
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

9-18-1980

Volume 03 (Part 3)

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

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Arderly - redirect

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2 Q Of? --

3 A -- of 1971.

4 Q Now, the second payment listed there was called to be
5 made August 13, 1971.

6 Mr. Lansdale has drawn your attention to CEI
7 Exhibit 61, and will you get that in front of you,
8 please.

9 A {The witness complies.}

10 Yes, I have it.

11 Q And what is the date of CEI Exhibit 61?

12 A August 13.

13 Q 1971?

14 A 1971.

15 Q And what payment was made -- I mean, a payment in what
16 amount was made?

17 A \$400,000.

18 Q Compare that to Paragraph 2 on the other exhibit,
19 Plaintiff's Exhibit 1516; what was the amount of
20 payment called for by August 13 in that July letter?

21 A \$400,000.

22 Q Moving to the third payment; what was the obligation
23 of the City with respect to the third payment as
24 disclosed in Director James' letter?

25 A The balance due.

1 Ardery - redirect

2 Q By when?

3 A The end of August.

4 Q When was the payment to be made of that amount?

5 A I believe it was to be made --

6 Q Referring to the letter --

7 A -- by October 1.

8 Q Now, Mr. Lansdale called your attention to CEI Exhibit
9 67.

10 Would you get that in front of you, please.

11 A I have it.

12 Q And what is the date of that letter?

13 A November 4.

14 Q 1971?

15 A 1971.

16 Q And that is a letter from Mr. Hinchee to Mr. Howley?

17 A Correct.

18 Q And, as Mr. Lansdale pointed out, there was a check
19 sent with that letter, and in what amount?

20 A \$692,367.16

21 Q Is that the payment that is recited in Paragraph 3
22 of Director James' letter of July 15, 1971?

23 A I presume so.

24 Q And addressing your attention to Director James'
25 letter, the bottom of page 1 and the top of page 2,

Ardeny - redirect

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2 what were those payments contingent upon?

3 A Upon the willingness of the company, CEI, to go ahead
4 and make the permanent interconnection.

5 MR. NORRIS: No further questions.

6 - - - - -

7
8 RE-CROSS-EXAMINATION OF PHILIP ARDERY

9
10 BY MR. LANSDALE:

11 Q Do I understand it to be your statement that the
12 November 4th payment referred to in CEI Exhibit 67 is
13 in fact the payment which was designated by Director
14 James to be made by October 1, 1971, as set out in
15 CEI Exhibit 69; is that it?

16 A I said I presume that to be correct.

17 Q And please look at CEI Exhibit 67, and that states, does
18 it not, in Mr. Hinchey's statement, their statement, that
19 this is made in accordance with the City's computation
20 of the amount owed, and that there is disagreement as
21 to the correctness of the amount; that says that, doesn't
22 it, the second paragraph?

23 A Yes.

24 Q And thus would you not similarly assume that the City
25 did not on November 4 pay the entire bill of CEI to

1 Ardery - recross

2 date or through October 31; is that not correct?

3 A Yes, according to CEI's computations.

4 Q According to CEI's computations, and the agreement made
5 in June at the Federal Power Commission was that the
6 City would pay the company's entire bill, reserving
7 for later litigation the question as to the correctness;
8 is that not so?

9 A That is correct.

10 Q Thank you.

11 THE COURT: Re-redirect examination?

12 MR. NORRIS: No further questions.

13 THE COURT: Thank you, Mr. Ardery,
14 you may step down.

15 Please call your next witness.

16 MR. WEINER: The City calls Mr.
17 John Engle.

18 THE COURT: Gentlemen, approach
19 the bench.

20 - - - - -
21 {Bench conference ensued on the record as
22 follows:}

23 THE COURT: Gentlemen, I use the
24 interrogation of the last witness, both on direct
25 and on cross-examination, as an example of how we

Arduery - recross

are wasting time.

Mr. Norris, you attempted to elicit from this gentleman what obviously he had no personal knowledge of.

He was conjecturing. And Mr. Lansdale, you continue to permit it without objecting; and secondly, on cross-examination, going into the same conjecture.

He was testifying to hearsay, that he had absolutely no knowledge of what in fact the actual payments were.

Please, let's try to keep the questioning material and lay proper foundations, both of you.

You may proceed.

{End of bench conference.}

- - - - -

THE COURT: You may proceed with your next witness.

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1 J O H N C . E N G L E ,

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

5
6 DIRECT EXAMINATION OF JOHN C. ENGLE

7
8 BY MR. WEINER:

9 Q Would you state your name, please.

10 A John C. Engle, Jr.

11 Q What is your address?

12 A 3522 Pleasant Avenue, Hamilton, Ohio.

13 Q What is your occupation?

14 A Director of Utilities for the City of Hamilton, Ohio.

15 Q Where is Hamilton, Ohio located?

16 A It is located in southwestern Ohio, approximately 25
17 miles north of Cincinnati.

18 Q What are public utilities?

19 A Public utilities in our area are those services provided
20 to the people by our community, gas, water, and electric.

21 Q And what has been your prior employment before being a
22 Director of Public Utilities in Hamilton?

23 A Prior to that I was Superintendent of Utilities
24 Engineering for the City of Hamilton, Ohio.

25 Q When did you begin that job?

Engle - direct

- 1
- 2 A In May of 1960.
- 3 Q How long did you hold that job?
- 4 A From May of 1960 until September 1st of 1968.
- 5 Q Since 1968 what has been your job?
- 6 A Director of Public Utilities.
- 7 Q What are your duties as Director of Public Utilities in
- 8 Hamilton?
- 9 A I manage the gas, water and electric divisions of the
- 10 Department of Public Utilities, including sewage
- 11 treatment.
- 12 Q When you say "manage them" are you the person who is
- 13 in overall charge?
- 14 A That is correct.
- 15 Q How did you get your job?
- 16 A I am appointed; and I serve at the pleasure of the City
- 17 Manager of the City of Hamilton.
- 18 Q What is the City Manager?
- 19 A He is the Chief Executive Officer of the City of
- 20 Hamilton, and he serves at the pleasure of the City
- 21 Council.
- 22 Q What is your educational background?
- 23 A I hold a Bachelor of Science degree in Electrical
- 24 Engineering from Drexel University, and I am a
- 25 Registered Professional Engineer in the States of

Engle - direct

1
2 Pennsylvania and Ohio.

3 Q Have you been involved in any professional organizations
4 or service activities?

5 A Yes. I have served as the President of the American
6 Public Gas Association, and as Director of the American
7 Public Power Association, and past President and member
8 of the Executive Committee of the American Municipal
9 Power of Ohio, and as President of several organizations
10 within the City of Hamilton.

11 Q You say you were a director of the American Public
12 Power Association?

13 A Yes, sir.

14 Q What is that association?

15 A That is an association -- it is a trade association,
16 a national trade organization of publicly owned
17 electric systems.

18 Q Could you describe briefly your normal activity as
19 Director of Public Utilities in Hamilton?

20 A On a day-to-day basis, of course, I manage the daily
21 problems of the systems.

22 In a larger context, I manage the expenditures of
23 funds, the planning for the expansion of our systems,
24 and during my tenure we have made two major additions
25 to our power plant, and we have built a gas

Engle - direct

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2 manufacturing plant, and we have enlarged our water
3 plant and built a major addition to a sewage treatment
4 plant.

5 Q Could you describe briefly what the electrical system
6 in Hamilton is, the one that you are in charge of?

7 A We operate both the distribution and the electrical
8 production in Hamilton.

9 We have a total load to our customers in 1980 of
10 109 megawatts, which is generated with our own equipment,
11 and we have a generating plant that has an installed
12 capacity of approximately 135 megawatts.

13 Q Is the Hamilton system connected with any other system?

14 A Yes. We are interconnected with Cincinnati Gas and
15 Electric Company.

16 Q How is that operated?

17 A It is operated synchronously -- we are in continuous
18 synchronism with them.

19 Q Is Cincinnati Gas & Electric another municipal
20 organization?

21 A No. They are an investor-owned company in southwestern
22 Ohio.

23 Q In what area; the Cincinnati-Hamilton area?

24 A Yes. It serves generally Hamilton County and Claremont
25 County and Butler County.

Engle - direct

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Q Is the Cincinnati Gas & Electric ever provided by a load transfer basis?

A No.

Q What is the advantage of a synchronous versus load transfer basis?

A Basically the advantage is that when a synchronous interconnection goes into operation, it goes in without interruption to the customers.

Q You have been, as I understand it, the past President and Director of the American Municipal Power of Ohio?

A Yes.

Q What is that association?

A It was a not-for-profit corporation of the municipal systems in Ohio, formed for the purposes of providing bulk power to our municipal members.

Q And when was that formed?

A In 1972.

Q And did you have a position at the time it was formed?

A Yes, I did.

I was its first President and President of the AMP-Ohio, as it was known as from 1972 until 1977.

Q And what was the purpose of AMP-O being formed?

A That was formed to become a power supply agency for our municipal systems.

Engle - direct

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Q And what was the first action that AMP-0 took after it was formed?

A AMP-Ohio took over the litigation that was then in progress involving the acquisition of Columbus and Southern Ohio Electric Company by the American Electric Power Company.

Q Could you describe those two companies again?

A Those are both investor-owned companies.

American Electric Power Company is a holding company which owns the Ohio Power Company and a number of other companies in neighboring states, and Columbus and Southern is an investor-owned company which operates in southeastern Ohio.

THE COURT:
material to this case?

Mr. Weiner, is this

MR. WEINER:
also.

Yes, I will be brief,

THE COURT:

Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

THE COURT:
material.

Tell me how it is

MR. WEINER:

I am laying a foundation

1 Engle - direct

2 for what AMP-0 did.

