16 approximately 90 percent of the residential
17 conversions from Muny Light to CEI were the result
18 of the free wiring payments.

19 With respect to the commercial, about 89
20 percent of the total switches from Muny Light to
21 CEI received free wiring payments of one or
22 another, and with respect to the industrial
23 customers, about 45 percent of the industrial
24 customers that were switched from Muny Light to
25 CEI received these free wiring payments.

1 This last confidential chart shows in dollar
2 terms the numbers of -- the number of dollars in
3 revenue that these conversions shown on this other
4 chart amounted to in terms of annual revenue.

5 This chart has dollars going up the left
6 side and years, the same configuration of years
7 going from left to right.

8 What this chart tells is that by the end of
9 1973 for all of these conversions that I've been
10 describing, they amounted to something like
11 \$3 million in annual revenue.

12 This is one of the business practices that
13 the City is complaining about. This is one of
14 the business practices that the City brought this
15 lawsuit because of. This is one of the business
16 practices that the City is charging CEI with
17 having gone beyond normal competition, and this
18 represents an exercise of CEI's monopoly power to
19 the detriment of Munny Light.

20 A second business practice that the City is
21 complaining about in this lawsuit is a refusal to
22 interconnect.

23 Now, the term "interconnect" -- an
24 interconnection between electric power companies
25 is nothing more than a connection over which

1 electricity can instantaneously flow back and
2 forth in both directions.

3 For the past half century interconnections
4 have been customary in the electric power
5 industry. They are very important for electric
6 utility companies to be able to have back-up
7 power in case of emergency or in case one of the
8 power companies needs to take its equipment out of
9 service for repair, rehabilitation, maintenance,
10 that kind of thing. And if a power company does
11 not have some source of replacement power, then it's
12 a very difficult thing for that company to remain
13 reliable in its service to its customers.

14 So when we speak of the term
15 "interconnection," the way I am using the term
16 and I believe the way most of the witnesses will
17 use the term, it connotes a closed switch
18 arrangement where power flows back and forth
19 instantaneously from one utility company to the
20 other, and back and forth.

21 Those exchanges, of course, are metered, and
22 after a period of time if one power company has
23 exchanged more power and received more power than
24 the other, of course, there is an adjustment in
25 dollars and sense to make up for what has been used

1 by one or the other.

2 Now, as I say, the second business practice
3 that the City is complaining about in this lawsuit
4 is that CEI refused in 1971, in July of 1971,
5 refused to interconnect with Muny Light, and its
6 intent, its purpose, was for the elimination of
7 Muny Light as a competitive threat.

8 Much more will be described to you about the
9 events in July, 1971. Much more will be described
10 to you with respect to this refusal to interconnect.
11 I'm only trying to give you a quick picture right
12 now of the business practices that caused the
13 City to bring this antitrust suit.

14 A third type of business practice that the
15 City is complaining about in this lawsuit is a
16 refusal by CEI in 1973 to wheel or transmit power
17 over the transmission system maintained by CEI.

18 You are going to hear a lot about PASNY and
19 I think this is as good a time as any to just
20 explain what is PASNY.

21 PASNY stands for the Power Authority of the
22 State of New York and, basically, it has the
23 responsibility for developing the hydroelectric
24 power that is produced out of the Niagara River
25 Project. Now, there is a tremendous amount of

1 hydroelectric power that has been harnessed with
2 falling water, if you will, supplying the power to
3 turn the turbines that then generates the
4 electricity.

5 Now, other types of turbines -- you can have
6 a steam turbine. A steam turbine generates
7 electricity by water being heated and frequently
8 coal is burned to create the heat. The heat then
9 causes the water to turn into steam and the steam
10 projects against the blades of the rotor and the
11 turbine then is steam-powered.

12 Now, there are other kinds of turbines. A
13 turbine could be fired by gas, natural gas;
14 it could be fired by fuel oil; and there are
15 different ones associated with the generation of
16 different kinds of electricity. But
17 hydroelectric power is the cheapest power that
18 is available.

19 Now, Congress passed a statute that required
20 PAsNY to make available a certain amount of the
21 power that comes out of the Niagara River project
22 to adjoining states. The theory is -- and I think
23 it's a good one -- that just because the water
24 falls in New York State, that doesn't necessarily
25 mean that all of the benefit that comes from that

1 falling water in New York should stay in New
2 York. So Congress has required that PASNY share
3 a certain proportion of that hydroelectric power
4 with public power systems -- public power
5 systems -- in neighboring states.

6 Now, I emphasize public power. The way I am
7 using that term is a municipally-owned power
8 system like Muny Light as distinguished from a
9 privately-owned electric utility like CEI.

10 CEI, of course, is a private corporation.
11 It's stockholders are the owners of the company
12 and CEI's purpose in being in business is to make
13 money for its stockholders.

14 Muny Light, on the other hand, is owned by
15 the citizens of the City of Cleveland. Villages
16 and communities under the Ohio Constitution are
17 permitted to have their own utility companies and
18 in the City Charter of the City of Cleveland there
19 is a provision that was voted on by the people to
20 create Muny Light.

21 So I am just trying to draw a parallel, if
22 you will, between a privately-owned utility
23 company like CEI and a publicly-owned electric
24 power company like Muny Light.

25 Now, coming back to PASNY, the obligation

1 that Congress rested on PASNY was that a certain
2 proportion of the hydroelectric power should be
3 shared with public power entities in neighboring
4 states, neighboring to the State of New York.

5 All right.

6 Now, in 1973 the City of Cleveland, in
7 conjunction with a municipal power group in Ohio
8 called AMP-Ohio -- AMP means American Municipal
9 Power, and this happens to be the American
10 Municipal Power within the State of Ohio, so that
11 this is a group of public power companies -- and
12 through the intervention of the Governor,
13 through the intervention of AMP-Ohio, Muny Light
14 in 1973 became entitled to 30 megawatts of
15 PASNY power.

16 Now, at that time, that was close to a third
17 of the Muny Light load -- Muny Light's load was
18 on the order of 100 megawatts of power, and
19 that's a unit of power, and the turbines are
20 sized by megawatts, and generating plants are
21 sized by megawatts, and loads of utility
22 companies are sized by megawatts.

23 So that just, again, for our purposes today,
24 the load of Muny Light was about 100 megawatts.
25 So for Muny Light to become entitled to 30

1 megawatts of very low-cost hydroelectric power
2 PASNY was a great thing.

3 Now, that power was only available if
4 three requirements were met:

5 First, there had to be a bargaining agent
6 representing the interests in the State of Ohio.
7 AMP-Ohio filled that requirement, they were
8 the bargaining agent designated by the Government.
9 So the first requirement was satisfied.

10 A second requirement was that there had to be
11 a feasibility study, an engineering study, to show
12 that it was feasible for 30 megawatts of power to
13 be transported down to Cleveland. So the
14 engineering study was performed, and that
15 requirement was satisfied.

16 The third requirement was that the power had
17 to be wheeled or transmitted from the Niagara
18 project down to Cleveland; and this chart,
19 PTX 2494, is a representation of the situation
20 that I'm describing.

21 Up here where I'm pointing my finger, that
22 represents the Niagara Falls area; and I'm talking
23 now about this third requirement: How does the
24 power get from Niagara Falls down to Cleveland.

25 Niagara Mohawk is the name of a

privately-owned electric power company in the State of New York, and arrangements were made with Niagara Mohawk to wheel that power from Niagara Falls down to the Pennsylvania border. So part of that requirement then was taken care of.

Pennsylvania Electric Company, or Penelec for short, is a privately-owned electric power company in the State of Pennsylvania, and Penelec agreed that it would wheel or transmit this power across the panhandle of Pennsylvania. So we're getting closer to home all the time.

Now, the only thing that remained was to get that power from the Ohio border into Cleveland for the benefit of Muny Light.

The only transmission system that was capable of doing that in 1973 was the transmission system owned by CEI.

CEI refused to wheel that power. That is one of the business practices that the City is complaining about, that is one of the business practices of CEI that the City claims is an abuse of CEI's monopoly power.

I would ask Mr. Kopit to kindly turn the lights out, and I would like to just show you the letter from CEI that refused the wheeling.

1 {Mr. Kopit complies.}

2 MR. NORRIS: I don't know whether
3 you can all see that, but it is a letter on CEI
4 stationery, and if I can just walk up here
5 slightly I can see it a little better myself.

6 It is signed by Donald Hauser, the corporate
7 solicitor of CEI and it is addressed to Mr.
8 Wallace L. Duncan, and he was the attorney for
9 American Municipal Power of Ohio, AMP-Ohio.

10 "Dear Mr. Duncan:

11 "This letter will advise you that after
12 review the Illuminating Company has concluded
13 that at this time it is not willing to commit
14 itself to enter into a transmission agreement
15 to wheel power generated by the Power Authority
16 of the State of New York and to deliver it in
17 Ohio to the City of Cleveland.

18 "In reviewing the request of AMP-Ohio, many
19 factors were considered including, very
20 importantly, the following:

21 "As you may know, the Illuminating Company
22 competes with the Cleveland Municipal Electric
23 Light Plant in a customer-to-customer and
24 street-to-street basis in a sizeable portion
25 of the City. This competitive situation is

1 clearly unique. Economic studies indicate an
2 arrangement to transmit the PASNY power would
3 provide the municipal system electric energy at
4 a cost which would be injurious to the Illuminating
5 Company's competitive position.

6 "Very truly yours, Donald Hauser,
7 Corporate Solicitor."

8 Thank you.

9 Now, the fourth business practice is related
10 to the second and the third.

11 The second business practice that I've
12 described was the refusal to interconnect, and
13 this third business practice that the City is
14 complaining about is the refusal to wheel.

