
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

9-1-1981

Volume 24 (Part 1)

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

Follow this and additional works at: <https://scholarlycommons.law.case.edu/clevelandcei>

 Part of the [Antitrust and Trade Regulation Commons](#), and the [Litigation Commons](#)

Recommended Citation

District Court of the United States for the Northern District of Ohio, Eastern Division, "Volume 24 (Part 1)" (1981). *City of Cleveland v. The Cleveland Illuminating Company, 1980*. 92.
<https://scholarlycommons.law.case.edu/clevelandcei/92>

This Book is brought to you for free and open access by the Transcripts at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in City of Cleveland v. The Cleveland Illuminating Company, 1980 by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

Transcript

Tuesday, September 1, 1981



C 60-13

KF
228
. C43
1980

1 TUESDAY, SEPTEMBER 1, 1981; 1:45 O'CLOCK P.M.

2
3 THE COURT: You may proceed.

4 MR. NORRIS: Call Mayor George
5 Voinovich.

6
7
8 G E O R G E V O I N O V I C H,

9 a witness called on behalf of the City, being
0 first duly sworn, was examined and testified
1 as follows:

2
3 THE COURT: You may proceed,
4 Mr. Norris.

5
6 DIRECT EXAMINATION OF GEORGE VOINOVICH

7
8 BY MR. NORRIS:

9 Q Please state your name.

0 A George Voinovich.

1 Q And your address?

2 A 17820 Rosecliff Road.

3 Q And you are the Mayor of the City of Cleveland?

4 A Yes.

5 Q How long have you served in that capacity?

Voinovich - direct

A Approximately two years.

MR. NORRIS: I can't hear you
very well.

{Short pause.}

MR. NORRIS: Thank you.

THE WITNESS: Can you hear me now?

MR. NORRIS: Yes. Thank you.

Mayor.

BY MR. NORRIS:

Q Prior to becoming Mayor of the City of Cleveland, what public office did you hold?

A I was Lieutenant Governor of the State of Ohio for approximately one year. I was a member of the Board of County Commissioners in Cuyahoga County for two years. I was the County Auditor for five years and prior to that I served for five years in the State Legislature. And before that I was an Assistant Attorney General.

Q Mr. Mayor, what are your duties as Mayor of the City of Cleveland?

A The Mayor of the City is the Chief Executive Officer of the City and, as a result, has the responsibility of providing the services that are provided for in the charter and the ordinances of the City of Cleveland.

1 Voinovich - direct

2 Q What are the lines of authority within the executive
3 branch of the city government for the operation of
4 Muny Light?

5 A Well, I think the best way to explain it is you have
6 the Mayor and then we have the Director of Public
7 Utilities and then the Director of Public Utilities
8 has a Commissioner and that Commissioner is, in
9 effect, the Chief Executive Officer of the Muny Light
10 Plant.

11 Q And in your administration, Mayor Voinovich, how is
12 Muny Light actually run?

13 A Well, fundamentally, the job, everyday responsibilities
14 are in the hands of the Commissioner and Muny Light has
15 a separate budget.

16 It's like any other business. We have customers,
17 we have expenses, and it is what we refer to in this
18 city as an enterprise. It's a business. It's one of
19 four businesses that we have.

20 Q And is the Muny Light Fund a separate thing from the
21 General Fund of the City?

22 A Yes.

23 Q Is the Muny Light Fund a separate thing from the
24 Water Division Fund and the Sewer Division Fund?

25 A Yes; and the other one is the Airport Fund, and that

1 Voinovich - direct

2 was a separate budget.

3 Q Would you please identify the Mayor's Task Force for
4 the jury.

5 A Well, it is actually called the Mayor's Operations
6 Improvement Task Force, and when I came in as Mayor of
7 the City of Cleveland, one of the things that I wanted
8 to do was to identify the problems that we had in
9 the City and to attempt to identify solutions so
10 that we would have something to work on during our
11 tenure as the Mayor, and what we did is ask the
12 Cleveland Foundation and another foundation to come
13 up with a quarter of a million dollars of money to
14 help pay for a consulting outfit to come into
15 Cleveland, and that consulting team acted as a
16 coordinator, and through their help and through the
17 help of our business and private agency community,
18 we were able to get 88 executives to come into the
19 City of Cleveland and to review every phase of the
20 operation of the City of Cleveland.

21 The idea was that these people were seasoned
22 business people and experienced and had the
23 capability of going through our various departments
24 and reviewing them and analyzing them and identifying
25 the problems and recommending solutions to the problems

Voinovich - direct

that they perceived, and in some instances suggesting personnel changes that should be made to improve the operation of the City Government.

Q Did this analysis go over the full range of all city services?

A It included the entire City of Cleveland, yes.

Q And were there recommendations made to you as Mayor as a result of this report, as a result of this study?

A Yes, there were.

I think there were approximately 650 recommendations that were made to me by the Task Force.

Q Now, did the Task Force make any recommendations to you with respect to Muny Light in particular?

A Yes, they did.

I think they made some 18 recommendations in regard to Muny Light.

Q And what did you do with respect to those recommendations, Mayor?

A Well, as we did with many of the other recommendations, or all of the other recommendations that they made, we came in contact with the individuals that were in charge of the various departments, and in this case

1 Voinovich - direct

2 it was Muny Light with Mr. Pandy, who is the
3 Commissioner, and we urged him in a very nice way
4 to implement the recommendations.

5 Q Now, did you accept all the recommendations made by
6 the Task Force?

7 A I think just about all of them except for two of the
8 recommendations, and very frankly we are sort of
9 holding those in abeyance.

10 One of them deals with the creation of a special
11 board that would more or less be responsible for
12 the operation of Muny Light, and the other dealt
13 with the sale of our plant on Lake Road, the
14 Lake Shore Boulevard plant.

15 Q And those last two recommendations that you have
16 described; those have not been accepted; is that
17 correct?

18 A Well, we were just not doing anything about them right
19 now.

20 Q Mr. Mayor, would you please briefly describe what
21 you have done during your administration with
22 respect to the operation of Muny Light?

23 A Well, I think the most important thing that I did was
24 to put together a screening committee of individuals
25 that would aid me in trying to find the most

Voinovich - direct

1
2
3
4
5
6
7
8
9
10
competent individual that we could find to become
the Commissioner for the Municipal Light Plant, and
we had a search nationwide for someone I thought
would be a good manager of the Municipal Light
Plant, and we came up with Mr. Pandy who, in my
opinion, is extremely qualified. He is a mechanical
engineer and has had a career in business administration,
and he has had extensive experience in the public
power business.

11
12
13
14
15
In addition to that, we were actively involved in
negotiating with the Public Authority of the State
of New York. They call it PASNY. And that was to
obtain for the City of Cleveland cheap power that is
generated up at Niagara Falls.

16
17
18
19
20
21
22
In addition to that, we also were personally
involved in negotiations with the Buckeye Power &
Light Company. It is a rural electric company, and
that was for the purchase of energy for them, so
that, whereas, when I came in as Mayor of the City
of Cleveland, we were dependent 100 percent upon the
Cleveland Electric Illuminating Company.

23
24
25
With PASNY power and with Buckeye power today,
we are only relying on CEI for approximately 55
percent of our power.

Voinovich - direct

The PASNY power is, I believe, half of the cost of the CEI power.

MR. LANSDALE: I object. May I approach the bench?

THE COURT: Yes.

{The following proceedings were had at the bench:}

MR. LANSDALE: I have two objections, if your Honor please.

The question was a very simple question and a short one, and he is now far removed from the question itself in discussing comparative costs of power. He was asked what he did.

Secondly, I object to the relevance of this entire line of interrogation.

I had refrained from objecting in the beginning on the theory that we would only have a little bit, but it is going on in detail.

What the Mayor is doing now, and what steps are being taken with respect to Muny Light at the present time, I submit that it is irrelevant to this case.

MR. NORRIS: I would agree with

1 Voinovich - direct

2 counsel that the answer is more fulsome than I
3 had asked. I asked exactly what he did, but I
4 do know he was personally involved in those
5 negotiations.

6 The relevance of what he did, however, is,
7 as I stated previously, that what this man has
8 done in his administration and the policies
9 that he has established with respect to the City
10 staying in the municipal light business is
11 relevant to the damage case, and I do not want to
12 get him into speculating what the cost
13 differentials are.

14 THE COURT: He is permitted to
15 testify. Hayes vs. Solomon sets for the
16 principles that he would be able to testify what
17 he did when he became Mayor, and the plans and
18 projections that he has undertaken to insure
19 that Munc Light is going to be a continuing
20 entity.

21 You are free to cross-examine him, Mr.
22 Lansdale.

23 He is permitted to testify, but of course
24 he has gone beyond the question.

25 MR. NORRIS: I will put another

Voinovich - direct

question.

{End of bench conference.}

- - - - -

THE COURT: Mr. Mayor, please
listen to the question and respond to the
question.

THE WITNESS: Okay.

BY MR. NORRIS:

Q Mr. Mayor, in addition to securing professional
management and obtaining PASNY power and Buckeye power,
what else have you done during your administration
with respect to the operation of Muny Light?

A Well, we immediately began the plans and now have
underway the second interconnect that I thought was
necessary based on recommendations from Mr. Pandy and
the Operation-Improving Task Force.

Q Now, that interconnection between Muny Light and CEI,
is that what you are referring to?

A That's correct.

Q Anything else, Mayor?

A Yes, of course, an implementation of the Task Force
recommendations. And I think the only other thing
is the current effort to get resource recovery plant
to generate steam so we could start to generate power

Voinovich - direct

again.

Q Mr. Mayor, what commitment has your administration made with respect to Muny Light staying in the electric power business?

A We have a full commitment to the Municipal Power System. I think that it is one of the best economic development tools that the City of Cleveland has available to it and, therefore, it has very high priority in this administration.

Q What policy have you established concerning the use of any damages which might be awarded in this case?

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

THE COURT: Sustain the objection.

MR. NORRIS: Pardon me?

THE COURT: Sustain the objection.

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

THE COURT: Sure.

{The following proceedings were had at the bench:}

Voinovich - direct

THE COURT: This is a very prejudicial question. Place your reasons on the record.

MR. NORRIS: Your Honor, --

THE COURT: Let him place his reasons on the record.

MR. LANSDALE: I object to trying to sell this jury on the fact that by awarding damages it will contribute to the betterment of the City of Cleveland and the improvement of the Light Plant, and so on.

This is an extremely prejudicial question. I have to ask for an instruction to the jury on it.

MR. NORRIS: Your Honor, the reason for the question is that Mr. Lansdale has made an issue out of the discount rate versus the interest rate and if I am not permitted to have the witness state what his policies are with respect to any damages that would come out of this case, I want to put an offer of proof on the record as to what his testimony would be if he were permitted to testify.

THE COURT: What he plans to do

1 Voinovich - direct

2 with the money has nothing whatsoever to do with
3 the theory of the damage.

4 THE COURT: That approaches a
5 mistrial question.

6 MR. LANSDALE: It sure does.

7 MR. NORRIS: Well, your Honor,
8 the suggestions Mr. Lansdale has been making to
9 the jury that the rate of interest of Treasury
10 bills is the proper discount rate for measuring
11 damages is the reason that I have asked this
12 question because the City -- and the Mayor would
13 so testify that the renovation of the Muny Light
14 Plant, pumping money into the substations, the
15 transmission, the distribution, the gas turbines,
16 vehicles and equipment on the order of \$45 million
17 and \$65 million is what he has established with
18 the recommendation of his Director and his
19 Commissioner as to the uses that would be made of
20 this money and this is further -- the reason it is
21 relevant to the discount rate is that if the
22 City were going to be putting the money into the
23 market in an effort to try to generate the
24 maximum recovery from those funds, that would
25 support Mr. Lansdale's argument that the Treasury

Voinovich - direct

bill interest rate is the appropriate discount factor.

THE COURT: And you can bring in testimony to show that it is not.

Let's proceed.

{End of-bench conference.}

THE COURT: Sustain the objection, ladies and gentlemen. Please disregard the question.

BY MR. NORRIS:

Q Mr. Mayor, have you ordered any economic feasibility studies of what would be involved in getting Muny Light back into generation?

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

THE COURT: Overruled.

A No, we have not.

Q Mr. Mayor, what priorities do you assign to Muny Light getting back into the generating business?

A High priority.

Q Are there any higher priorities with respect to Muny Light that you have established as Mayor?

A I think that the main emphasis needs to be made on

Voinovich - direct

improving our distribution transmission and I would, quite frankly, like to see it expand its market.

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

THE COURT: Yes.

{The following proceedings were had at the bench:}

MR. NORRIS: I understand that the Court has ruled that I may not elicit testimony with respect to the votes of the people with respect to retaining Muny Light and not selling Muny Light, and I wanted to make an offer of proof on the record that, absent the Court's ruling, I would ask the Mayor what has influenced the determination of the policies that he's arrived at as Mayor of the City of Cleveland, and the Mayor would testify that the votes of the people with respect to Muny Light have played an important part because they have made it very clear that they want the Muny Light Plant retained and that he, as Mayor, not only follows his own conscience and his own judgment as to how to run the City but he also attempts to follow

1 Voinovich - direct

2 the will of the people as expressed at the
3 ballot box.

