10-6-1981

Volume 30 (Part 1)

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

Tuesday, Oct. 6.

TUESDAY, OCTOBER 6, 1981; 8:50 O'CLOCK A.M.

THE COURT: Well, gentlemen, the working copy of my charge has been completed by the secretary, and hopefully that will be concluded when we conclude the motions and the rulings on the motions.

The first order of business is the reading of the evidence of the testimony of Dr. Wein, so the jury is available, and we can do that just as soon as Mr. Norris and the others arrive, and then we can go on to any motions, and while the lawyers are reviewing the charge, the Court will review the outstanding exhibits, and I will be prepared to rule on the exhibits by the time that counsel have examined the charge.

I anticipate proceeding with closing arguments at 1:00 o'clock this afternoon. Each side will be permitted one hour and 45 minutes, and that should conclude us by no later than 4:45.

MR. NORRIS: Your Honor, I apologize. I missed the point that we were to be here at 8:30.

THE COURT: I thought I had

mentioned it, that I wanted to start promptly at 8:30.

(The jury was seated in the jury box.)

THE COURT: Good morning, ladies and gentlemen of the jury. Please be seated.

Are we ready to proceed?

Ladies and gentlemen of the jury, we will conclude the testimony of Dr. Wein by reading it from the transcript of the record, and you are to attach to this testimony the same significance and give it the same consideration that you would if Dr. Wein were testifying here in person, and we will proceed accordingly.

MR. LANSDALE: Do you have the page number?

THE COURT: Yes, page 18,855.

MR. LANSDALE: May we approach the bench?

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(The following proceedings were had at the bench:)

MR. LANSDALE: Has your Honor done any editing?

THE COURT: No. I think there is nothing to be edited. It is unfortunate that

we couldn't have proceeded in this manner with Dr. Wein, but apart from that, you will read the questions and the answers and ignore any comments and orders of the Court.

MR. LANSDALE: Okay.

THE COURT: All right.

(End of bench conference.)

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THE COURT: Mr. Murphy will read the testimony of Dr. Wein at this time.

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

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(The following proceedings were had at the bench:)

MS. COLEMAN: I am sorry. I thought we were providing the person, since this is our witness.

THE COURT: You can provide it for your side. Let's proceed.

(End of bench conference.)

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THE COURT: You may proceed.

(Thereupon the testimony of Dr. Wein taken on voir dire examination the preceding afternoon, was read to the jury as follows, the questions read by Mr. Lansdale and the answers by Mr. Murphy:)

CROSS-EXAMINATION OF DR. HAROLD H. WEIN

BY MR. LANSDALE:

"Q Now -- and you estimated, you and Mr. Mayben together, you estimated that the cost of operation with the 85-megawatt unit in operation would be less than the cost of Muny Light as it is as a distribution-only utility; is that correct?

A Receiving PASNY power -- is that in the case? Yes.

Q Thank you.

"And when you estimated the cost of operation of Muny Light receiving PASNY power as a distribution-only utility, you estimated the cost of operation cheaper than its cost of operation as you estimated it to be actually in the future without PASNY power, did you not?

A Yes."

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THE COURT: Would you please

slow down. I am having difficulty following it. Would you slow down for me. I am having difficulty following the transcript.

Let's proceed.

MR. LANSDALE: All right.

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"Q The cost of operation determined in accordance with this last hypothesis; that is to say, as a distribution-only utility with PASNY power, that cost was cheaper than its cost of operation with an 85-megawatt unit but without PASNY power; is that not so?

A I would have to look at the cases to see that. I don't recall.

Q I invite your attention to Beck Table No. 2, the long sheet.

A Is this the table that you are referring to?

Q Mr. Mayben has it in his exhibit.

A Okay.

Q -- as Beck Table No. 2, a long spread, and you will find, for example, 1-H is PASNY power as a distribution-only utility receiving it in the future, is it not?

A Yes.

"Q And 1-H has $3,779,000 as the so-called engineering estimate?

A Yes.

Q And that is the profit over and above the base case, is it not?

A Yes.

Q Stated another way, it reflects the amount by which costs are less under this hypothesis than under the base case; right?

A Yes.

Q Now, Dr. Wein, what I wish to ask you is the costs if you had the 85-megawatt unit in operation, and I think if you will see 2-F, $5,992,000 is the estimated cost, the estimated profit with the 85-megawatt unit in operation, is it not, compared to the base case?

A Yes.

Q However, if you add the savings from PASNY power on top of those, you would have a figure even higher than this figure, would you not?

A Which case are we now talking about? Are you talking about 2-F? 2-F has what you stated.

I am looking at 2-H."

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MR. LANSDALE: Continue with the answer.

- - - - -

"A I think we are now looking at 2-H, and I have a very poor copy. It looks like it would be greater, yes.

Q 2-H would be the figure to look at, would it?

A That seems to me would be the figure, assuming that we have PASNY power starting in 1974.

Q Right, and that demonstrates, does it not, that the PASNY power would give you savings over and above the savings achieved by the utilization of the 85-megawatt unit, doesn't it?

A Without PASNY power, yes.

Q Yes, certainly.

"Now, Dr. Wein, the problem is to assess the damage that Muny Light received, if it did, if CEI is liable, to assess the damage that Muny Light received from the failure to get PASNY power without assessing against CEI the damage sustained by not having the 85-megawatt unit in operation.

"Do you agree with that?

A Yes.

Q And in order to do that, we have to compare, do we not, the cost that Muny Light would have with the

" 85-megawatt unit in operation, but without PASNY power, with the costs that it would have with PASNY power and the 85-megawatt unit in operation?

"That is so, is it not?

"A No. I already explained why it is not so.

Q Now, Dr. Wein, it is your testimony that your projections of losses in the future relating to the free wiring program was not affected in any way by the conclusions that you earlier reached of Muny Light having to remain a distribution-only utility?

A Yes.

Q You recall that in one of your earlier reports you decided that you could project damages only through 1988; that is correct, is it not?

A Well, if you show me where -- I think the very first one --

Q Dr. Wein, you know whether you did or not, don't you?

A No, Mr. Lansdale.

Q In one of your earlier reports on damages, Dr. Wein, you determined that you could not or would not project damages beyond the year 1988; is this not so?

A In one of the very earlier reports we did not project them beyond the year 1988.

Q And the consideration that you had in mind in deciding

later to project to the year 2000 was your assumption that Muny Light would have to remain as a distribution-only utility in that future period; is that not so?

A Yes.

Q And similarly, your determination that the market share of CEI and Muny Light would remain essentially stable through the future period, beyond the year 1988, rested upon your assumption that Muny Light would have to remain a distribution-only utility; right?

A True. That was one of the assumptions, yes.

Q Now, as an economist, an antitrust economist, Dr. Wein, --"

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MR. LANSDALE: Withdraw that.

Go to page -866:

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"Q Dr. Wein, referring again to your Exhibits 3315 and -16 and the third item of damage, the so-called free wiring program.

"The difference between this damage figure and the one originally produced by you has to do with the adjustment you made to SIFCO to release certain amounts

" of the load and add a little bit more to the future, is that correct?

"A Yes, that's right.

Q Now, the damages as they remain claimed for the free wiring program represent the difference in the profitability where the customers which you assumed were taken away and the Muny Light situation as it is and is estimated to be as a non-distribution utility; correct?

A Not a non-distribution utility.

Q Pardon me.

"As a non-generating utility?

A Yes, as a non-generating utility.

Q And similar to the case we were considering a moment ago, the difference between those profitability figures would be less than you have postulated if you assume the existence of the 85-megawatt unit, is this not so?

A If I may please consult --

Q You may look at your tapes 3-A and -F.

A Yes.

"I think that's correct.

Q Now, Dr. Wein, one of the cities that you testified on direct examination that had duplicative

" distribution was Samson, Alabama, was it not?

"A Yes.

Q And the conditions in that town are something that you have previously given consideration to in this, isn't that so?

A Yes.

Q And that's a very small place, is it not?

A Well, at the time of the trial, it was 1,500 people, I believe.

Q And you were of the view that the duplication existing in Samson was the most expensive form of distribution duplication that you can have, did you not have that belief?

A I'm not sure that I used those words.

"I would like to see what you're referring to.

"Yes, I've seen it."

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MR. LANSDALE: Now, pass to -870, where I think you will find the answer.

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"A Yes. I said that the action of the Alabama Power Company to go into the City of Samson, which was completely and wholly served by an electric rural cooperative, simply if you want to get a franchise

" from the Mayor and then stomping over building lines into the city was -- going street by street was the most expensive I could think of, yes.

"Q Dr. Wein, you gave some testimony about the percentage relationship between operation and maintenance expenses, distribution and depreciation expenses relating to distribution relative to revenue of CEI and, at my request, Ms. Coleman gave me your working papers.

"Will you advise me where you obtained the revenue figures which you used?

A Yes.

"The source is CEI Form 1 and the income statement.

Q Well, the attachments that were handed to me contained only the sheets relating to depreciation.

"Do you happen to have the necessary pages from Form 1 for 1980?

A I don't have the pages from Form 1, but I can give you the revenue figures which come from there.

Q Let's look at 1980, where you show -- go ahead.

A 1980?

Q Yes.

A $956,013,000.

Q And I will hand you, Dr. Wein, the report for the year

1980, and I think I have slipped in the necessary pages, but I assume you could find your way around and tell me with more precision where you got that $956 million figure.

"I think you'll find page 114, line 2 --

"A Yes, I'm looking at that.