15 Now, you put those two things together, the
16 refusal to interconnect and the refusal to wheel
17 and what the City is complaining about as a fourth
18 business practice which denied Munny Light the
19 opportunity to shop around, if you will, for other
20 sources of power supply.

21 There are many sources of power. There are
22 some electric power companies that have a summer
23 peak that have excess power to sell in the
24 winter, but they don't have enough for their own
25 purposes in the summer. There are others that are

1 just the reverse, so that an alert utility
2 manager knowing what he or she is doing can find
3 good buys just like buying off the supermarket
4 shelf.

5 And without the wheeling and without the
6 interconnection, CEI was -- Muny Light was
7 foreclosed from that ability to share reserves
8 with other power companies, to make good purchases
9 of economical units of power.

10 So now, that is a quick overview of the four
11 business practices that Muny Light is complaining
12 about in this lawsuit.

13 As Judge Krupansky told you this morning in
14 defining monopoly power, the larger the market
15 share of a business enterprise, the greater
16 likelihood that that company possesses the power
17 to control prices or exclude competition, which
18 is the definition of a monopoly power as Judge
19 Krupansky gave it to you this morning.

20 Now, in the early 1970's, just again to give
21 you -- I am not trying to get into great detail --
22 but just to give you a thumbnail sketch of the
23 market position the City claims equals monopoly
24 power -- in the early 1970's CEI in the City of
25 Cleveland served about 80 percent of the customers.

1 So that that -- that measurement would be called
2 an 80 percent market share. .

3 Now, there is another way you could measure
4 it. You could measure it by all sales of electric
5 power at retail, and if you looked at that
6 measurement, CEI in the early 1970's was selling
7 approximately 90 percent of all electric sales
8 made in the City of Cleveland.

9 And then, if you look at revenues, the figure
10 is about the same, that 90 percent of all revenues
11 derived from the sale of retail electric power in
12 Cleveland, CEI had about 90 percent.

13 So, if you start with the market share, the
14 percentage gain, the City believes that that is a
15 very high market percentage.

16 But that isn't the only thing that Judge
17 Krupansky indicated that the jury could consider.
18 There are other factors, too, additional
19 considerations that point to whether or not the
20 substantial market power satisfies the legal
21 definition of monopoly power.

22 Now, this is very important because if
23 monopoly power is found to exist, then certain
24 other obligations flow from that.

25 As Judge Krupansky charged to you this

1 morning in the preliminary jury instructions,
2 typically a businessman or a businesswoman does
3 not have to help his or her competitor. However,
4 if the business enterprise that's in question
5 possesses monopoly power, then added obligations
6 can come to that business enterprise. And the
7 City's evidence will demonstrate that CEI did
8 possess monopoly power, and once that conclusion
9 is reached, CEI had a duty in the City's view of
10 interconnecting.

11 It wasn't that they -- that Muny Light was
12 asking to be rescued. If the City is right and if
13 you ladies and gentlemen of the jury find that CEI,
14 indeed, did have monopoly power, then it is the
15 City's position that CEI had a positive duty to
16 interconnect in 1971.

17 The City similarly takes the position that if
18 you find that CEI did have monopoly power in the
19 Cleveland market, it is the City's position that
20 CEI had a positive duty, a positive obligation to
21 provide wheeling for the benefit of Muny Light to
22 bring that 30 megawatts of PASNY power from
23 Niagara Falls down to the City of Cleveland.

24 Now, just a word on some of the other
25 considerations that the Court's charge has

1 indicated you are permitted to consider.

2 One is the number of competitors in the market.
3 The more the competitors, the less likely the
4 existence of monopoly power.

5 But where you have a market with two
6 competitors only, there will be evidence in this
7 case that suggests that that is a strong indicator
8 in the direction of finding monopoly power.

9 Another factor that there will be evidence
10 introduced with respect to is entry barriers. --
11 You can imagine that if it is very -- if it is
12 very easy and economical for a new business person
13 to get into business and to give an industry, that
14 if the entry barriers, therefore, are very low,
15 well, potential competitors could have an impact
16 on the existing competotors.

17 On the other hand, if you have an industry
18 where the entry barriers are very high, it takes
19 a lot of money, it takes a lot of time, factors
20 of State regulations, whatever, if the entry
21 barriers are very high, that would also tend,
22 in the City's view, to point towards the
23 existence of monopoly power. Because in the case
24 of the Cleveland market with retail electric
25 power in the early 1970's, there just were not a

1 lot of other people trying to get into that
2 business.

3 A third additional factor that Judge
4 Krupansky commented on was -- and you will
5 probably remember **the words** -- essential facility.

6 It is the City's position that CEI's
7 transmission network represents what is called
8 in the law an essential facility or a scarce
9 facility and, again, the theory is easy enough to
10 understand that if a business enterprise has this
11 thing called monopoly power, and if that business
12 enterprise controls a scarce commodity or a scarce
13 facility or an essential facility, then, once
14 again, that points in the direction, at least in
15 the City's view, that the market power possessed by
16 that enterprise rises beyond just being simple
17 market power and satisfies or tends to satisfy
18 the legal definition of monopoly power.

19 All right. This is one of the questions
20 that you ladies and gentlemen will have to decide
21 as to whether or not monopoly power exists in
22 this case with respect to CEI.

23 On the essential facility, one more point.
24 Judge Krupansky told you that the kinds of things
25 you can consider as to whether or not a thing is

1 an essential facility is whether or not it can
2 be feasibly duplicated and whether or not the denial
3 of access to that facility would have an adverse
4 impact on the business enterprise that is denied
5 the access.

6 It is the City's position, and you will have
7 evidence presented to you, that the transmission
8 network of CEI did fill the definition of an
9 essential facility which, in turn, adds to the
10 likelihood that CEI's market power constituted,
11 in the law, monopoly power. And then once you get
12 to the monopoly power, that then brings with it
13 these other positive duties: They must interconnect
14 and they must wheel.

15 There will be a lot of evidence with
16 respect to CEI's true intent in pursuing these
17 various business practices. The City will present
18 evidence that in the City's view demonstrates that
19 the reason CEI committed the acts that it did
20 commit in the early 1970's was twofold: One, to
21 maintain that monopoly power position that CEI had
22 already achieved and, secondly, to exclude or limit
23 the competition that CEI was getting from Muny Light.

24 Evidence will be presented in this case that
25 demonstrates that these business practices of CEI

1 came dangerously close to driving Muny Light
2 out of business and thereby giving CEI a total
3 monopoly of retail electric power sales in
4 Cleveland.

5 Now, while CEI did not succeed in its effort
6 and attempt to monopolize, to attempt to monopolize
7 and to drive Muny Light out of business through
8 these devices, the business practices that the
9 City is complaining about directly caused
10 significant injury to Muny Light. And this is a
11 money damage case and at the conclusion of this
12 case one of the questions that the City is going
13 to be asking this jury to find is how many dollars
14 are necessary to compensate the City of Cleveland
15 for the injuries that will be proved in this case.
16 If the City doesn't prove it was injured, zero.
17 If the City proves that it was injured, then the
18 jury is going to have to decide the number of
19 dollars that will compensate the City for those
20 injuries.

21 Now, Judge Krupansky told you this morning
22 that the purpose of the Sherman Act was to
23 preserve competition for the benefit of the
24 consuming public and to encourage, to the fullest
25 extent practicable, free and open competition so

1 as to prevent the accomplishment of monopolies in
2 any business or industry to the end that the
3 consuming public may receive better goods and
4 services at a lower cost.

5 Now, these principles are what this case is
6 all about.

7 The City believes that free and open
8 competition between Muny Light and CEI should
9 determine the way electric power is sold and
10 distributed in the City of Cleveland.

11 CEI disagrees. CEI thinks that it should be
12 the only supplier of electric power --

13 THE COURT: Mr. Norris, you are
14 getting into argument here.

15 Please stay with the facts.

16 MR. NORRIS: Thank you, your
17 Honor.

18 Let me pause and introduce representatives of
19 the City who are at the trial table.

20 Mayor George Voinovich will be unable to be
21 at the trial table all the time because he has a
22 city to run, and his absence should not be equated
23 with lack of interest or lack of importance in his
24 view.

25 Mr. Thomas Wagner is the Law Director of the

1 City of Cleveland, and Mr. Wagner similarly will
2 give this trial as much attention as he can.

3 Mr. Ed Richards is the Director of Public
4 Utilities; and to Mr. Richards' left is Mr.
5 Joseph Pandy, who is the Commissioner of Muny
6 Light. And, again, in keeping with Mr. Pandy's
7 responsibilities in running Muny Light while this
8 trial goes on, Mr. Pandy will be in the courtroom
9 as much as he can.

10 The lawyers -- other lawyers that are at the
11 table that will be assisting me in the trial of
12 this case and who will be rotating with me on the
13 handling of witnesses and other chores in the trial
14 of this case are my colleague Ms. Deborah Coleman;
15 and at the far end of the table, Mr. David Weiner,
16 and Mr. David Hjelmfelt.

17 And to my far right is one of our paralegals,
18 Mrs. Patricia Richards, who will be assisting in
19 keeping the exhibits organized and, hopefully,
20 keeping the lawyers organized.

21 I wanted just to share with you the
22 representatives of the City that would be with you
23 for what may be several weeks.

24 Now, the opening statement is a privilege for
25 the party to engage in, and the purpose of the

1 opening statement is to help the jury understand
2 the evidence.

3 The evidence will be in the form of oral
4 testimony; it will be in the form of letters like
5 you saw on the screen; it will be in the form of
6 memoranda and documents; and it won't all come in
7 in a nice chronological order. In some situations
8 there will be a transaction where one witness will
9 know part of the transaction and another witness
10 will know some other part of the transaction, so
11 that it's going to be somewhat difficult sometimes --
12 sometimes it's downright confusing to know exactly
13 what's going on.