4 THE COURT: Are you also going
5 to proffer that they voted down two bond issues
6 to support it?

7 MR. NORRIS: That was back in the
8 1930's.

9 THE COURT: No, that was in the
10 1970's, as I recall.

11 MR. NORRIS: But I am correct that
12 the Court has so ruled?

13 THE COURT: Yes.

14 {End of bench conference.}

15
16 MR. NORRIS: No further questions.

17 THE COURT: Cross-examination.
18
19
20
21
22

23 CROSS-EXAMINATION OF GEORGE VOINOVICH

24 BY MR. LANSDALE:

25 Q Mr. Mayor, you mentioned a Task Force report and that
you are generally in accord with all of the
recommendations except two which you named, that is

1 Voinovich - cross

2 to say, the sale of certain properties and the
3 creation of a special board to manage the plant?

4 A Excuse me, Mr. Lansdale. I said we acted on most of
5 them but for those two. I didn't specifically say
6 what position I took in regard to those two.

7 Q All right. I wasn't attempting to dwell upon your
8 position with respect to those two. I was trying to
9 verify my understanding that you accepted or were in
10 accord with the other recommendations other than
11 those two.

12 Is that the purport of your testimony?

13 A Yes. It's my understanding that we have gone forward
14 with the implementation of, I think, 16 of the 18
15 recommendations.

16 Q 16 out of the 18.

17 Then Recommendation 440 is one I wish to devote
18 your attention to and since you probably don't have
19 that in mind, perhaps we should show you that one.

20 {The exhibit was placed before the witness.}

21 Q That's CEI Exhibit 1141 which happens to be the portion
22 of the Mayor's Task Force Report dealing with Muny
23 Light, and I am inviting your attention to No. 440
24 which is on page 148, the pages being at the bottom
25 of the page.

Voinovich - cross

A Yes, that's right.

Q And you concur in that recommendation, do you?

A I concur in it and from what Mr. Pandy tells me, the company you represent has been contacted in regard to moving forward on this recommendation.

Q So that people may know what I am talking about, I will read this to you, Mayor.

MR. NORRIS: Object, your Honor.
Objection.

THE COURT: Approach the bench.

{The following proceedings were had at the bench:}

MR. NORRIS: The exhibit can speak for itself. I don't think that it needs extra emphasis by having Mr. Lansdale read it. He's already answered the question in respect to that.

THE COURT: If my recollection serves me correctly, Mr. Lansdale, this is the very type of thing you were objecting to when Mr. Norris was doing it. You are free to cross-examine him on the contents of it.

MR. LANSDALE: I will just ask the Mayor what it says. It's all right with me.

1 Voinovich - cross

2 THE COURT: Sustain the objection.

3 {End of bench conference.}

4 - - - - -

5 THE COURT: Sustain the objection

6 as to form, not as to substance.

7 BY MR. LANSDALE:

8 Q Mr. Mayor, it is then the policy of your
9 administration of the Muny Light, is it, to avoid the
10 cost of duplication of service as between Muny Light
11 and CEI in the service particularly of residential and
12 small commercial users?

13 A I think that the policy is that where it is mutually
14 advantageous to both CEI and to Municipal Light that
15 they should both try to do what they can to cut
16 costs.

17 Q And would you agree that costs are cut when
18 duplication is avoided?

19 A Yes. But you also know that duplication in many
20 instances is fundamental to competition, Mr. Lansdale.

21 Q Mr. Mayor, I don't see how you can have competition,
22 in the electric business at least, without having
23 duplication, can you?

24 A It's necessarily so, but that doesn't mean there
25 aren't ways that both the competitors in some

1 Voinovich - cross

2 instances can work together.

3 Q And you agree, however, that twice as many poles down
4 the street as need be is an extra cost?

5 A Yes. But sometimes that's necessary, Mr. Lansdale,
6 for competition.

7 Q My question was not whether it was necessary for
8 competition but whether you agreed it resulted in
9 extra cost to both parties.

10 A I think that's right.

11 Q Thank you. Now, Mr. Mayor, you discussed the
12 business program that you have ordered for Muny Light
13 and do I gather from your testimony that it is your
14 intention that Muny Light shall be operated as a
15 self-sustaining business?

16 A Yes, it is my intention that it be operated as a
17 self-sustaining business, but I think it is of such
18 great value to the City of Cleveland that, as you well
19 know, advances have to be made of Muny Light in order
20 to provide for its survival during a very difficult
21 period of time.

22 Q Well, yes, sir, and I am not really referring to the
23 thirty-four odd million dollars that had been
24 advanced to Muny Light in the past.

25 I am asking you about your policies for the

1 Voinovich - cross

2 future, Mr. Mayor.

3 A Yes.

4 Q -- that Muny Light -- Is it your intent that Muny
5 Light shall pay for out of revenues all of the costs
6 of supplying customers with electric service?

7 A -- No, it is not my intention to do that.

8 Q Then, you do have an intention that the City, from
9 other funds, shall bear part of the cost of supplying
10 electric energy?

11 A From other funds I expect to make major capital
12 improvements for the Municipal Light Plant to the
13 tune, in the next ten years, of \$45 million, so we
14 can do a better job of competing.

15 Q Mr. Mayor, advancing capital funds, of course, does
16 not necessarily mean that you do not impose all the
17 costs of supplying service on the revenues of the
18 system, does it?

19 A Would you repeat that question.

20 {Question read by the reporter.}

21 A I don't understand the question.

22 Q Let me put it to you this way, Mr. Mayor:

23 Suppose capital funds are borrowed in order to
24 build something for Muny Light, additional
25 transmission and distribution that you mentioned, for

1 Voinovich - cross

2 example, and under ordinary business principles I
3 believe that the business, for the purposes for
4 which that investment is made, will pay out of
5 revenues from the business, interest on the money,
6 plus the amortization or the annual payments
7 necessary to eradicate the debt?

8
9 A You are getting to me there.

10 There are two ways that it can be done: One is
11 an outright grant of, in this case \$45 million, that
12 could be made to the Municipal Light Plant from the
13 General Fund of the City of Cleveland, which is
14 permissible under current law and the ordinances of
15 the City.

16 The other way would be to borrow \$45 million
17 and amortize the cost of the borrowing by the
18 customers picking up that cost and by increasing
19 their rates to pay off that money.

20 Q And whether that money is advanced by revenue
21 borrowing, as we have heard here, or the general
22 obligation borrowing of the City of Cleveland, or
23 simply taken out of the City till and handed to Muny
24 Light, the money still has to be repaid by somebody,
25 doesn't it?

A Not necessarily, Mr. Lansdale.

1 Voinovich - cross

2 It depends on what pot you expect to find the
3 money to make the improvements.

4 Q Mr. Mayor, I am continually astonished at the number
5 of times in this case that we meet with the suggestion
6 that money can be found without somebody paying for
7 it.

8 A In this case I hope you pay for it when we win this
9 lawsuit.

10 MR. LANSDALE: If your Honor
11 please --

12 THE COURT: Mr. Mayor, please
13 listen to the question and answer the question.

14 The jury will disregard that answer. I
15 don't want to have problems here. Ask your
16 question and give your answer, and keep this
17 material.

18 Q Mr. Mayor, if you take \$45 million of the City's
19 money -- withdraw that.

20 Where does the City get its money, Mr. Mayor, if
21 you know?

22 A It gets its money from the taxpayers of the City of
23 Cleveland and others that pay into the General Fund
24 of the City of Cleveland.

25 Q All right, sir.

1 Voinovich - cross

2 Now, let's suppose that you collect \$45 million
3 from the taxpayers of the City of Cleveland, and you
4 advance that money to Muny Light, are you saying that
5 that money doesn't cost the City anything or the
6 taxpayers?

7 A Well, it could cost -- well, are you referring to
8 dollars and cents now, or are you talking about in
9 terms of not being able to do other things with the
10 money that is available, and it is a question of
11 priorities.

12 Q Let me give a few examples:

13 One thing the City could do with that money is
14 to do what I hope you understand it does with idle
15 funds, that it could invest that money in securities,
16 could it not?

17 A Yes, it could.

18 Q And you understand that your Treasurer and your
19 Finance Director do exactly this with respect to the
20 monies they have in the bank or on hand from time to
21 time that are not immediately needed; you understand
22 that?

23 A Absolutely. Any prudent Treasurer would do that.

24 Q Yes; and this is paying you on the order of 15 or 16
25 percent return per annum at the present time?

Voinovich - cross

A I would hope more than that.

Q All right; and if you take \$45 million out of that pot and give it to Muny Light or anybody else, you immediately lose those earnings, do you not?

A That is assuming that it comes from the money that is sitting in the bank.

Q Certainly, assuming it does, and I am taking this step by step.

Assuming that it does, and that is a cost, isn't it, in the ordinary significance of the term?

A Mr. Lansdale --

Q Well --

THE COURT:

Just a moment. Don't

interrupt him.

A {Continuing} The General Fund money comes in, and a policy decision is made where that money is allocated; and when you allocate that money, if I follow the example you are using, we could take \$45 million and decide over a ten-year period to put it into the Municipal Light Plant.

Now, that would result in one of two things happening:

Number one, it would mean that the money would not be used for other services that the City of

1 Voinovich - cross

2 Cleveland could generate, or in the alternative,
3 following your example, it would mean that money would
4 not be available in the bank to generate interest for
5 the City of Cleveland.

6 So there are two alternatives that are available
7 with that.

8 Q I would assume, Mr. Mayor, that there is more than
9 two alternatives of what you can do with tax money.

10 But let me ask you this, and I am trying to cut
11 this short, and if I cannot, we will take it step by
12 step.

13 Is it not the fact that whatever you do with this
14 money, whether it is to pay policemen, or whether it
15 is to build a fire station, or whether it is to pass
16 it to Munny Light for its business, that you expect to
17 derive a benefit from that?

18 A You bet.

19 Q And you expect to derive a benefit which is greater
20 than or at least as great as any alternative use of
21 the money?

22 A Well, what you try to do is to take and expend your
23 money in the most significant way that you can, and
24 of course you get into the question of priorities,
25 where are you going to put your dollars.

Voinovich - cross

Q Certainly, you get into priorities.

Now, if you transfer \$45 million to Muny Light and Muny Light does not pay the general fund of the City of Cleveland, if that is where it came from, the worth of that money, plus the return of the capital funds involved, then the customers of Muny Light are not paying the full cost of their service, are they?

A You see, what you are assuming is --

THE COURT: Just a minute.

Listen to the question, and if you don't understand, I will have it rephrased. If you do understand, answer the question.

A Well --

THE COURT: Just a moment.

Read the question back.

{Question read by the reporter.}

THE COURT: Do you understand the question?

A Yes; that is right.

Q Thank you.

And it is your intention, Mr. Mayor, that the customers of Muny Light pay the full cost of providing electrical energy to them, aren't you?

A But no capital costs that are going to be needed to

Voinovich - cross

put into that plant during the next ten years.

Q You are saying that you do not expect the customer of Muny Light to pay the costs of the capital involved in providing the additions to the plant over the next ten years; is that what you are saying?

THE WITNESS: Your Honor, you reprimanded me about what I said before, and I am not going to repeat that because you already reprimanded me.

THE COURT: Just a moment.

Mr. Lansdale, approach the bench.

[The following proceedings were had at the bench:]

THE COURT: That was a self-serving statement.

You know, you are bordering on a mistrial, and if you people want a mistrial, you may very well have it, and he is trying to get into this trial a self-serving declaration.

You may have created error, but I don't know how the verdict will be, and Mr. Lansdale, let me tell you something, you asked for it. It was so obvious that this was the answer that was going

1 Voinovich - cross

2 to come.

3 Now, let's get on and proceed in the proper
4 manner. It was quite obvious.

5 If you people want a mistrial, fine, I don't
6 care.

7 {End of bench conference.}

8
9 THE COURT: Mr. Mayor, listen to
10 the question and kindly respond to the question.
11 If you don't understand the question, indicate,
12 and I will have it rephrased or read back.

13 Let's proceed.

14 MR. LANSDALE: I have no further
15 question.

16 THE COURT: All right. Redirect.

17 MR. NORRIS: No questions.

18 THE COURT: Thank you, Mr. Mayor.
19 You may step down.

20 Call your next witness, please.

21 MR. NORRIS: We call Joseph
22 Banas.

23
24
25

J O S E P H B A N A S,

having been called as a witness on behalf of
the plaintiff, after having been duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION OF JOSEPH BANAS

BY MR. NORRIS:

Q Would you please state your full name.

A My name is Joseph Banas.

Q What is your address, Mr. Banas?

A I live at 5850 Graydon Drive, in Seven Hills.

Q For whom are you currently employed?

A Pleasantly I am employed by the Cleveland Metropolitan
General Hospital at the Sunny Acres Division.

Q Have you ever been employed by the Clark Control
Company?

A Yes, I have.

Q And during what period of time were you with Clark
Control?

A From April of 1972 to August of 1979.

Q And at what business location were you working for
Clark Control?

A The plant was located at 1146 East 152nd Street.

Q What were your duties there?

1 Banas - direct

2 A I was the Director of Plant Engineering and
3 Maintenance.

4 Q What kind of a business was Clark Control?

5 A Clark Control was in the business of fabricating
6 control panels for industry.

7 Q Would you tell the jury generally what your duties
8 were as Plant Engineer?

9 A As Plant Engineer, as you may know, I am primarily
10 responsible for the mechanical and electrical upkeep
11 of all of the equipment and all the buildings, and
12 assure the utility supply to the plant to keep
13 production rolling, and by utility supply I mean gas,
14 water, and electric.