Q Gives electric revenues right there, doesn't it?

A Yes, but -- it may well be, it's obvious that the figures are not matching. I'm trying to see what happened, so just bear with me and I'll see whether I can help you.

"I think I have the reason for it.

"What that is, Mr. Lansdale, is the total operating revenues plus apparently the net other income and deductions which amounts to $62 million; and if you add both of those together, you get the total revenues.

Q Moreover, you include steam revenue, do you not?

A Yes, steam revenue is included.

Q And for your purposes, you should have taken electric operating revenues, should you not?

A Probably so, yes.

Q What do you mean, 'probably'?

A Yes; well, I don't know how much steam -- I don't

" know the details of the allocation of how much expense goes to steam, and how much does not go to steam, because you do have steam from your generating utilities.

"Q Dr. Wein, Form 1 shows the revenues from electric operations, does it not?

A Yes.

Q And you are attempting to relate the expenses of electric distribution to electric revenues, are you not?

A I would be glad to recompute that percentage.

Q I'm not asking you to recompute it.

"I'm just asking you what the proper figure is.

A Well, I think that we should not have taken net other income; I think we should have taken the first figure.

Q Then you should not have taken steam, should you?

A Well, I'm not too sure about that; but that's a very small number.

Q What does steam revenue have to do with the distribution of electric energy?

A I'm not talking about the distribution of electric energy; we're talking about the total revenue.

"The total revenue -- part of the total revenue

" comes from steam. Steam happens to be very small in the total figure; steam is a by-product of generation of electricity; part of that should perhaps be allocated to distribution, now, I don't know how much.

"Now, steam is very trivial, and we can take that out.

"Q Yes. I think you should, don't you?

A If it will make you happy, I would.

Q Now, moreover, the revenues -- total revenues from electric energy reflect, do they not, the way the utility people go at it, the total cost of service, is that correct?

A The total revenue?

Q The revenues are equivalent to total cost of service, is this not so in utility parlance?

A Well, the operating revenues?

Q Yes.

A Let me just take a look at this and see.

"Yes.

Q And part of the costs of service, of course, are what we call fixed charges, is this not so?

A Yes.

Q And the fixed charges consist of depreciation, taxes,

" and the cost of money, is this not so?

"A The fixed charges include, as I am looking right down here on 114, taxes other than income taxes, income taxes, other taxes, preferred income taxes, income tax credits, gains, and so forth, depreciation, amortization of utility plant.

"You mean the interest that you pay?

Q Yes.

A Oh, yes, sure.

Q On the earnings that you must have to persuade your common shareholders to give you --

A Those are the provision for --

Q Certainly.

A -- income taxes.

Q And all of those things, with the possible exception of income taxes, are related to property, are they not, a function of property?

A Most of those are a function of property.

Q And all of those costs are in part properly allocable to distribution costs, is this not so?

A Part of them are, yes.

Q And you included, however, only one element of fixed charges, that is to say, depreciation and amortization?

"A On distribution?

Q Yes.

A Well, that's because the others were treated as a lump sum.

"Yes, that's correct.

Q And you reduced the revenue figure to the revenue from electric energy, and had you included the other fixed charges, to say nothing of administration and general expense, your percentage of expense related to revenue would have been more on the order of 16 percent than 5 and a fraction percent --

A You'll have to show me.

Q -- in 1980, would it not?

A You'll have to show me the arithmetic on that. I don't know whether it would be 16 percent.

Q In any event, you will agree, will you not, that it would be substantially higher than 5.18?

A It would be higher than 5.18 if I did that procedure.

Q And would you agree that for the purposes of a fair approximation, that the fixed charges other than depreciation would be properly allocable on the basis of the relationship of depreciation --"

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MR. LANSDALE: Withdraw that

question and start again, going to line 20:

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"Q Would you agree that for the purpose of a fair approximation, one could allocate other fixed charges upon the basis of the relationship between the depreciation of distribution property and total company depreciation?

A Allocate the other fixed charges on the basis of the ratio of depreciation and distribution to total depreciation?

Q Yes.

A I'm not sure. I'd have to think about that.

Q My question to you is:

"That this relationship is about 34 percent, and that dividing fixed charges on that basis gives you a percentage relationship between revenue and expense of operation of something over 16 percent, 16.44 to be exact?

A I can't go through complex arithmetic on the stand; I have to see the things in front of me.

Q In any event, we agree that the percentage would be higher if you pull all the costs?

A As you suggest, they would be higher."

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Wein - redirect

MR. LANSDALE: I have no further questions.

(The redirect examination of Dr. Harold H. Wein was read, Ms. Coleman reading the questions and Mr. Hjelmfelt reading the answers, as follows:)

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"Q Dr. Wein, in terms of the manner in which depreciation was handled in the R. W. Beck damage cases, what method did R. W. Beck use?

"By that, I mean, did they use what Muny did or some other approach?

A They used essentially what the City did. They took the depreciation following the City's pattern over the past.

Q Dr. Wein, when you came to your conclusions about the damages, what assumption did you make about power supply when you wanted to compare to cases which do not test the effect of power supply?

A We always look to see what the actual base case was and compared whatever case we were interested in with that."

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MS. COLEMAN: Your Honor, you had

a --

MR. LANSDALE: You have a line, your Honor.

THE COURT: I have a line?

MR. LANSDALE: Yes, line 11.

(Laughter.)

THE COURT: (Reading) "Is that what you did, Dr. Wein?

"The Witness: What I understand Mr. Mayben to do, and that's what I did."

(Ms. Coleman and Mr. Hjelmfelt continuing to read the questions and answers as follows:)

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"Q Dr. Wein, if you wanted to measure the difference in cost to Muny Light of being able to operate the 85-megawatt unit --

A Yes.

Q What is the power supply characteristics to prepare the cases that you would choose?

A We would choose the case in which we have the 85-megawatt plant, and then we would choose a corresponding case, all other positions remaining the same, where you did not have the 85-megawatt power.

"Q If you want to study a case where your concern is solely the effect of having PASNY power, what are the characteristics of cases that you would choose?

A We would choose the case which did not have PASNY power and all other conditions were the same.

Q What did you use as your measuring rod there without PASNY power?

A We used essentially the base case.

Q Which is a description of what?

A Which is a description of what actually happened during the time period we're concerned with.

Q Similarly, Dr. Wein, if you want to measure the damages flowing from Muny's having less sales than it actually had, what cases would you compare?

A We take the case and we make the assumption that they actually did not lose the customers which they allegedly lost, all other things being the same.

Q Dr. Wein, what is the relationship of the general approach that has been used to measure damages to the question of how long into the future one ought to look to measure future damages?"

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MS. COLEMAN: Page -884.

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"A Well, there are the following considerations:

"One is as to whether the damage itself with respect, for example, to the loss of customers would continue on into the future?

"And with respect to that particular question, yes, the loss of damages -- the loss of damages which are due to the loss of customers would continue into the future independently as to whether Muny was a generating distribution utility or a non-generating distribution utility.

"The second question, which goes to broader considerations of damage other than the loss of customers, such as the question as to whether or not you would become a generating utility, if you could become a generating utility within the period as when we made this original study that Mr. Lansdale was referring to, the question there was whether Muny Light could become -- even though they had lost their generation -- a generating utility within the period of 1988.

"It was my opinion that they could not become a generating utility during that period and that, in fact, as of now, -- and in subsequent studies -- that it was my opinion -- which I believe was shared

" in by Mr. Mayben, that they wouldn't become a generating utility before the year 2000.

"And then with respect to that, all the interconnection damages and the specific value of PASNY where you are comparing now a generation case as against a distribution case, it's in those areas where the damages then depend. But it would depend on whether you are generating or not generating.

"With respect to the loss of customers, it doesn't depend on that at all."

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MS. COLEMAN: No further questions.

THE COURT: Thank you, Doctor.

(The following testimony of the recross examination of Dr. Harold H. Wein was read by Mr. Lansdale and Mr. Murphy as follows:)

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"RECROSS-EXAMINATION OF DR. HAROLD H. WEIN (VOIR DIRE)

"BY MR. LANSDALE:

"Q Dr. Wein, the relevance as you viewed it previously of Muny being a generating utility or not being a generating utility out in the future has to do with its ability to keep its prices down below CEI's, did

" it not?

"A I think that is an implicit assumption, yes.

Q Thank you, and the assumption was having in mind, I think, as you remarked somewhere in your testimony, the duty of what the lawyers call 'mitigation' and you felt if it was a generating facility, in view of your survey, it would be highly likely they would be able to get those customers back or some of them; is this not so?

A When you say 'highly likely,' you mean able to get which customers back?

Q The ones they lost under the free wiring program.

A I never said that. I said that all that happened in the survey was if there were certain differences, customers would switch if they could switch.

"The question of generation -- and if the prices were low enough, the customers would switch.

"A lot of customers may not have switched, and they would have gotten -- either company would have attracted more business, I think.

Q Dr. Wein, your assumption is, and Mr. Mayben's calculations are that if Muny Light were to still be a generating facility with its' 85-megawatt unit, its costs would be substantially lower than they

" are now, or are forecast by you to be; is that correct?

"A That is so, yes.

Q And your implicit assumption, as you characterized it a moment ago, was that if that were the fact, good judgment would require you to assume that Muny Light would be able to attract more business than it otherwise would; is this a correct statement of the assumption implicit in your testimony?

A Than it otherwise would as a distribution utility, and if CEI did not meet their competition.