14 So the purpose of the opening statement is to
15 try to share with the jury the picture that all of
16 these pieces of evidence will ultimately add up to.

17 I think of it like the picture on the front
18 of a jigsaw puzzle box, because you can see before
19 you start the puzzle what it's going to all --
20 once you get the pieces all together, what it's
21 all going to look like.

22 I'm not going to try to overburden you, I
23 don't know if I will take my full hour and a half,
24 but I wanted to share with you what I was
25 attempting to accomplish in these few remarks that

1 I'm making in this opening statement.

2 There are other facts and figures that will
3 come in to the jury's attention with respect to the
4 size of CEI and the size of Muny Light in terms of
5 customers, sales, and revenues.

6 Suffice it to say, I won't go through all
7 those details today, but it's a real David and
8 Goliath situation, where you have got a small
9 utility company that is publicly owned, and its
10 opponent is, of course, a much larger, much more
11 powerful utility company.

12 This is a map taken from the 1977 annual
13 report of CEI, and it shows you roughly -- I hope
14 you can all see it -- it shows you roughly where
15 CEI's service area is, and CEI is interconnected
16 with four other privately-owned utility companies.

17 The orange in the far left represents the
18 Toledo Edison service area.

19 The large yellow here represents the Ohio
20 Edison service area.

21 Of course, the green represents the CEI
22 service area.

23 The brown over here in Pennsylvania represents
24 the Pennsylvania Electric Company; and the
25 orange down here in the Pittsburgh area represents

1 Duquesne Light.

2 These five utility companies are joint owners
3 of certain facilities.

4 CEI has five generating plants of its own in
5 its service area, and then it is a partner with
6 these other companies in other facilities both in
7 Pennsylvania and in Ohio.

8 These lines that you see on this map are
9 representations of transmission lines that carry
10 very high voltage power long distances, and I'm
11 sure you have seen these high-rise transmission
12 lines.

13 I like to think of them as interstate highways
14 of electric power.

15 Also shown on this map are various
16 interconnection points where CEI does have
17 interconnections with its neighboring utility
18 companies.

19 And if I recall correctly, CEI's first
20 interconnection was in the mid-1920's; and by the
21 time we get to 1971 when CEI refused to interconnect
22 with Muny Light, interconnections were just a very
23 common, ordinary thing in the power industry,
24 and the very denial of that, the City claims
25 represents an indication of the intent that lay

1 behind it.

2 Just a few quick comments with respect to the
3 other utility companies.

4 Muny Light. In 1905, the City of Cleveland
5 annexed the little village of South Brooklyn.

6 South Brooklyn had a municipal power plant.
7 This is a picture taken in about 1905.

8 In 1910, another annexation of the Village of
9 Collinwood took place up in the north shore,
10 eastern part of what is today the City of
11 Cleveland, and so Collinwood also had a municipal
12 system.

13 So those two systems, the South Brooklyn
14 system and the Collinwood system, became the
15 backbone of what ultimately -- later became Muny
16 Light.

17 In 1914, a few years before World War I --
18 this picture was taken in 1918 -- but in the
19 pre-World War I period, a new plant -- a new
20 generating station was built by Muny Light down
21 on the south side of the Shoreway. If you are
22 familiar with the present Muny Light plant on
23 the north side of the Shoreway, this structure
24 went into service in about 1914 on the south side
25 of the Shoreway at East 53rd and, of course, these

1 smaller plants were then phased out.

2 Muny Light grew enormously. This -- let me
3 just tell you about that.

4 In 1914, the City Council of the City of
5 Cleveland passed an ordinance putting a ceiling on
6 the costs of electricity, 3 cents a kilowatt hour.

7 Muny Light followed the ordinance. CEI
8 felt that it was unconstitutional.

9 CEI litigated that. They were charging
10 10 cents a kilowatt hour at that time, and this
11 litigation went on for six years.

12 Finally, in 1920 the litigation was
13 compromised, and the rate was set for CEI at 5
14 cents a kilowatt hour instead of the 10 cents
15 that they had been charging earlier. And that is
16 an indication of the advantage of competition
17 even in the electric power industry.

18 So that thousands of customers switched at
19 that time because of the lower rate, and it was
20 a good deal because Muny Light was reliable and
21 their rates were a lot cheaper. So a lot of
22 customers did leave CEI just because of the
23 competitive tactics.

24 Now, in 1942 a new generating station was
25 built across the freeway from the old East 53rd

1 Street station I have just put on the floor, and
2 you will notice that three smokestacks, originally
3 there were three --

4 That's a handy alarm, your Honor. I thought
5 I would set that.

6 -- the three smokestacks indicate three steam
7 boilers. And again Muny Light was continuing to
8 grow at roughly 3 percent a year and by 1953 it
9 was necessary to add further capacity, and now, if
10 you will count the stacks, you will find there are
11 five stacks.

12 They continued to grow and, actually, here's
13 an aerial view of the same time. This is taken,
14 of course, from out over Lake Erie, and you can
15 see the five stacks that are there.

16 Then figuring into this lawsuit, in 1967
17 Muny Light added a very large unit, an 85
18 megawatt unit, and that's the sixth smokestack that
19 is right here {indicating}. And that meant that
20 by this period of time you had a large 85
21 megawatt unit and you had three other steam
22 turbines that were fed by these five other boilers.

23 Now, because there is going to be so much
24 testimony in this case with respect to the
25 operations, the City has prepared an operations

1 chart like this one. {Indicating}. This happens
2 to be the chart for 1971, and the top bracket
3 shows every day of the year. This is January,
4 February, March -- all the way over to December,
5 and each month is divided into days.

6 So this information, which is based upon
7 operating data and logs, that sort of thing -- it's
8 all been checked -- this shows every day of the
9 year that the big unit was operating. The next
10 band here shows three other turbines, and this
11 happens to be representing at the bottom of this
12 band numbers 8, 9 and 10, and these three are fed
13 by these five boilers. These five boilers were
14 not connected to the big boiler. The big turbine
15 had its own boiler. But this second band
16 represents 8, 9 and 10. This third band represents
17 three smaller units, the combustion turbines that
18 are there, located at the Lake Road station, that
19 are located at the substations, one in the east
20 at Collinwood and two in the west at West 43rd
21 Street, and again every day these units were in
22 operation is shown in a color.

23 Down here, this represents the purchases of
24 power that Muncy Light bought from CEI.

25 In 1970, because of an emergency that put the

1 big unit out of service, CEI and Muny Light agreed
2 that about 10 of Muny Lights 26 substations --
3 there are about 26 substations that Muny Light has
4 throughout the City -- about 10 of those were
5 close enough to CEI cables that it was possible to
6 actually connect those Muny Light substations up
7 to the CEI lines so that when Muny Light was unable
8 to serve the total load that it had, and because
9 it did not have an interconnection -- which, of
10 course, would have solved the problem -- but as an
11 emergency, temporary stopgap measure, CEI and
12 Muny Light entered into this load transfer -- it
13 was called load transfer from just the way the
14 whole substation was actually transferred, the
15 load of that substation was transferred from the
16 Muny system to the CEI system -- so this fourth
17 band on this operations chart shows the period of
18 time during which in that month or on that day
19 load transfer service was being purchased from
20 CEI.

21 Then this last chart -- I'm not going to take
22 any more time in explaining this but just to show you
23 there is this kind of detail available to help the
24 jury understand the testimony -- this again now
25 is from 1972 to 1973, and the bare chart up above

1 this series of mountains -- the horizon chart, I
2 call it -- this shows in any month where Muny
3 Light was getting the power it was distributing.
4 The top line across are purchases of different
5 kinds from CEI. This red in here {indicating}
6 represents the power generated by the little gas
7 turbines that I described. This blue represents
8 the power that is derived from the big 85
9 megawatt unit, and at the bottom the orange
10 represents all other power that came from the
11 other three turbines, 8, 9 and 10.

12 Witnesses will from time to time have
13 occasion to make reference to these exhibits.

14 Now, in the CEI service area there are at
15 the present time only two municipal electric
16 systems that still survive. One is Muny Light
17 and one is the Painesville Municipal Light System,
18 and that estimation is depicted on this sketch.

19 You will see -- I don't know if you can see
20 it -- but in faint lines the CEI service area is
21 outlined and the City of Cleveland is represented
22 there. The City of Painesville is represented
23 there, and the overlay that we will put down, this
24 represents the transmission grid that is CEI's
25 transmission grid in the CEI service area.

1 It shows various parts of interconnection with
2 other privately owned utility companies and, of
3 course, it was this transmission grid that Muny
4 Light wanted to have access to for the wheeling of
5 the PASNY power which was, of course, denied in
6 1971.

7 Muny Light is one of about 70 publicly-owned
8 power companies in the State of Ohio. Just to
9 mention a few, Painesville, Columbus has a
10 municipal system, Cuyahoga Falls, Oberlin, Newton
11 Falls, Orville and many others that you would
12 recognize.

13 Now, another question that the jury will have
14 to answer referred to by Judge Krupansky this
15 morning is the relevant geographic market for the
16 purposes of this case.

17 CEI will be claiming that the relevant
18 geographic market is the 30 square miles within
19 the City of Cleveland where both CEI and Muny
20 Light have head-to-head competition. Head-to-head
21 or house-to-house or street-by-street. For want of
22 a better term, I call it head-to-head competition.

23 The City on the other hand believes that the
24 relevant geographic market for purposes of this
25 case is the entire City of Cleveland plus areas,

1 small areas contiguous to the city but beyond the
2 municipal boundaries.