15 Q Who was the supplier of electricity to Clark Control
16 during your time as Plant Engineer?

17 A The Cleveland Electric Illuminating Company.

18 Q And during your time with Clark did you ever have a
19 problem with CEI?

20 A Yes, I did, on one occasion.

21 Q And approximately what period of time are you
22 referring to?

23 A This was in December of 1972.

24 Q And what was the nature of the problem that you had
25 with CEI?

Banas - direct

1
2 A I was attempting to get CEI to combine our two
3 electric meters that we had in the plant.

4 We had a single-service entrance, but I had two
5 electric meters, one for Plant 3 and 4 and one for
6 Plants 1 and 2, and I didn't agree with this because
7 it was costing the plant \$7,200 a year for which we
8 received nothing in return.

9 Q Why was it more expensive to have service through two
0 meters than the same amount of service through one
1 meter?

2 A Well, CEI said they were not set up to run it through
3 one meter unless they put in special switch gear,
4 and of course I believe that is true, there is no
5 argument there, but that wasn't my problem.

6 CEI was in the business of providing power and
7 providing switch gear, and we were the user, and we
8 were paying for everything, so we felt that we should
9 have it.

0 Q Whom did you deal with, Mr. Banas, at CEI?

1 A I dealt with our electrical representative, Mr. Ben
2 DePompey.

3 Q Specifically what request did you make of CEI about
4 this problem?

5 A I asked that he go to his people and I requested that

1 Banas - direct

2 they combine our two meters into one similar to our
3 Minnesota plant which had combined meter billing,
4 and their meters were almost a third of a mile apart,
5 and for which the power company that serviced them
6 charged them nothing.

7 Q Now, what response did you receive from CEI?

8 A CEI said they could do nothing for me, and they
9 ignored it completely.

10 Q Did you do anything else to try to resolve this
11 problem?

12 A After several attempts to get them to do something,
13 in desperation I finally wrote to the Public
14 Utilities Commission of Ohio, and I asked them if
15 they would please intercede and contact CEI as to
16 whether something could be done.

17 Q Did you get a response from the PUCO?

18 A I did not receive a response from the PUCO.

19 Q Did you follow up on that in any way?

20 A Yes, I did.

21 In March of 1973, I called to find out what was
22 happening, and they said, well, they had contacted --

23 THE COURT: The PUCO or CEI?

24 A The PUCO.

{Continuing} And they said that they would

1 Banas - direct

2 personally contact CEI, and they felt that something
3 should be able to be done, and the examiner said that
4 he would personally contact CEI, and I left it at that.

5 Q Now, Mr. Banas, during this period of time did you have
6 occasion to have any discussions with Muny Light
7 about electric service?

8 A Yes, I did.

9 Q And what was the nature of those discussions that you
0 had with MunyLight?

1 A I had called Mr. Balzer, who was the Chief of the
2 Meter Department for the City of Cleveland, and I
3 asked him if he would please come out to the plant
4 to check out our operations and see if there was
5 some way in which the City of Cleveland could serve
6 us with power insofar as I was getting no place with
7 CEI.

8 Q And what response did you receive from Muny Light?

9 A Mr. Balzer and Mr. Cristell both came out to the
0 plant and made a complete check on the operations,
1 and they said there would be no problem, especially
2 so insofar as the City of Cleveland already had an
3 ordinance on the books allowing double meter
4 combinations.
5

1 Banas - direct

2 MR. NORRIS: Mrs. Richards, would
3 you hand Mr. Banas CEI Exhibit 309?

4 {The exhibit was placed before the
5 witness.}

6 BY MR. NORRIS:

7 Q Mr. Banas, Mrs. Richards has handed you CEI Exhibit
8 309.

9 Can you identify that?

10 A I don't believe this is the CEI's exhibit. This is
11 the one from Muny.

12 Q Well, yes, but there should be a sticker on it.

13 It's called Defendant's Exhibit 309. Do you see that
14 in the lower corner?

15 A Oh, yes, I do.

16 Q That is simply the exhibit number in the case.

17 So if you have Defendant's Exhibit 309 in front
18 of you, can you identify what that letter is?

19 A Yes.

20 Q What is it?

21 A This is a letter that was sent to me by Mr. Balzer,
22 Chief, Electrical Meter Bureau.

23 Q What is the date of that letter?

24 A April 23, 1973.

25 Q Now, Mr. Banas, during your discussion with CEI did

Banas - direct

1
2 you at any time bring up the subject of Muny Light?

3 A Yes, I did.

4 Q And you recall whom it was or who it was that you
5 brought that subject up with?

6 A I first approached Mr. DePompey, of course, and
7 mentioned that to him since he was the first line
8 direct representative for CEI.

9 Q And what did you say to Mr. DePompey of CEI with
10 respect to Muny Light?

11 A I had mentioned to him that if CEI was going to be
12 uncooperative and would give us no consideration on
13 double meter billing that we would maybe convert the
14 plant's power to Muny, and at that time Mr. DePompey
15 had told me, well, there was no Muny power in the
16 area and, of course, I had not investigated that
17 answer at the time and I did not know it, so I let it
18 ride at that. But that was the answer that I
19 received from Mr. DePompey.

20 Q At a subsequent time did you investigate yourself
21 to determine whether or not Muny Light had power in
22 the area?

23 A Yes, I did. As I said before, I called Mr. Balzer
24 at the City's Meter Bureau and he, in turn, had come
25 out and made the investigation and recommendation that

1 Banas - direct

2 they could very well take care of us because there was
3 11 KV power right behind my plant and it was available
4 at the Marquette Metals right next to us.

5 Q How far was Marquette Metals away from your plant?

6 A Oh, maybe 200 feet.

7 Q When you mentioned the possibility of converting to
8 Muny Light, what, if anything, did the CEI
9 representative say to you?

10 A Well, at first they just said they would look into
11 the situation. They didn't become too disturbed
12 because they maybe didn't think I was serious about
13 it, but they said they would get back to me.

14 Q In your conversation with CEI did Reliance Electric
15 Company or Atlas Car Company ever come up in the
16 discussion?

17 A Yes.

18 Q And in what respect did those other companies come
19 up in your discussion with CEI?

20 A Well, there was a situation, I guess, that I understand
21 that they were having a few problems with CEI, also,
22 and so I had mentioned to them that if I took our
23 power to Muny -- this is after I found out -- I would
24 most certainly be glad to talk to the engineers at
25 Reliance and Atlas because they were also having some

1 Banas - direct

2 problems, I understand, the nature of which I don't
3 know and I didn't go into details.

4 Q Now, you got a quote from Muny Light for serving your
5 plant, is that correct?

6 A Yes, I did.

7 Q Was that quote higher or lower than the CEI's service?

8 A The City made a check of the power costs for the year,
9 I believe it was March of 1973, which power we had
10 used for the month of March. I had taken those
11 costs from CEI and the description of the power used
12 and given it to the City and asked them if they would
13 run this through their calculations.

14 THE COURT: Mr. Banas, listen to
15 the question and please be responsive to the
16 question.

17 Read the question back.

18 THE WITNESS: Would you please
19 repeat the question?

20 {Question read by the reporter.}

21 A The quote was 22 percent lower.

22 Q The Muny quote was 22 percent lower than CEI's?

23 A That's correct.

24 Q Did you show that quote to CEI?

25 A Yes, I did.

1 Banas - direct

2 Q Did CEI check that calculation?

3 A Yes, they did.

4 Q Did they agree or disagree with the calculation as
5 you gave it to them?

6 A They said it was possibly off maybe 1 or 2 percent but
7 it was very close.

8 Q Now, Mr. Banas, did any CEI representative make any
9 statements to you with respect to the Munny Light
10 service?

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

13 THE COURT: Approach the bench.

14 -----
15 {The following proceedings were had at the
16 bench:}

17 THE COURT: Go ahead.

18 MR. LANSDALE: I object on the
19 grounds it's calling for hearsay and not every
20 salesman or every person can --

21 THE COURT: Read the question
22 back.

23 The question is: Did you have a conversation
24 with anybody from CEI. If that's the question --

25 MR. LANSDALE: That's right.

1 Banas - direct

2 THE COURT: -- if you identify

3 the fellow he had the conversation with --

4 Let's proceed. Overrule the objection.

5 {End of bench conference.}

6 - - - - -

7 THE COURT: Overrule the

8 objection. The question may stand if you identify

9 the participants in the conversation.

10 BY MR. NORRIS:

11 Q Can you identify the CEI representative who had
12 occasion to comment to you with respect to Munny Light
13 service?

14 A The primary one was Mr. DePompey, the electrical
15 representative.

16 Q What did Mr. DePompey of CEI say to you with respect
17 to the Munny Light services?

18 A The best I can recall, he had mentioned that the Munny
19 service was unreliable because the Munny plant was
20 being kicked around as a political football. It was
21 favorable one time and unfavorable the next. And
22 also the fact that CEI -- I mean the Munny Plant was
23 acting as an isolated entity unto themselves, whereas,
24 CEI had the ability of being interconnected with other
25 electrical utilities.

Banas - direct

Q What happened next in connection with your negotiations with CEI?

A It was left at that and Mr. DePompey told me that he would take my position back to his people and they would talk it over and get back to me.

Q And did they ever get back to you?

A Yes, within a week's time.

Q And what did CEI say to you when they got back to you on this subject?

A Well, Mr. DePompey came back with Mr. Kanda, I believe, and said that they wanted to look over the service entrance switch gear and come up with some sort of a cost figure if and when they would agree to give us combined meter billing.

Q And did at some point in time CEI make a proposal to you?

A Yes.

Q What was that proposal?

A The proposal was they would give us combined meter billing and save us the \$600 per month but our company would have to absorb the \$7569 for labor and material costs for the switch gear that would be necessary to make this switch over.

Q And what was your response to CEI with respect to that

1 Banas - direct

2 proposal?

3 A Well, I felt this was unfair but I told them I would
4 go to our top people and give them an answer.

5 Q Did you ultimately give CEI an answer?

6 A Yes.

7 Q What answer did you give them?

8 A We told them we would not go along with them. We felt
9 they should pick up the entire bill.

10 Q Was this at a time when you were still converting to
11 Muny Light?

12 A Yes, very much so.

13 Q Did you so state to Mr. DePompey?

14 A Yes. In fact, I told him we needed an answer from CEI
15 very shortly because we were about to make a decision
16 on this one way or the other and we were very seriously
17 considering going with Muny.

18 Q Did you get a further proposal from CEI?

19 A Yes.

20 Q What was the nature of that proposal?

21 A It came back within about 24 hours and they said they
22 had reconsidered once more and said they would absorb
23 the \$7569 labor and material cost and they would
24 eliminate the \$600 additional cost per month providing
25 we sign a letter of intent to remain a customer of CEI

Banas - direct

for a period of ten years.

Q What did you respond to that proposal?

A I told them I would take this to our Vice-President of Operations and let them know within two days.

Q Did you then get back to CEI with respect to that?

A Yes.

Q What did you tell CEI?

A I told them we had decided we would go along with them and they should draw up the necessary papers.

Q And was a letter of intent signed by Clark Controls to remain a CEI customer for ten years?

A Yes, it was.

MR. NORRIS: Mrs. Richards, please give Mr. Banas PTX-2527.

{The exhibit was placed before the witness.}

Q Mrs. Banas, Mrs. Richards has handed you PTX-2527 which is a collection of seven memoranda which are already in evidence. These are CEI internal memoranda.

Have you had occasion to look over these seven CEI memoranda before coming to the witness chair?

A Yes, I have seen them.

Q In each of these there is reference made to you when you were making a phone call to CEI or whether CEI

1 Banas - direct

2 was phoning you or when they met with you. Let me ask
3 you a general question.

4 Are the dates that are made reference to in
5 PTX-2527 involving your conversations with CEI and
6 your meeting with CEI, are those dates approximately
7 accurate, to your recollection?

8 A To the best of my recollection, I would say yes.

9 Q Let me ask you one more question with respect to the
10 substance of the statements made in PTX-2527 as to
11 things said to you and things you said to CEI.

12 Is the substance as set forth in PTX-2527
13 generally accurate to your recollection?

14 A Yes, I would say so.

15 MR. NORRIS:

No further questions.

16 THE COURT:

Cross-examination.

17 - - - - -

18
19 CROSS-EXAMINATION OF JOSEPH P. BANAS

20
21 BY MR. LANSDALE:

22 Q Mr. Banas, in addition to this agreement that you
23 referred to, the CEI also, did it not, conveyed
24 title to the A. O. Smith Company, or the Clark
25 Control Division of A. O. Smith, the two utility

Banas - cross

poles and the several hundred feet of wire and related equipment which they used to combine the two entrance points outside of the buildings of Clark Control; they conveyed those to your company for the sum of \$1, did they not?

A Yes, that's correct, sir.

MR. LANSDALE:

I have nothing else.

Thank you.

MR. NORRIS:

No questions, your

Honor.

THE COURT:

Perhaps this would

be an opportune time for us to take our recess, ladies and gentlemen. Please during the recess keep the Court's admonition in mind.

{Recess was taken.}

- - - - -

{The following proceedings were had in the Court's chambers:}

THE COURT:

Somebody wanted

something on the record.