"Now, that, I couldn't know, whether CEI would or would not meet their competition.

Q All right, sir.

"Now, insofar as the depreciation is concerned, you testified that Mr. Mayben deducted that in years after -- that is, the depreciation of the three 25-megawatt units, he deducted that in the years after the retirement of those units; is that what you are saying?

A What I am saying is that I am not sure what Mr. Mayben did with respect to the 25-megawatt units.

"I would have to look up the cases in terms of the depreciation which he was following. On all cases

" I answered Ms. Coleman, namely, they were following the City's actual practice of depreciation.

"Q And you are not intending to make any testimony one way or the other as to the treatment of the $1,705,000 depreciation and interest relating to the three 25-megawatt units which is not taking into account of unusual determination of damages; is that correct?

A Well, in my determination of damages, the depreciation rules of the City are followed, and as of the time that these 25-megawatt units go out of business in 1977, the City would have been depreciating them.

"Now, the question as to whether the depreciation by the City goes out into the future; is that what you are asking me? I assume that it would.

Q My question is, it is true, is it not, that there are, according to Mr. Mayben's figures, $1,705,000 of interest and depreciation relating to the three 25-megawatt units which is not deducted in your determination of the damage figure in your most recent exhibit, 3315, I believe."

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MR. LANSDALE:

Go to page 18,891.

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"A I don't know the details of Mr. Mayben's figure until I look it up."

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(End of the reading of Dr. Wein's testimony.)

MR. LANSDALE: I have no further questions.

MS. COLEMAN: Nothing further, your Honor.

THE COURT: Approach the bench.

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(The following proceedings were had at the bench:)

THE COURT: Subject to the ruling, the Court's ruling on the outstanding exhibits which I will do later this morning, I assume that the plaintiffs rest.

MR. WEINER: Your Honor, we have some exhibits that have not been identified yet, and they have been given to CEI, but not the Court, as unsponsored rebuttal exhibits, and we would also like to offer the stipulations to be read, 136 through 144, and those relate to --

THE COURT: Which ones?

MR. WEINER: 136 through 144.

That is page 29.

MR. LANSDALE: I object. I don't see what that has got to do with any rebuttal.

MR. WEINER: I object on relevancy grounds.

THE COURT: Let me read them first, 136 through what?

MR. WEINER: 144, the bottom of the page.

THE COURT: Okay. I have read them.

MR. WEINER: They are being offered in rebuttal to the defendant's natural monopoly defense.

The testimony of the witnesses was that one of the characteristics of a natural monopoly was that the firms in the market would have to operate at the most efficient level possible.

CEI is one of the firms in that market, and the stipulations show they are not operating at the most efficient level possible.

MR. LANSDALE: I don't recall any such testimony by any of our people.

THE COURT: I will overrule the

objection. Let's proceed -- rather, I will overrule the proffer, not the objection.

I will overrule the proffer, and let's proceed.

MR. LANSDALE: I want to object to Dr. Wein's damage exhibits, and I would like to be heard on it, your Honor.

THE COURT: Well, we can do that, and I am reserving my right to rule on the admission of the exhibits, but I want to get this thing in a posture where we can move along.

Do the plaintiffs rest?

MR. NORRIS: We have some damage exhibits before we rest.

THE COURT: All right. We will dismiss the jury first. Let's go back.

(End of bench conference.)

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THE COURT: Ladies and gentlemen of the jury, we must address ourselves to certain legal matters, so rather than inconvenience you and require your presence in the jury box, you are free to return to the jury room and relax, and we will call you when and if

we need you.

Thank you very much. Keep in mind the Court's admonition.

(The jury was excused from the courtroom.)

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(The following proceedings were had in the absence of the jury:)

THE COURT: All right. You are talking about 3315 and 3316?

MR. LANSDALE: Yes.

My objection to those is that they do not conform to the Court's order in respect of the damage and eliminating the effect of the claim to damages of the 85-megawatt unit.

And Dr. Wein agrees that the problem is to assess the damages Muny Light receives from the failure to get PASNY power without assessing it, the damage sustained, by not having the 85-megawatt unit in operation.

It is clear, if your Honor please, and I invite -- that Dr. Wein has included damage from the failure of the 85-megawatt unit in his determination of the PASNY power damage, and I invite your Honor's attention to Dr. Wein's description of why it is no longer necessary to

have a combined figure rather than separately adding them up, and this is on page 18,755, and he points out that:

"The value of PASNY power is going to depend upon what it displaces, and if you have the 85-megawatt unit, the question is different than if you don't have the 85-megawatt unit.

"Once we do not have the 85-megawatt unit, the PASNY power is always displacing the most expensive power from 1977 on, and the most expensive power is the power which they are buying in this case, and it happens to be the CEI power."

And I submit, your Honor, that at page 18,842 Dr. Wein agrees that, "Muny Light's costs would have been lower had they had the 85-megawatt unit in operation."

Now, if your Honor please, to determine PASNY costs -- PASNY damages -- by the difference between the cost of CEI power to Muny Light as a non-generating facility and the cost it would have had had it received PASNY power, that is clearly to include damages from the loss of the 85-megawatt unit; and I submit that there can be no question about that upon the basis of

Dr. Wein's testimony.

With respect to the interconnection portion of it, he agrees, Dr. Wein agrees that the difference between his figure and Mr. Bingham's figure of $1,705,000 relates to the cost of depreciation of the three 25-megawatt units and the interest on the monies to repair and rehabilitate the three 25-megawatt units, and that is that the expense of the operation of the units were not deducted in his determination.

And I submit that it is crystal-clear, if your Honor please, that he has failed in his determination of those damages to deduct all of the costs properly attributable to the rehabilitation of those three 25-megawatt units, which is the excuse for the damages there.

Now, on the free wiring program, it is clear that Dr. Wein treated that the same as he did the PASNY power; that is to say, that he took the difference between the profitability with the customer at hand and compared it with the profitability without them, based upon the treatment of Muny Light as a non-generating facility.

This necessarily involves the assumption that the damages include the damages occurring by reason of the loss of the 85-megawatt unit.

Now, as to one more point on the free wiring program:

He testified on direct examination, if your Honor please, that his consideration of the future damages for free wiring had nothing whatsoever to do -- and he was particularly emphatic about it -- Muny Light being a distribution-only utility, yet he testified time and again on direct examination and admitted it on cross-examination that his determination to go from 1988 to 2000, and I quote:

"Q And similarly your determination that the market share" -- pardon me -- "and the consideration that you had in mind in deciding later to project it to the year 2000 was your assumption that Muny Light would have to remain as a distribution-only utility in the future, is that not so?

"A Yes."

And that is 18,863 and 18,864 of the record.

I submit that in these considerations, your Honor, it is clear indeed that Exhibits 3315 and

3316 do not present damage claims in accordance with your Honor's order and do not present something upon the basis, upon a basis upon which the jury would be permitted to make a finding as to damages.

MS. COLEMAN: Your Honor, I will speak to each of those points and in order.

The first is the claim about PASNY power.

The cases on damages in the antitrust field make it quite clear that the damages ought to be measured by comparing what the plaintiff actually is and what it would have been absent the conduct, and therefore the method of damages used here is to compare what the plaintiff actually is to what it is expected to be -- to what it would have been absent defendant's conduct.

In the case of PASNY power, the plaintiff is what it is, a distribution-only utility, and the effect of the PASNY power measured alone is the impact that, having PASNY power by that distribution utility, that Muny would have on its cost of operation a very straightforward approach of comparing what is to what might have been.

The kind of approach that Mr. Lansdale is advocating I am sure does not find any support in the literature that you ought to look at what might have been compared to what might have been. The question is what happened to this plaintiff in the condition that we find it, and that is the impact of PASNY power, what it has had on Muny Light as a distribution utility.

The question of damages relating to Muny continuing to have an interconnection were measured by a separate case and are much greater than and different from the damages related to PASNY power.

You can tell that just from looking at the figures on the old exhibits.

The damages relating to refusal to interconnect in the future were some $14 million in the period from 1981 to 1988, and the damages relating to PASNY in the future are approximately $4 million.

It cannot be -- it is impossible that that $14 million is there in the $4 million, and obviously it isn't.

The question is simply what has happened to this plaintiff in the condition that it is

as a result of the refusal to wheel PASNY power.

On the second point, the question of depreciation, Mr. Bingham when he had his deduction and had it on the screen, he never explained what it was in his direct examination, and he never justified what he had done or explained what he had done.

It was brought out on cross-examination that this amount had some relation to charges in the future for the period of 1980 to 1985 associated with depreciation.

The testimony of Mr. Mayben back several weeks ago was that the approach of measuring damages had been to treat the depreciation in the way that Muny treats it, and he stated that it is done on a straight-line basis.

Our only concern as a result of the Court's order is the period from 1971 to 1977, and therefore our only concern of those charges are those charges and expenses, and those revenues that accrue in those years, and by comparing the revenues and expenses, to come up with a net revenue figure which is the damages, and to disregard the practices of the plaintiff here in its accounting and to come up

with a figure without justifying it and without explaining why one should depart from the assumptions made in creating this damage case, and that cannot provide a basis, your Honor, for dismissing damages, the damage presentation of Dr. Wein.

There is, I don't believe, any question of fact but that Dr. Wein has done it correctly.

Mr. Bingham offered nothing to support what he did. He said he just did the arithmetic.