3 THE COURT: In litigation?

4 MR. WEINER: Yes.

5 THE COURT: Very well. You may
6 proceed.

7 {End of bench conference.}

8 - - - - -

9 THE COURT: Proceed.

10 MR. WEINER: Thank you.

11 BY MR. WEINER:

12 Q What was the purpose of AMP-0's intervention in that
13 litigation?

14 A To provide a power supply to municipal systems through
15 a formation of a Muny Buckeye.

16 Q What do you mean by "Muny Buckeye"?

17 A This is a means of supplying bulk power to the municipal
18 systems.

19 It would have been patterned after the Buckeye
20 Power Supply arrangement of the co-ops.

21 Q You used a few phrases there.

22 What do you mean "Buckeye Power"?

23 A Bulk power is basically the movement of blocks of power
24 and energy from a generating plant -- it is the power to
25 be moved from a generating plant to a distributor.

Engle - direct

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Q And what is "Buckeye"?

A Buckeye is a power supply group made up of the Ohio cooperatively owned systems. There are 19 of them.

Q What was the result of AMP-O's intervention in the matter?

A Ohio Power, as the operating company for American Electric Power Company, agreed through a coordination agreement to assist AMP-Ohio, and its successor entities, if any, to set up a bulk power supply arrangement to purchase a generating plant and set up basically a Muny Buckeye.

Q Who are some of the municipal members of AMP-Ohio?

A Some of the members are the City of Cleveland, the Cities of Columbus, Hamilton, Picquaway, St. Mary's, and Orrville, and Cuyahoga Falls.

All together in the initial group there were 30.

Q Are these all cities in the State of Ohio?

A Yes.

Q And they are all cities that had their own municipal electric facilities?

A All had, at the very least, their distribution systems.

Q Was this with American Power, Incorporated?

A Yes, it was.

Q What else did AMP-O do other than intervene in the

1 Engle - direct

2 A-P matter?

3 A Early in the spring of 1972, through our executive
4 manager, Mr. Powers Sluice, we contacted the Power
5 Authority of the State of New York, who had previously
6 announced that they were going to allocate additional,
7 an additional 30 megawatts of PASNY power outside of
8 the State of New York to neighboring states.

9 MR. WEINER: Your Honor, would you
10 read Stipulation No. 4 at this time?

11 THE COURT: Gentlemen, approach
12 the bench.

13 - - - - -

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

16 THE COURT: In the event that you
17 are desirous of having the Court do something, you
18 request to approach the bench.

19 I don't want any dialogue between lawyers and
20 the Court and between lawyers and witnesses in the
21 presence of the jury.

22 Now, please, gentlemen.

23 MR. WEINER: It is No. 4. That is
24 the only one with this witness.

25 THE COURT: All right.

1 Engle - direct

2 {End of bench conference.}

3 - - - - -

4 THE COURT: Ladies and gentlemen
5 of the jury, Joint Stipulation No. 4 reads as
6 follows:

7 "PASNY power is low-cost hydro power generated
8 at Niagara Falls by a public project operated by
9 the Power Authority of the State of New York.

10 "A substantial portion of PASNY power is
11 'preference power' that is, available only to
12 public agencies {which agencies must be designated
13 by the state in which each is located} in
14 neighboring states, including Ohio.

15 "An organization known as AMP-Ohio is a
16 designated agency to receive PASNY power in Ohio.

17 "AMP-Ohio agreed to sell such power, when
18 received, to M.ny Light."

19 MR. WEINER: Thank you.

20 BY MR. WEINER:

21 Q Mr. Engle, is the group called AMP-Ohio or AMP-0, or
22 both?

23 A AMP-0 and AMP-Ohio are the same thing, the American
24 Municipal Power - Ohio, which became AMP-0, which is
25 difficult to say, so it was also spoken of as

Engle - direct

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AMP-Ohio.

Q How did you know this power was available from PASNY?

A It was announced in the trade publications that the Power Authority intended to recommend allocation of the remaining "preference power" to be sold to neighboring states.

Q What did AMP-Ohio do with respect to that power that was available?

A We filed a letter of application with the Power Authority.

Actually, we started by asking them for the requirements for us to file.

Q And did you receive those requirements?

A Well, the first thing that we felt that we had to do was to engage engineers, which we did, in order to determine primarily the feasibility of the movement of PASNY power into Ohio.

Q And then after you engaged your engineers, what did you do next?

A With the engineers and with legal counsel, we met with the Power Authority or the PASNY staff at their offices in New York City.

Q Where in New York?

A They are at Columbus Circle in New York City.

Engle - direct

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Q Do you recall when the initial meeting may have been held, approximately?

A In early 1972, I believe in June or July.

Q And who was present at the meeting on behalf of AMP-0?

A I was present, and Mr. Warren Hinchee represented Cleveland, and Adam Kubik O'Brien and Gear, the engineers, and Wallace Duncan, who was our attorney.

Q What was the purpose of that meeting?

A It was to determine whether or not AMP-Ohio felt they would be able to fulfill the requirements and to learn the requirements of the Power Authority.

Q Who was present on behalf of the Power Authority?

A A group of their staff, including at various points during the meeting Mr. George Berry, Mr. Scott Hilly and John Boston and Winthrop Tone and some others.

Q What was the response to the PASNY personnel, from the PASNY personnel to your interest?

A They were receptive to our request and suggested that they would write us a letter telling us what was required.

They told us verbally, and then followed up with a letter.

Q What did you learn that was required?

A They were basically a feasibility study, to determine

Engle - direct

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2 that the delivery of power to the City of Cleveland was
3 economically feasible.

4 The second thing that was required was a letter from
5 the Governor which would state that there was no other
6 agency in Ohio authorized by the Government to receive
7 this power.

8 And thirdly, that we attained wheeling agreements
9 or a commitment for wheeling, so that the power could
10 be gotten to Cleveland.

11 Q And what did AMP-0 do after this meeting?

12 A We proceeded to try to get all these things done.

13 O'Brien and Gear, at our request, prepared the
14 feasibility study, and the letter was obtained from
15 Governor Gilligan, then Governor Gilligan, and then
16 attested to by Attorney General Brown; and we met with
17 Mr. James Lieberman of Penelec, who was one of the
18 wheeling companies, and we obtained from him a letter
19 of commitment, and we approached CEI for the wheeling
20 of power.

21 Q What did AMP-0 intend to do with the 30 megawatts of
22 power if it received it and when it received it from
23 PASNY?

24 A There were two possibilities in the early stages, in
25 the preliminary planning.

1 Engle - direct

2 Within economical transmission distance at that
3 time, which is what the law required, were two systems:

4 {1} was the City of Painesville, and the other was
5 the City of Cleveland.

6 Cleveland was a member of the AMP-Ohio, and
7 Painesville was not.

8 Q What did AMP-Ohio intend to do with the power if you
9 received it?

10 A It was our intention to allocate it to the City of
11 Cleveland.

12 Q Why?

13 A They had a need. They were having problems with their
14 generating equipment, and they were having serious
15 interruptions, and they were having problems with
16 their load transfer points, and so on.

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

19 THE COURT: Approach the bench.

20 - - - - -

21 {Bench conference ensued on the record as
22 follows:}

23 MR. LANSDALE: This witness is
24 testifying about stuff he can't know about.

25 I don't object to testifying, to him

1 Engle - direct

2 testifying as to what he was told, if it was
3 essential to his understanding, irrespective of
4 the truth of it.

5 I am taking a new leaf. I am going to start
6 objecting to the irrelevancy and to people
7 testifying to stuff they don't know about.

8 THE COURT: You haven't laid a
9 foundation. I don't know if he is testifying
10 from memory, or hearsay, or from what.

11 MR. WEINER: All right.

12 THE COURT: I will sustain the
13 objection.

14 {End of bench conference.}

15 - - - - -

16 THE COURT: Sustain the objection.

17 BY MR. WEINER:

18 Q Mr. Engle, what did you know about the Cleveland
19 system at that time in 1972?

20 A I knew of the outages and this sort of thing. These
21 difficulties had been reported in the press, and they
22 had been provided to our Executive Manager by way of
23 clipping service, so that copies of these had been
24 given to me as President of the AMP-Ohio, and so I was
25 aware of what was being stated in the press with regard

Engle - direct

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2 to these problems.

3 And also, at our Executive Committee meetings, the
4 veracity of these were confirmed by Mr. Hinchee.

5 Q What was Mr. Hinchee's role in AMP-0?

6 A He was a Director, and also he was a member of the
7 Executive Committee.

8 Q Of AMP-0 itself?

9 A Yes, of AMP-Ohio.

10 Q Did you discuss with Mr. Hinchee about what was
11 happening in Cleveland with the Municipal System?

12 A Yes, we did.

13 Q Did there come a time when AMP-0 told Cleveland of
14 AMP-0's intention to give them 30 megawatts of power
15 from PASNY to Cleveland?

16 A Yes.

17 Q How was that done?

18 A Through our contact with Mr. Hinchee, and I presume
19 through channels within the City of Cleveland.

20 Q Was that intention ever formalized?

21 A Yes, it was.

22 MR. WEINER:

May we have the

23 witness have PTX 1654?

24 {After an interval.}

25 Q Mr. Engle, can you identify 1654?

Engle - direct

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2 A Yes. This is an agreement between the City of
3 Cleveland and American Municipal Power of Ohio.

4 Q Did you sign that on behalf of AMP-0?

5 A Yes.

6 Q Well, what was the purpose of that?

7 A It was to provide services to the City of Cleveland to
8 apply for 30 megawatts of electric power from PASNY,
9 and to provide engineering services necessary to
10 provide for the delivery of this power, and to provide
11 legal services for the delivery of this power.

12 Q What about the other members of AMP-0; how were they to
13 benefit from the 30 megawatts of power that went to the
14 City of Cleveland?