MR. LANSDALE:

Yes. I asked for

this, your Honor, and I wanted to get on the record in a more formal way and not restrained by the confines of the bench conference my

1 Banas - cross

2 objection -- and I wish I could think of a
3 stronger word that it was wise to use -- to the
4 performance that we have just been subjected to
5 in the courtroom by both counsel for the
6 Plaintiff and the Mayor of this City trying to
7 get a plea before the jury that they need this
8 judgment in this case in order to save Muny
9 Light for the benefit of all the people of
10 Cleveland and all the other benefits and assets
11 of the City that would be derived thereby.

12 I just think that the conduct of counsel
13 and the Mayor is inexcusable.

14 I deliberately waited for this to get my
15 temperature down some and now it's getting up
16 again. I shouldn't say any more. I won't.
17 It was obvious to me that this was a deliberate
18 ploy by counsel and that the Mayor himself,
19 after having been given information once that
20 this was impermissible testimony, to attempt it
21 on two additional occasions, to volunteer it,
22 and I think it's a despicable act.

23 And that's the end of my story. I just
24 wanted to get this on the record. I have been
25 practicing law for 40 years and I have never had

1 Banas - cross

2 anyone do this to me before.

3 THE COURT: Mr. Lansdale, Mr.
4 Norris asked the question, albeit it was an
5 improper question, nevertheless, I think he
6 asked it in good faith. You came to the bench,
7 the Court sustained your objection, and he
8 abided by that objection. I don't think you can
9 hold Mr. Norris responsible for the conjecture
10 of the Mayor. It was obvious that he wanted to
11 get that in, and he got it in.

12 As I say, I don't know what the verdict
13 will be in this case, but, in the event it is a
14 verdict for the plaintiff, I think that it is
15 highly prejudicial and it would constitute
16 reversible error.

17 MR. NORRIS: Well, your Honor, I
18 would like to respond.

19 MR. LANSDALE: I would like to say
20 one more thing.

21 THE COURT: Let Mr. Norris
22 respond.

23 MR. NORRIS: I think that the
24 offer of proof that I put on the record at the
25 bench conference demonstrated the relevance of the

Banas - cross

question that I put under direct examination because I don't think it's a despicable act on my part and I respectfully reject Mr. Lansdale's reference thereto.

I think that with respect to the answer that Mr. Voinovich gave to Mr. Lansdale's cross-examination, I think that the question invited the response that the Mayor gave and I would like the record to so reflect.

MR. LANSDALE: May I make a response to that?

THE COURT: Go ahead. Sure. We've got about five more minutes before the recess is up and everybody can make whatever comments they want.

MR. LANSDALE: I heard Mr. Norris's offer of proof in which his excuse for doing this was my suggestion as to the proper discount rate.

More than a year ago I filed a brief on this subject in which this was elucidated. I think the question actually is -- each of the facets of the question which Mr. Norris attempted to raise by this testimony is covered in that brief. The City has never seen fit to respond to it and

Banas - cross

I cannot -- I cannot believe that counsel seriously thought or thinks that what the City may choose to do with this money has anything to do with the discount rate. I submit that's a ridiculous observation.

THE COURT: Everybody got everything o-n the record?

MR. NORRIS: The only thing I will say in response, since we have still got three minutes left of the recess --

THE COURT: No, there's only one minute now.

MR. NORRIS: -- I, in all earnestness, wanted the record to reflect that the City is not intending to put this money into Treasury bills or in interest-bearing form in order to try and generate the biggest return on that money, and I think it is relevant to this case because Mr. Lansdale is going to argue that the 8 percent discount rate is not appropriate, that we should have only half of the damages we are claiming because we should be using a 16 percent discount rate.

I wanted the record to reflect that the

1 Banas - cross

2 City is going to use this money -- there has
3 been a policy decision already made -- that the
4 City is not going to dump it into some
5 interest-bearing account.

6 MR. LANSDALE: I've got news for you.

7 MR. NORRIS: Sure, on a short-term
8 basis, to the extent they haven't been able to use
9 the money for renovation, the law requires that it
10 be put in that form. But I was attempting to
11 counteract the inference Mr. Lansdale created
12 with respect to this 16 percent discount rate.

13 THE COURT: Let's go back in
14 the courtroom. Who do you have?

15 MR. NORRIS: Dr. Wein on damages.

16 MR. LANSDALE: Is that the end of
17 the road?

18 MR. NORRIS: Yes.

19 THE COURT: How long will you be?

20 MR. NORRIS: I expect it will go
21 today and most of tomorrow on direct. I haven't
22 asked Ms. Coleman and she's not here at the
23 moment so I can't really give you a good estimate.

24 THE COURT: Okay. Let's go.

25 {The foregoing proceedings were had in the

1 Banas - cross

2 Court's chambers.}

3 - - - - -

4 THE COURT: Please be seated.
5 Bring in the jury, please.

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

8 THE COURT: Please be seated,
9 ladies and gentlemen of the jury.

10 Dr. Wein, you will be testifying under the
11 same oath that had been heretofore administered.
12 Do you understand that?

13 DR. WEIN: Yes, I do.

14 THE COURT: You may proceed,
15 Ms. Coleman.

16 MS. COLEMAN: Thank you, your
17 Honor.

18 - - - - -

19
20 D R. H A R O L D H. W E I N,
21 having been previously sworn, and now being
22 recalled on behalf of the Plaintiff,
23 testified as follows:
24
25

DIRECT EXAMINATION OF DR. HAROLD H. WEIN

BY MS. COLEMAN:

Q Dr. Wein, was there, in addition to the assignment which you described for us last week, a further assignment which was given to you by the City?

A Yes.

Q Would you describe that assignment for us, please.

A Yes.

I was asked to analyze the various documents and data which the City attorneys had collected, plus whatever documents and data that I felt was relevant in order to come to a way by which damages, if any, done to the Municipal Light Plant could be determined, some method of determining them; and if that were the case, how would one arrive at some method of measuring them in dollars.

Q Did you perform that work?

A Yes, I had.

Q What information did you review for that purpose?

A Pretty nearly all of the documents that I previously mentioned.

Q With whom did you work on the project of determining the measurement of damages?

A I worked primarily with R. W. Beck, with their team,

Wein - direct

with Mr. Mayben and his associates, and with the attorneys for the City, and with the associates of my own.

MS. COLEMAN: Mrs. Richards, would you please give Dr. Wein Plaintiff's Exhibit 3040 and 3040-A.

{After an interval.}

Q Dr. Wein, did you prepare a report on your conclusions at the end of this study?

A Yes, I did.

Q Would you identify the document that has been placed before you?

A Well, 304 -- Plaintiff's Exhibit 304 --

Q 3040.

A Yes; Plaintiff's Exhibit 3040 is a letter which consists of two parts.

One part is a letter from me to Mr. Norris, in which I express what I have done and provide certain figures of damages, and it has two tables in it, and both contain damages.

And the other part are the details of what I have done.

Q Dr. Wein, how do you define damages?

A Damages are an injurious alteration or change done to

Wein - direct

a physical thing, a person, or an organization.

Q In getting the measure of the damages, did it make a difference whether it is a thing or a person or an organization?

A Yes.

Q Why is that?

A Well, an organization is a much more complex sort of entity than a thing. It consists of things, equipment, and in the case of Mundy Light, and it consists of persons, as is the case of Mundy Light, and it consists of money, and it consists of market, and good will. In short, it is a going concern, and therefore it is quite different when one studies damages for that kind of an entity than when one studies damages to a person or a thing.

Q How did you determine how damages should be measured in this case?

A Well, I go back to the definition that I gave, which was a change, an injurious change in the state of an entity, and in this case an organization, and the damages then would be what the difference between what that organization would have been had these injurious acts not been performed upon it; so it is the difference between the organization, because of

Wein - direct

these injurious acts, compared to what the organization would have been were it not for these injurious acts, had they not been performed upon it.

Q And in what form is that measurement expressed?

A Well, I express that in the present case in terms of the income of the organization, in this case Muny Light, as to the difference between what Muny Light's income, net income was in fact from the damage period, 1971 forward, to what it would have been had the alleged injurious acts not been perpetrated upon it.

So what I have done is, and what I have asked Beck to do, was to study this situation and prepare the measurements in the forms of income statements, as the Beck organization is familiar with in utility accounting, and in the form of balance sheets, income statements and balance sheets for the actual situation compared to the would-have-been situation; i.e. the situation that the organization would have been in if these injurious acts, the alleged injurious acts had not been performed.

Q What approach do you use to get an idea of what the organization would have been?

A Well, first we had to identify what the organization was, and knowing that, we had to identify what the

Wein - direct

alleged injurious acts were.

Having identified the alleged injurious acts, I then asked Beck to say, "Suppose the opposite of those acts had existed," in other words, instead of not an interconnection, that there was an interconnection, and so forth, and figure out, have Beck figure out what a utility such as MELP would have under the kind of reasonable management that you would have expected, and assuming that CEI and MELP would have engaged in ordinary utility operations-- what Muny Light would have been like, and this is what Beck did.

Q Why did you choose that approach as opposed to others which might be available?

A Well, I thought it was the best approach because, as I said, an organization is a complex thing.

You can't look at it solely as a combination of generators and distribution lines and transmission lines, and so forth.

Nor can you simply look at it as a combination of people.

You have to look at it as a going firm, and as a consequence, the best way to measure a going firm is to -- as to the damages to it, is to see the

Wein - direct

consequences of the damage as against the consequences for the firm -- how it would have been absent the damage, and I thought that was the best way.

Q What consideration, if any, did you give to using the approach of measuring the change in asset value?

A Well, I gave some consideration to that.

Q Why did you decide not to proceed that way?

A Well, because an asset is a very difficult thing to measure, particularly the asset of a going company.

If I said, "What are the assets of MELP," well, there were financial assets, and physical assets, and assets of markets, and customers, and assets of good will, and that is one thing.

Secondly, the valuation of assets is again a rather difficult thing.

I couldn't simply say that MELP is just a value on the books of what its machinery is.

That may or may not be its economic value.

In theory, if one wanted to, if we had, for example, a going concern in a non-regulated business, one might say the value of the assets is really the value of the firm, is really capitalized earning power, and that is what the value of the assets might be.

Wein - direct

So it wouldn't matter. Capitalized earning power wouldn't depend upon the value on the books.

So the question of simply looking at assets doesn't get to the whole idea of this organization as a going business.

It is more than just the assets.

Q When you chose to use the approach of reconstructing what would have happened, what considerations did you give to a before-and-after approach to measure damages?

A I considered that as well.

The problem is that when you say "before and after" it is hard to pull out all the things that are before an act and all the things that are after an act. It is hard to pull out those things which are relevant. There are many, many things that happen before and many, many things that happen after, and I just couldn't define that precisely enough to handle it.

Q What consideration did you give in your choice of methods to any other methods which might be available?

A Well, there was also the question of looking at comparable utilities under the same circumstances.

I rejected that as well, because in a real

Wein - direct

sense most utilities are unique, either because of their size or the history, or their competitive situation, and where they are located, and the nature of the vintages of their physical assets, and the source of money.

It would be hard to find something which was comparable, and I couldn't find anything in the State of Ohio that would be comparable, and it was a method which I thought would not really be appropriate.

Q -- Did you prepare a chart which displays damages as you have defined them?

A Yes, I have.

MS. COLEMAN: Mrs. Richards, would you place on the easel Plaintiff's Exhibit 3100. It should be the largest one closest to the witness -- yes. That is it, right.

{After an interval.}

Q Would you first identify Plaintiff's Exhibit 3100, Dr. Wein.

A Yes. I prepared that chart.

Q What do you show in the chart?

A Well, what I have there is, first, a definition of what damages are in this particular case of Muny Light.

Wein - direct

and that of course is right on the top. It is the difference in net income, but historically and in the future between what Muny Light would have been and what Muny Light is and will be.

Now, the first case here is what Muny Light was in the historic period, and in this case 1971 to 1980, 1971 being the beginning of our damage period.

Q What is the second box?

A Going down?

Q No, going across.

A All right. The second box is what Muny Light will be in the future period, 1981 to the year 2000, and that is called the future base case.

Now, as you can see, that says Muny Light is a distribution system purchasing power from others, and that is my view as to what Muny Light will be from 1981 to the year 2000.

Q What is the significance of the arrow drawn between the first box on the left and the first box on the right?

A Well, this one {indicating} tells you what happened to Muny Light between 1971 and 1980.

By this time Muny Light is a purchasing utility.

Wein - direct

It doesn't generate, for all practical purposes, very much power. It used to.

It says, "Given the fact that it is what it is now, what is it going to be out into the future."

Well, clearly, what it is going to be in the future depends upon what it is now, and what the likelihood of any changes in the future are going to be.

So you go from this case to this case {indicating}, and at 1980 it is a distribution system, and given it is a distribution system, what is it likely to be in the period 1982 to the year 2000, and this is then the projection from where we stand now in Muny Light to where Muny Light is going to be in the next 20 years, and that is what that one is.

Q What is the box in the heavier black outline below the sequence that you have been discussing?

A Well, I call this the "Reconstructed Historic Case," and reconstructed means what it would have been in the historic period if certain actions had not happened, certain actions which are alleged to be anticompetitive wouldn't have happened, and this then is what Muny Light would have been in each year if CEI had not engaged in alleged monopolizing, and these are setups of acts which the attorneys for

Wein - direct.

that's what it is saying. It's not really what it is now but it's what it would have been.

And from there we go from what it would have been in the historic period to what it will be in the future.

So that's essentially what that arrow leads to.

Q Do these boxes identify cases which you required R. W. Beck to prepare?

A Yes.

Q How are these cases used to compute damages?

A Well --

Q Say for the historic period.