In the best defense of Mr. Lansdale's position there is a question of fact, and there is no basis for dismissing the claim in the manner that Dr. Wein calculated it.

On the free wiring program, the approach again is the same, what happened to this plaintiff in the condition that it is by reason of having fewer sales and less customers than it would have had absent the Muny Displacement Program, and that question can be studied by itself, and it was by Mr. Mayben and by Dr. Wein, as they explained in their earlier testimony, and that is the approach that Dr. Wein took again in his testimony yesterday, and once again it is really the only proper way to

MR. LANSDALE: Oh, I forgot SIFCO, because we argued that yesterday, the motion to exclude the SIFCO company from the so-called free wiring program upon the basis argued yesterday.

THE COURT: Very well.

Mr. Norris, are you desirous of bringing to the attention of the Court any areas of the record, including testimony or exhibits, that you are desirous of having the Court review before it rules upon the defendant's motion?

MR. WEINER: Yes, your Honor, we are.

THE COURT: Do you have a printed sheet?

MR. WEINER: I do.

THE COURT: Do you have a copy for me?

MR. WEINER: It is done in a way that is a little argumentative, but I will be happy to give it to the Court.

THE COURT: All right.

Why don't you just tell me. I will write it down.

MR. WEINER: Okay.

There are several points:

First of all, I think it is clear the issue is whether there is evidence to support a jury finding of whether CEI's payment of $250,000 to the contractor who did the work was a contributing factor in SIFCO's conversion of the Muny Light -- I mean, to CEI, excuse me.

THE COURT: I don't think that is the exact rule that we are confronted with. We are confronted here at this time as to whether or not there is sufficient evidence to present this matter to the jury as a question of fact.

MR. WEINER: Right. I think we agree on that.

Let me give you the cites. Mr. Jackman, the witness, was a former employee of SIFCO, and he testified at page 17,447 and 17,448.

THE COURT: Just a minute.

MR. WEINER: He testified that he was not the person who made the decision for SIFCO to switch to CEI.

THE COURT: All right.

MR. WEINER: He was only the plant manager, and he was not in the management

of SIFCO.

THE COURT: Okay. I read that.

MR. WEINER: Plaintiff's Exhibit 2630 is a document of the CEI company which shows that SIFCO was targeted for conversion by CEI as part of its efforts to accelerate industrial Muny conversions as early as 1966.

Plaintiff's Exhibit 3249 shows --

THE COURT: Wait a minute. 3249? --

MR. WEINER: Yes. That shows that in April of 1972, when the work was underway, or when the conversion was accomplished, the projected load of SIFCO for July of 1972 -- and this is the new projected load -- when the conversion work was to be completed, was an estimated annual revenue of only $238,000.

That goes to the point to show that the only justification for making that kind of an investment for an EAR, projected EAR, which didn't come to fruition, was to take a customer.

Now, the testimony at 14,137 shows -- this is Wyman -- shows this was such an

unusually large transaction for CEI that it had to get the approval of the Executive Vice President.

Plaintiff's Exhibit 383 shows that SIFCO was Muny Light's largest single private customer at the time.

Plaintiff's Exhibit 293 shows that the amount of payment made by CEI was $250,500. Mr. Jackman says the payment was only $200,000.

This is significant because I think it shows the actual lack of knowledge Mr. Jackman had as to the true facts surrounding the matter.

Another occasion is at page 17,448 where he testified very clearly that CEI was the owner -- retained the ownership of the distribution lines that were put in there, and the contract, 292, at the third full paragraph on page 2, and of those exhibits clearly shows the distribution and its related equipment were to become the property of SIFCO.

And I think all of this testimony put together clearly creates an inference that the jury can rule on that SIFCO would not have switched but for that payment of $250,000.

I say to the Court that common sense tells you that if they were going to switch now, there is no possible reason to pay $250,000, and I think the jury ought to have that question.

There is good law on this, and there is a good Sixth Circuit case, Shephard vs. Maxwell, 346 Fed. 2d 707 at 726; and there are a couple of circuit cases in the antitrust area that the jury obviously was, as you know, is a finder of fact, and when there is a question, they are the ones to judge the credibility.

THE COURT: I am going to review these before I rule on the motions.

In the meantime, I am going to call the jury back, and I am going to tell them that they have free time between now and 1:00 o'clock, and we will commence closing arguments at 1:00 o'clock, and in the interim I will make the necessary rulings on the outstanding exhibits and the outstanding motion, and the lawyers will have an opportunity of reviewing the charge and an opportunity of placing on the record their exceptions and objections to the charge, and so we will be ready to proceed at 1:00 o'clock.

Call the jury in.

MR. NORRIS: I am sorry. I didn't hear you. Did you say that the charge would be available when we recess?

THE COURT: I don't know. It will be ready within the hour I am sure.

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(The jury was reseated in the jury box.)

THE COURT: Ladies and gentlemen, please be seated.

It is now about ten minutes to 10:00, and we have reached that point in this case where all of the parties have rested, and there will be no further evidence to be presented.

There remains the closing arguments of counsel as well as the instructions of the Court as to the law that applies to the facts of the case before the matter is submitted to you for your deliberations.

So that there may be continuity in the closing arguments, rather than commencing them at this juncture, we will wait until 1:00 o'clock, at which time counsel will be given an opportunity to summarize for you what they think that the evidence in this case has shown.

We will be completing closing arguments at about 4:30 or a quarter of 5:00, and the Court will give its instructions on the law to you in the morning, so that the case may be submitted to you for your deliberations before noon tomorrow.

Even though we have concluded the taking of the testimony, ladies and gentlemen of the jury, you are to keep in mind -- and I cannot emphasize this too strongly -- that you are not to discuss this case, either among yourselves or with anyone else, and you are not to read any newspaper accounts of it, or view any television, or listen to any broadcasts of it until -- and you should keep an open mind until such time as you have heard the arguments of counsel for both sides, and until such time as the Court has instructed you on the law, and until such time as the matter is ultimately submitted to you for your deliberations, with a view of arriving at a verdict, and even at that time, ladies and gentlemen, the only time that you are supposed to discuss this case among yourselves is when the jury is assembled in the jury room for the purposes of deliberations.

So, with that admonition, ladies and gentlemen, I am going to release you at this time until ten minutes to 1:00, and you are free to do whatever you want to do and be back here at ten minutes to 1:00, so that we can proceed with closing arguments at that time.

You are free to go.

{The jury was excused.}

{Recess had.}

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{Thereupon, at 10:50 o'clock a.m., the following proceedings were had in the courtroom in the absence of the jury:}

THE COURT: The Court is prepared to rule on the defendant's motion as it relates to the SIFCO claim damages accruing as a result thereof.

I have reviewed the transcript of the record as well as the exhibits that have been directed to my attention, and it is the judgment of the Court to overrule the motion.

At page 17,447, Mr. Jackman said, in answer to a question that was directed to him as follows:

"Q I assume, Mr. Jackman, that you

did not make the decision for SIFCO to switch from Muny Light service to CEI service?

"A I couldn't make the decision to spend $50,000, but I emphasized to our people that we -- and they knew what was going on, it was in the back of their mind that we would have to change because of the power outages and the losses that we were incurring through these power outages."

That, coupled with the exhibits, together with the credibility issue that may arise as a result of the testimony is the basis for the Court's ruling. There are inferences that would raise appropriate jury questions; accordingly, it is overruled.

I take it that there is nothing further as relates to any motion.

I will review the exhibits and be prepared to rule upon the exhibits that are still outstanding.

The Court will at 11:30, entertain any objections to or suggestions to the proposed charge.

I presume that that will be concluded by noon or, at the latest, ten after 12:00; at

which time we will go to lunch and return here at 1:00 o'clock and we will take our closing arguments.

MR. WEINER: Your Honor, just on that jury charge matter:

We didn't get them until 10:30, and --

THE COURT: You may not have gotten them until 10:30, but you had at least seven months to review them, review the proposed charge. It's essentially the same charge with about three or four changes.

MR. WEINER: Well, let me just say, we just got them, it's now 10:55, --

THE COURT: I will be back at 11:30.

MR. WEINER: Okay. But I don't know how many pages there are, there must be --

THE COURT: There are about 126 pages, but what I'm saying to you is that it's basically the same charge that the Court gave at the close of the last trial with some modification, so there is no necessity to have to take any longer than that to review the charge.

MR. WEINER: We don't even have

a copy, your Honor; we're all working off the same thing, we're sharing it.

THE COURT: Well, Mr. Weiner, all I can say --

MR. WEINER: I'm just telling you our problems.

THE COURT: -- all I can say to you is that I have been asking you people for two weeks to get your suggested charges in, your suggested interrogatories in; and, as I indicated to you earlier in this case that, obviously, my suggestions were ignored because I was getting interrogatories as late as last Saturday.

I can't help it if you people don't take seriously my suggestions.

So, as a result of that, I did not complete the final charge in its proposed draft until this morning, and that resulted because I had to work over the weekend.

So, gentlemen, I can't help it if you ignore my requests.

MR. WEINER: Well, just so it's clear, your Honor, we didn't submit anything as late as Saturday, and our things were on time.

THE COURT: Mr. Weiner, I never got your suggested interrogatories until the middle of last week, and they were supposed to be in the week before that.

MR. WEINER: The interrogatories, I'm sure you're not right, your Honor; maybe the jury charge came in later than you suggested.

MR. LANSDALE: May I be excused, your Honor?

THE COURT: Yes.

I don't intend to argue the point.