3 The evidence will show you what this
4 head-to-head competition area is, and the evidence
5 will also show other factors that, in the City's
6 view, are relevant to the jury's consideration of
7 whether the relevant geographic market is just the
8 smaller area claimed by CEI or the larger area
9 claimed by the City.

10 Dr. Harold Wein is the economic expert that
11 the City of Cleveland has retained for purposes of
12 this case, and Dr. Wein will be testifying with
13 respect to this issue of market, what is the
14 market, what are the things that in economic and
15 realistic business terms determine the area of
16 effective competition, and that was the
17 definition that Judge Krupansky gave you earlier.

18 So, in answering this question, your task
19 will be what is the area of effective competition,
20 and Dr. Wein and other witnesses will describe not
21 only the existing competition or the actual
22 competition, but also the potential competition
23 that goes into this equation, where the consumers
24 look for suppliers of electric power. Consumers
25 throughout the city were aware of the difference

1 in price.

2 Those are the kinds of factors that the City's
3 witnesses will testify with respect to.

4 I'd like to talk a little bit further about
5 this matter of monopolistic intent. In order to
6 evaluate CEI's intent during the 1971, 1975 period
7 when CEI was carrying on the Munny Displacement
8 Program, the refusal to interconnect and the
9 refusal to wheel, it is helpful to look back at
10 some more of the internal CEI documentation to see
11 what that will contribute to the true state of
12 mind of CEI in effecting these refusals.

13 There typically isn't any way that somebody
14 can take a picture of an intent. You have to
15 infer intent from other objective things. There
16 is no eyewitness to what somebody's intent is, and
17 it is for this reason that the City is going to be
18 putting in evidence for your consideration of what
19 happened in the decade prior to the refusal to
20 interconnect in July, 1971.

21 I have a series of slides that I would like
22 to show you.

23 Your Honor, could I just check with you.
24 Did I start at 1:35?

25 THE COURT:

1:32.

1 MR. NORRIS: 1:32. Thank you.

2 THE COURT: You've got a lot of
3 time left.

4 MR. NORRIS: I'm sorry?

5 THE COURT: You have got a great
6 deal of time left. You have a half hour.

7 MR. NORRIS: Thank you.

8 That is a memorandum dated December 9, 1959,
9 and it is -- I will read just a couple of
10 paragraphs to you from this memorandum because
11 the City believes that through looking at memoranda
12 of this kind that were prepared long before the
13 trial of this lawsuit, gives us an objective
14 perspective as to what the true intent of CEI was
15 10 years later when it did refuse to interconnect
16 with Muny Light.

17 Now, this memorandum is a CEI memorandum
18 recommending strategies that CEI should follow in
19 dealing with competition from Muny Light.

20 It is much too long to go through all the way,
21 but I'm going to turn to page 6, and on page 6, the
22 third and fourth paragraphs on the page read as
23 follows:

24 "One additional concept or principle, while
25 not set out in previous projects should be

1 considered at this time. Since it is unlikely
2 under present circumstances that Muny operation
3 will continue its rate of decline as we had
4 previously hoped, it should be recognized that
5 before we can successfully contain the Muny
6 operation and reverse the trend of customer loss
7 which we have recently been experiencing, or arrive
8 at a point where a sale could be negotiated, the
9 rate differential between our service and Muny
10 service must be equalized and reduced to a minimum."

11 And the last paragraph on that page reads as
12 follows:

13 "And further, it should be recognized that
14 the mere elimination of the rate differential
15 would result in no material gain to us unless the
16 additional revenues realized from equalization of
17 Muny rates to the level of our rates are syphoned
18 off into additional costs, additional financial
19 burdens by way of increased interest and the like,
20 or the payment to the City General Fund of a sum
21 in lieu of taxes or by an increase of
22 non-remunerative services, such as low-paying
23 street lighting, et cetera, should the additional
24 revenues be used to better the MELP service and
25 increase its capacity, any benefit to us from rate

1 equalization would be nullified."

2 Would you turn the lights back on, please,
3 Mr. Kopit.

4 About 7 or 8 months later, there was another
5 CEI memorandum, this one by Mr. Horning, dated
6 July 22, 1960, and this memorandum picks up on the
7 same theme that was in the 1959 memorandum that I
8 have just addressed your attention to.

9 This particular exhibit is an excerpt from
10 page 2 of that memorandum, and because it happens
11 to be a 17-page memorandum, in order to make it
12 more manageable we have simply blown up particular
13 portions of it that we want to emphasize.

14 The first paragraph of the memorandum states
15 as follows:

16 "This report will discuss the principles of
17 acquiring municipal electric systems as practiced
18 by those electric utilities most active in the
19 field in recent years."

20 And then over on page 2, Mr. Horning states
21 as follows:

22 The heading is Roman Numeral I, "Circumstances
23 Leading to Successful Municipal System Acquisition.

24 "Certain conditions usually exist where a
25 company has been successful in acquiring a

1 municipal electric system. These conditions
2 include:

3 "Municipal rates that are equal to or
4 higher than the rates that will be charged by
5 the company.

6 "A need of the municipal power system to
7 expand its generating capacity or to contract for
8 additional wholesale power.

9 "Service performance below that of the
10 company..

11 "An apparent need for other municipal
12 service or capital improvement.

13 "A history of persistent attempts by the
14 company to purchase the system."

15 And over on page 4, this paragraph appears.
16 I should state, before you get to page 4, the
17 writer is describing the places he went to to
18 cover with other investor-owned utility companies
19 into how they successfully acquired municipal
20 systems. He went to Dunkirk, New York; Decatur,
21 Indiana; Herkimer, New York; Minerva and
22 Willard, Ohio; Woodstock; Oberlin, Shelby,
23 Centerville and others.

24 On page 4, and he's reporting on the various
25 interviews that he had in this major survey that

1 was done. "the interviews brought out a
2 substantial difference of opinion as to what
3 relationship should exist between a private
4 company and a municipal system. This difference
5 of attitude is reflected in the approach used
6 when an offer to purchase is initiated.

7 "One group thinks that the private company
8 should stand ready to provide all of the power
9 requirements of the municipal system. This group
10 believes that the working relationship involved
11 in selling wholesale power will ultimately break
12 down the resistance to sell and provide the
13 opportunity to make an offer.

14 "A second group believes that a company should
15 offer just enough power that a family relationship
16 will be established without giving the municipal
17 system an opportunity to close down its own high
18 cost generating equipment.

19 "A third group refuses to sell wholesale power
20 to the municipality. This last policy, of course,
21 increases, the chances that the municipality will
22 be faced with a critical power shortage and
23 reduces the reliability of the municipal system.

24 "There is much to favor the third attitude."

25 On page 11, in the section entitled

1 "Conclusions and Recommendations," the writer
2 states, "It may be beneficial to conclude this
3 report with a comparison of the Cleveland and
4 municipal electric systems with those acquired by
5 other companies.

6 "There is no precedent for the acquisition of
7 a municipal system as large as Cleveland. The
8 problems involved undoubtedly would multiply in
9 number and intensity. For example, any intent to
10 acquire the Cleveland Municipal System would
11 probably rally the opposition of all public power
12 forces in the country:

13 "As a precedent, this acquisition would be a
14 decisive victory for private ownership and could
15 have a far-reaching effect on other large municipal
16 systems.

17 "Because of this, a victory for the company
18 might well be a real contribution to continued
19 private ownership of the electric power business
20 and, therefore, the work and extreme effort and
21 sacrifice.

22 "The existence of higher municipal rates for
23 residential customers has contributed to the
24 success of other acquisitions. The situation in
25 Cleveland and Painesville is quite different.

1 "Those municipal systems have rates for
2 residential customers that are substantially below
3 those of the Illuminating Company. This is a real
4 stumbling block and adds materially to the
5 system's value to the community.

6 The offering price for either Cleveland or
7 Painesville will have to give consideration to this
8 rate situation. The only alternative appears to be
9 an overwhelming promotional campaign to sell the
10 long-range advantages of service by the company."

11 Now, on the final page of this memorandum,
12 page 12 -- the other five pages I mentioned are
13 exhibits that are attached -- let me read one more
14 paragraph from the Conclusion section of this
15 memorandum.

16 "It seems apparent that the company is faced
17 with a problem of buying either the Painesville
18 or Cleveland systems under very unfavorable
19 conditions. Therefore, it will be necessary to use
20 extreme measures if successful acquisitions are to
21 be accomplished. These extreme measures would
22 include an offering price in excess of what has
23 been paid in the past by this company or other
24 companies and a tremendous promotional effort to
25 convince the public of a need or a desirability to

1 sell. It is undoubtedly true that the City
2 Councils and administrations of the Cities of
3 Cleveland and Painesville will not agree to sell
4 without voter approval."

5 Another memorandum that indicates, in the
6 City's view, an attitude that is relevant to your
7 consideration of what was the true intent in 1971
8 when CEI refused to interconnect with Muny
9 Light.

10 Mr. Kopit, may I have the lights?

11 {The courtroom lights were lowered.}

12 The last memorandum that we looked at was
13 the 1960 memorandum. This now is a couple of
14 years later. This is a letter from Mr. Elmer
15 Lindseth, a Chairman of the Board of CEI, to
16 Mayor Ralph S. Locher, who was then Mayor of the
17 City of Cleveland, dated September 17th, 1972.