A Well, for example, the historic period, taking a specific thing such as an interconnection, synchronous interconnection, parallel interconnection, Beck assumes, for example, in a particular case that the City would have gotten it because the assumption is that CEI is cooperating as a utility would cooperate under normal action.

Beck is assuming that the City got the interconnection when the City asked for it, a year after the City asked or a year and a half after the City asked for it. That was Beck's judgment as to when it could have happened.

Wein - direct

Then Beck says, "Well, I can construct a case holding all other things constant on that basis." Or it could take what would happen if the City got the interconnection a year and a half after they requested it, what would happen if they got PASNY power a year and a half after they requested it, if they requested it in 1973 and got it September 1, 1974, what would have happened if there hadn't been any Muni Displacement Program, what would have happened if there had been coordinated operations so reserve sharing might have taken place.

Q Dr. Wein, assuming that the box with the heavy black outline includes all those assumptions, how could that be contrasted with the smaller box to compute damages?

A This one?

Q Yes.

A Well, this is what actually happened, you see. And you take all the things that the City alleged they should have had and say if that happened at the soonest time they could have gotten it, if that would be the case, you would then have reconstructed what the net income would have been in that reconstructed case compared to what it actually was, and the

Wein - direct

difference between those two comparisons would be a measure of damages that particular reconstructed historic case as against this one [indicating]. I think it would be a case for ACE, I think.

Q Thank you.

Dr. Wein, how far into the future are damages measured -- or have you measured damages in this case?

Pardon me.

A Well, I have measured them out to the year 2000. I actually did computations somewhat beyond the year 2000 in order to see whether I could go out that far.

Q What considerations did you take into account in deciding that there were future damages beyond the historic period?

A Well, theoretically, a damage continues sort of on and forever. It's like if I threw a stone in Lake Erie. The ripples go on and if there's nothing in between, it would finally hit the Canadian shore.

Obviously, there are things in between. The effects diminish the further out you go. And it is clear that if you lose customers, for example, as

Wein - direct

is alleged in the Muny Conversion Program, and those customers don't come back, all other things equal, you have lost them not only for the year you lost them but the damage of losing them continues to go on out.

Similarly, if you don't have PASNY power, the damage continues to go on.

So in theory a damage keeps on going on forever but the further out you go the effects of other things come in and the effect of measuring them, particularly on the question of present value, takes over and you have to stop at a particular point.

Q What made you decide to stop at the year 2000?

A Well, because if I went out, it was my judgment that beyond the year 2000 the errors that I would make in going beyond that would probably equal the discount value of the damages going beyond that. So there was no point in considering it.

And secondly, I didn't want to appear beyond the year 2000. Twenty years is far enough. My crystal ball doesn't go beyond twenty years. So I stopped there.

Q Dr. Wein, I assume you didn't use a crystall ball in this case?

Wein - direct

A No.

Q Can you tell us what you did consider in deciding to go out to the year 2000?

A Yes.

Q You might want to put the pointer away.

A Pardon me?

Q You might want to put the pointer away.

A Oh. Well, all right, I will put that aside.

There are three things that I considered in going out to the year 2000.

The first question was: Would the power supply be any different? Would there be a change which might say you shouldn't go out to the year 2000, you should stop at 1990, say, ten years from now. When we originally did it, it was 1988, ten years. So the power supply is one thing.

The second thing is the market, the market for Munny Light, in particular. Is that going to be greatly different insofar as what we can see and insofar methods of projection would allow you to go out? Would that be different?

And the third factor was whether the price, the path of prices in the economy -- which is sometimes known as inflation, particularly in this

Wein - direct

era; it sometimes goes the other way and it's deflation in some other era -- could I see a path of prices 20 years in the future?

And I considered those three things.

Q Dr. Wein, did you consider specifically the opinion of Mr. Mayben as expressed last week that at least prior to 1988 Muny could not be in the generating business to take advantage of economies of scale?

A Well, of course, I did that. You have to consider that what Mr. Mayben is really saying is if you want to get into generation you have to count on lead time of about ten years, and the reason 1988 was used was, originally, we had 1978 and ten years is 1988, and if we had to redo the whole thing, which would seem to be quite unnecessary, we would have to go from 1980 to 1990.

There's nothing we can do now to change our fundamental position in the ten years, and that was his opinion.

Q Tell us what, if any, factors you considered in addition to that in projecting out to the year 2000?

A I considered the question as to whether Muny Light could at some period of time between now and the year 2000

Wein - direct

get into generation, assuming that technology is as it is now and we do not get any breakthroughs, that we make electricity pretty much as we make it now. And my feeling was -- and it wasn't only my feeling, I discussed this with Mr. Mayben as well -- that Munny Light could not engage in building a generation system out into the future.

Q What specific factors in terms of economic considerations did you take into account?

A I took the following into account. First, there was the load.

THE COURT: The what?

THE WITNESS: The load.

A The load is the demand, the kilowatts and kilowatt hours that would be on the Munny System, and I did a projection of that.

The second was the fact that if Munny Light wanted to build a new generating unit somewhere between now and the year 2000 -- let's say arbitrarily 1985, but anywhere between now and the year 2000 -- it might build something of 100 megawatts. That would be something less than it is now. Its peak load is around 108 megawatts. It might build a 200-megawatt unit, which at some point in the past

Wein - direct

they were considering, but if they built either a 100- or 200-megawatt unit, it would be at a serious disadvantage as a generating system for new units, first, because those units are not as economic, all things considered, as a larger unit or as the larger unit such as CEI and other utilities have, secondly, because it would come in at a level of costs of generation which are three to four times what it would have been had they built it back in 1971, 1972 or 1973. So that they would have had a system which would be coming in at cost now or in the future which are higher due to inflation.

It's like trying to reproduce a house that you built in 1950 in 1980. It's going to cost you a great deal more, and if you had to compete in terms of building that system as against somebody that has a vintage of plants such as CEI or any large utility does which come in at various periods of time, some at low prices, some at moderate prices and finally some at high prices, you would find it very difficult to compete if all your generating equipment came in at all the highest prices, and that's what would happen. So that was a second consideration.

And viewing those two things together, it seemed

Wein - direct

to me that, given the current technology as it is now, Muni Light, for all intents and purposes, so far as I could see, would have been foreclosed from building say a 200-megawatt generating plant.

Had they built a 200-megawatt generating plant in order to get better economies than with 100, they would have had excess capacity until they grew into that load, and the problem is what to do with it. If they don't have coordinated operations and coordinated development and somebody to sell their surplus to, they would be eating that excess capacity until they finally develop into that load.

So for those reasons I decided it was not possible to do it.

Q What consideration, if any, did you give to the question of financing a generating plant?

A Well, a 200-megawatt plant, according to Mr. Mayben, if it were to be built somewhere now, I think the figure of \$150 million was the figure. And, of course, for the City or for a municipal lighting plant to raise \$150 million would at the present time be a very difficult thing. The cost of interest currently is very high.

Q Dr. Wein, you mentioned two other considerations in

Wein - direct

your decision to project future damages to the year 2000. You mentioned load.

Would you describe what consideration you gave to future load in deciding to project out to the year 2000?

A Yes. The load is essentially the demand on the system for electricity measured in two ways, one in terms of the capacity or the megawatts and the other in terms of the hours of that capacity, the kilowatt hours.

I studied the history of the City of Cleveland to some extent and finally took the occupied family dwelling units of the City and also of the area in which MELP serves, and I observed that, for example, the City of Cleveland right after World War II, say in the 1950 Census, had a population of about 910,000 -- a pretty large city. Now, in 1980 it has a population of perhaps 580,000. The City has been going down.

So I studied the occupied family dwelling units and observed that they were going down.

Now, it has a particular form. So, in effect, I forecast the load. It's a fairly complex basis but one of the --

Wein - direct

Q We will return to that.

A All right.

-- one of the factors of the trend in the population of the City and the occupied family dwelling units.

Q What considerations did you have about Muny's load in the future in deciding you could project damages out to the year 2000?

A I felt that Muny would be very lucky to maintain their present position, more or less, at or around their present loads. That would mean roughly about 580 million kilowatt hours and roughly around 107 or 110 megawatts at peak. I felt they would be doing well to maintain that out to the year 2000.

Q What was the reason for that conclusion?

A Well, the reason for that is that they are now a distribution system and they buy most of their power from CEI. Last year, 1980, as I recall, if you take the total operating expenses, the cost of power purchased from CEI was somewhere over 60 percent of their total cost.

It's very difficult for a city system to increase its share when it is purchasing power from its competitor who accounts for over 60 percent of its

Wein - direct

total cost. It's a very difficult thing.

So I felt that for Muny Light to engage in rate competition over the future, in other words, to have in the future the kind of advantages they had when they were a generating system back in 1971 to 1975 and before that when their rates were 12 to 15 percent below CEI's in practically all their classes of rate, was not going to prevail in the future when they would have to be purchasing power.

Now, I also considered this, that to the extent that they expand, given the fact that they are now getting PASNY power which is cheap and Buckeye which is a little cheaper than CEI power, those contracts only go out for five years. But even if those contracts go out beyond that, if that were the case, if Muny became bigger by competing on the basis of this low-cost power they would be getting, what they would be doing would be diluting the effort they have because they can't get any more than 22 megawatts from PASNY and roughly 30 megawatts from Buckeye for nine months of the year. They would have to buy more from CEI. Well, the cost of CEI power is going up because of inflationary conditions.

Wein - direct

So to expand, you would have to cut into such price advantage as these forms of power might give.

So I came to the conclusion that they really in the future would do well to hold their own in the markets which they now have.

Q Dr. Wein, the third consideration in projecting to the year 2000 was price.

What is the role of price trends in projecting out?

A Well, the role of price trends in projecting out goes back to this question of income statements. You have to say something about what the prices are going to be in the future. You want to come out with some number and there are various devices which economists use and which I have used by which one can do this, and you need the prices because you are trying to compute the revenue and that depends on the price you charge. The price you charge depends on the cost you pay, that you incur for purchased power, for coal, for whatnot.

Therefore, when you are going to compute the revenue, you have to say what your inflation assumptions are.

That's one way of doing it, and, therefore,

Wein - direct

I had to make my judgments back in 1978 as to what the long-term inflation prospects were going to be for the United States.

Q For how long a term did you project such prospects?

A For 20 years.

Q Can you tell me what bearing actual price trends would have on a projection out to the year 2000?

A Well, let's see if I can get that question in mind.

It would have the following significance. I have assumed that 7 percent is a good rate for inflation from the vantage point of where I was in 1978, doing this.

I and anybody else would know that when you go out 20 years, there is nothing more hazardous than predicting inflation. If I could predict inflation for 20 years in the future, I wouldn't be sitting here. I would be advising Frank Martin, making a lot more money.

So the question is you have to take some figure. The importance is not the figure that you take, because it could in fact be 7 percent or it might in fact be 10 percent or it might in fact be some other percentage.

One device of dealing with it is what economists

Wein - direct

call putting everything in constant dollars. What they mean is let's take the dollars and the price levels as of 1980 and forget about inflation going on out. That means then that you get everything in 1980 dollars, but if you are dealing with damages in the future, you have to see what the dollars in the future are going to be. They are going to be different dollars than today if any kind of inflation takes place. So I said I would take 7 percent for those reasons.

Q Dr. Wein, I'm sorry... I may not have made my question clear.

A Maybe not.

Q Given your assumption about power supply and your assumption about load, what did you assume about price levels in deciding you would be able to project damages out to the year 2000?

THE COURT: Read the question back.

{Question read by the reporter.}

A Well, I assume that whatever the prices were -- say 7 percent inflation -- they were going to affect. Muny Light and CEI pretty much in the same way, so that the competitive conditions would be pretty much

Wein - direct

the same.

CEI is exposed to the same inflationary factors that Muni is. In fact, Muni is exposed, as I pointed out, since it buys -- since 60 percent of its operating costs are purchased power from CEI, Muni is obviously exposed to the same inflationary factors CEI is.

So the question of 7 percent is simply -- whatever it is, whether it's 7 percent, 10 percent or any other percent, that in the future would operate to affect both companies in pretty much similar ways.

THE COURT: Ms. Coleman, would you like to wait until tomorrow morning to ask the next question?

MS. COLEMAN: I guess it's that time, your Honor.

THE COURT: Very well. Ladies and gentlemen of the jury, it's 4:00 o'clock. We will adjourn for the day. The exhibits of the day will be sent to you and, having reviewed the exhibits, you may go on your way home. We will see you tomorrow morning at 8:30.

Please during the adjournment keep in mind

the Court's admonitions. Thank you and good night.

{The jurors left the courtroom.}

- - - - -

THE COURT: Well, what about the exhibits? -- Do we have any today, gentlemen?

MR. NORRIS: We offered none with the Mayor.

MR. MURPHY: We have with the Mayor CEI Exhibit 1141, which was the Task Force recommendations about which he testified, and we offer those.

THE COURT: Very well. It may be admitted.

Again, you are not going to send that whole thing in, are you?

MR. MURPHY: It is only the excerpt related to the Division of Light and Power.

THE COURT: All right. Anything else?

MR. NORRIS: There were two with Mr. Banas.

THE COURT: I thought you weren't offering them.

MR. NORRIS: Yes.

THE COURT: Oh, I misunderstood.

MR. NORRIS: CEI-309 is already admitted -- I am sorry, I am in error. That is right -- 2527 is already admitted, and we would offer CEI-309, which is the letter.