MR. WEINER: It's, I just, you know, may not be able to be done by 11:30.

We'll work on it.

THE COURT: That's too bad, Mr. Weiner.

I'm giving you the charge as a courtesy. There is no requirement in law that I give it to you; there is absolutely no requirement that I give it to you.

(Recess had.)

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(Thereupon, at 11:40 o'clock a.m., the following proceedings were had in the Court's chambers in the absence of the jury.)

MR. MURPHY: Your Honor, this is Mr. Bergin of our office, he's a lawyer.

THE COURT: Good morning, Mr. Bergin.

Gentlemen, just so the record reflects what transpired in this matter.

I have gone through my notes and I find that on Monday, September 14th, the Court requested and solicited from counsel a submission -- an early submission of proposed jury instructions and proposed interrogatories, and I suggested that it would be helpful to the Court if the Court got those by September 18th.

Mr. Norris, as we all recollect, indicated that it would be more comfortable if those documents were submitted by the 22nd of September, which was the following Tuesday.

Now, pursuant to that, on September 21st, I received from the defendants a 16-page document styled "Defendant's Proposed Written Interrogatories to the Jury under Rule 49(b)."

On that same date, I received a five-page document from the City styled "Plaintiff City of Cleveland's Proposal to Revise Special Interrogatory No. 4."

There were no submissions of any proposed charges.

On September 28th, which was the following Tuesday, I received from the plaintiffs a 41-page document styled, "Plaintiff City of Cleveland's Proposed Supplemental Jury Instructions - Trial No. II."

On that same date, I received a 48-page document styled, "Proposed Jury Instructions Submitted by CEI," which submissions were a week after the Court requested that they be submitted.

Now, so that the Court's obligations as to counsel are reflected on the record, Rule 52 provides -- I'm sorry -- Rule 51 provides:

"At the close of evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the

jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Now, Mr. Weiner, contrary to your statement, I am not required to show you or to present to you a copy of the Court's charge. I extended it to counsel purely as a courtesy.

As it relates to the proposed instructions submitted by both sides, in comformity with Rule 51, the proposed instructions of the plaintiff, unless incorporated into the charge that the Court intends to give, are overruled.

Similarly, as to the proposed jury instructions submitted by CEI, except as may be incorporated in the charge as proposed to be given by the Court, are also overruled.

Gentlemen, I want to also state that I have reviewed all of your proposed instructions, and keeping in mind that the Court's instruction

in this case was initially drafted for the first trial that concluded in November of 1980, and that charge was a matter of record in the previous case, in reviewing both submissions of proposed supplemental jury instructions, I find that what both counsel have done is primarily an attempt to redraft the language of the basic charges in a self-serving way. And in most instances, except as I have incorporated the substantive matters in my charge, I find that, apart from being self-serving, they are not accurate statements of the law. Consequently, as I say, with the exception of those suggestions that are incorporated in the general charge, both sets of proposed interrogatories are overruled.

And those proposed interrogatories that represent accurate statements of the law have been incorporated in the general charge, albeit not in the exact language proposed by the parties hereto, the substance of those proposed charges are in the Court's charge.

Now, with that, you gentlemen are free to place upon the record whatever you are desirous of stating, including any exceptions which you

are desirous of making at this time.

You see, at this juncture, the only purpose of extending an opportunity to review the charge is so that it may be utilized by counsel in the presentation of closing arguments.

I notice that Mr. Norris and Ms. Coleman, who apparently are going to make the closing argument, are not even present here or reviewing the charge, Mr. Weiner.

MR. WEINER: We are reviewing it for them, your Honor.

THE COURT: I don't know how they're going to utilize the substance of the charge if they're not here, in their closing arguments?

MR. WEINER: Let me say this, your Honor:

You have made a record on this, that is all well and good.

We got these things at 10:30 this morning, they're over one hundred and -- I don't know how long they are yet.

We had time out for the Court's ruling --

THE COURT: We had five minutes out for that.

MR. WEINER: Whatever time; as far as I'm concerned, we did not have the instructions in time to use them to effectively prepare for the closing argument that is set for 1:00 o'clock.

THE COURT: As far as I'm concerned, you are not arguing, Mr. Weiner; Mr. Norris is.

MR. NORRIS: Yes.

THE COURT: He is not even reviewing the charge.

MR. WEINER: No.

THE COURT: He hasn't been here all morning.

MR. WEINER: He can't review that many pages and give a closing argument at 1:00 o'clock, your Honor; I mean, it's just a physical impossibility.

THE COURT: That seems rather inconsistent, that he shouldn't even be here attempting to --

MR. WEINER: That's what we're trying to do for him, to find out which ones have been changed; and of the first 70 pages that I have been able to read by now, I find a

lot of changes from the first trial.

THE COURT: Okay.

Let's proceed.

MR. WEINER: And I just -- in light of the length of this trial, I honestly do not believe that giving one copy to two counsel that have to share it at 10:30 is fair to counsel.

THE COURT: Well, counsel has not been fair to the Court.

MR. WEINER: I understand what you have just said on the record.

THE COURT: Let's proceed.

MR. WEINER: And that's my position.

THE COURT: Do you have any exceptions or objections at this time?

MR. WEINER: I do have exceptions.

As I say, I have not gotten through -- I only got to page 72, --

THE COURT: You will be free to examine the charge between now and 1:00 o'clock further.

So let's put on the record your objections

and your exceptions at this juncture.

And I would suggest that if either Ms. Coleman or Mr. Norris are going to do the argument, and if it is so imperative that they review the charge, that they should be here reviewing it.

MR. WEINER: Well, --

THE COURT: Don't give me that second-hand business. That is not the way counsel are supposed to review charges.

Let's proceed. Put your exceptions that you have on the record or any suggestions that you may have so that the Court may appropriately consider those suggestions between now and tomorrow morning when it charges.

MR. WEINER: Well, we will certainly continue working on this and get all this to you before tomorrow morning; but I will give the ones that I have now.

THE COURT: You're not going to continue working on it, because I told you this is a working draft, and when we go in there for arguments, my secretary has to prepare the charge that is going to be submitted to the jury in writing, and, to do that, she has to

eliminate all of the citations incorporated in the charge, and that's going to be a job in itself.

Now, when she finishes that, you will be free to utilize the charge again.

MR. WEINER: I don't want to belabor it, your Honor, but I honestly don't understand --

THE COURT: Let's proceed, please, now, Mr. Weiner, I don't want to argue with you.

MR. WEINER: I can't understand why we don't get a copy of it in this day of Xerox machines.

THE COURT: Would you please proceed?

MR. WEINER: All right.

THE COURT: Proceed, or I will call this off right now.

MR. WEINER: I will. I will do it, I don't want --

THE COURT: Why do you always insist upon creating a controversy?

Now, you have put it on the record; proceed.

MR. WEINER: Okay.

The first objection is Paragraph 4(B) of the Special Interrogatory No. 4, and we would ask the Court to include the word "exclusionary" as well as the other language the Court has in Special Interrogatory 4(B).

The basis for that is the Hecht case.

THE COURT: What is that?

MR. WEINER: 4(B) of the Special Interrogatories.

(After an interval.)

THE COURT: "Do you the jury find from a preponderance of the evidence that the defendant CEI has monopolized or attempted to monopolize the relevant market by unfair or predatory means?"

MR. WEINER: I would put in the word "exclusionary," your Honor.

(After an interval.)

MR. WEINER: Plaintiff has no other comments with respect to the Special Interrogatories.

THE COURT: All right.

How about the defendant?

MR. LANSDALE: So far, I have no comments, your Honor.

I'm just reading the damage now, and the only request --

THE COURT: I'm talking about the Special Interrogatories.

MR. LANSDALE: No, sir, I don't have any.

THE COURT: All right.

MR. WEINER: Turning to the jury instructions, the first one would be on page 7, your Honor.

THE COURT: What?

MR. WEINER: Page 7.

THE COURT: Okay.

MR. WEINER: The last line, I believe.

If I'm inaccurate, this is just because I don't have it in front of me, but I think there is a reference to this in terms of the City's allegations of denial of wheeling, there is an allegation or a reference to "other power suppliers", and I don't believe the City has put on any evidence of denial of transmission service for "other power suppliers," I don't think that should be part of the charge.

THE COURT: Let's see.

I can't find it.

MR. WEINER: It's on page 7.

Can I look over your shoulder?

THE COURT: Sure.

MR. WEINER: I think it's the last line.

(Mr. Weiner looking over the Court's shoulder.)

MR. WEINER: Oh, I'm sorry, you have page 10.

THE COURT: Okay.

(The Court turns to page 7.)

MR. WEINER: Right here (indicating.)

THE COURT: Let's see.

Are you saying that you want this out, that:

"Defendant refused to sheel or to permit the transmission of electric power from other power suppliers, such as PASNY"?

MR. WEINER: I think it should be just "from PASNY."

THE COURT: Okay.

MR. WEINER: The next comment, your Honor, would be at page 21 and 22.

(The Court turns to pages 21 and 22.)

THE COURT: Okay.

MR. WEINER: This is under the heading, I think, of --

THE COURT: "Credibility."

MR. WEINER: -- "Credibility," and this is new, I think the paragraph starting "In assessing whether a witness is worthy of belief", et cetera, is new. And we will object to that.

The reason for the objection is that prior language used by the Court at the first trial, plus the language in this charge covers all the things about --

THE COURT: I think that the record should reflect that in considering the credibility charge, I have modified the one that I intended to charge the jury on by excluding the names of the individuals to whom I directed the remarks, so this way the jury can conclude in their own minds as to the individuals that they should evaluate.