18 "Dear Mayor: I am glad to have your statement
19 that you are willing to discuss our proposal for
20 interconnecting the Illuminating Company and
21 the Municipal Light Plant System. I believe this
22 interconnection would be a major step forward for
23 Cleveland and its people and it would open a new
24 chapter of progress for the entire community.
25 Our proposal, if accepted, will produce the

1 equivalent of more than \$1 million a year in
2 increased revenues to the general fund. This
3 additional revenue would equal that which would
4 be produced by an increase in real estate taxes
5 of 0.4 mills. All of this can be brought about
6 simply by charging full electric rates to all the
7 municipal light plant's private customers and
8 accruing the benefits of these increased rates to
9 the General Fund by reducing rates for public
10 load. There is no legal obstacle to returning the
11 benefits of the tax exemption of the municipal
12 light plant to the public at large to reductions
13 in charges to the general fund. It requires
14 only City Council action. The principal has
15 already been established by Council in that
16 the Municipal Light Plant now charges the general
17 fund something less than true cost for its
18 street lighting. Such a change in policy would
19 not only be a substantial benefit to the City
20 government but an operational improvement to the
21 Municipal Light Plant as well. It would mean
22 an interconnection agreement which would carry
23 with it all of the benefits of standby emergency
24 service, firm power interchange, economy
25 interchange, sale of bulk power, pooling of

1 personnel and equipment in times of emergency,
2 and many others."

3 The next page concludes as follows:

4 "I believe that such a working arrangement
5 would also make available to you power at a rate
6 that would make the proposed \$12 million
7 investment for expansion of Municipal Light Plant
8 both uneconomical and unnecessary. Attached is an
9 outline of the provisions which would bring about
10 the benefits. The details I'm sure could
11 readily be worked out since the Illuminating
12 Company already has similar arrangements with
13 other utilities."

14 The attachments I won't bother reading, but
15 there are three pages of attachments that follow
16 the kind of interconnection -- full interconnection,
17 permanent interconnection -- CEI is willing to
18 confer upon the City, providing the City would
19 raise its rates to the level of CEI's rates.

20 This next letter is a year -- well, about
21 nine months later, June 27, 1963, and this is,
22 again, a letter from Mr. Lindseth, again to Mayor
23 Locher, and it -- without taking the time to read
24 it, it makes the same offer on the same terms:
25 "We'll give you interconnection if you'll raise

1 your rates."

2 The next letter that I'd like to draw to your
3 attention is a letter from Mr. Ralph Besse, who
4 was then the President in 1965, and this letter,
5 again to Mayor Locher, makes the same proposal:
6 "If you'll raise your rates to our level, CEI
7 will interconnect with Muny Light."

8 Five days later, Mayor Locher responded to
9 Mr. Besse, and the response -- I won't read the
10 whole letter, but I'll just read the third and
11 fourth paragraphs.

12 Starting on the first page, Mayor Locher
13 rejects the offer of interconnection based upon
14 rate equalization, and Mayor Locher says:

15 "In view of the fact that the rates for
16 service of the two systems are not in any way
17 related to the purposes of interconnection, I
18 cannot accept this coercive limitation. I am,
19 however, very much interested in an interconnection
20 of the two systems in the interest of the public
21 welfare and the mutual benefit to the two systems,
22 and I am willing to consider an interconnection on
23 a business basis without unfair strings attached.

24 "Furthermore, rate equalization being
25 unrelated to interconnection, can be effectuated,

1 as your letter points out, by councilmanic and
2 Board of Control action, should the City decide
3 on this policy; but, I for one reject this policy
4 of rate equalization between the two systems
5 because it defies all principles of rate
6 economics. The rates of the two systems must
7 necessarily be based upon economics and the cost
8 of each particular system, and I have never before
9 heard it suggested that the rates of one public
10 utility be predicated solely on the consideration
11 of the rate level of some other individual
12 enterprise. This is arbitrary; it ignores the
13 costs of operation and capital costs of the
14 enterprise subjected to such rate fixing."

15 A year and a half after that letter was
16 written, Muny Light's big 85 megawatt unit went
17 into service.

18 From that point forward, you hear nothing
19 more about offers from CEI to interconnect with
20 Muny Light based upon rate equalization.

21 What you hear from that point forward are
22 nothing but refusals to interconnect on any basis
23 at all.

24 Plaintiff's Exhibit 2631 is an internal CEI
25 memorandum dated early 1968. It is a memorandum

1 prepared by multiple authors within CEI, many
2 different departments contributed to this, and I
3 won't take time to put the slide up on the screen,
4 but on page 2, the objective of the CEI program
5 is indicated, and I quote, "To acquire and
6 eliminate MELP."

7 Over on page 4 of this exhibit, at the bottom
8 of the page, the internal CEI memorandum states
9 as follows:

10 "An interconnection appears to be the best
11 solution to MELP's operating and financial
12 problems."

13 Over on page 7, the last paragraph on that
14 page, reads as follows:

15 "The time element is of extreme importance;
16 the time in which MELP may be acquired is limited.
17 As indicated previously, an interconnection would
18 drastically affect the possibility of acquiring
19 MELP."

20 Turn the lights out again.

21 If you would center that, please, Mr.
22 Weiner.

23 {Mr. Weiner complies.}

24 MR. NORRIS: In 1969, in a
25

1 major analysis by Mr. Loshing, the Treasurer of
2 CEI, a memorandum which he sends to Mr. Besse,
3 Mr. Rudolph, Mr. Ginn, the Chairman of the Board,
4 President, and many Vice-Presidents, Mr. Loshing
5 is reporting on the situation with Muny Light.
6 And after going through a detailed analysis of
7 Muny Light's cash position, its net income, the
8 possibility of an interconnection, Mr. Loshing
9 is describing how a strong -- and I quote,
10 "A strong permanent interconnection would give
11 MELP the system reliability it so sorely needs."

12 Then Mr. Loshing suggests three sources of
13 action that are open to Muny Light: One was to
14 make an all-out effort to purchase Muny Light now
15 while the reliability financial pressures are still
16 present.

17 Another alternative that is quoted by Mr.
18 Loshing is:

19 "Take the initiative in establishing an
20 interconnection with proper standby charges, to
21 give them reliability but increase the financial
22 pressure on them. "

23 And then the third alternative, which is the
24 one that CEI followed, it's on the screen:

25 "Avoid an interconnection and run the risk of

1 an FPC dictated interconnection, hoping that the
2 financial and service problems will eliminate
3 MELP as a competitive threat."

4 Now, "FPC" in that sentence refers to the
5 Federal Power Commission.

6 Under certain circumstances, the Federal
7 Power Commission was authorized to order an
8 interconnection, and a reference to "FPC dictated
9 interconnection" was that reference.

10 After 1971 -- you can turn that off.

11 {Mr. Weiner complies.}

12 MR. NORRIS: After 1971, after --
13 well, I'm sorry, let me back up and give it to
14 you like this.

15 In March of 1971, a new commissioner of Muny
16 Light was brought to Cleveland, his name was
17 Warren Hinchee; you will be hearing from Mr.
18 Hinchee from the witness stand.

19 Mr. Hinchee had run the Columbus municipal
20 system and he was an experienced utility man.

21 He arrived in March, he looked over the
22 situation; he immediately asked CEI for an
23 interconnection.

24 There was a meeting held in April. Mr.
25 Hinchee formed a very firm conclusion that CEI

1 was not about to give an interconnection to
2 Muny Light.

3 The next month, in May, the City of Cleveland
4 was forced to go to the Federal Power Commission
5 and ask for an order requiring CEI to interconnect.

6 Now, many years later, that order was issued.
7 There is an interconnection today between Muny
8 Light and CEI, and, as a matter of fact, there is
9 a second interconnection now under construction.
10 The way the City got that interconnection was
11 through going to the Federal Power Commission.

12 The other details that I won't take the time
13 to share with you now, but Mr. Hinchee looked at
14 the Muny Light system in March and April of 1971
15 and made a determination that the system was
16 still -- it could be saved.

17 And there was a lot to do. It was necessary
18 to refurbish equipment, to rehabilitate boilers,
19 to rehabilitate generators; it was necessary to
20 bring in a deeper -- more experienced in terms of
21 engineering; it was necessary to reorganize, it
22 was necessary to put in training programs; but
23 Mr. Hinchee determined that the most important
24 thing that the City needed was an interconnection
25 with CEI, because without an interconnection, it

1 was electrically cut off from the rest of the
2 world.

3 The two companies met in July, 1971, and --
4 would you turn the lights out again?

5 {The lights were turned out.}

6 MR. NORRIS: -- a firm arrangement
7 was entered into where the City of Cleveland
8 agreed to set up a payment schedule for certain
9 amounts that were owed to CEI because of the load
10 transfer service that I had earlier mentioned to
11 you.

12 And on the 8th of July, 1971, -- and this
13 letter is the 15th of July, and it is in confirmation
14 of the understanding that was reached on July 8th --
15 this is a letter from Mr. Clarence L. James, Jr.,
16 the Law Director of the City of Cleveland, to
17 Mr. Lee C. Howley, Vice-President and General
18 Counsel of the Illuminating Company:

19 "Dear Mr. Howley:

20 "This letter is a further clarification of
21 my June 30, 1971, letter to you.

22 "In accordance with the Federal Power
23 Commission's staff request and as related to you
24 by telephone, the City of Cleveland would agree
25 to the following:

1 "1. Payment of \$400,000 against the
2 temporary interconnection billings, by Friday,
3 July 2, 1971. "

4 That amount was paid.

5 "2. Payment of \$400,000 against the
6 temporary interconnection billings, by Friday,
7 August 13, 1971."

8 That amount was paid.

9 "3. Payment by October 1, 1971, of the
10 balance due for services rendered through
11 August 31, 1971."

12 That amount was paid.

13 "The above-agreed action on the part of the
14 City is contingent on the Cleveland Electric
15 Illuminating Company agreeing to the following:

16 "1. Cleveland Electric Illuminating Company
17 will voluntarily extend the time of termination
18 of the service to Cleveland until the City can
19 complete the maintenance work it is presently
20 doing on its generating facility and be prepared to
21 carry its load with its own generating capacity
22 with reliability.