MR. MURPHY: No objection.

THE COURT: It may be admitted.

Thank you.

{Court was adjourned for the day.}

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

Transcript

Wednesday, September 2, 1981

KF
228
.C43
1980

WEDNESDAY, SEPTEMBER 2, 1981; 9:15 O'CLOCK A.M.

{The following proceedings ensued in the Court's chambers:}

THE COURT: I understand the defendants are desirous of putting something on the record.

MR. LANSDALE: Yes, your Honor. I refrained from mentioning yesterday one other aspect of the Mayor's unfortunate testimony because I wanted to check it out.

Yesterday I asked him whether he concurred in the recommendation of his Task Force to eliminate competition -- not competition, but duplication, and he said, "I concurred in it," and then he added, "As to what Mr. Pandy tells me, the company you represent has been contacted in regard to moving forward on this recommendation."

And that really -- really, that answer really set me back on my heels, and I felt unable to pursue it at the time because, who knows, something might be occurring that I don't know about.

I just checked it, and there is nothing

1 that I can find going along on this at all.

2 I am aware, of course, of the City's approach
3 to CEI to settle this case, and CEI's response
4 that it was interested in settlement in the
5 event of a separation of territories.

6 In view of the statements made to us by the
7 City negotiators insisting upon the utmost
8 secrecy about this thing, I am very disturbed
9 about this.

10 I was prevented from pursuing it, and I want
11 to know if the City claims that there was anything
12 else in the works or anything going on in this
13 respect.

14 MR. NORRIS: Well, with respect
15 to clarifying the record, I don't think it is
16 correct to state that the City approached CEI
17 with respect to settlement. I don't think it is
18 material.

19 MR. LANSDALE: I know what
20 happened --

21 MR. NORRIS: I am just trying to
22 make a statement.

23 THE COURT: Just a moment. Let
24 Mr. Norris finish.

25 MR. NORRIS: Just to clarify the

record, both parties were responding to overtures from the Court and discussions were held, and I do not think it is correct to state that the discussions were broken off by the City.

The fact is that the two parties could not reach common ground.

Now, it is not important to say who broke it off.

THE COURT: I don't think that is what he referred to at all. I don't get this out of reading this at all, that that is what he is referring to.

MR. LANSDALE: This is what I am bringing up, because I did not pursue it, because I wanted to check, and there is absolutely nothing, no contact in respect to this matter that I can find out, and this is what upsets me.

MR. NORRIS: Well, I wanted to finish my statement for the record. I do not read the Mayor's statement that Mr. Lansdale is referring to as having any reference at all to the settlement.

That ends my statement.

1 MR. LANSDALE: Do you all claim
2 that he has proposed some mode of eliminating or
3 reducing duplication?

4 MR. NORRIS: We are not making
5 any such claim.

6 You asked the gentleman a question, and he
7 gave you the best answer he could, based on
8 information given to him by the Commissioner of
9 Muny Light.

0 MR. LANSDALE: He answered the
1 question, and then he volunteered the statement.

2 THE COURT: Wait a minute,
3 gentlemen.

4 First of all, I don't think it is going to
5 have any effect upon the jury at all. I don't
6 think they even picked it up; and secondly, it
7 is obviously hearsay.

8 He said that Mr. Pandy advised him as to
9 some ambiguity of not duplicating lines and
0 telephone poles, and that was the context of
1 the testimony before that.

2 MR. LANSDALE: Yes.

3 THE COURT: And it stopped there
4 in mid air. I don't know what the big ado is.

5 MR. LANSDALE: The big ado is that

I can't go forward with this thing on cross-examination and find out what he is talking about, this issue of duplication, and this is of some importance to us in this case.

The only contact that I am aware of in this respect is then settlement discussions, and this Mayor exhibits a simple anxiety to testify about how if the jury just gives lots of damages, they can save Munny Light, and because of this obvious situation I am prevented from adequately cross-examining him, and he has testified to something that I always -- to my certain knowledge -- well, I don't know what Mr. Pandy told him, but I know Mr. Pandy never approached us in this regard other than his participation in these discussions --

MR. MURPHY: -- settlement discussions.

MR. LANSDALE: Sure.

MR. NORRIS: Well, I know of no approach to rationalized territories other than the discussions that have taken place this summer at the behest of the Court to have both parties at least explore what the possibilities were, so that exhausts my knowledge of the situation.

1 THE COURT: What are we here for?

2 MR. LANSDALE: Well, we are here to
3 try to find out whether there is some claim in
4 this regard or whether they are simply talking
5 about settlement discussions. That is all I want
6 to know.

7 MR. NORRIS: There is certainly
8 no claim, Mr. Lansdale.

9 MR. LANSDALE: All right.

0 MR. NORRIS: While we are here,
1 your Honor, could we discuss the scheduling
2 problem? The Court referred to the possibility
3 of not having court on Friday.

4 THE COURT: I understand Ms.
5 Coleman can't make it on Friday, so how come
6 you can't make it, Ms. Coleman?

7 MS. COLEMAN: My brother's
8 bar mitzvah in North Carolina is on Friday, and I
9 want to get there.

0 THE COURT: Okay. We will take
1 Friday off.

{Discussion ensued off the record.}

{Discussion in chambers came to a close.}

{The following proceedings were had in the absence of the jury:}

LAW CLERK KURDZIEL: Your Honor, this is Civil Action No. C75-560, the City of Cleveland versus the Cleveland Electric Illuminating Company.

THE COURT: Bring in the jury.

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

{The jury resumed their places in the jury box.}

THE COURT: Good morning.

Ladies and gentlemen of the jury, as I indicated to you, from time to time there are other matters that require the attention of the Court. It appears that the Court must address itself to some other areas and this will take approximately a day. I can do that tomorrow or I can do it on Friday. I have opted to do it on Friday so that you may have a long weekend. So you may plan for that weekend, I wanted to notify you today that I can't have the pleasure of your company on Friday. So you all have a nice weekend.

Ms. Coleman, you may proceed.

D R. H A R O L D H. W E I N,

a witness called by the plaintiff, having been previously sworn, was further examined and testified as follows:

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

BY MS. COLEMAN:

Q Dr. Wein, yesterday you identified your report, Plaintiff's Exhibit 3040-A and in that report you mentioned that you have provided previous reports on the subject of damages to us; is that correct?

A Yes.

Q Now, in your earliest reports, to what year did you project damages?

A 1988.

Q And what were the considerations in deciding later to project to the year 2000?

A Well, essentially, there was the possibility in earlier reports that Muny Light together with other municipal organizations might be able to share the expense of building new equipment, and for that purpose a constitutional amendment was placed before the citizens of Ohio and it was defeated in June of 1980. So that Muny Light then, or any other

Wein - direct

municipality, could not share joint facilities.

As a consequence of that, I felt that for the reasons I have mentioned yesterday that Muny Light on its own could not afford anywhere from during the period 1980 to try and build its own generating plant without the assistance of these others to share it which it was now prohibited from doing.

So that seemed to me to make it very clear that it was going to continue to be a distribution-only plant and, therefore, I extended it out to the year 2000. Had the other thing gone, had the constitutional amendment passed as Mr. Mayben had informed me, they could at some point have built a new generating plant and attending facilities which, in his view, would take ten years. So that would have gone from 1978 to 1988 or, had that scenario had prevailed for this trial, from 1980 to 1990, but that was not possible.

MR. LANSDALE:

May I approach the

bench, if your Honor please?

THE COURT:

Yes.

- - - - -

{The following proceedings were had at the
bench:}

Wein - direct

MR. LANSDALE: Mr. Wein has expressed the opinion that one municipality may not share ownership of facilities with another municipality and this is not a correct statement of law, in my view.

The problem with the constitutional amendment was that they wanted cooperatives such as Buckeye and the rest of them in it.

This is a matter which is of some significance in this case and I want to ask if there is a claim that there is a constitutional prohibition against one municipality owning something jointly with another municipality. Is this a claim in this case as a matter of law? If so, I am unaware of it.

MS. COLEMAN: Well, I believe that the constitutional amendment was intended to address exactly the situation of permitting the cities to work together.

MR. LANSDALE: Permitting what?

MS. COLEMAN: Permitting the cities to work together.

I hesitate to call that a claim in the case.

The potential of the constitutional amendment

Wein - direct

is something Dr. Wein considered.

MR. LANSDALE: My understanding of the constitutional amendment is it was necessary to permit the cooperatives to join in which was regarded as essential.

If it is claimed that it is unlawful for the cities -- for one city to own something jointly with another city, then I will withhold my request that the Court instruct the jury that this is an erroneous statement of law until we can brief the question if there is any doubt about it. But this is a matter of considerable consequence in this case.

In any event, I object to this witness placing a legal opinion before the jury.

MS. COLEMAN: What do you mean it's a matter of considerable consequence?

MR. LANSDALE: Beg your pardon?

MS. COLEMAN: What do you mean it's a matter of considerable consequence? I'm not sure what you are referring to.

MR. LANSDALE: - The witness has stated it's unlawful and unconstitutional --

MS. COLEMAN: No, he hasn't.

Wein - direct

THE COURT: Read the answer back.

{Answer read by the reporter.}

MR. LANSDALE: If your Honor please, it already appears in this case that a joint enterprise, Painesville, Orville and Cleveland, when a joint building of a plant on the lake was proposed and Mayor Locher stated publicly he was going ahead with it. I'm uncertain at this point whether it actually appears in the record but it's a fact that the Law Department of the City of Cleveland gave an opinion that this was a lawful enterprise, and I object to this witness stating it's unlawful.

THE COURT: Stating what?

MR. LANSDALE: That it's unlawful.

MS. COLEMAN: There's no evidence about the three cities building a plant.

MR. LANSDALE: Well, there's a recommendation in the file about it and in evidence there's an exhibit which recommends building the plant.

MS. COLEMAN: It relates to transmission.

THE COURT: I'm not going to get

Wein - direct

back into that.

What is your objection to this question?

MR. LANSDALE: My objection is that the witness has testified it's unlawful for two municipalities to jointly own electric facilities.

THE COURT: Read the answer again.

{Answer read by the reporter.}

THE COURT: I'm going to strike the entire answer.

Rephrase your question and he can testify apart from the interpretation of the law.

Let's proceed.

{End of bench conference.}

THE COURT: Ladies and gentlemen of the jury, you will disregard the last answer since it incorporates an incorrect statement of the law that was involved.

Please rephrase your question and, Dr. Wein, please answer the question without interpretation of what the constitutional amendment was.

Let's proceed.

Wein - direct

BY MS. COLEMAN:

Q Dr. Wein, in deciding to project the future damages out to the year 2000, did you take into account your understanding of the effect of the proposed constitutional amendment?

A I was advised by counsel that it was possible.

Q And did you consider that fact among the others which you detailed for your use in deciding to project the damages out to the year 2000?

A Yes.

Q Who made the calculations of the damages for the historical period from 1971 through 1980 and for the period 1981 through the year 2000?

A Well, for the period 1971 through 1988, those calculations were made by R. W. Beck, and from the period 1989 to the year 2000, they were made by me and my staff.

Q Why did you not have R. W. Beck do detailed calculations for the period from 1989 forward?

A Well, for several reasons:

First, because as I explained yesterday, the power supply situation from 1989 was going to be the same as it would be out to the year 2000 for each of the cases that Beck considered, and there would be

Wein - direct

no difference in the power supply situation appropriate to that case.

Secondly, the loads that were projected from 1989 to the year 2000 were all that were going to change, essentially all that were going to change, and they were going to change by very minor amounts according to my projection; and third, R. W. Beck had done a mathematical computation which showed that for a given power supply situation that one could get the net income for an appropriate case simply by inserting the kilowatt hour values.

In other words, there is a formula which R. W. Beck had arrived to for each of the cases which enable you to state what the net income would be as you changed the kilowatt hours for that case.

Well, I am supplying the kilowatt hours, and I have the mathematical formula, and all I did to those was compute it.

Now, the only thing that could possibly change would be the inflation factors, and in order to avoid all this arithmetic, I said, "Well, I will project it out from 1989 to the year 2000, and it would be in 1988 dollars, dollars that we had computed or expenses that we had computed on the

Wein - direct

inflationary factors that we used, and it would be in 1988 dollars, and then I simply had to bring them all back to 1980.

So I felt, and so did R. W. Beck, that there wouldn't be any point in engaging in a very expensive elaboration of each of these cases for another 11 years when we come down with practically the same answers by those methods.

Q And is that the method that you used?

A Yes.

Q Dr. Wein, yesterday you testified that in making the reconstruction of Munny Light for the purposes of measuring damages, you undertook to identify alleged injurious acts, and then you tried to trace what their consequences were.

MR. LANSDALE: What page?

MS. COLEMAN: Transcript 15,963.

Q Did you organize your information about the results of accidents studied in a written form?

A Yes.

MS. COLEMAN: Ms. Richards, would you please place Exhibit 3097 on the easel.

{After an interval.}

Q Dr. Wein, would you identify Plaintiff's Exhibit 3097?

Wein - direct

A Yes. That is a model, a damage model which I drew up.

Q What was the purpose of this chart?

A Well, what I was trying to do in this chart was to trace a chain of causation, trying to show how alleged actions would operate and lead to what I called the final effects. That is what I was trying to do.

Q You identified the actions which are studied there?

A Yes.

Q Reading from the top down, the first box is called "A Munny Displacement Program," and the other, "Unfair Practices."

The second box is "Refusal to Interconnect."