Anything further?

MR. WEINER: No, your Honor.

But we do take exception to that, --

THE COURT: You may.

MR. WEINER: -- the new language in that charge, that's what we're taking exception to.

Page 28, --

THE COURT: The Court has some rather decided views as to the credibility of certain witnesses as to both parties to this case, but I have accommodated both sides by not commenting on the credibility of witnesses that appeared on behalf of either side.

You may proceed.

MR. WEINER: 28, your Honor.

This is a -- {The Court turns to page 28.}

MR. WEINER: This is a point that we have raised before, but in the second sentence, you start the sentence with the word "However," we're talking about the charts or summaries, and, to us, that sort of puts the cast that charts and summaries are to be taken as different types of evidence than the other evidence and having like a less influence than other evidence.

THE COURT: I have no objection to taking that out.

Okay.

MR. WEINER: The next one is the language at 31, your Honor.

We objected at the last trial and again object to the "sink or swim" language without the other additional language that we proposed in our charge.

I think that was just for the purposes of the Court, page 3 of our submission, Plaintiff City of Cleveland's Proposed Supplemental Jury Instructions - Trial No. II, where we asked the Court for additional language, your Honor.

(Mr. Weiner showing a document to the Court.)

THE COURT: I will overrule that.

MR. WEINER: You have overruled that. Okay.

Let's see, 45, your Honor.

(After an interval.)

THE COURT: Yes.

MR. WEINER: We would take exception, your Honor, on the potential competition part of the charge, the language that says "except for any actions of the defendant," because --

THE COURT: Let me read this.

{The Court reading silently.}

THE COURT: Tell me why you are objecting.

You are objecting to "any actions of the defendant"?

MR. WEINER: Right. We think that that term of potential competition is not relevant to whether our potential competition was blocked by them.

The question is, what's the relevant geographic market, and if we have potential competition out there, it doesn't have to be blocked by them in order to be --

MR. LANSDALE: Yes, it does.

MR. WEINER: Well, we don't think that is the law.

MR. LANSDALE: That was our reflection last time, and it's our reflection this time clearly.

THE COURT: Do you have any comment other than that?

MR. LANSDALE: No.

MR. WEINER: We had some, of course, on that from our first charge, I guess

the Court considered --

THE COURT: The fact that it was in the last charge doesn't necessarily mean that it was correct.

(After an interval.)

MR. WEINER: Page 47, your Honor.

We would request the Court not to list those seven factors there because they give undue influence to those seven factors; that the jury should be able to consider whatever factors they want in determining whether there is going to be --

THE COURT: That is overruled.

Let's proceed.

MR. WEINER: Page 49.

There is a paragraph about the jury may not consider the element of price influence in determining whether there is competition or effective competition or -- I'm not quite sure how the language reads.

THE COURT: "The jury is instructed, however, that in spite of any evidence to the contrary, you are not to consider, in determining the relevant geographic market, the extent to which, if at all,

the City's electric service rates may have influenced the setting of CEI's service rates."

That's overruled.

MR. WEINER: I just wanted for the record to show in our supplemental trial brief, on pages 2 and 7 are the cases that particularly would indicate it, your Honor should be able to consider that.

THE COURT: Yes.

MR. WEINER: Okay.

Page 52, your Honor.

{The Court turns to page 52.}

MR. WEINER: This is under the "Power to Control Prices", and it gets into the PUCO.

It would seem to us that the way the second sentence should read is:

"However, the specific circumstances of regulatory control may be relevant to whether CEI had power to control prices, as I have just defined that term," rather than "monopoly power."

{The Court places a paper clip on the page.}

MR. WEINER: I also submit, your Honor, that that charge should include language

that CEI had the power to initiate rate increases throughout this period.

THE COURT: That's inferred in the charge.

Well, all right.

MR. WEINER: I didn't see that.

Yes, there. Otter Tail and Northeastern would be citations for that. We had some language, I think, in our instruction on page 11 of our Second Supplemental filing, just in terms of the record.

{The Court reading silently.}

THE COURT: Well, I will review that, although we have attempted to track the Ohio Revised Code as to the situation in what you suggest is implicit in the charge, but I'll review it.

What's the next exception?

MS. COLEMAN: Your Honor, on that charge, we except to the detailing of various provisions of the law, particularly in light of your Honor's excluding presentation of the evidence concerning the effectiveness of the PUCO regulation, and will except to the direction to the jury to presume such

effectiveness contrary to the law.

THE COURT: Very well.

The Court's charge has not had put on the authority on which it relied in drafting -- constructing the charge.

Let's proceed.

MR. WEINER: 55, your Honor, under the heading "Power to Exclude Competition."

We would request the Court consider putting language in that to indicate that neither -- neither those regulatory -- that regulatory agency has no power to award damages. In any event, even if it did, it would fit in at the end of that charge.

THE COURT: I will review that.

MR. WEINER: Okay.

And if you will turn to page 58.

(The Court turns to page 58.

MR. WEINER: Could I borrow this a second?

THE COURT: Sure.

(Mr. Weiner takes the previous page.)

(After an interval.)

MR. WEINER: I can't follow my notes on page 58.

I may have to come back to this.

THE COURT: All right.

MR. WEINER: I will leave a question mark here.

62.

(The Court turns to page 62.)

MR. WEINER: We will request the Court to use the language I think the Court has used before, and when you say, "Acts in an unreasonably exclusionary manner" we would say is unfair.

MR. LANSDALE: That also is the language, I think, of Union Leader.

THE COURT: You have to understand that I have to conform this language.

That's a quote from Byars versus Bluff City News, and that is the exact language, and I have tried to plagiarize from the decisions the language that has been approved by reviewing courts.

So I will review that.

MR. WEINER: Okay.

64, your Honor.

(The Court turns to page 64.)

MR. WEINER: I assume the Court

is set on this, but this gets into the natural monopoly, and we end up having two natural monopoly charges, and we object to having it raised twice.

THE COURT: Okay.

MR. WEINER: 69.

(The Court turns to page 69.)

MR. WEINER: 69, as I read it, this paragraph starts, "Accordingly, if you should determine" is an entirely new paragraph drawn in from the Mid-Texas decision; and, as I read the law, it uses -- you are using the Mid-Texas decision as opposed to the Lorain Journal and the --

THE COURT: Right.

MR. WEINER: -- Eastman Kodak that you used in the last trial, and I would just submit we ought to say with the Supreme Court language on that.

THE COURT: I'll review that.

(After an interval.)

THE COURT: Yes?

MR. WEINER: Here's the one I'm talking about.

THE COURT: We'll check that.

MR. WEINER: It's the paragraph beginning "Accordingly," going -- on page 69, going to the second line on page 70.

THE COURT: I'll check that.

MR. WEINER: Okay.

72, your Honor.

(The Court turns to page 72.)

MR. WEINER: This is about where I ended up reading, but there is one thing that caught my eye that, on page 72, we talk about the Essential Facility Doctrine, and the paragraph numbered 1, we submit the phrase "or other powers" is not necessary because --

THE COURT: What was that?

MR. WEINER: I'm sorry.

"It was not reasonably foreseeable for the plaintiff to have --"

THE COURT: "-- feasible."

MR. WEINER: -- "-- feasible --" excuse me -- "-- for the plaintiff to have constructed its own transmission lines to obtain PASNY power."

THE COURT: Okay.

That goes back to what you said before.

MR. WEINER: Right.

That's as far as I got, your Honor.

THE COURT: Well, you are free to go out there over the rest of it.

MR. LANSDALE: May I make one comment?

THE COURT: Yes.

MR. LANSDALE: Page 112, which, I believe, should be page 122 -- it was misnumbered -- back in the damage section.

THE COURT: Yes -- I don't have it.

MR. MURPHY: Do you have page 112 {addressing Ms. Coleman}?

MS. COLEMAN: Yes.

{Ms. Coleman hands the page to Mr. Murphy who, in turn, hands it to the Court.}

THE COURT: You understand, of course, that after we finish arguments and she has conformed this copy with the copy to go to the jury, that you will be able to review this and take whatever further exceptions you are desirous of putting on the record.

MR. WEINER: Thank you.

We appreciate that.

THE COURT: All I'm doing at

this juncture is giving you the opportunity for those that are going to argue the case to know what the charge is.

MR. LANSDALE: At the third line -- we just turned it down -- the third line on that page numbered 112, but which is really 122, I would request that it be amended to read "proximate result of a specific act or omission which is an antitrust violation."

THE COURT: Well, I don't see any necessity for that.

Anything further?

MR. LANSDALE: No, your Honor.

THE COURT: Well, --

MR. WEINER: Off the record -- could I?

THE COURT: Yes.

(A discussion ensued off the record.)

MR. MURPHY: Your Honor, may I be excused?

THE COURT: Yes.

(The Court and Law Clerk Schmitz conferred off the record.)

MR. LANSDALE: I do have another objection I forgot.

It is the section where you deal with inflation rates, --

THE COURT: Yes.

MR. LANSDALE: -- and you state the inflation rate is 7 percent, with 9-1/2 percent for such a period; and for another period, there are two things there, one of them is Dr. Wein's original thing about an average inflation rate of 7, and the second one as you relate, and I would object to giving the jury only the second one because I'm entitled to contend, I think, that it should be the first, if you follow me.

THE COURT: Yes, I know, you're referring now to 3316?