15 A Basically AMP-Ohio was and is a planning agency, and
16 the purpose of it, of course, was to supply bulk power.

17 In order to become a viable organization, it was
18 necessary for us to have a power source and customers
19 for it.

20 The City of Cleveland was the customer, and the
21 power source of this particular transaction was the
22 Power Authority.

23 Q What were the major steps in AMP-0, that AMP-0 had to
24 get over in order to get the 30 megawatts of power to
25 the City of Cleveland?

Engle - direct

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A As I already testified, it was necessary for us to first have a feasibility study made.

O'Brien and Gear did this.

THE COURT: He already testified to this. You don't need to repeat it. Get on to something else.

MR. WEINER: Yes. Thank you, your Honor.

Q With respect to the feasibility study, who performed that?

A O'Brien and Gear.

Q What was their job?

A Their job was as consulting engineer, they were a consulting engineering firm in Syracuse, New York, and they worked in a number of fields, including electric power systems and electric systems engineering.

Q And was O'Brien and Gear hired through AMP-0?

A Yes.

Q And was the feasibility study performed?

A Yes.

Q How was the feasibility study done, if you recall?

A Basically it took the cost of the power at the Niagara Bus Bar, and added to that the wheeling charges of Niagara Mohawk Company, and added to that then the

Engle - direct

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2 presumed wheeling charges of the other two intervening
3 companies, Penelectric and CEI, to develop a cost of
4 delivered power to the City of Cleveland.

5 Compare this to the cost of the generation of that
6 power by Muny Light.

7 Q And was there a formal study prepared?

8 A Yes.

9 Q And what was done with that form of study after it was
10 prepared?

11 A Ultimately it was presented to the Power Authority as a
12 part of our preliminary application, and then ultimately
13 as part of the -- and updated -- as part of the final
14 application to the Power Authority.

15 Q What was the result of that study?

16 A The bottom line was that it was feasible to transmit
17 PASNY power to the City of Cleveland.

18 MR. WEINER: Would you put on the
19 easel the exhibit behind the easel, 2494, the map --
20 it is to your right, the one behind the next one,
21 back -- the big one all the way back.

22 {After an interval.}

23 BY MR. WEINER:

24 Q Mr. Engle, have you seen that map before?

25 A This is the first time that I have had this specific

Engle - direct

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exhibit.

Q Would you study it a second and tell me when you have done that.

Can you see it from there, by the way?

A Yes.

Q What does that map depict?

A It depicts the western part of the State of New York and the State of Pennsylvania and Northern Ohio, around Lake Erie, and it shows what I presume are routes of transmission lines within the States of New York, bound by the Niagara Mohawk, and within the States of Pennsylvania, owned by Penelectric, and lines owned by the Cleveland Electric Illuminating Company.

Q Mr. Engle, I will tell you that that is what the colored lines are. They are basically where the transmission lines go.

Now, with respect to requirements of PASNY, that AMP-0 had to show how the engineering would be wheeled, through Niagara down to Cleveland, could you explain, please, the role of Niagara Mohawk in that?

A Niagara Mohawk delivered the PASNY power to the Penelectric Company at the New York - Pennsylvania border; that is, they would wheel the power from the buss at the Niagara generating station down to a

Engle - direct

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substation at or near the New York - Pennsylvania line.

Q Now, was Niagara Mohawk, what is that, is that an investor-owned utility?

A That is an investor-owned utility company in New York State.

Q Why was it necessary for Niagara Mohawk to wheel power?

A Because of the power authority wheeling agreements with Niagara Mohawk to deliver Niagara power to wherever the power authority wished to have it delivered.

Q And did you have a contact with the people at Niagara Mohawk?

A No.

Q Did you ever contact -- did you have a contact with the people at Penelectric?

A Yes.

Q Why was it necessary to wheel this power at all? -- How does wheeling come into this?

A Well, electric power, in order to move from where it is generated to where it is used has to be moved over transmission lines.

There are basically two choices in doing this:

One is to wheel it over existing lines, and the other is to build your own.

Q The wheeling is something that is common in the industry?

Engle - direct

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A Yes, it is very common.

Q You did have contact with the people at Penelectric?

A Yes.

Q Describe those contacts, please.

A I met with Mr. Duncan and Attorney James Lieberman at his offices in New York City, and we discussed the matters of wheeling, and in essence he said at that time, and later confirmed in a letter, that Penelectric Company would wheel power for AMP-0, subject to certain terms and conditions, some of which had to be worked out at the time the agreement was actually developed, but in principle they would wheel for us.

Subsequently there were other meetings, but I didn't attend those meetings.

Q Who was Mr. Duncan?

A An attorney in Washington, D.C.

Q Who did he represent?

A He represented the firm of --

Q Well --

A It escapes my mind at the present time.

Q Was he counsel for Penelectric or AMP-Ohio?

A He was counsel for AMP-Ohio.

Q And who was Mr. Lieberman?

A He was counsel for Penelectric.

1 Engle - direct

2 Q And where would the power be wheeled?

3 A From the New York - Pennsylvania border to the Ohio -

4 Pennsylvania border.

5 Q Why did you contact Penelectric as opposed to some
6 other organization?

7 A Because Penelectric served the area shown where that
8 red line is on the drawing, which was the most direct
9 route between the Niagara project and the City of
10 Cleveland.

11 Q What is Penelectric?

12 A It is an investor-owned company, wholly owned
13 subsidiary of the General Public Utilities.

14 Q It is not a municipal system?

15 A No, it is not.

16 Q At that time was Penelectric wheeling any PASNY power
17 for any other organization?

18 A Yes.

19 Penelectric was wheeling power for the Allegheny
20 Electric Company, operating in the State of
21 Pennsylvania.

22 MR. LANSDALE: I object.

23 THE COURT: Sustain the objection.

24 Mr. Weiner, please keep this testimony
25 material.

1 Engle - direct

2 Please proceed.

3 MR. WEINER: May I approach the
4 bench?

5 THE COURT: Yes. .

6 - - - - -

7 {Bench conference ensued on the record as
8 follows:}

9 MR. WEINER: What was the objection,
10 to the answer or to the question?

11 MR. LANSDALE: To the question.

12 THE COURT: The agreement here was
13 to wheel 30 megawatts to this state. What
14 difference does it make?

15 MR. WEINER: I believe it is
16 material.

17 THE COURT: Mr. Weiner, please
18 don't argue with me.

19 I asked you, what was the materiality the
20 other time, before the other testimony, and you
21 never did make that material, and that was about
22 the lawsuit down in Columbus.

23 How is this material to this lawsuit?

24 MR. WEINER: They were trying to
25 find more power.

Engle - direct

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2 THE COURT: How is that material to
3 the fact that PASNY was going to wheel power?

4 MR. WEINER: It is important
5 background.

6 THE COURT: Please keep it
7 material. I will sustain the objection.

8 {End of bench conference.}

9 - - - - -
10 THE COURT: I have sustained the
11 objection. Proceed.

12 BY MR. WEINER:

13 Q At the time, Mr. Engle, that you first went to PASNY,
14 what was the situation with respect to the amount of
15 PASNY power that was being allocated to preference
16 customers outside of the State of New York?

17 A 180 megawatts total, of which 50 megawatts had been
18 allocated to the State of Vermont, and 100 megawatts
19 was to the Allegheny co-op in Pennsylvania.

20 Q What happened to the rest? That adds up to 150.

21 A The other 30 was yet to be allocated.

22 Q Who was receiving the 100 megawatts?

23 A The Allegheny Electric Company.

24 Q How were they to receive that?

25 A By Niagara Mohawk, to the New York - Pennsylvania line,

Engle - direct

1
2 and by the Penelec Company from the New York -
3 Pennsylvania line to Allegheny's delivery points.

4 Q What is the Allegheny company -- a co-op system?

5 A It is a cooperative made up of co-ops similar to the
6 Buckeye Power Company operating in Ohio.

7 Q Now, after having your meeting with Penelec, what was
8 the next thing that you did?

9 A Our attorney, Mr. Duncan, requested a meeting with the
10 Cleveland Electric Illuminating Company to discuss
11 wheeling.

12 Q And was such a meeting held?

13 A In due course, yes.

14 MR. LANSDALE: Objection.

15 THE COURT: Overruled.

16 Q Do you recall when that meeting was held?

17 A I believe in July of 1972.

18 Q And were you present at that meeting?

19 A Yes, I was.

20 Q Who else was present?

21 A For AMP-Ohio, Mr. Duncan and Mr. Charles Illingworth
22 of O'Brien and Gear, and for the Cleveland Electric
23 Illuminating Company, Mr. -- I am sorry, my memory
24 fails me right at the moment.

25 There were two persons from the Cleveland Electric

Engle - direct

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2 Illuminating Company, and Mr. Lansdale was there and
3 two engineering types, and Mr. Hauser, Don Hauser.

4 Q And where was that meeting held?

5 A In the corporate offices of Cleveland Electric
6 Illuminating Company.

7 Q What was discussed at that meeting?

8 A AMP-Ohio requested CEI to supply wheeling services
9 similar to what we had requested Penelec to do. We
10 outlined the basic scope of our effort and asked CEI
11 if they would wheel.

12 Q What was their -- what was CEI's response to your
13 request at that meeting?

14 A First, they listed a whole group of their complaints
15 against the City of Cleveland, a number of those,
16 explaining to us that the City of Cleveland owed them
17 money, and so forth.

18 We tried to explain that we were not becoming
19 involved in the financial situation with the City of
20 Cleveland; that we were interested only in wheeling
21 the power to -- from the Power Authority to the City
22 of Cleveland.

23 Q Was AMP-0 asking CEI to wheel this power for free for
24 AMP-0?

25 A No, we were not.

Engle - direct

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2 THE COURT: I sustained the
3 objection, Mr. Weiner, because you are leading
4 your witness.