The third box is "Refusal to Engage in Coordinated Obligations."

The fourth box is "Refusal to Wheel."

Those are the alleged anticompetitive actions.

Q What is shown on the second column?

A The second column shows the direct effects of each of these actions.

Q And what is shown in the third column?

A The third column, again, shows the effects of the direct effects.

This is the chain of causation, and so they are

Wein - direct

called indirect effects.

Q And the last column?

A Well, -- let me just say, the indirect effects you see are divided into two parts, so that we go from this to that {indicating}, and that is the first set of effects, and these in turn lead to this set of effects {indicating}, and this {indicating} set of effects in turn leads to these {indicating}, and I spelled out -- and the last column we simply go to what are the final effects, and the final effects are Munny Light as it now is.

That is what I was trying to do in that.

Q Dr. Wein, as an example of how these trace through, would you trace through the first one, the Munny Displacement Program, and just identify it for us.

A Well, it is fairly clear if you lose a customer, whatever it is, this program leads to a loss of customers.

The program -- this is the program {indicating}, and this is the effect {indicating}.

If you lose customers, you are going to lose revenue that those customers provided, and that is this arrow {indicating}.

Now, if you want to trace out the effect of this

Wein - direct

arrow, what happens to the loss of revenue, then it feeds into this box {indicating}.

Well, one of the things that may happen as a consequence of the loss of revenue might be lower profits.

Now, if you go down to the second one, the refusal to interconnect, and what this means is a refusal to have a synchronous interconnection as against the dead load transfer.

This leads to abnormal outages. Now, if you trace abnormal outages, what that does is lead also to loss of customers.

So, if you want to take this one box, loss of customers, and you can see that the Munny Displacement Program would lead to the loss of customers and abnormal outages, and would lead to the loss of customers, and then that leads to a loss of revenue, and then it has these effects {indicating}.

The second consequence of the refusal to interconnect would be higher cost of operation.

Well, higher cost of operation also feeds into this box, at least, and leads to higher cost to have KWH, and the loss of profit, and so on.

Each one of these things has its effect, and

Wein - direct

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
all of those combine and interact because these things during the period 1971 to 1975, which is the damage period, these things are going on simultaneously, so that they are all interacting to eventually produce this box {indicating}.

They feed in, as you can see on the chart, and now when you get to this box {indicating} you have higher costs of KWH, and lower profit and the market is lower, and your reliability is lower, and the morale is lower, and these come from these things all acting simultaneously, and they each have an effect, and some of them combine and you get that {indicating}.

Q What judgment did you form, if any, as to whether in fact the actions there had the effects which are displayed on your chart?

A Well, we had several things.

First, you can look at the audited reports of Munny Light, and you can see what happened over the period, the costs went up and they had lower profits, and their number of customers went down, and they had lower reliability, and they had lower morale, and that is one thing you can do, is to look at the record to see what happened, and they are in these bare-bone figures.

Wein - direct

Then, it is a matter of logic to know that if you lose customers, you are going to lose revenue, and that is something which follows; the higher cost of operations, and these things were testified to by various witnesses, which indicated higher repair and maintenance cost, and the inability to do adequate maintenance, and in terms of outages there are sufficient things in the record which show why.

Q Perhaps I didn't make myself clear.

A I am sorry.

Q Based on what you reviewed from the study of R. W. Beck as well as your own work, what judgment did you come to about whether the actions produced the effects displayed on the chart?

A Well, I came to the judgment that the actions did produce those effects.

Q What judgment, if any, did you form about the relationship of the effect indicated there in the final effect of the actions noted in the beginning?

A Okay. There was one other thing.

If we start backward, and here we are starting forward with the actions and going to the effect.

Now, starting backwards, and these effects were really the objectives as I found in the memoranda, and

Wein - direct

as I have heard from witnesses, and these effects were objectives of CEI.

Q You are pointing to the final effect?

A Yes, this column {indicating}.

They wish to acquire the Muny System if they could, and if they couldn't, they wish to have these things {indicating}.

Well now, given this {indicating}, what actions would be taken in order to accomplish this {indicating} -- these being the objectives {indicating}. -- Well, these actions --

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

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

THE COURT: State your position.

MR. LANSDALE: My objection is that we are getting way far afield from the question, number one; and number two, we are getting into a jury argument again.

He asked a rhetorical question, "What would you expect CEI to do," and now he is going to

Wein - direct

give us an argument, and this is a jury argument and not the expression of an opinion or of a fact, and I object.

MS. COLEMAN: Your Honor, his opinion is expressed on the question of causation and on the question of whether these actions necessarily produced these effects, given the fact of CEI's objective.

THE COURT: He goes into these excursions where he is going off on a tangent and getting into arguments, and it is not responsive to the question.

Read the question.

{Question read by the reporter.}

THE COURT: He ignores your question completely.

Let's proceed. I will sustain the objection.

{End of bench conference.}

THE COURT: Now, please answer the question.

Read the question.

{Pending question read by the reporter as follows:}

Wein - direct

"Q Perhaps I didn't make myself clear.

"Based on what you reviewed from the study of R. W. Beck as well as your own work, what judgment did you come to about whether the actions produced the effects displayed on the chart?"}

A My conclusions were that the actions in the first column produced the effects in the last column.

Q Now, based on the review of that information, what judgment, if any, did you come to as to whether there was a relationship between the final effects you have stated and the actions at the beginning?

MR. LANSDALE: I object.

THE COURT: Approach the bench.

{The following proceedings were had at the bench:}

THE COURT: Read the question.

{Question read by the reporter as follows:

"Q What judgment, if any, did you form about the relationship of the effect indicated there in the final effect of the actions noted in the beginning?"}

MR. LANSDALE: It sounds like the

Wein - direct

same question.

THE COURT: It is. It's the
same question.

Let's proceed.

{End of bench conference.}

THE COURT: Sustain the objection.

I believe that's the same question that the
doctor just answered.

Please proceed.

BY MS. COLEMAN:

Q Dr. Wein, what consideration did you give to the
final effect as an objective of CEI in concluding
that the actions produced the consequences?

MR. LANSDALE: Object, if your
Honor please.

{The following proceedings were had at
the bench:}

MR. LANSDALE: What difference
does it make whether in his opinion CEI intended
to do it? This is just argument.

MS. COLEMAN: It tends to suggest
that these consequences were the consequences of

Wein - direct

CEI's actions and not something else.

THE COURT: Overruled. Let's
proceed.

{End of bench conference.}

THE COURT: Overrule the objection.
Read the question back.

{Question read by the reporter.}

THE WITNESS: Read it more slowly,
please.

{Question read again by the reporter.}

A I gave the following consideration, following reasons:

MR. LANSDALE: I can't hear the
witness, if your Honor please.

THE COURT: Keep your voice up,
Dr. Wein.

MR. LANSDALE: He's got his hand
in front of his mouth.

A I gave the final effects the following reason.

In getting a damage model I have to do two things.
First I have to show that what are considered to be
the alleged actions will produce the final effects.
These final effects are obvious. That's the fourth
column. Given that they are objectives, I have to

Wein - direct

reverse the logic and ask myself whether, if these were the objectives, would these objectives lead to this set of actions, all four of them. So my logic and my causation is going in two directions.

First I am saying this implies by this chain of events that, the final effect, and, secondly, if that is an objective of CEI, then given that objective, you would expect to find the existence of these actions.

That was the logic of my procedures.

Q Now, in your discussion you stated that the actions would have the final effects.

Did you refer also to whether the actions would have the direct and the indirect effects shown in your chart?

A Yes, of course. The final effects are at the end of the chain. This is what I mean by chain of causation. This leads to this which leads to that which leads to that which leads to that.

Q Dr. Wein, what sources did you rely upon to conclude that the direct effects and the indirect effects flowed from the actions listed?

A Well, I have used the documents that are in the case, I have used records that are in the case, I have used,

Wein - direct

as I said, testimony that I have heard, and I have used logic such as pointing out that if you lose a thousand customers you are going to have a loss of revenue.

Q Did you refer also to the studies done at your request by Mr. Mayben?

A The studies done by Mr. Mayben would show the actual damages resulting from these actions. They would be a measure of the actual damages.

Q Is there one of those damages which you yourself identified by research -- I'm sorry.

Is there one of those effects among indirect effects which you yourself identified by research?

A Well, certainly. The decline in the bond rating market, for example, is one of them.

Q Could you describe what the results of your research on that issue were?

A Well, I am relying on my memory but, essentially, what it showed is that Muni Light in 1971 was an investment grade rating from bond rating services, Moody's and Standard & Poors, if my memory is right, which is subject to checking.

In 1971, for example, Muni Light was Double A. That meant that investors could -- it was a high grade

Wein - direct

bond. By 1972 it still was an investment-grade bond.

By 1978 I believe it had been not rated at all or else it was down to C Double -- some very low rating which would be lower. And I don't know what the present rating is. I think it has finally come back in one of the services to a C rating.

MR. LANSDALE: Oh, I object.

THE COURT: Sustain the objection.

A Well, this is what I found.

Now, the significance of these letters means that if you get a C rating, you pay a higher interest rate than if you had, say, a Double A rating.

So the lower your rating is, that is to say, when you go from Double A or Triple A down to C or unrated, the cost of money to you is more expensive. Instead of paying 6 percent, if you are Double A, you might have to pay up to 7-1/2 percent if you are a C.

MR. LANSDALE: Object, if your Honor please.

THE COURT: Approach the bench.

{The following proceedings were had at the bench:}

THE COURT: There's nothing in

Wein - direct

the evidence about a C rating.

MR. LANSDALE: And moreover --

THE COURT: That's obviously the objection. And he's rambling on and on and on.

MR. LANSDALE: There's no claim, as I understand it, for paying high interest costs. I think this is highly prejudicial, all this argument. I object to it.

THE COURT: Unless he's going to start responding to questions, I'm going to do what I said I was going to do and we are going to take his testimony on voir dire and read it to the jury.

MS. COLEMAN: May I be heard?

THE COURT: Yes.

MS. COLEMAN: The question was what was the result of his study on bond ratings and he's providing that information. It's his research and his opinion.

THE COURT: He's saying "I guess" and "I don't know."

Go back and read his answer. This constant conjecture of his as to facts that do not appear in the record is just ridiculous.

1 Wein - direct

2 back and read the answer back.

3 The last answer was read by the reporter.]

4 LANSDALE: {A} He's obviously
5 sping. {B} There's no claim in this case
6 forcing the ability of Muny Light to borrow
7 mo

8 THE COURT: There's no what?

9 LANSDALE: No claim of reducing
10 thity of Muny Light to borrow money.
11 However, your Honor ruled out in the last
12 ce claim that we interfered with Muny
13 Liability to sell bonds. This was
14 rut. This was one of the allegations in
15 tplaint that was ruled out, not proved in
16 tist trial.

17 There is certainly no claim for damages in
18 tise for increasing Muny's interest cost.
19 Ty evidence we have in this case of
20 bng is the attempt to borrow \$9.8 million
21 was specifically -- the claim was
22 scally ruled out.

23 THE COURT: Keep your voice down,

24 p

25 . LANSDALE: The claim about that

Wein - direct

was specifically ruled out at the conclusion of plaintiff's testimony in the last case and I object to testimony along this line.

THE COURT: Ms. Coleman?

MS. COLEMAN: Your Honor, may the witness refer to his notes and testify on this?

THE COURT: He can refer to anything he wants to refer to.

MS. COLEMAN: Fine. That will take care of that problem.

The witness is describing what the consequences are of these actions and we should be permitted to show what the consequences are at this stage. This particular one is one that is a result of his study and is well within his ability to testify. He may need to refer to his notes and he may not have understood he could do so.

THE COURT: What is the materiality of it?

MS. COLEMAN: The materiality is it is one of the adverse consequences of the actions we have alleged.

THE COURT: But there is no claim remaining in this action for inability to

Wein - direct

borrow money at higher interest rates.

MS. COLEMAN: Your Honor, it's an injury. We have to prove injury and this is one of the injuries that was done. The fact that it is not measured is a separate issue.

I am not referring to the \$9.8 million bond issue and I don't see any reason to inject that here. That's really not the point.

MR. LANSDALE: I now have your Honor's order. You specifically ruled out the claim that the CEI prevented the plaintiff from issuing bonds and financing the system. It was specifically ruled out in your Honor's order of October 20, 1980, and there is no claim for any damage in respect to that, and so far as I know, this is the first time this has been injected into this case.

MS. COLEMAN: This testimony was given without objection in the last case, your Honor. It does not go to the \$9.8 million bond issue.

The testimony has been that as a result of the cumulative effect of the conduct of CEI, Muncy Light cannot finance major generating

Wein - direct

expansion right now and it is material to that and to the review of the injurious consequences of the alleged actions.

THE COURT: Just a moment.

{End of bench conference.}

- - - - -

THE COURT: Ladies and gentlemen, why don't we take our morning break and we will ask you back when we are ready.

Please keep in mind the Court's admonition.

- {The jurors left the courtroom.}

- - - - -

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

THE COURT: Let's go back and see what he is going to say. I'm getting tired of this man's testimony. He just ignores every direction of the Court and ignores your directions to him.

MS. COLEMAN: There is nothing in the nature of being ignored going on.

THE COURT: Go back to your place.

Read the question back.

Wein - direct

Continue with your answer and we will see where we are going with this line of questioning. We will see what your answers are and see if they are going to be responsive to the question.