23 "2. Cleveland Electric Illuminating Company
24 will sit down and discuss in good faith a
25 permanent interconnection tie-in with the hopes

1 of reaching an agreement by August 1, 1971,
2 for the necessary engineering work for an
3 permanent interconnection.

4 "It is understood that all payments by the
5 City to the Cleveland Electric Illuminating
6 Company will be made under protest and will be
7 subject to refund upon final resolution of the
8 protest. Further, that the above commitments
9 will be enforced by the Federal Power Commission.

10 "Yours very truly,

11 "Charles L. James, Jr."

12 That understanding was reached by CEI. The
13 meeting to sit down and do the engineering work
14 for the interconnection did not take place, and
15 you will be hearing more testimony with respect
16 to that.

17 In closing, ladies and gentlemen, the
18 business practices that the City is complaining
19 about, the Munny Displacement Program, the refusal
20 to interconnect, the refusal to wheel, the City
21 will present evidence that will demonstrate that
22 those business practices were engaged in by CEI
23 to maintain their monopoly position in this
24 market and, indeed, to foreclose Munny Light from
25 being a competitor.

1 We did get PASNY power starting in June of
2 1980 because another Federal agency in Washington
3 ordered CEI to wheel. And the three things that
4 we are complaining about all came to an end not
5 because of CEI's voluntary action but because of
6 the intervention of Government.

7 When we get to the damage portion, you will
8 have damage consultants -- the City will bring to
9 you consultants that have estimated the damages
10 that it will take to compensate the City.

11 The way that study has been done has been to
12 take the historical Muny Light operating sheets
13 and balance sheets, and then to assume -- making
14 only one assumption: That the CEI conduct was
15 cooperative rather than uncooperative; that they
16 did interconnect; that they did wheel; that they
17 did have a Muny Displacement Program. And then
18 the experts who will come here will all tell you
19 the part that they played in this analysis, the
20 difference between the retained -- the revenues
21 and costs that actually happened in historical
22 terms compared with what it would have been had
23 there been an interconnection, and had there
24 been wheeling, the differential is the damages.
25

1 The final note I would like to make is that
2 CEI will claim Muny Light was mismanaged. There is
3 no doubt about it that through the years from time
4 to time Muny Light's manager made errors, but they
5 did a pretty good job in the overall. But if there
6 was mismanagement, the consultants preparing the
7 damage report have been careful not to make any
8 changes in the assumption about the way Muny
9 Light was run internally. So if there was
10 mismanagement in the base case, you will see
11 that that same mismanagement shows up in the
12 alternate cases, and when you make a comparison
13 of those, CEI is not being charged with any cost
14 associated with to whatever extent Muny Light
15 might have been mismanaged.

16 I thank you for your time and attention and
17 I look forward to going through the trial.

18 Thank you, your Honor.

19 THE COURT: Ladies and gentlemen
20 of the jury, it's now 3:00 o'clock. You have been
21 very attentive through this opening statement on
22 behalf of the City. So that you may be equally
23 attentive and awake during the presentation of
24 the defendant, supposing we take a very short
25 recess. You can retire to the jury room and

1 relax for about 10 minutes, move around and get
2 your blood circulating. And, hopefully, that room
3 is a little cooler than it was before. You let me
4 know when you come back out if it is satisfactory.

5 {Recess taken.}

6 THE COURT: You may proceed.

7 MR. LANSDALE: May it please the
8 Court, ladies and gentlemen of the jury, seated
9 with me at counsel table is Mr. Murphy and Mr.
10 Bingham. Mr. Murphy is one of my partners and
11 Mr. Bingham is the principal rate engineer of
12 the Cleveland Electric Illuminating Company.
13 He's very knowledgeable about the company and
14 here to keep me out of trouble from a factual
15 standpoint.

16 Ladies and gentlemen, you've undoubtedly
17 already noted that some of the exhibits are
18 numbered in the two thousands and you have my
19 sympathy and I hope that we can --

20 THE COURT: Mr. Lansdale, I
21 don't think that we can hear you too well up here.
22 You have the microphone. I suggest that you
23 speak into the microphone.

24 MR. LANSDALE: Yes, sir.

25 The Court instructed you in his initial

1 charge that the object of the antitrust law
2 was the preservation of competition, not
3 necessarily competitors, and that the antitrust
4 laws is contemplated that competitors who could
5 not keep up in the game of competition and fall
6 by the wayside are not entitled to compensation
7 for their losses thereby sustained. We have a
8 case here of exactly that.

9 The question before you in part, at least,
10 is going to be whether CEI has done anything to
11 subvert the competitive process or whether we
12 have competed as you and we and the evidence will
13 show you that term is best understood.

14 One of the things that is going to be
15 difficult, I think, to make distinctions about is
16 the statement that you heard from his Honor,
17 that Section 2 of the Sherman Act, which is what
18 we're dealing with here, says that one shall not
19 monopolize or have a monopoly, and at the same
20 breath, that not always is having a monopoly bad.

21 This is a case in which monopoly is not bad.
22 The CEI possesses a monopoly in the ordinary
23 dictionary sense of that word in most of the
24 1,700 square miles in the Northeastern Ohio and
25 in about 60 percent or 70 percent of the geographic

1 area of the City of Cleveland in the sense that
2 it is the exclusive supplier there.

3 I am not aware that there is any claim that
4 this monopoly position was achieved unlawfully and
5 it has not been.

6 The Court also indicated to you that one of
7 our defenses here is that this is a national
8 monopoly area. That is to say, that the
9 distribution of electric energy as the evidence
10 will show is characterized by such costs that it
11 is cheaper for one company to serve the entire
12 market than the combined cost of two companies
13 serving the same market.

14 Our defenses here involve two general
15 propositions.

16 One of them is that we're dealing with a
17 national monopoly market in which there are two
18 competitors and that the end result of such a
19 situation where the competitors truly compete is
20 that one of them shall fail, and that's exactly
21 what happened here.

22 The second principal defense that we have is,
23 as Mr. Norris suggested to you, mismanagement,
24 and you will hear an incredible tale of mismanagement.

25 At this point, perhaps, I should in view of the

1 national monopoly thing, you may recall that the
2 Court said to you that the statements of counsel
3 are not evidence unless they involve admissions.
4 Well, I have an admission to make which I have
5 reduced to writing in order that there may be no
6 doubt about it and I will read it to you.

7 CEI has in the past intended and attempted
8 to reduce or eliminate competition between it and
9 Muny Light by one or more of the following means:

10 One, acquisitions by purchase.

11 Two, agreement with Muny Light express or
12 implied to reduce or eliminate competition by
13 one or a combination of means such as; equalization
14 of rates to private customers, a mutual policy of
15 refraining from soliciting or expanding to serve
16 the other customers. In other words, a mutual
17 live and let live situation.

18 When competition could not be peacefully
19 reduced or eliminated, CEI competed as vigorously
20 as it could in the area in which there was
21 duplication of service with Muny Light and still
22 intends to do so.

23 In furtherance of this, either CEI sometimes
24 sought to avoid doing and, in any event, did not
25 wish to do things which would help Muny Light to

1 compete more effectively.

2 Pass that out.

3 And our position is that this was a proper
4 attitude for us to have, that we acted in
5 accordance with those principles, and we
6 confidently believe that when this case comes to
7 an end, you will so find.

8 Now, mismanagement -- let me outline to you
9 a bit of the evidence. Let us think for a minute
10 about what management is and what is expected of
11 a good manager.

12 Of a good manager I think is expected that
13 he will charge a price that is equal to his
14 cost, because if he doesn't, he's going to be out
15 of business pretty soon. I think we expect of
16 a good manager that they will plan. I think we
17 expect of a good manager that they will arrange
18 financing and that a good manager should not be
19 in business if he cannot finance the business
20 that he is in.

21 A good manager must do a lot of other things,
22 but let's start with those principal things that
23 Munny Light did none of.

24 For example, in the past 10 years Munny Light
25 has received in its revenues from its customers

1 in charges for its services slightly over
2 \$200 million, an average of \$20 million a year.
3 In the same period of time Muny Light has been
4 subsidized by the taxpayers of the City of
5 Cleveland for somewhat over \$30 million, an
6 average of \$3 million a year.

7 This, just by coincidence, happens to be
8 15 percent of their annual revenues, approximately
9 the difference between CEI rates and Muny rates
10 at their greatest differential.

11 The period has been characterized by a
12 repeated failure to increase their rates when their
13 costs dictated, and for very many years now --
14 in point of fact the evidence will show since
15 1964 -- Muny Light has not charged its customers
16 the cost of services, and that, among other
17 things, is why events have caught up with them.

18 If a fraction of the sum advanced over the
19 past 10 years to Muny Light by the taxpayers of
20 the City of Cleveland had been spent in doing some
21 of the things that needed to be done to Muny
22 Lights plant and in building their own
23 interconnections, as they should have done and
24 they had the opportunity to do, as the evidence,
25 will show, then they wouldn't be in the fix that

1 they are in today, and not only wouldn't they be
2 in the fix they are in today, but, quite frankly,
3 they might well have run CEI out of business in
4 the City of Cleveland.

5 Now, I think that you will perceive as you
6 list the evidence that one of the things that
7 the CEI people were fearful of was that the
8 City would begin to get some decent management
9 and would begin to take advantage of their
10 natural advantages.

11 They do not have to pay taxes. Now, please
12 don't misunderstand me. I'm not talking about a
13 question of fairness here. This is a question,
14 basically, of economics. Muny Light does not
15 pay property taxes. Muny Light does not pay
16 income taxes. Muny Light does not have to earn
17 a profit in the technical sense, although I don't
18 want to emphasize that because borrowing money
19 costs money for Muny Light just as well as it
20 does for any private enterprise, so we play that
21 down.