5 MR. WEINER: I understand.

6 THE COURT: Well, then, don't lead
7 your witness.

8 MR. WEINER: I won't.

9 BY MR. WEINER:

10 Q Was any discussion held with respect to the capacity of
11 CEI to wheel the power from the Ohio - Pennsylvania
12 border?

13 MR. LANSDALE: Object.

14 THE COURT: Sustain the objection.

15 Q Were there any --

16 THE COURT: The question is: What
17 was the conversation?

18 MR. WEINER: I understand.

19 THE COURT: All right. Ask him the
20 question and he'll answer it instead of you.

21 Sustain the objection.

22 MR. LANSDALE: May I approach the
23 bench?

24 THE COURT: Please be seated, Mr.
25 Lansdale.

1 Engle - direct

2 Q What effect did CEI's refusal have upon AMP-0 in its
3 effort to secure the 30 megawatts of power?

4 A It basically killed the project at that time.

5 Q What did AMP-0 do after that then?

6 A AMP-Ohio continued to try to secure this power either
7 by obtaining it for the City of Cleveland from some
8 other municipality within the State of Ohio or in some
9 other manner to secure it.

10 Q Were there other applicants before PASNY for the 30
11 megawatts of power?

12 A Yes. Both the State of Vermont and Allegheny Electric
13 Cooperative were competing applications.

14 Q Did AMP-0 have any discussion with either of those
15 applicants?

16 A Yes, we did.

17 We discussed the matter with -- I discussed the
18 matter with Mr. William Matson, who was General
19 Manager of the Allegheny Electric Cooperative, and we
20 reached an agreement.

21 Q What was the understanding you reached?

22 A Basically, the understanding was that we would support --
23 AMP-Ohio would support Allegheny's application for the
24 additional 30 megawatts conditioned upon their agreement
25 to restore this and support AMP-Ohio's application for

Engle - direct

1
2 this 30 megawatts to be delivered to Ohio.

3 Q When you say "you would support," what do you mean by
4 "you would support"?

5 A We would testify before the Power Authority and whatever
6 other bodies reviewed it.

7 Q When did you reach that understanding with Allegheny?

8 A That was in the fall of 1972.

9 Q That was before you met with Penelec and with CEI?

10 A No, that was afterward.

11 Q When did you meet with Penelec and CEI?

12 A Early in '72.

13 Q I think, Mr. Engle, you misspoke with respect to one year.
14 Let's see if we can clarify this.

15 AMP-0 was organized when?

16 A '72.

17 Q Okay. And you made your initial contact with PASNY?

18 A In '72.

19 Q When did you contact the people from Penelec?

20 A Let me reflect for a moment.

21 {After an interval}

22 A You're correct; I believe it was in February of 1973
23 that some of these meetings took place, so it would
24 have been in the late summer of '73.

25 Q Just to make sure we know what you're talking about,

Engle - direct

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what was in the late summer of '73?

3

A The meeting with Mr. Matson.

4

Q That was after CEI refused to wheel the power?

5

A That's correct.

6

Q Was that agreement with Mr. Matson and Allegheny --

7

what was Mr. Matson's title, by the way?

8

A He was General Manager of the Allegheny Electric

9

Cooperative.

10

Q Was that agreement or understanding reduced to writing?

11

A Yes, it was. It was signed in 1974.

12

MR. WEINER: Are all the exhibits

13

up there?

14

PTX 1396.

15

{Exhibit handed to the witness by the clerk.}

16

Q Do you have 1396 before you?

17

A Yes, I do.

18

Q Can you identify that document?

19

A Yes. This is the agreement between American Municipal

20

Power - Ohio and Allegheny Electric Cooperative.

21

Q You signed that agreement?

22

A Yes, I did.

23

Q What was the purpose of that agreement?

24

A The purpose of this agreement was that AMP-Ohio would

25

support Allegheny's application for the

Engle - direct

1
2 additional 30,000 megawatts -- 30,000 kilowatts; and
3 that Allegheny would then restore this to AMP-Ohio if
4 AMP-Ohio was able to perfect an application before
5 PASNY.

6 Q If CEI had agreed to wheel the power, would AMP-Ohio
7 have entered into such an agreement with Allegheny?

8 A It would not have been necessary. We could have filed
9 a -- perfected an application before PASNY at that time.

10 Q Why did AMP-O make such an agreement with Allegheny
11 Cooperative as opposed to the competing application
12 from the State of Vermont?

13 A We felt that Allegheny was the recipient in a
14 neighboring state, and we felt that we could deal better
15 with them than with Vermont.

16 Q What happened to the 30 megawatts that AMP-Ohio had been
17 seeking?

18 A It was allotted to Allegheny Electric Cooperative.

19 Q Who allots that?

20 A The Trustees, the Power Authority of the State of
21 New York, and then confirmed by the Governor.

22 Q When did Allegheny, if you recall, start receiving that
23 30 megawatts of power?

24 A I believe it was in early 1975, February, I think.

25 I'm not sure of that; in 1975, I believe.

Engle - direct

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Q If the evidence would show it was September 16, 1974,
could that be correct?

A That could be.

Q How long, if you know, was the contract under which
Allegheny received the 30 megawatts of power for?

A It expired in February of 1978.

Q And how did Allegheny, if you know, physically receive
the 30 megawatts of power?

A Through the wheeling arrangements with the intervening
investor-owned companies.

Q What arrangements were those?

MR. LANSDALE: I object, your Honor.

THE COURT: If he lays the proper
foundation, if he knows what they are, to his
personal knowledge, Mr. Weiner.

MR. WEINER: I think he already
testified that he did.

A Yes, I did.

Q Do you know how --?

THE COURT: Approach the bench,
please.

- - - - -

{Bench conference ensued on the record as
follows:}

Engle - direct

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THE COURT: You be free to ask him these questions if you lay a foundation.

Do you know what a foundation is?

MR. WEINER: I think I already laid one.

THE COURT: Because he didn't object the first time doesn't make it non-objectionable this time, Mr. Weiner.

Was this the objection, Mr. Lansdale?

MR. LANSDALE: You bent over two or three times. I do object on that ground. I do object on that ground; he has been over it two or three times.

THE COURT: Yes. You keep repeating and you keep testifying there.

Obviously he didn't know when they started to wheel the power, so you told him when.

MR. WEINER: I asked if he knew.

THE COURT: But you are not under oath.

MR. WEINER: I will put the evidence in.

THE COURT: There is a difference, Mr. Weiner --

1 Engle - direct

2 MR. WEINER: I understand.

3 THE COURT: -- between
4 cross-examination -- direct examination and
5 cross-examination.

6 MR. WEINER: I understand.

7 THE COURT: Now, please ask proper
8 questions.

9 MR. WEINER: I thought I was.

10 THE COURT: I'm telling you you
11 weren't.

12 Will you do that for me?

13 MR. WEINER: Yes.

14 {End of bench conference.}

15 - - - - -

16 THE COURT: Mr. Weiner, the
17 objection is predicated on two grounds:

18 Number one, that it is repetitious; and,
19 number two, there is no foundation laid for it.

20 So let us proceed, please.

21 BY MR. WEINER:

22 Q What subsequent efforts did AMP-0 make to obtain the
23 PASNY power?

24 A In 1978 when -- in 1976 when the Power Authority noticed
25 all of the previous parties who had been interested in

Engle - direct

power that they would be reconsidering the contracts with Vermont and with Allegheny, we began again to try to perfect an application.

Q What steps did you take?

A We again corresponded with the Power Authority, and letters were written to various -- the various people with whom we had previously dealt to see if we could make any headway in overcoming these objections; particularly it had to do with correspondence to CEI with regard to wheeling.

MR. LANSDALE: I have an objection.

May I approach the bench?

THE COURT: Well, ladies and gentlemen of the jury, it's now noon, so why don't we take our luncheon recess.

Please, during the recess, do not discuss the case either among yourselves or with anyone else; keep an open mind until such time as you have heard all of the evidence and until such time as the matter is submitted to you upon the instruction of the Court for your deliberation and judgment.

With that, you are free to go to lunch and return here at 1:30.

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Engle - direct

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2 {Thereupon the jury left the courtroom and
3 the following proceedings were had out of their
4 hearing and presence:}

5 THE COURT: Read the question back
6 to me, please.

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

9 "Q What steps did you take?"

10 THE COURT: Read the question
11 preceding that.

12 {The preceding question was read by the
13 reporter as follows:}

14 "Q What subsequent efforts did AMP-0 make
15 to obtain the PASNY power?"

16 THE COURT: Read the answer,
17 please.

18 {The answer was read by the reporter as
19 follows:}

20 "A In 1978 when -- in 1976 when the Power
21 Authority noticed all of the previous parties who
22 had been interested in power that they would be
23 reconsidering the contracts with Vermont and with
24 Allegheny, we began again to try to perfect an
25 application.

1 Engle - direct

2 "Q What steps did you take?"

3 THE COURT: State the reason for
4 your objection.

5 MR. LANSDALE: My objection was --
6 perhaps I was a little bit previous.

7 This was covered by Stipulation 126 which
8 provides -- which covers the inability to obtain
9 wheeling service from CEI until January, 1977.

10 THE COURT: Just a moment until I
11 get the stipulation.

12 {After an interval.}

13 THE COURT: Mr. Weiner?

14 MR. WEINER: I don't think that that
15 is applicable -- I mean, it is applicable, but not --

16 THE COURT: Overrule the objection.
17 I think that the plaintiff has a right to show
18 what effort was made to obtain these wheeling
19 agreements.

20 I overrule the objection; exceptions are noted.

21 Gentlemen, 1:30.

22 {Thereupon the luncheon recess was taken, to
23 reconvene at 1:30 P.M. the same date.}

24 - - - - -

1 MONDAY, SEPTEMBER 22, 1980; 1:30 P.M.

2
3 THE COURT: Everyone may be
4 seated.