MR. LANSDALE: No, sir.

Where there is an average inflation rate of 7 --

THE COURT: Yes.

MR. LANSDALE: Yes; 16 --

THE COURT: That's right.

MR. LANSDALE: -- average inflation rate of 16.

THE COURT: I will look at that.

What about the PASNY power situation, should

that be refusal to -- this is the special interrogatory:

"What damages, if any, do you find were sustained by the City as a result of the City's refusal to wheel PASNY power:

"1. For the period July 1, 1971-1980"?

MS. COLEMAN: That is simply going by the historic period. I don't know that we need to define each period by the time.

THE COURT: I think it would be more accurate if we put "1973 to 1980", and then "For the period 1981 through 1985."

MR. MURPHY: I think September, '74.

MR. LANSDALE: September, '74 is the earliest date.

MS. COLEMAN: I think it would be best to just leave it in the periods that conform the way the exhibits are presented, your Honor.

THE COURT: Well, let me give that some further consideration.

MR. MURPHY: Your Honor, in Special Interrogatory 4(B), the City has suggested the inclusion of the word "exclusionary."

We would object to the inclusion of that word.

THE COURT: Let me check it and see how it should be accurately stated.

If that's the way it should be, fine. If it's the way they suggest it should be, I'll put the word "exclusionary" in there.

MR. MURPHY: Thank you, your Honor.

(The proceedings in the Court's chambers were concluded, and the luncheon recess was taken, to reconvene at 1:00 p.m. the same date.)

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TUESDAY, OCTOBER 6, 1981; 1:05 O'CLOCK P.M.

THE COURT: Please be seated.

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

THE COURT: Gentlemen, and Ms. Coleman, the following exhibits to which there are no objections taken may be admitted.

Defendant's Exhibit 1372, Defendant's Exhibits 1367 through -71, Defendant's Exhibits 1314 through -17, Defendant's Exhibit 1044.

Plaintiff's Exhibit 3133, Plaintiff's Exhibit 3138, 3162, 3311, 3161, 3307, 2965-B, -C, -D, and -E, 3157 through -59.

The following exhibits submitted by the City and objected to by the CEI:

Plaintiff's Exhibit 3298, sustained.

Plaintiff's Exhibit 3309, Kemper map, overruled.

Plaintiff's Exhibit 3310, overruled.

Plaintiff's Exhibit 900, sustained.

Plaintiff's Exhibit 2303, sustained.

Plaintiff's Exhibit 3308, sustained.

Plaintiff's Exhibits 3134, 3135, 3136,

Before you bring in the jury, Mr. Norris, --

MR. NORRIS: Yes, your Honor.

THE COURT: -- are you desirous of splitting your time?

MR. NORRIS: Yes.

THE COURT: In which manner?

MR. NORRIS: We will split an hour and a half and 15.

THE COURT: All right. And you are going to take an hour and a half?

MR. NORRIS: Yes.

THE COURT: And Ms. Coleman will take the balance?

MR. NORRIS: Yes.

THE COURT: Let me ask you this: Are you desirous of being your own timekeeper?

MR. NORRIS: I'd like to have you be at this time.

THE COURT: All right.

Let me ask you this:

When do you want to be notified as to when you are approaching --

MR. NORRIS: I've been thinking about that.

I would like, if you will, to give me

45 and 75.

THE COURT: All right, at 45 and 75 minutes.

MR. NORRIS: Because at 75, I'll still have 15 to go.

THE COURT: All right.

And then 3 minutes before your time runs out, --

MR.NORRIS: Fine.

THE COURT: -- I'll let you know.

Are you going to split your argument?

MR. LANSDALE: Yes, sir.

THE COURT: Is Mr. Murphy going to -- are you going to argue all of it?

MR. LANSDALE: Yes.

THE COURT: Bring in the jury.

(The jury entered the courtroom.)

THE COURT: Please be seated, ladies and gentlemen.

Ladies and gentlemen of the jury, we have reached that portion of the trial where counsel for both sides will be permitted to address you in what is styled the "closing arguments of counsel."

You are to keep in mind that this is a

privilege which is extended to the lawyers for both sides to briefly summarize for you what each side believes that the evidence in its entirety has shown.

Keep in mind that closing arguments are not to be considered by you as evidence, only an opportunity extended to counsel to summarize facts which they believe are important in the case.

With that, Mr. Norris will argue for the City initially.

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CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

BY MR. NORRIS:

MR. NORRIS: If it please the Court, and ladies and gentlemen of the jury:

Judge Knupansky will instruct you that it is reasonable to infer that a person intends the natural and probable consequences of his acts.

For example, if a person has a candle and the oxygen is blocked out from that candle, it's going to go out.

If a person has a butterfly and puts it

into a jar and screws the lid on tight, that butterfly is going to die.

And because the natural and probable consequences of the acts involved are what they are, it's reasonable to infer that that person meant to put out that flame and to kill that butterfly.

Now, similarly, in this case, the City has proved that CEI refused to interconnect with Muny Light, refused to wheel PASNY power for Muny Light, and these acts had several natural and probable consequences:

In the first place, Muny Light was totally isolated from the balance of the electric power industry.

By way of comparison, the last time that CEI was totally isolated from the electric power industry was in the early 1920's. Mr. Lindseth indicated that the first interconnection that CEI had was in the early 1920's with the predecessor of Ohio Edison.

Another natural and probable consequence of these acts of CEI is that it injured Muny Light's ability to render reliable service.

And, thirdly, at the same time, another

natural and probable consequence of these acts, in the view of the City, was to maintain and enhance its monopoly power that CEI had in this area.

I submit to you that because those are the natural and probable consequences of those acts, it is a reasonable inference that CEI intended all of those consequences.

Now, in this case, the butterfly came close to dying, but it didn't.

Muny Light sought help from Federal agencies, and the evidence has shown that CEI was ordered to give Muny Light an interconnection.

The evidence has also shown that CEI was ordered to provide wheeling services for Muny Light and, indeed, PASNY power has been received by Muny Light since June of last year by virtue of the wheeling services that CEI has provided.

As Judge Krupansky told you at the beginning of this case, and as he will again instruct you, the purpose of the Sherman Antitrust Act is to preserve and advance our system of free, competitive enterprise and to

encourage to the fullest extent practicable, free and open competition in the marketplace.

Another purpose of the Sherman Act is to prevent the accomplishment of a monopoly in any business or industry, all to the end that the consuming public may receive better goods and services at lower costs.

Stated differently, the purpose of the Sherman Antitrust Act, as the Court has indicated and will, again, is to preserve competition and the competitive process for the benefit of the public.

The City submits that CEI has violated the Sherman Act by monopolizing and by attempting to monopolize the relevant markets in this case, and the City submits that CEI should be made to pay damages for those violations.

Judge Krupansky also told you at the beginning of the case that a company that possesses monopoly power and then engages in wilful and conscious acts to maintain and enhance that monopoly power commits the offense called "monopolization." I will say more about these various concepts in a few minutes; but the City believes that it has proved in this case

that CEI has committed the offense of monopolization.

The City also believes that the conscious and wilful business practices, the refusal to wheel, the refusal to interconnect, the Muny Displacement Program, and other acts that have been put into evidence in this trial, constitute those business practices that were designed and have the effect of maintaining and enhancing CEI's monopoly power. These same business practices, the City submits, at the same time, they constituted a violation of the Sherman ACt in the way of monopolization.

The City submits that, also, the offense has been committed of attempting to monopolize.

Now, these terms, again, will be given to you in more detail by Judge Krupansky tomorrow morning, and I necessarily have to make reference to these terms. It is not my purpose to tell you what the law is, that is the Judge's purpose; but I have to make reference to these concepts so that my remarks will make sense.

Now, the engineering and economic testimony that Mr. Mayben and Dr. Wein presented, even after the elimination of damages related to the failure of the 85-megawatt unit pursuant to the

Court's recent order, our damage proof demonstrates, in our view, that CEI's actions have injured the City of Cleveland to the extent of at least $35 million. And, today, we are asking you to return a verdict in the City's favor in this amount to restore to the City that which is rightfully its.

This has been a long, long trial, and I'm sure it hasn't been easy listening to the evidence as it comes in, frequently in disjointed fashion.

In my opening statement, I tried to paint a road map, give you a road map of what the evidence would show; and in the brief period of time that Ms. Coleman and I will have the privilege of addressing you with respect to these closing remarks, we are going to try to remind you of w-hat the evidence shows, so that we will be able to see -- at least, hopefully, that I will be able to demonstrate to you, and Ms. Coleman will be able to demonstrate to you, that the City is entitled to a verdict in this case.

Before going any further, let me remind you that CEI presented no witnesses who denied that

CEI engaged in the conscious and wilful business practices that I have described.

They could not deny the Muny Displacement Program, they could not deny the refusal to interconnect; they could not deny the refusal to wheel.

Instead, CEI has sought to divert your attention from their monopolistic acts by claiming that Muny Light was guilty of mismanagement.

CEI also argues that Cleveland, and the distribution of retail firm power in the Cleveland area, is a so-called natural monopoly market and, because of this, CEI argues that what constituted efforts to injure the City and injure the business and property of the City, should somehow be excused.

As Ms. Coleman will demonstrate, both of these CEI arguments are flawed as a matter of fact and as a matter of logic and, in our view, neither of these concepts in any way justifies the wrongful and unfair conduct of CEI in trying to drive Muny Light out of business.