22 But, basically, in the period in which we are
23 talking about, 25 percent of every dollar which
24 CEI collected from its customers was paid for
25 taxes, and Muny Light there starts off with an

1 enormous advantage. And if Muny Light takes
2 advantage of its opportunities, took advantage of
3 the same opportunities that confronted CEI, and
4 we are going to show you the long history of
5 Muny Light since 1910, or whatever it is, and the
6 size of the enterprises was not all that different
7 way back when this competition started -- had
8 Muny Light taken advantage of its opportunities
9 along the way, believe me, CEI would not be in
10 business in the City of Cleveland today.

11 Now, for example, one of the exhibits that
12 Mr. Norris read to you from, Nos. 3054, which is
13 a 1959 internal memorandum -- and, by the way,
14 that and a few years earlier was when the
15 so-called Muny Conversion Program started, but I
16 will get to it in a moment, not 1963. Here is
17 what Mr. Fitzgerald says:

18 "In the area of developing load by
19 soliciting our customers, MELP has hired a number
20 of full time employees for this purpose and has
21 adopted what appears to be a more liberal policy
22 in offering additional service and equipment
23 without additional cost whether this is change of
24 MELP's former policy we have not been able to
25

1 accurately determine."

2 Part of the purpose of this memorandum was to
3 tell his manager they better get on the stick and
4 meet that competition.

5 Also in here, and very interestingly, they
6 were worrying about -- this is 1959, about the
7 time that the Power Authority of the State of
8 New York, the acronym of which is PASNY, as was
9 related to you, was getting started and there was
10 a project afoot then to bring PASNY power into
11 Ohio and other states and the project there was
12 for them to build their own transmission lines --
13 this memorandum notes on page 4, worries about
14 this, that Muny Light is going to go out and
15 build an interconnection and bring in hydropower
16 to it, and, believe me, if they had gone ahead
17 and done it, as they had plenty of recommendations
18 from consultants to do, again I suggest that the
19 likelihood of CEI being in business in
20 Cleveland is remote.

21 Now, there's going to be a good deal about
22 management and we are going to show you that not
23 only couldn't Muny Light manage its light plant,
24 it couldn't manage its water plant and sewers,
25 either, in areas in which CEI had nothing to do

1 accurately determine."

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3 tell his manager they better get on the stick and
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20 Cleveland is remote.

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22 management and we are going to show you that not
23 only couldn't Muny Light manage its light plant,
24 it couldn't manage its water plant and sewers,
25 either, in areas in which CEI had nothing to do

1 with.

2 In point of fact, as late as the last few
3 weeks, as splendid an administration as Mayor
4 Voinovich has -- and, believe me, we are all for
5 him and for what he is trying to do for
6 Cleveland; thank goodness we have him in place
7 and not a few others I can think of -- as good as
8 he is, he is not able to get the rate of the
9 Water Department up high enough to enable the
10 rating agency to give them a rating sufficient to
11 issue bonds for the improvements that are vitally
12 necessary for the water plant.

13 And this is the history of Muny Light. They
14 never were willing to increase their rates enough
15 to cover their costs.

16 And we will show you various items on this
17 management thing, and the question of their
18 management of their plant and whether they
19 repaired it or not or whether they were building a
20 plant they needed. For 35 years consultants --
21 Griffin-Hagen in 1937, Jones & McDonald in 1973,
22 the Citizens Commission in 1964, the Little
23 Hoover Commission in 1967, Peat, Marwick &
24 Mitchell in 1966 -- told them that the 53rd Street
25 plant was obsolete, needed to be replaced, and did

1 they pay any attention to them? No. They kept
2 running these plants. These were plants built in
3 1914, by the way. They ran them into the ground
4 and finally gave up the ghost early in the 1970's,
5 which is one reason why they were having problems.

6 Since the same period of time, consultant
7 after consultant told them that they were not
8 doing any long-range planning. Did they ever do
9 it? No.

10 Since 1947, consultants have been telling
11 them that their rates were too low, their
12 revenues were insufficient to do the things they
13 needed to do to stay in business. Paid no
14 attention to them.

15 Since 1961, according to the figures from
16 the compilation of the Federal Power Commission,
17 Muni Light, except in one year, was in the worse
18 financial shape of any municipal electric utility
19 in the United States.

20 Since 1947, consultants have been telling
21 them that their books were kept in such a way
22 that nobody could know what their financial
23 situation was.

24 Since 1947, their consultants have been telling
25 them that in the lower levels they were grossly

1 overstaffed. In their upper levels they had a
2 shortage of skills and technical ability. Was
3 that ever remedied until they got Mr. Pandy a
4 couple of years ago? No.

5 There will be considerable, believe me,
6 about this mismanagement, and it is very real and
7 it is because, believe me, the evidence will show
8 of the shape that Muny Light is in today.

9 And let me talk a little bit about natural
10 monopoly and get into some economic issues.

11 One of the characterizations of the electric
12 business is that it takes a very enormous
13 investment to provide service. In the areas that
14 we're talking about here, basically, it took
15 4 or 5 dollars of investment for every dollar of
16 revenue. Today, the cost of fuel has escalated
17 so drastically, thus affecting revenues that the
18 ratio is about \$3 and a quarter to every dollar
19 of revenue. But even so, it is far more than
20 any other industry in the United States.

21 For example, in the automobile industry it
22 takes about a dollar of investment for each two
23 dollars of revenue, contrasted with three dollars
24 of investment or three and a half of investment
25 for each dollar of revenue in the electric

1 business.

2 In the grocery business it takes only a
3 dollar of investment for each \$5 of revenue.

4 In the steel business, it takes \$2 of
5 investment for \$3 of revenue, and so on.

6 One of the very high cost ones is the
7 airlines, about \$1.20 of investment for each
8 dollar of revenue.

9 Now, the point of this is, of course, that
10 it costs a great deal of money to get into the
11 electric business and to stay in the electric
12 business, and this was one of Muny Light's
13 principal problems.

14 And by the way, I want to digress here to
15 make this point. You must not fall into the
16 error of differentiating between the City of
17 Cleveland and Muny Light, because unlike, the
18 evidence will show, almost every other city in
19 the country that has an electric plant of any
20 consequence, we don't have Muny Light run by an
21 independent commission who has no other
22 responsibility than running it.

23 Muny Light is an integral part of the City
24 of Cleveland Government. We have a Department of
25 Public Utilities with the Director of Public

1 Utilities, Mr. Richard {indicating} -- oh, he is
2 gone -- who reports to the Mayor. And the Board
3 of Directors, so to speak, of Muny Light and the
4 Water Department and Sewer Department and everything
5 else is the City Council rather than some
6 independent commission.

7 So, when we talk about Muny Light, we are
8 talking about the City of Cleveland just as if it
9 were the Police Department, Fire Department, or
10 the Water Department.

11 Now, to get back to this -- to the standpoint
12 of natural monopoly, the other characterization of
13 the electric business which is also different from
14 every other business that I know of, is that the
15 marketing of the product has to be physically
16 connected to the manufacture of the product.
17 There has to be a physical connection by a wire,
18 poles and whatnot between the generator that
19 generates the electric energy and the customer
20 or the house and the business that gets the power.
21 This is, I believe, different from every other
22 thing.

23 The automobile business, you can ship them
24 anywhere. Sure, you have to have some dealers
25 or you have to have a repair facility, but these

1 are relatively speaking very cheap and very easy
2 to move around.

3 This means that it is -- this adds, of
4 course, to the expense of the service, but it
5 also adds -- it also is the key to why this is a
6 natural monopoly situation.

7 Now, the Court pointed out to you, I believe,
8 that what we are talking about here is the
9 distribution of electric energy. So, the electric
10 business, just like any other business, you have
11 to make the stuff, you have to get it to the
12 customers and you have to sell it to the
13 customers.

14 We're talking about this portion of the
15 business where you sell it to the customers, the
16 distribution of electric energy, its sale at
17 retail.

18 Now, the Court said to you in his charge that
19 the characterization of a natural monopoly make
20 it inappropriate to apply the usual rules that
21 success in driving competitors from the market is
22 evidence of an illegal monopoly, and we think that
23 we did not drive them from the market, we think
24 they drove themselves from the market for all
25 practical purposes, but for the subsidization of

1 them by the taxpayers of the City of Cleveland.

2 But, whether we drove them out by competitive
3 activity or whether they drove themselves out of
4 the market, it is plain that they would have been
5 out of business probably by 1971, and certainly
6 by the middle of this period that we're talking
7 about here but for the subsidization of the
8 taxpayers of the City of Cleveland.

9 Now, let's talk about what a natural monopoly
10 is.

11 Now, the evidence will show this to you and
12 I wish to give you some illustrations other than
13 the electric business to show you what the evidence
14 will show as to why this is a natural monopoly
15 market.

16 Most of you, at least some of you on the jury
17 are old enough to remember, in practically every
18 city of any consequence in this country had
19 two newspapers. And those of you who are
20 observant about this thing today know that there
21 are very few places where there are two newspapers
22 any more. And the reason is that due to the
23 competition of other media rising over this last
24 30 or 40 years, TV, radio, what have you, there
25 simply is not enough business to support more

1 than one newspaper.

2 This is what is called a natural monopoly
3 market, because in the nature of things only one
4 can survive, and we have many, many instances of
5 two or more newspapers fighting it out to death,
6 so to speak, and one survives.

7 The same thing would be true if you can
8 imagine a situation in which somebody said that,
9 for example, in Fort Wayne -- frankly, I don't
10 know how big Fort Wayne is -- but suppose somebody
11 said that in Fort Wayne nobody can sell automobiles
12 that doesn't manufacture them in Fort Wayne.