5 You may proceed, Mr. Weiner.

6 MR. WEINER: Thank you, your Honor.
7

8 DIRECT EXAMINATION OF JOHN C. ENGLE {Resumed}

9
10 BY MR. WEINER:

11 Q Mr. Engle, so there is no mistake on the record, and
12 to clarify the record with respect to dates of certain
13 things, do you recall when the meeting you attended
14 here in Cleveland with the representatives of CEI was
15 held?

16 A Yes, I believe I said 1972, and my testimony -- it
17 should have been 1973.

18 There is a similar discrepancy existing with the
19 meeting with Penelec.

20 Q And when was that meeting held?

21 A In 1973 also.

22 Q Which meeting came first?

23 A Penelec.

24 Q Going back to where we left off this morning, did
25 there come a time when AMP-0 was advised with respect

1 Engle - direct

2 to 30 megawatts of power from PASNY?

3 A I am sorry. I didn't understand the question.

4 Q All right. I will try to reframe it:

5 Subsequent to 1974, when the power was flowing to
6 Allegheny, did there come a time when AMP-0 was again
7 advised with respect to proposed activity by PASNY
8 with respect to the 30 megawatts?

9 A Yes; 1976.

10 THE COURT: Counsel, you have
11 gone through this. I have it in my notes.

12 Why don't you stop being repetitious and
13 ask questions just one time, and let's get the
14 answers and then go on to something else.

15 We will be here until Christmas if you keep
16 repeating.

17 Please, I ask this of both counsel.

18 Q Mr. Engle, what was AMP-0's position with respect to
19 PASNY's notice?

20 A We were unable at that time -- still unable at that
21 time to perfect an application for service because we
22 still did not have wheeling into the Cleveland area.
23 We favored the allocation of whatever power was
24 available to Allegheny.

25 Q Why did you favor Allegheny?

1 Engle - direct

2 A Because we did have an agreement with them to -- for the
3 power to be reallocated to Ohio.

4 THE COURT: That's the second time
5 that he's answered that question.

6 If you would like me to go back, I can read it
7 from my notes.

8 Mr. Weiner, don't I make myself clear when I
9 say: Please do not be repetitious.

10 MR. WEINER: Thank you, your Honor.
11 I'll try not to be. I apologize if I am.

12 Will Mr. Leo hand the witness Plaintiff's
13 Exhibit 2208?

14 {The clerk complies.}

15 Q Mr. Engle, can you identify that exhibit?

16 A Yes. This is a letter that I wrote to Mr. Clark,
17 Chairman of the Power Authority of the State of New
18 York.

19 Q What was the purpose of that letter?

20 A To go on public record with the trustees that we were
21 in support of Allegheny's application for 110,000
22 kilowatts of firm power and 20,000 kilowatts of
23 peaking power.

24 Q When was that letter written?

25 A October 21st, 1977.

Engle - direct

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Q Mr. Engle, were there any requirements of PASNY that AMP-0 could not comply with other than have the wheeling from the Pennsylvania-Ohio border into Cleveland?

A No, there were not.

Q Is that true also with respect to back in 1973?

A Yes, it was.

MR. WEINER:

No further questions.

THE COURT:

Cross-examination.

- - - - -

CROSS-EXAMINATION OF JOHN C. ENGLE

BY MR. LANSDALE:

Q Mr. Engle, the City of Hamilton, Ohio, with respect to its electric utility, is the exclusive seller of retail energy within its service area, is it not?

A No, sir, it is not.

Q It is not?

A No, sir.

Q To what extent are you non-exclusive in service?

A Certain areas of the City of Hamilton are serviced by the Cincinnati Gas and Electric Company.

Q I appreciate that, Mr. Engle; but the area of --

Engle - cross

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served by the Cincinnati Gas & Electric Company are served exclusively by the Cincinnati Gas & Electric, are they not? There is no duplication of lines?

A I believe I can say that reasonably there is no duplication of lines.

Q So that within the area in which the City of Hamilton Utility is served, it is the exclusive server -- I'm having problems -- it is the exclusive distributor at retail of electric energy and, similarly, the Cincinnati Gas & Electric Company, to the extent that it served within the City of Hamilton, is the exclusive seller of electric energy?

A That's true, except at the innerface of the systems there is an occasional competitive area.

Q At the innerface?

A That is correct.

MR. LANSDALE: No further questions.

THE COURT: Mr. Weiner, any redirect?

MR. WEINER: No, your Honor.

THE COURT: Thank you very much, Mr. Engle, you may step down.

MR. WEINER: Mr. Wallace Duncan,

1 your Honor.

2

3

4 W A L L A C E L. D U N C A N,

5 of lawful age, called as a witness on behalf
6 of the plaintiff, was examined and testified as
7 follows:

8

9 D I R E C T E X A M I N A T I O N O F W A L L A C E L. D U N C A N

10

11 BY MR. WEINER:

12 Q State your name, please, for the record.

13 A My name is Wallace L. Duncan.

14 Q And your home address?

15 A 4732 Old Dominion Drive, Arlington, Virginia.

16 Q Your business address?

17 A I practice law at 1775 Pennsylvania Avenue in
18 Washington, D.C.

19 Q Your education?

20 A I hold a B.A. degree, a Juris Doctor degree of law;
21 I also hold an LLM degree, which is a Masters in law.

22 Q And your occupation currently?

23 A I'm a practicing attorney.

24 Q And just a brief description of your law school
25 employment?

1 Duncan - direct

2 A Since -- you mean since law school?

3 Q Yes, I mean to say post law school employment, excuse me.

4 A Upon graduation from law school, I attended Georgetown,
5 Virginia law school under a fellowship program which led
6 to the Masters degree; there was a certain amount of
7 teaching at Georgetown Law School in connection with a
8 fellowship program.

9 In 1962 I joined the office of the Solicitor of the
10 Department of the Interior and became a legal adviser to
11 them, Secretary of Interior Stuart Udall and an assistant
12 solicitor in the Office of the Solicitor.

13 I held that position until 1965 when I left the
14 Department of the Interior and joined a large Arizona
15 law firm known as Jennings, Strause & Salmon and, in that
16 same year, opened a Washington office for that firm
17 which I operated as a managing partner until 1971.

18 In 1971 another partner and I acquired all of the
19 assets of Jennings, Strause & Salmon in Washington and
20 we have operated that firm or its successor firm since
21 that time.

22 The present firm is known as Duncan, Weinberg &
23 Miller, a professional --

24 Q Excuse me?

25 A -- a professional corporation.

1 Duncan - direct

2 Q Are you the "Duncan" in that firm?

3 A I am.

4 Q Just in the last five or six years, what type of clients
5 have you represented?

6 A Our practice is heavily into the utility field.

7 Most of us are from the Department of Interior, and
8 our law practice in many respects tracks the field of
9 expertise that we developed from our period with the
10 Department of Interior. Hydroelectric power is one of
11 those fields.

12 I could say roughly about 60 to 70 percent of our
13 business is devoted to utility matters or antitrust
14 matters associated with utility matters.

15 We represent a number of rural electric and
16 municipally owned electric systems. We also do a great
17 deal of Indian claims work and other work unrelated to
18 the utility field.

19 Q Are you the Mr. Duncan that Mr. Engle referred to in his
20 testimony?

21 A That is correct.

22 Q And you were counsel on behalf of AMP-Ohio?

23 A Yes.

24 We were first engaged in connection with the
25 AMP-Ohio matter as a legal adviser to AMP-Ohio's

1 Duncan - direct

2 engineering firm, O'Brien and Gear. ,

3 That relationship lasted for about a year, at
4 which point we were retained and engaged to represent
5 AMP-Ohio directly by that organization.

6 Q What was your assignments on behalf of AMP-Ohio?

7 A From the beginning it was either to assist AMP-Ohio
8 engineers or AMP-Ohio directly in securing an allocation
9 of Niagara Power from the Power Authority of the State
10 of New York, and in requesting that power delivered to
11 a member, particularly the City of Cleveland, of
12 AMP-Ohio in Ohio.

13 Q How did you go about doing your legal assignments on
14 behalf of AMP-O?

15 A Initially, as part of O'Brien and Gear's feasibility
16 study, there were a number of legal problems related
17 to that study.

18 Procedurally and substantively legal problems
19 arose that had to be resolved before they could access
20 the real feasibility after making an allocation on
21 behalf of the entity in Ohio; so we initially worked
22 with O'Brien and Gear in working out those
23 substantive problems.

24 Subsequently, when it was determined by AMP-Ohio
25 that they would make that application, we assisted both

1 Duncan - direct

2 the engineers and AMP-Ohio directly in making the
3 application to the Power Authority and in making
4 application to the various wheeling agents; that is,
5 Penelec and CEI, in an attempt to introduce that power
6 in the State of Ohio.

7 Q Why did you have to deal with a wheeling agent?

8 A One of the requirements of the Power Authority is to
9 make a determination -- in making an allocation, that
10 the recipient of the power is within an economic
11 transmission distance of the project from which the
12 power is marketed.

13 In this case it was the Niagara project.

14 So we had, as one of the elements in demonstrating
15 to the Power Authority that our plan for the
16 utilization of that power was the bulk adapted plan,
17 that is, better than the other applications, was to
18 demonstrate that we could feasibly introduce that power
19 into Ohio and into Cleveland in a manner that was
20 economically feasible and competitive with the other
21 applicants for that power.

22 The only way that you could do that was over the
23 existing lines, first New York wheeling agent, and then
24 Penelectric, and finally CEI into the Cleveland system;
25 as I believe the map demonstrates.

Duncan - direct

MR. WEINER: Would you hand the
witness Plaintiff's Exhibit 836, please.

{After an interval.}

Q Can you identify that letter, Mr. Duncan?