Now, before you begin your deliberations,

Judge Krupansky will give you a series of questions called "special interrogatories." These are questions that are to be answered with respect to different aspects of the case, and one of the questions will deal with what you have heard a lot of testimony about, "relevant market."

Now, there is no issue as to the relevant product market; there is an issue with respect to the relevant geographic market.

You will be making a determination as to what is the area of effective competition; and, as the Court has already charged you and will again, in making such a determination, you are permitted to look at both actual competition and potential competition.

Now, in the City's view, the relevant geographic market is the entire City of Cleveland plus a small area beyond.

CEI, on the other hand, contends that the only area of effective competition is that smaller area within which both systems have distribution facilities in place.

Dr. Wein addressed himself to this issue of relevant market. That was with respect to

his first appearance on the stand, that was quite a while ago.

As a matter of fact, the opening statements, I was reminded looking at the calendar, were 12 weeks ago; so that this has been a long trial, and we appreciate the patience that you have all shown to the parties and to the witnesses.

Let me remind you that Dr. Wein concluded that, for the purposes of this case, the relevant geographic market is the entire City of Cleveland plus a small area beyond.

Now, what did he base his conclusions on? I just want to quickly hit the highlights.

First of all, Muny Light has the legal authority to serve throughout the entire City and outside the City up to 50 percent of the sales that it makes in the City.

Secondly, Muny Light serves customers in 139 out of 200 Census tracts in the City; and in those 139 Census tracts, 70 percent of the Cleveland population lives.

Muny Light also serves customers adjacent to the borders of the City of Cleveland in Bratenahl, East Cleveland, and Brooklyn.

Third, Muny Light has tried to obtain customers in areas outside of the yellow area that has been referred to sometimes as a 30-square-mile area. I'm not sure that the 30-square miles has ever been proved, but if I call it the overlap area, or the yellow area, or 30-square miles, that is what Mr. Lansdale refers to as the relevant geographic market.

Therefore, using that as a reference point, another factor in Dr. Wein's conclusion was that Muny Light had tried to obtain customers outside of that yellow area.

As both Mr. Hinchee and Mr. Pofok testified, Muny Light investigated serving load at the four pumping stations: Fairmont, Easterly, Westerly, and Southerly.

Muny Light also investigated the possibility of serving the airport, and if these extensions had taken place, Mr. Pofok testified that attempts would have been made to have gotten other customers in the areas of those new loads.

You will recall that the Director of the Department, however, particularly with respect to the proposed extension to Southerly, believed

that since Muny Light was an isolated utility, that it could not provide sufficiently reliable service; Muny Light was not able, in short, to make those extensions.

Now, Muny Light has, of course, been able to make some extensions. The Commodore Hotel is one such location near University Circle, and Muny Light was able to extend to that customer in 1973.

Dr. Wein also based his conclusion in part on the fact that Muny Light was a potential competitor in the entire City of Cleveland and in the small area beyond; and Dr. Wein pointed to various factors with respect to this element of potential competition:

First of all, Muny Light had the knowledge and the ability to run an electric utility system, it wasn't a brand-new person on the block.

Muny Light had the good will of customers throughout the City and, according to Dr. Wein's survey, customers generally throughout the City recognized that Muny had lower rates.

Another factor was that Muny Light had had

success previously in raising capital funds.

And perhaps of greatest importance, however, the actual location where Muny Light presently has facilities was not the controlling factor in Dr. Wein's view because, as he testified, either competitor, CEI or Muny Light, will expand to serve new customers where the expense is justified by the load.

Now, Mr. Gerber, the economic witness for CEI, presented his view of the relevant geographic market, that it was only the overlap area where both systems presently have distribution facilities.

You will perhaps recall that Mr. Gerber was unable to testify to any prior experience in analyzing this issue of relevant market; and I suggest to you that Mr. Gerber's view ignores, for the most part, the important element of potential competition, and I would submit that you should answer the first special interrogatory that the relevant geographic market for the purposes of this case is the entire City of Cleveland and the small undefined area beyond.

Now, you have also heard the term "monopoly power" used in the last 12 weeks, and Judge

Krupansky defined monopoly power for you and he will again tomorrow morning.

And the Court will give you an instruction with respect to "monopolization" and attempt to monopolize."

The Court will tell you, as the Court told you before, that for the offense of monopolization, what is necessary is that CEI must be found to possess monopoly power as that is defined in the cases and as the Court will define it for you.

Secondly, CEI must be found to have engaged in conscious and wilful business practices to maintain or enhance that monopoly power. And, as I said earlier, the City submits that it has proved both elements of the monopolization claim.

I would like, however, just for purposes of clarity, to deal more fulsomely with the monopoly power concept.

One of the factors that points to monopoly power in a case like this is the market share of the company in question.

Now, as you know, market share can be measured in lots of different ways, and we have

shown you in this case that during the relevant time period, CEI had approximately 80 percent of the electric customers in the City of Cleveland, approximately 90 percent of all retail electric power sales in Cleveland, and approximately 90 percent of all revenues derived from electric power sales in Cleveland.

As the Court will instruct you, generally speaking, the larger the market share, the greater the likeklihood that the company in question possesses monopoly power.

Now, beyond what I have said about market share, CEI can be found to possess monopoly power if it has the power to control prices in the relevant geographic market.

This does not mean that CEI must actually have controlled prices but, rather, that CEI had the power to do it if it wanted to.

The City submits that the evidence has shown that notwithstanding regulation in this industry, that CEI has considerable control over prices.

Now, you heard testimony with respect to regulation of CEI's prices by the Public Utilities Commission of Ohio, and Judge

Krupansky will tell you that the fact of PUCO regulation is simply another market fact of life that you have to take into consideration in your determination.

One of the stipulations that we have read in this case by Judge Krupansky was to the effect that the PUCO has no power over rate reductions by CEI.

Furthermore, the PUCO has no power over CEI's establishing of new rate classifications, nor of rates which CEI negotiates with specific cities to be charged to customers in those cities.

I ask you to recall that Mr. Bingham testified that throughout the relevant period, CEI has had an automatic fuel adjustment clause which would increase or decrease the cost of electric power to the customer depending upon variations in the cost of CEI's fuel purchases.

As Mr. Williams testified, CEI made its own decisions as to fuel purchases as well as the purchases of other goods and services necessary to produce electric power. And these decisions made by CEI influenced their costs which, in turn, influenced what their

prices would be.

Another factor that you should keep in mind in deciding whether or not CEI possessed the power to control prices in the relevant geographic market is the testimony admitted into evidence of Mr. Eckhart, a former Chairman of the PUCO in Columbus.

Mr. Eckhart testified that in 1971 the PUCO had no Rate Bureau and no rate engineers.

Notice that, in contrast, CEI had two or three rate engineers.

During 1972, there were 58 cases pending at the PUCO, all of which required detailed evaluations by the PUCO as explained by Mr. Bingham.

Furthermore, the PUCO had the obligation to review rates not only for CEI but for all of the other electric investor-owned utilities in the state, the investor-owned gas companies, the investor-owned telephone utilities, and the PUCO also had authority over common carriers and other service corporations.

I suggest that these facts are important, and that it is a reasonable inference that the effective power to control prices for the purposes

of this case lay in CEI rather than in the PUCO.

Another factor that should be considered is that CEI looked upon its rate tariffs as minimums and, therefore, CEI believed that it had the power and, indeed, it exercised the power from time to time to depart from those filed rates.

MR. LANSDALE: I'm going to object, if your Honor please.

THE COURT: Just a minute.

Approach the bench.

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(The following proceedings were had at the bench:)

MR. LANSDALE: I have refrained from objecting while counsel was arguing to the jury that the jury could assume that the PUCO would not do its duties; but to say that we could depart from our rate schedules, and the testimony --

THE COURT: Sustain the objection.

Let's proceed.

MR. LANSDALE: I ask the specific instruction that the jury is to assume that the PUCO does its duty.

THE COURT: That is in the general instruction.

Let's proceed.

MR. NORRIS: Just for the record, your Honor, my reference is to the Muny Displacement Program and the competition of the gas companies Mr. Blank testified to.

THE COURT: Let's proceed.

(End of bench conference.)

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MR. NORRIS: In addition to the power to control prices, another way of determining whether or not CEI possesses monopoly power is whether or not, in your view, -- a question of fact -- whether or not, in your view, CEI had the power to exclude competition in the relevant market.

In the City's view, the fact that CEI controlled Muny Light's access to the rest of the electric power industry demonstrates that CEI had the power to exclude competition.

Indeed, the evidence showed that CEI exercised that power by refusing to wheel PASNY power for Muny Light, thereby excluding PASNY from entering the Cleveland market as a

supplier of firm wholesale power in competition with CEI. That, in the City's view, demonstrates that CEI indeed had the power to exclude competition.

Further, Mr. Rudolph testified that CEI made the decision on August 8th, 1973 -- it was not communicated to the City until August 30 of that year -- but on August 8th, 1973, CEI made the decision not to wheel PASNY power or any third party power for Muny Light.

Additionally, the City's position is that CEI's control over access to interconnection for Muny Light was another means by which CEI could exercise the power to exclude competition.

I submit to you that the evidence showed that it was not economically feasible for Muny Light to have obtained either interconnection or wheeling services from any source other than CEI, and all of this adds up, in our view, to compel the conclusion that CEI indeed did have the power to exclude competition.

The Court will instruct you that you are permitted to look at other factors in trying to determine whether or not CEI had the power to exclude competition.