13 I believe that everybody can appreciate that
14 there would only be one factory in Fort Wayne,
15 because the cost of making automobiles are such
16 that the two or more factories could not afford
17 to make them.

18 Or, stated in another way, if somebody came
19 in and built a big factory, he'd run the small
20 ones out of business as we all know what happened
21 in the last generation or two in the automobile
22 business itself. All you have to do is go down
23 to the auto museum in University Circle and see
24 the hundreds of makes they used to make as opposed
25 to the three or four companies at least in the

1 United States that exist now.

2 We have a similar situation in the electric
3 business, but it is a natural monopoly of a
4 slightly different kind.

5 We in CEI service exclusively in about
6 70 percent of the City of Cleveland, and the
7 other 30 percent, the business is not -- is almost
8 equally divided between CEI and Muny Light.

9 We have about 56 or -7 percent of the business,
10 we believe. The figures are not precise, but
11 they are approximately correct, the evidence will
12 show, and Muny Light services the rest of them.

13 Now, I would like to show you a couple of
14 exhibits as to illustrate what I'm about to say
15 to you.

16 Show them 1050, will you, Jim?

17 This is at St. Clair. It is on St. Clair near
18 186th Street, and you can see that the Municipal
19 Electric Light Plant and CEI have a pole line
20 side by side. I don't know who the street light
21 belongs to, but I suspect they belong to Muny
22 Light.

23 Now, it doesn't take an economist to show
24 you that one -- entirely apart from the visual
25 contact, that one pole line is enough.

1 Let's look at 1051. This is a little bit
2 different configuration. This happens to be on
3 West 56th and Clark Avenue, and they are not on
4 the same side of the street there. They
5 encumber both sides of the street.

6 Again, it doesn't take an economist to tell
7 you that one is enough.

8 Now, the Court mentioned to you next with
9 natural monopoly -- I'm not going to bore you
10 with any more of those pictures -- but if you
11 drive around the City of Cleveland very much,
12 you'll see it and you won't see the worst of it
13 because all through downtown Cleveland it is
14 underground and that is the most expensive of all.

15 Now, one of the things the Court mentioned
16 to you next with defining natural monopoly was
17 the economy of scale. The more you make of a
18 product with a given investment, the cheaper it is.
19 And you can think of many illustrations of this in
20 ordinary life.

21 In the electric business, one pole line is
22 enough, one set of transformers is enough, and
23 having put one pole line down, one set of
24 transformers and one -- what do you call them --
25 the drops to the individual houses or businesses,

1 the more each individual customer uses, the
2 cheaper it becomes to serve them. That's the
3 reason we have the declining rate phenomenon in
4 the electric business because -- by the way,
5 electric rates are based strictly on costs, as
6 the evidence will show. You may not like what
7 the costs are, but that's what they are based on.

8 Now, I want to mention one other thing. In
9 addition to the fact that you have to have
10 duplicate facilities of this kind, you might say
11 well, since CEI serves only half of them and
12 Muny Light serves only half of them, maybe they
13 don't quite have to have double facilities.

14 Well, this is right, they don't quite have
15 to have, except this for going to compete you
16 have to stand ready to serve, and the absence of
17 competition and the situation in most of the
18 competitive area is that either of these two
19 utilities say to you if you are there we will
20 serve you if you will take from us.

21 You have to stand ready to serve the customers
22 that you don't serve, and I assure that the
23 evidence will show that the extra costs involved
24 here are enormous.

25 Now, the evidence will show that it is

1 standard economic feeling that in a natural
2 monopoly market where you have these economies
3 of scale, if the parties truly compete, then one
4 is bound to go out of business. Usually the one
5 that is underfinanced, but one of them will go out
6 of business. Sometimes they beat each other to
7 death and both of them go out of business, but
8 ordinarily it is just one.

9 Now, this being so, we have to explain to you
10 why it is, if this is so, that CEI and Muni Light
11 have been in competition for 70 years. 70 years
12 seems long enough to iron out this differential
13 and believe me, it is.

14 I assure you that the electric business where
15 there is a very heavy investment, where it is
16 fixed facilities, these competitive relationships
17 and changes do not happen overnight, they take a
18 fair amount of time to happen, but 70 years I think
19 we can all agree ought to be long enough.

20 The fact of the matter is that what it took
21 here -- and we will have evidence that explains
22 to you in detail why they are here after 70 years --
23 but the evidence will show that the process, the
24 actual competitive process which results in the
25 de facto bankruptcy of the Municipal Plant in the

1 early '70's began in the late 1950's, and that
2 is the period of time which it took.

3 Now, why we have given a great deal of
4 attention -- because of the necessities in
5 explaining this -- to the history of Muny Light
6 and CEI and their competitive relationship. And
7 this study was conducted by Mr. Lindseth, a
8 gentleman now 79 years old who was the Chief
9 Executuve of CEI for 22 years and lived
10 through and worked for them for a much longer
11 time and lived through much of this period.

12 Much of it he knows from personal experience.

13 The rest of it he has analyzed the records in the
14 years prior to the lifetime of all of us and we
15 have a pretty good history and explanation of the
16 relationship, and this is shown in an exhibit
17 which he prepared which was introduced into
18 evidence as Plaintiff's Exhibit 3106, and you
19 will have a chance to see that at some time.

20 Now, let's show 1037, Exhibit 1037, Jim.

21 As Mr. Norris indicated to you, the Muny
22 Light began with the acquisition by the City of
23 Cleveland -- the annexation by the City of
24 Cleveland of the Village of Collinwood up in the
25 northeast and the Village of South Brooklyn in the

1 southeast.

2 If you look at the 1910 map, 1910 was when
3 South Brooklyn came in -- pardon me -- was when
4 Collinwood came in. South Brooklyn came in 1905
5 or -6.

6 The green area is the area of the boundaries
7 of the City of Cleveland at that time. The
8 black outline of the boundaries today.

9 The red areas are the then Villages of
10 Collinwood and South Brooklyn, and the lines up
11 from the South Brooklyn area indicate construction
12 initiated by then Mayor Tom L. Johnson, immediately
13 upon the acquisition of the municipality of
14 South Brooklyn.

15 Okay. At that time CEI served throughout the
16 City of Cleveland and its environs. At that
17 time there weren't many environs around the City
18 of Cleveland and, moreover, this was, believe it
19 or not, in the early days of electric energy and
20 a very substantial number of residences and
21 business in the City of Cleveland were not wired
22 for electric energy. For all practical purposes,
23 the electric energy began in Cleveland at about
24 1890, so it had only been around for about 20
25 years. And this, basically, was the period when

1 it took off, so to speak. People began to realize
2 they had to have it, and so on.

3 Now, at this time this was before there was
4 any regulation of the electric business and, as
5 Mr. Norris stated to you, CEI's top rate was
6 10 cents a kilowatt hour. That seemed very high
7 then. It doesn't seem quite so high any more,
8 today. The average rate, by the way, was about
9 5-1/2 cents. 10 cents was the initial, but
10 about 5-1/2 cents was average.

11 And Mr. Johnson, those of you who read your
12 history know he was a very active and aggressive
13 Mayor for Cleveland. His statue is out on Public
14 Square in the southwest quadrant -- northwest
15 quadrant, seated in a chair. He was very
16 active in promoting public ownership of public
17 utilities and he was aggressively pursuing the
18 streetcar business with 3 cent fares.

19 And as soon as he acquired these two little
20 plants, he advertised that he was going to bring
21 the City of Cleveland 3 cent electric energy
22 and, by golly, he did and, by golly, it brought
23 the CEI rate down in those days prior to
24 regulation.

25 By the way, CEI then did not serve in those

1 two red areas and, except around the periphery,
2 they still don't serve in those two areas. Muny
3 Light is the exclusive service area except
4 around where CEI has intruded in the peripheries
5 in those two areas.

6 Now, immediately after this the bond issue
7 of \$2 million was submitted to the people of the
8 City of Cleveland in the year 1911 for the purpose
9 of building a light plant, and, parenthetically,
10 1911 happens to be the year in which regulation
11 of the electric utilities and other utilities was
12 established by the State of Ohio. But, in any
13 event, the people passed the bond issue and they
14 built a new plant and it started business in 1914.

15 Now, we are going to show you the history of
16 this business, and this history divides itself
17 naturally into three eras. 1914 to 1937. And
18 we will show you some evidence in a minute of a
19 very aggressive and rapid expansion of Muny Light
20 and the expansion of CEI. 1937 to 1958. In the
21 1930's some of you may remember -- one gentleman
22 I see here does, with me -- the Great Depression,
23 and the people of the City of Cleveland refused to
24 approve any bond issues that year and it stopped
25 the growth of Muny Light.

1 Then we have a period 1937 to 1958. We
2 call this the "live-and-let-live period." In this
3 era they really didn't compete. Muny didn't try
4 to take CEI's customers; CEI didn't try to take
5 Muny Light's customers; and they got along without
6 fussing, without any fights so far as I know,
7 and the business of each, from the standpoint of
8 number of customers served, remained approximately
9 static.

10 Then beginning in about 1958 or 1957, with the
11 advent into the public utilities office of the
12 very aggressive -- and very able man, by the way --
13 named Klementowicz, Muny Light's increasing
14 profitability -- and it was becoming increasingly
15 profitable -- Muny Light began an aggressive
16 campaign. Remember I read to you from that
17 exhibit about 1959 about them hiring people to
18 solicit customers, and so on? And from that
19 point to the present day we have had a very
20 aggressive, competitive row between CEI and
21 Muny Light.

22 What happened in the early years? Let me
23 show you Exhibit 1210.

24 There was a very able engineer that worked
25 for Muny Light a long period of time.