A This is a letter that I wrote on May 1st of 1973, to
Mr. Carl Rudolph, President of the Cleveland Electric
Illuminating Company, in which I attempted to initiate
AMP-Ohio's request for wheeling services of some 30
megawatts of PASNY power from the Niagara project for
which we were in the process of making application for.

Q What response did you receive to that letter?

A I received a letter from CEI -- I don't believe it was
signed by Mr. Rudolph, which asked a number of questions
and requested that I provide CEI with a number of
documents and additional information.

I recall, among other things, among the other
things that was requested was the articles of
incorporation of AMP-Ohio and my fee agreement with
AMP-Ohio, and some financial information respecting
AMP-Ohio.

I was in New Orleans at the time I received that
letter, and I talked to Mr. Greenslade of CEI who
summarized what the letter was about and what
information was requested.

1 Duncan - direct

2 Based upon my discussion with Mr. Greenslade and
3 subsequently when I did see the letter, I made
4 arrangements to deliver the information to CEI, either
5 to Mr. Engle directly, who went to CEI's office and
6 delivered it, or it was sent from my office.

7 MR. WEINER: Would you hand the
8 witness Plaintiff's Exhibit 839, please.

9 {After an interval.}

10 Q Mr. Duncan, can you identify that letter?

11 A This is a letter that I wrote May 22, 1973, upon my
12 return to my office from New Orleans, which I told him
13 in the letter that I was either transmitting information
14 which was contained as an enclosure to this letter or
15 described information of which Mr. Engle was either
16 preparing or previously delivered to CEI in response to
17 their letter of May 14, 1973.

18 I notice from your Exhibit 839 that the letter
19 requesting that information was actually prepared and
20 sent by Mr. Howley.

21 MR. WEINER: Would Mr. Leo kindly
22 hand the witness Plaintiff's Exhibit 1658.

23 THE COURT: What number?

24 THE CLERK: 1658.

25 Q Can you identify that letter, Mr. Duncan?

Duncan - direct

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2 A Yes. This is a letter that I prepared and sent to Mr.
3 Don Hauser, at that time the Corporate Solicitor of the
4 Cleveland Electric Illuminating Company, respecting the
5 negotiations that we were having during that period of
6 time with Penelec.

7 Penelec, as has already been identified by Mr.
8 Engle, it was wheeling for Allegheny, and we neglected
9 to initiate discussions with Penelec, and in the letter
10 marked 1658 I was transmitting a copy of the Allegheny
11 Penelec contract to Mr. Hauser and indicating to him
12 that that was where we expected to get the wheeling
13 across Pennsylvania from the New York State line to the
14 CEI system.

15 Q Were you familiar at that time whether Penelec and CEI
16 were connected at that point?

17 A I was advised by the engineering consultants that there
18 was a transmission path that included an interconnection
19 between those systems.

20 Q And what happened after you furnished the information
21 that CEI requested?

22 A There was a meeting arranged which occurred subsequent
23 to this June 25, 1973, letter with Mr. Hauser, and it
24 was a meeting -- it was a meeting attended by myself
25 and Mr. Engle and two representatives of O'Brien and

Duncan - direct

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2 Gear, the engineering consultants, and Mr. Charles
3 Hillingly and Mr. Kubik, and it was also attended by
4 three or four representatives of CEI.

5 I can't give you a specific date, but in July of
6 1973.

7 Q Is that the same man, the Mr. Engle, that testified this
8 morning?

9 A Yes.

10 Q You were both present?

11 A Yes.

12 Q What discussions took place at that meeting, and how long
13 did they last?

14 A The meeting lasted approximately an hour or more, and it
15 was initiated by a discussion by either me, Mr. Engle,
16 or the engineering consultants in trying to tell CEI
17 what we wanted in the way of interconnection and the
18 approximate dates..

19 Also, we advised them that we were in active
20 negotiations with the power authority, and we advised
21 them of the state of negotiations with Penelectric,
22 which were progressing.

23 Penelectric at that point had made a commitment to
24 deliver that power over its system from the New York
25 line to CEI's system.

1 Duncan - direct

2 We had not arranged or negotiated specific terms
3 and conditions with Penelec.

4 All of these matters were described to Mr. Howley,
5 and I know Mr. Lansdale was there.

6 I don't know if I mentioned that he was, but he was
7 in attendance at the meeting.

8 We also discussed the reasons that we wanted to
9 introduce this power to Cleveland rather than one of
10 the other, I think, 41-member system of AMP-Ohio.

11 After that there was some discussion about CEI's
12 problems with the City of Cleveland. We attempted to
13 avoid getting into that subject, and at the close of
14 the meeting we were told, I believe by either Mr.
15 Lansdale or Mr. Hauser, that this matter would be
16 presented to management of CEI, and that they would
17 come back to us as soon as possible.

18 Q Were there discussions at that meeting with respect to
19 CEI's physical capabilities of wheeling the power?

20 A Yes.

21 Our engineering consultants had, based upon the
22 maps and information available by the CEI system, had
23 already ascertained that there was adequate capacity
24 to accommodate those deliveries.

25 My recollection is that that was verified in the

Duncan - direct

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2 meeting with CEI, and that that never really was an
3 issue.

4 MR. WEINER: May I approach the
5 bench?

6 THE COURT: Yes.

7 - - - - -

8 {Bench conference ensued on the record as
9 follows:}

10 MR. WEINER: I would like to have
11 Stipulation 49 read.

12 MR. LANSDALE: He just testified to
13 it, didn't he?

14 MR. WEINER: He testified to a
15 little bit of it. I don't think he knows the rest
16 of it.

17 MR. LANSDALE: It is all right with me.
18 I don't care. I started to object to the question
19 and didn't, but --

20 THE COURT: Well, obviously,
21 gentlemen, there are those that don't know what
22 stipulations are for, and I don't know when you
23 want them read in what number.

24 MR. WEINER: 49, your Honor.

25 THE COURT: Very well. I will read

Duncan - direct

it.

{End of bench conference.}

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THE COURT: Ladies and gentlemen
of the jury, Stipulation No. 49 reads as follows:

"The transmission system of CEI has had since
at least 1970, currently has, and will have the
capacity in the foreseeable future to accept and
transmit 30 megawatts of power from the Power
Authority of the State of New York {PASNY} to MELP,
and the transmission of CEI has satisfied since at
least 1970, currently satisfies, and will satisfy
in the foreseeable future, the reliability
criteria of the East Central Area Coordination
Council, assuming the transmission of 30 megawatts
of PASNY power to MELP."

MR. WEINER: Thank you, your Honor.

BY MR. WEINER:

Q What was the outcome of that meeting, Mr. Duncan?

A There was no immediate outcome.

There was a letter that I received dated August
30, 1973, from Mr. Don Hauser, Corporate Solicitor of CEI,
to me, and it indicated in a brief, one-page letter that
CEI would not wheel because it would permit Cleveland to

Duncan - direct

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2 compete with them.

3 MR. WEINER: Would you hand the
4 witness Plaintiff's Exhibit 38, which we also have --
5 it is the exhibit on the floor, the large exhibit,
6 2502.

7 If you would put that on the board.

8 Your Honor, may I step over to the machine to
9 put that up on the screen?

10 THE COURT: Yes.

11 {After an interval.}

12 BY MR. WEINER:

13 Q Mr. Duncan, Plaintiff's Exhibit 38, the one before you,
14 is that the letter that you just made mention of?

15 A Yes.

16 Q What was your reaction upon receipt of that letter?

17 A I was shocked at receiving it, frankly.

18 Q Why were you shocked?

19 A Well, for a number of reasons:

20 In the first place, the meeting that was held in
21 July had an optimistic tone to it, and we came away ~~with~~
22 from the meeting feeling that something could be
23 arranged. We knew it would be a long and hard
24 negotiation, but we were optimistic because we were
25 encouraged to be by some of the things said at that

Duncan - direct

meeting.

We assumed that they would meet with us.

MR. LANSDALE: Objection.

THE COURT: Counsel, please respond to the question. I shouldn't have to interject to tell you that, you are a lawyer.

THE WITNESS: Sorry.

Q Did you receive a subsequent response or any other response from CEI as a result of your meeting in July?

A No, I never did.

Q Was any other alternative made to AMP-Ohio by CEI?

A Not to my knowledge.

Q What other alternatives were there for AMP-0 to get the PASNY power to Cleveland?

A To my knowledge, there were none.

Q What did AMP-0 do after that?

A There were a couple of things that AMP-Ohio did procedurally.

First, it authorized and directed us to intervene on behalf of AMP-Ohio in some proceedings then pending at the Nuclear Regulatory Agency or licensing agency in connection with CEI's Perry unit, and for which they were seeking licensing.

One of the aspects of these proceedings is the

Duncan - direct

determining by the licensing board --

MR. LANSDALE: Objection.

THE COURT: Counsel, kindly respond to the question, please.

THE WITNESS: I was trying to explain --

THE COURT: Read the question.

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

Q I will rephrase the question.

Were you authorized to do anything on behalf of AMP-0 after the refusal by CEI?

A Yes. We were authorized and directed to file an application for intervention in Docket 50-440 and 50-441.

These were the licensing proceedings then pending at the NRC.

MR. LANSDALE: Objection.

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

MR. LANSDALE: I object to this:

Number one, he is going beyond the question, and number two, it is getting into the NRC application, which was an application by CAPCO,

Duncan - direct

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2 by the CAPCO group, and not dealing with CEI.
3 It is dealing with CAPCO, and we object to this.

4 THE COURT: What is the basis for
5 this, Mr. Weiner?

6 MR. WEINER: I don't buy that
7 argument --

8 THE COURT: I don't want you to
9 argue with Mr. Lansdale. He is stating his
10 position, and I will give you an opportunity of
11 stating your position.

12 MR. WEINER: I understand. I am
13 sorry.

14 THE COURT: Let's conduct ourselves
15 like lawyers.

16 MR. WEINER: The position is that
17 this was a step taken by AMP-0 to obtain the
18 wheeling they were looking to obtain.