{Record read by the reporter.}

THE COURT: Do you want to have the doctor continue or place another question?

BY MS. COLEMAN:

Q Dr. Wein, you may refer to your notes on that. Do you have your notes?

A Yes, I do.

Q Do you want to indicate precisely what the rating is?

A 1971, as I said, Standard & Poor gave MELP a Double A rating. By September, 1972, it had gone down to an A. By 1975, Standard & Poor delisted it. It wasn't rated by Standard & Poor.

Moody's, in 1971 MELP was, electric was an A and 1972 -- the electric was double, in 1972 it's Double A; in 1973 it was A, 1974 it was an A, 1975 it was B Double A; 1976 it was B Double A, 1977 it was B Double A, 1978 it was ABA, and December of 1978 it went down to a C Double A, and this is Moody's, and 1981 it's a C Double A.

This is what I have been able to find.

Wein - direct

What does a C Double A indicate about bond market rating and availability of capital as contrasted to the Double A you noted in 1971?

Well, a C Double A is a rating which indicates that it's more risky, considerably more risky than a Double A rating and, as a consequence, investors would want higher yields for it, they want higher interest rates.

Thank you.

MS. COLEMAN: I have no other questions on that issue.

MR. LANSDALE: I object to this entire line of testimony and ask that it be stricken, if your Honor please.

Number one, the Court has --

THE COURT: Keep your voice up so I can hear you.

MR. LANSDALE: Number one, the Court in its order of October 20, 1980, gave judgment for the defendant on the ground that plaintiff had failed to prove its claim that CEI prevented the Muny Light from issuing bonds to finance improvements and extensions of its system; and number two, so far as I am aware,

Wein - direct

there is no claim in this case of damage resulting from the matters to which this witness has now testified.

Number three, we had testimony in this case just a day or two ago from Mr. Martin that, hypothetically, based upon the actual existing then rating of the company, of the Muny Light, that the Muny Light could issue \$15 million of mortgage revenue bonds at what he regarded as a favorable rate of interest, thus demonstrating that there is no claim in this case for inability to issue securities.

This entire line of questioning is irrelevant to the case and can only be regarded as prejudicial just in the sense of the witness coming on and claiming there are a lot of other dirty things that CEI did to Muny Light that we are not claiming damage for but we want you to know Muny Light was badly treated in other respects, and I submit that's not admissible evidence under the ordinary rules of evidence and under the claims of this case and I ask that this entire line be stricken.

THE COURT:

Ms. Coleman?

Wein - direct

MS. COLEMAN: I'm afraid Mr. Lansdale misunderstood the testimony, your Honor.

The purpose of the chart, as Dr. Wein explained, is to show how the actions first result in direct effects and then the cumulative effects as a result of all of them combined and one of the effects is the decline in market rate.

The evidence on that does not relate to a particular failed financing to which Mr. Lansdale refers in a prior order of this Court.

The evidence is material and relates to the testimony of Mr. Pandy about the difficulty of financing at this point and that relates to the projection of future damages as a consequence of expansion being delayed.

The testimony is based on Dr. Wein's own research and can be introduced by him into the record since he's familiar with these records in the course of his work as an economist. The testimony is material to this issue of damage and to the issue of the combined consequences of these actions.

THE COURT:

Sustain the objection.

Wein - direct

misunderstood it, that he based his opinion about the 1971 issues in whole or in part upon the actual existing 1978 bond rating, which, insofar as Moody's was concerned, as he testified was B Double B. That is his testimony, and it had nothing to do with any hypothetical.

THE COURT: Very well. Bring in the jury and let's proceed according to the Court's ruling.

{The foregoing proceedings were had out of the presence of the jury.}

{The jury was reseated in the jury box.}

THE COURT: Please be seated, ladies and gentlemen of the jury. You will disregard Dr. Wein's last answer.

Let's proceed.

BY MS. COLEMAN:

Q Dr. Wein, you told us yesterday that the results of the Beck study were to be presented in the form of income statement.

Can you explain to us how the effects that you have outlined would show up in the income statements?

A Yes.

Wein - direct

The income statements under the base case, which is used by Beck, and that is to say, the historic actual condition of the Muny Light as it really was starting from June of 1971 on out, say, 1981, or 1980, which is the latest figures that we have.

The historic condition will show what actually happened in terms of the total amount of revenue and total expenses and the total profits and the total kilowatt hour sales, and so forth, by the various classifications on those income statements, essentially the revenues and costs, what they would have been in the course of the operation, and so forth.

Now, in the Beck cases, if we were to compare the actual with the reconstructed case, under revenue, for example, there would not be -- we would throw back in the customers that were lost because of the Muny Displacement Program, essentially, and that would give you a different revenue figure.

It would give you a higher revenue figure.

Similarly, on the question of refusal to interconnect, we would say that there was an interconnection at that particular time, and in this case, a year and a half after Muny asked for it,

Wein - direct

and Mr. Mayben and the Beck team would figure out what the costs of operations would be under that reconstructed case, and so on through there, and with respect to the refusal to wheel PASNY power, if they got PASNY power, say, a year after they asked for it, and they got it say in 1974, then the Beck team would put that into their power supply model of Muny Light, and taking into account that they would be using cheaper power.

So the reconstructed case then shows you the difference between what actually happened and what would have been each one of those items, and that is essentially how one would get the damages.

Q Did you provide certain information to Beck to use in their calculations?

A Yes, I did.

Q What standards did you try to apply in identifying assumptions for them to use, the factual material for them to use?

A Well, where I had a choice of assumptions, I took that choice which would be conservative; that is to say, would operate to lower the damages rather than to raise them.

Q Could you give us an example?

Wein - direct

A Yes.

For example, in the Muny Displacement Program, we simply assumed from 1971 through 1975 and there on out that the Municipal Electric Light and Power Company would only get back those customers other than for a small factor -- get back essentially all they lost, and they would not continue to grow during this period of 1971 to 1975, though they had been growing in the past.

That simply says that Muny Light in 1971 to 1975 just gets the customers back, and they don't get anything else, and that is a conservative assumption.

The second thing we did on that is we took the average usage in the residential category, for example, of Muny Light customer, even though the residential, on the average, the residential customers of CEI are larger than Muny's, and also the ones they took, according to the documents that I have in the record, were somewhat higher than the Muny average.

Nevertheless, we took it at the Muny average, and that is lower.

Q Dr. Wein, pardon me. I would like to clarify

Wein - direct

something.

In regard to your projection about future customers, was that related to the entire case study or one particular action when you projected no growth of customers?

A Well, that's related to the entire case, not solely to one particular action.

Q And when you referred to the Munny Displacement Program and recovery of customers --

A Yes.

Q -- had you assumed that Munny Light recovered the customers lost due to that program?

A No. That would be in the reconstructed case they would have recovered -- they would not have had them. They wouldn't have lost them so they wouldn't have been there.

Q I see. So that you are stating, as to the situation where you assumed greater loads, you assumed only those loads actually lost to CEI; is that correct?

A Yes.

Q And no greater than that?

A No greater than that.

Q Now, the exhibit which you described to us yesterday, Plaintiff's Exhibit 3100, had four cases, two actual

Wein - direct

cases and two reconstructed cases.

MS. COLEMAN: Perhaps you can pull that down, Mrs. Richards. Set the other chart down below it.

{The exhibit was placed on the easel.}

BY MS. COLEMAN:

Q Did you request R. W. Beck to construct other cases as well besides those four?

A Yes, I did.

Q What was the purpose of those other cases?

A Well, the purpose of the other cases was essentially to try and pull out the separate aspects of each of the actions. That was essentially it. And so R. W. Beck did construct cases other than those four. They are variations on the basic four cases.

For example, one variation might be assume that you got PAsNY power in August of 1974 as against an assumption that you have it when you really did get it, in fact, in 1980. You could change that date and get a different case. Or, similarly, the interconnection date could be changed and you have a different case.

Q The cases measured combinations of the actions listed on your chart?

Wein - direct

A They measured combinations of those actions. For example, you might have said, well, suppose that this was not an anticompetitive action. What happens without it? Well, you can take any of those combinations occurring and you can vary them also as to the date of their occurrence.

MS. COLEMAN: Mrs. Richards, will you place --

MR. WEINER: I'll get it.

MS. COLEMAN: Thank you.

Q Dr. Wein --

A Yes. I was going to read from my report and give you the exact combinations which I asked for if these --

THE COURT: There's no question before you.

Ask a question.

MS. COLEMAN: Pardon me?

THE COURT: I say I don't think there is a question before the doctor.

MS. COLEMAN: No, your Honor.

I am just about to pose one.

Q Dr. Wein, when you were describing this chart earlier, you referred to the final effects, but I think it would be helpful if you could just identify those.

Wein - direct

specifically.

A Well, there are two that seem to me to be very important. The first was the virtual elimination of MELP as a generating system. It does not now generate any power to speak of. And, secondly, it's a much weaker company in many, many respects.

Q Dr. Wein, can you list for us, please, the categories of information that you provided to Mr. Mayben for his work in creating the reconstructed and base cases?

A Well, the first category had to do with the demand for power. That would include the number of customers by type of customer and also the kilowatt hours by class of customer. That would be one and I provided him with that for the historic period and also for the future period.

Second, I provided him with estimates of the kilowatt hours resulting from the Munny Displacement Program.

I also provided him with estimates of the inflation that he was to use in the projected period and also together with Mr. Martin we provided him with a discount factor to use.

Q Did you also provide Mr. Mayben with the directions on what assumption to make about revenues in the cases

Wein - direct

which he constructed?

A Yes. For the historic cases I told him to use the actual revenue per kilowatt hour that prevailed in the historic period.

Q Was that the instruction to him for each one of the historic studies he did?

A For each of the historic studies he did, that would be the case, other than under certain hypothetical situations.

Q What was your reason for instructing him to use that approach?

A Well, because the fact of it is that -- Well, let me back up.

When I said use the rates, I didn't really mean to state use the rates in the technical sense of rates. I said use the average revenue divided by the number of kilowatt hours. That was all that he needed for his purposes rather than going and saying, well, use this rate design and this rate design. That detail wasn't necessary for his purposes.

Q So what revenue per kilowatt hour did you ask him to use in his historic cases?

A The actual revenues that were received by Muny Light divided by the actual kilowatt hours.

Wein - direct

Q Could you tell us what the reason for that direction was?

A The reason for it was simply this, that the Beck models, in order to get the income and the operating costs of the net revenues, do not need any greater detail than that. Their models are driven essentially by three things: One, the number of customers; the second is the average revenue per kilowatt hour which I provide them and instructed them to use the actual things; and the third is the megawatts which they, Beck, derive from the kilowatt hours which I gave them.

Q What assumption did you direct Beck to make with regard to the assumed revenues for the future base case, the future actual of Muny?

A For the future base case I, not being able to predict what the City Council or the management of Muny Light would do in the future as to their rate designs and their actual revenues per hour, I stated and told Beck to assume that the rates would be set, the average revenue per kilowatt hour for the future in the base case would be set at break-even.

That means that the revenues would exactly equal the costs for that particular base case and, therefore,

Wein - direct

we did not have to say what specific rate would take place in 1982 or 1983 or 1984, and so on, because nobody really could predict that and what we are really interested in is solely to get a measuring rod. So that measuring rod for the future case would be set at break-even, i.e. the revenue per kilowatt hour would produce revenues equal to the cost, so that would give us kind of a standard to measure all the other cases against.

Q What direction did you give Mr. Mayben concerning what revenues should be assumed in the other cases, the reconstructed cases which measure effects?

A In the reconstructed cases they were simply to assume the same revenue per kilowatt hour as we have in the base case.

Q And what is the reason for that?

A Well, then we are comparing the two cases essentially on the same prices, and if the costs in one case are less than the costs -- Let me back up.

If the costs in the reconstructed future cases are less than the costs in the base cases, it would show up in that difference and there would not be the confounding effect of different rates. They both have the same rates.

Wein - direct

Q Is that same analysis true for the instruction you gave on the historic rates?

A Yes.

Q Dr. Wein, if in the future the rates adopted by Muny Light in fact are higher than the estimated that was used, what effect would that have on the calculations?

A In my opinion, it would not have a significant effect.

Q Why not?

A Well, if the rates are higher than break-even, it simply means they will be higher in all the cases in which we are comparing them, essentially. If a reconstructed future case has an advantage under a break-even case, it will have a very similar advantage under the other cases.

Q Dr. Wein, you stated that you provided R. W. Beck information on actual kilowatt hour sales; is that correct?

A Yes.

Q Are you familiar with how Mr. Mayben and his team used this information on kilowatt hour sales to customers?

A Yes.

Q How was that information used?

Wein - direct

A Well, it is used in the following way. Mr. Mayben and his team, on the basis of kilowatt hours, made certain assumptions as to what the load factor would be and they were able then to come up with what some numbers of what the peak demand is. That gave them one basis on which costs would be obtained.

Using the kilowatt hours; this enables them to determine how much energy they are going to need, how much they can either produce if they are in one of the cases where they have production equipment or, if they are taking the historic base case, how much they are going to buy. That depends on the number of kilowatt hours.

Secondly, the number of customers relates to the whole course that relates to customers; for example, billing and meter readers.

Q Dr. Wein, if Beck made use of the information you provided to them on kilowatt hours and customers, did it make a difference in their calculations what method you have used to come up with the amount of sales and customers?

A No. Insofar as the model was concerned, they weren't interested in how I came up with the figure. They just wanted the figures and that would drive their