19 THE COURT: We are not going to
20 permit into the record by circumvention or
21 indirection that which I have already ruled out;
22 namely, anything that occurred before the NRC.

23 Now, as I indicated before, I have the same
24 problem with your witnesses.

25 I know there are certain things they want to

1 Duncan - direct

2 say, but I would instruct your witnesses to listen
3 to the question and respond to the question.

4 Then we won't get into these problems where
5 these conjectures keep coming in, keep coming into
6 the record.

7 I will sustain the objection. Go back and
8 place another question, a proper question.

9 MR. LANSDALE: May I add one more
10 thing:

11 There is a stipulation about the dates and
12 there was not, I believe it is 123 or somewhere
13 in that neighborhood, and that specifies what we
14 were -- when we were wheeling.

15 THE COURT: I will sustain the
16 objection. Go back and ask another question.

17 {End of bench conference.}

18 - - - - -

19 THE COURT: Mr. Duncan, please
20 listen to the question and make an attempt to
21 respond to the question, and please don't go beyond
22 the question.

23 THE WITNESS: Yes, your Honor.

24 BY MR. WEINER:

25 Q What actions were you authorized to do on behalf of

Duncan - direct

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AMP-0 after CEI s refusal to wheel?

A We were asked and authorized and directed to petition to intervene in certain proceedings that were then pending before the Nuclear Regulatory Licensing Board.

Q On behalf of AMP-0?

A Yes.

Q Was a petition filed on behalf of AMP-0?

A Yes; and we were also authorized and directed to bring the matter of the company's refusal to wheel, as stated in the letter from Mr. Hauser to me, to the attention of the Antitrust Division of the Department of Justice, and to enlist their support in investigating the matter, and we did that also.

Q With respect to the intervention petition, was your petition accepted, were you allowed to intervene in the proceedings?

A Yes.

Q Who were the other parties to that proceedings?

MR. LANSDALE: I object.

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

MR. LANSDALE: I object to going into

Duncan - direct

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2 the NRC proceedings. They have absolutely nothing
3 to do with this thing.

4 The stipulation is clear when wheeling was
5 resumed, and what difference does it make whether
6 they made a complaint to the Antitrust Division or
7 the NRC or anything else?

8 MR. WEINER: I asked him who is
9 the -- who the parties were; and that is the last
10 question, and there is nothing objectionable about
11 who the parties were to the NRC proceedings, and he
12 said the City was allowed to intervene.

13 MR. LANSDALE: My recollection is it
14 was kicked out.

15 MR. WEINER: Your recollection is
16 incorrect.

17 THE COURT: Wait until cross
18 examination for that, and if that is a fact, I
19 don't know what the facts are, gentlemen.

20 I am waiting for the evolution of the facts,
21 but again, now, Mr. Weiner, you know the parameters
22 within which you can go into the nuclear regulatory
23 proceedings.

24 And you know, Mr. Lansdale, the parameters
25 that you can go into as far as the FPC.

1 Duncan - direct

2 MR. LANSDALE: Yes.

3 THE COURT: I thought in reading
4 the stipulation it would eliminate the concerns of
5 this very thing that we had stipulated the pertinent
6 facts that occurred before both commissions.

7 Does my memory serve me incorrectly?

8 MR. WEINER: I haven't asked anything
9 that was part of the stipulation. I don't intend to.

10 THE COURT: Very well. Proceed.

11 {End of bench conference.}

12 - - - - -

13 BY MR. WEINER:

14 Q I believe the question was, who were the parties to
15 this proceeding?

16 A There were a number of parties, I'm not sure I can
17 name them all.

18 CEI was one of several applicants in that
19 proceeding; I believe the whole CAPCO group was in
20 there, including Duquesne, and so forth.

21 There were other parties, including the Department
22 of Justice and the Antitrust Division, the Attorney
23 General of the State of Ohio, and the City of Cleveland
24 were all parties in addition to AMP-Ohio.

25 Q Did AMP-0 maintain its intervention in that proceeding

Duncan - direct

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throughout the entire proceeding?

A Through the preliminary phases we were active on behalf of AMP-Ohio.

THE COURT: Do you understand the question?

THE WITNESS: Yes.

THE COURT: It's a very simple question; it requires a very simple answer.

Can you answer it?

THE WITNESS: Yes.

THE COURT: Answer it.

THE WITNESS: No; no, we did not maintain it throughout.

Q And why didn't AMP-0 maintain their intervention throughout?

A Because its interest coincided directly with the City of Cleveland's; its interests were also -- coincided also with those advocated by the Department of Justice, Antitrust Division, that we thought the representation of AMP-0 actively would be cumulative or redundant, so we withdrew.

Q Did you, on behalf of AMP-0, follow that case as it went through the proceeding?

A Yes; we monitored it and reported to AMP-Ohio.

Duncan - direct

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MR. LANSDALE: Objection.

THE COURT: Overruled.

Q What was the outcome of that case?

MR. LANSDALE: Objection.

THE COURT: Sustain that objection.

MR. WEINER: Excuse me, your Honor,

just a moment, if I may.

{Mr. Weiner obtains a document from his file.}

MR. WEINER: May I approach the bench?

THE COURT: Yes, you may.

- - - - -

{Bench conference ensued on the record as follows:}

MR. WEINER: If we could have the Court read Stipulation 126.

THE COURT: Very well.

MR. WEINER: I'm trying to think --

THE COURT: Mr. Lansdale.

{Mr. Lansdale had started to leave the bench and promptly returned.}

MR. WEINER: If the Court would read -- it's a long one -- 211.

MR. LANSDALE: Which one?

MR. WEINER: 211.

1 Duncan - direct

2 MR. LANSDALE: I object to that.

3 {The Court reading silently.}

4 MR. LANSDALE: My objection --

5 THE COURT: You are running smack
6 into relief provisions, I guess, sir.

7 We are now going into relief provisions in
8 this.

9 MR. LANSDALE: Yes. And my position
10 is -- my position is that 12b covers everything that
11 is relevant to this matter; that this order covers
12 the applicants and does not cover CEI as such, it
13 covers the applicants, which is the whole group,
14 contains a lot of other things that have no
15 relationship in this case.

16 12b talks about -- tells when wheeling was
17 granted, and it was ordered by the NIC, and that's
18 the only thing that is relevant here, I submit.

19 THE COURT: Well, I'm going to
20 read 12b.

21 I'm going to reserve ruling on this other one
22 till there is some indication of what is going to
23 happen on the objection or the motion that CEI
24 presently has before me; because this stipulation,
25 as pointed out, goes to all of the defendants, CEI

Duncan - direct

1 and other CAPCO companies.

2 MR. WEINER: May I be heard?

3 THE COURT: This goes -- it appears
4 to me it goes to the conspiracy charge.

5 MR. WEINER: May I be heard?

6 THE COURT: Yes.

7 MR. WEINER: Only the part that
8 applies to wheeling, {a} and {b}. There are a
9 lot of other licensing conditions, and {a} and {b}
10 don't go to any conspiracy.

11 THE COURT: It goes to -- refers to
12 CEI and other CAPCO companies.

13 MR. WEINER: Well, we can take out
14 that --

15 THE COURT: I didn't draw the
16 stipulation.

17 All I'm telling you is what I read, Mr. Weiner,
18 and the language is clear to me.

19 Now, you may have intended something else, I
20 don't know.

21 MR. WEINER: Well, --

22 THE COURT: If you can agree on
23 the language, fine.

24 At this point in time, in view of the
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Duncan - direct

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2 outstanding motion as to the entire CAPCO situation
3 and for the reasons I have already given you, I will
4 sustain that objection.

5 MR. WEINER: Excuse me.

6 Mr. Lansdale, can we just make it "applicant"?
7 That would take --

8 MR. LANSDALE: No, sir.

9 MR. WEINER: Well, that would take
10 care of this release question.

11 {End of bench conference.}

12 - - - - -

13 THE COURT: Ladies and gentlemen
14 of the jury, Stipulation No. 12b of the Joint
15 Stipulations of Counsel reads as follows:

16 "Muny Light was unable to obtain wheeling
17 service of preference power from CEI until January
18 1977 when the Nuclear Regulatory Commission ordered
19 CEI to furnish such service to the City 'Preference
20 power' is power supplied by governmental agencies
21 not available to privately-owned utility companies."

22 MR. WEINER: Thank you, your Honor.

23 BY MR. WEINER:

24 Q Subsequent to the receipt of Plaintiff's Exhibit 38,
25 which is up on the screen, did you make any other

Duncan - direct

1 efforts to have CEI wheel the PASNY power for AMP-0?

2
3 A Yes. I wrote them another letter on August 2nd of 1974.

4 MR. WEINER: Mr. Leo will hand you
5 Plaintiff's Exhibit 77.

6 THE COURT: What is this exhibit?

7 THE CLERK: 77.

8 Q Can you identify Plaintiff's Exhibit 77, please, for us?

9 A 77 or 770?

10 Q Excuse me. 770.

11 MR. LANSDALE: Is this 770?

12 THE COURT: 770.

13 MR. LANSDALE: Do I have the right
14 number?

15 MR. WEINER: Yes, sir.

16 {Exhibit handed to the witness by the Court.}

17 A Yes; this is the letter to which I referred.

18 Q Who wrote that letter?

19 A I did.

20 Q What date?

21 A August 2nd, 1974.

22 Q Whom did you write it to?

23 A Mr. Lee Howley.

24 Q What was the purpose of that letter?

25 A It was, again, to attempt to open up or reopen

Duncan - direct

1 negotiations with respect to the delivery of PASNY
2 power to the City of Cleveland for the account of
3 AMP-Ohio.
4

5 My purpose in writing it was to call Mr. Howley's
6 attention to a number of occurrences that took place in
7 the year or 11 months since I received Mr. Hauser's
8 letter to see if I couldn't get him to reinstitute
9 the negotiations.

10 Q What response did you receive to that letter?

11 A To my recollection, I never received any response to
12 this letter.

13 Q What was the situation with respect to the actual 30
14 megawatts of PASNY power at that time?

15 A As of August 2nd, 1974?

16 Q Yes.

17 A At that point in time, the Power Authority was in the
18 process of allocating that power to Allegheny.

19 Q When did that allocation take place?

20 A I believe they actually started receiving that power in
21 September of '74. I believe the contract was signed
22 in August.

23 Q Was there any objection to that allocation to Allegheny?

24 A There were competing applications for it, if that's what
25 you mean.

Duncan - direct

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2 Q Did any of the competing applications raise any
3 objection after the trustees awarded it to Allegheny?

4 A Yes. There was a contest initiated by the State of
5 Vermont.

6 MR. LANSDALE: Objection.

7 THE COURT: Approach the bench.

8 - - - - -

9 {Bench conference ensued off the record as
10 follows:}

11 THE COURT: State the reason for
12 your objection?

13 MR. LANSDALE: The question is
14 whether there were any other objectives or contests.
15 He is going into a general explanation and I don't
16 know what he is going to say; I don't like it, I
17 don't think.

18 I object.

19 THE COURT: Sustained.

20 {End of bench conference.}

21 - - - - -

22 THE COURT: Again, Mr. Duncan,
23 please listen to the question and respond to the
24 question and do not go beyond the question.

25 The answer is "Yes."

Duncan - direct

THE WITNESS:

I'm sorry, your Honor.

BY MR. WEINER:

Q Who made that objection?

A The State of Vermont.

Q Where was that objection filed?

A At the Federal Power Commission, now the Federal Energy Regulatory Commission.

Q What involvement did AMP-0 have in conjunction with that proceeding?

A AMP-0 petitioned to intervene in that proceeding.

Q What was your involvement on behalf of AMP-0?

A I filed the intervention on behalf of AMP-Ohio.

Q What was the position of AMP-0?

A AMP-0 supported Allegheny's entitlement to that 30 megawatts.

Q Why did AMP-0 support Allegheny?

A Allegheny and AMP-Ohio had previously entered into -- or had entered into an agreement under which Allegheny agreed to relinquish the 30 megawatts to AMP-Ohio when AMP-Ohio could arrange for wheeling into the City of Cleveland.

We had no such arrangement with the State of Vermont or with any other applicants for that 30 megawatts so, naturally, we supported the position of

Duncan - direct

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2 Allegheny in opposition to the position advocated by
3 the other parties, namely, the Public Service Board of
4 Vermont and the Massachusetts and Connecticut Municipal
5 Systems that had intervened in that same docket.

6 Q What was PASNY's position with respect to that
7 proceeding?

8 A PASNY supported, in both briefs and oral arguments, the
9 position of Allegheny, citing, among other reasons, the
10 arrangement they had with AMP-Ohio; their position was
11 identical with that of both Allegheny and of AMP-Ohio.

12 Q What happened to the proceeding in the Federal Power
13 Commission?

14 A An initial ruling was issued by Judge Levant, presiding
15 administrative law judge, sustaining the PASNY allocation
16 to Allegheny.

17 That was petitioned to the Commission for
18 reconsideration, and the Commission sustained the
19 allocation, so Allegheny prevailed in those proceedings.

20 Q What happened with respect to the allocation to
21 Allegheny after the FPC review?

22 A The 30 megawatts was at all times after August -- or
23 September 1, I believe, of 1974 given to Allegheny
24 subject to its contractual agreement with AMP-Ohio,
25 and they were receiving that power and did for a period --

Duncan - direct

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2 until the contract expired.

3 Q Did there come a time subsequent that Allegheny and
4 AMP-0 entered into another agreement?

5 A Yes. In the fall, I believe, of 1976, we entered into
6 another agreement.

7 MR. WEINER:

Mr. Leo, could you give

8 Mr. Duncan a copy of Plaintiff's Exhibit 2209?

9 {The clerk complies.}

10 A I stand corrected. It was October of 1977.

11 Q What was in October of 1977?

12 A That they entered -- that AMP-Ohio and Allegheny
13 Electric Cooperative entered into another agreement.

14 Q Is that exhibit 2209, that agreement?

15 A Yes, it is.

16 Q And what role did you play with respect to that agreement?

17 A I drafted it and represented AMP-Ohio in connection with
18 its negotiation with Allegheny in connection with this
19 contract.

20 Q Is that an executed copy of that agreement?

21 A It's a copy, yes.

22 It's an executed copy.

23 Q What were the basic terms of that agreement?

24 A The terms, basically, were that at such time as
25 Allegheny or, as AMP-Ohio was able to arrange wheeling

1 Duncan - direct

2 with CEI and Penelec, Allegheny would support a
3 reallocation of a portion of the 30 megawatts to
4 AMP-Ohio for use by the City of Cleveland; and this
5 agreement stated the specific amounts of power that
6 would be relinquished by Allegheny for the benefit of
7 AMP-Ohio, of course, subject to the approval of the
8 Power Authority trustees and the Governor of the
9 State of New York.

10 Q What is the difference between that 1977 agreement
11 between AMP-0 and Allegheny and the 1974 agreement
12 between AMP-0 and Allegheny?

13 A The differences are twofold, and it is somewhat
14 technical, I'll try to simplify it.

15 First, the Power Authority, in reallocating that
16 power in 1976, the Power Authority said they would
17 reallocate the power at the expiration of Allegheny's
18 contract, which was February 19th, 1978.

19 However, the Power Authority said they would not
20 market 30 megawatts of firm power; rather, they
21 substituted some firm peaking power for the firm power
22 that Allegheny had been getting.

23 Q Let me, just for a second, interrupt you.

24 Can you describe the difference between "firm
25 power" and "firm peaking power"?

Duncan - direct

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2 A Well, "firm power," they're on different rate schedules
3 to begin with.

4 They're not a firm but an interruptible source,
5 they're different classes of power and they're subject
6 to different schedules. It has to do with very highly
7 technical distinctions between capacity and energy that
8 I am not quite as familiar with as an engineer.

9 So there was a change required in the agreement
10 between AMP-0 and Allegheny because Allegheny was
11 getting less firm power, and, therefore, they didn't
12 have the firm power to give up in the quantity of 30
13 megawatts to AMP-Ohio.

14 So we took proportionately less. Both Allegheny
15 and AMP-Ohio revised the agreement so that rather than
16 getting -- rather than getting all firm power, we took
17 a proportionate amount of firm power and peaking power.
18 That was one change.

19 The second change was that when Allegheny started
20 taking in excess of 100 megawatts of PASNY power in
21 1974, they went on a different wheeling rate with the
22 New York wheeling agents. Their power comes over the
23 combined system of New York State Electric and Gas
24 Corporation and Niagara-Mohawk Power Corporation.

25 Under that wheeling agreement, that there was

Duncan - direct

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2 what we call a kick-out clause; a clause under which
3 the rate would go up once you started taking in excess
4 of 100 megawatts.

5 So when -- in September of 1974 when Allegheny
6 started taking the 130, they went to a different rate.

7 We attempted to get the wheeling agents to agree
8 that when they went back to 100 megawatts when AMP-Ohio
9 got into business, that they would go back to the old
10 wheeling rate.

11 The wheeling agents refused; and so we had to
12 enter into an accommodation with Allegheny to make
13 them whole for the amount of power or the amount of
14 revenues they would lose as a result of going to the
15 higher wheeling rate but not having the 30 megawatts.

16 We calculated what the dollar impact of that change
17 was, and then tried to relate it to the benefits that
18 Allegheny received as a result of its receipt of PASNY
19 power, and the engineers arrived at the conclusion that
20 if we allowed Allegheny, out of the original 30
21 megawatts, to retain 7.28 approximately, they would be
22 made whole. And that is the agreement that we entered
23 into, and those are the two changes and distinctions
24 between the two contracts.

25 Q Did there come a time when AMP-0 submitted another

Duncan - direct

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application to PASNY?

A Well, in connection with the reallocation at the end of the Allegheny contracts, AMP-Ohio went back in and supported the Allegheny application once again without submitting an independent application. In other words, they advised the Power Authority they were still interested, still did not have wheeling, but still had an agreement to reallocate it when they did.

Q Was -- excuse me.

A {Continuing} It was only after the NRC imposed the conditions that were mentioned in the stipulation that Judge Krupansky read that we submitted an independent application on behalf of AMP-Ohio to the Power Authority trustees because, of course, those requirements opened the transmission path to AMP-Ohio and the City of Cleveland.

Q When was that, if you recall?

A I believe in early 1978.

Q What was the purpose of that application?

A The application to PASNY by AMP-Ohio?

Q Yes.

A It was an independent application for the 30 megawatts or some lesser amount of power that was available to preference customers outside the state once the

1 Duncan - direct

2 Allegheny contracts expired; and, again, that expiration
3 date was February 19th, 1978.

4 Q What was Allegheny's position with respect to AMP-0's
5 application?

6 A Allegheny at all times supported AMP-Ohio's application.

7 Q What was the result of the application of AMP-0?

8 A Eventually it was approved by the trustees and, my
9 recollection is, it was approved by Governor Carey in
10 early January of 1980.

11 Q And what was the result of the approval by Governor
12 Carey -- who is Governor Carey by the way?

13 A Governor Carey was -- is the Governor of the State of
14 New York who, under the Power Authority Act has the
15 -- Niagara Redevelopment Act -- has the responsibility
16 for approving all of the sales of power by the Power
17 Authority, including the sales of power from the
18 Niagara project.

19 Q What was the result of his approval of the AMP-0
20 application?

21 A When he approved it, it took some six months for the
22 details to be worked out, and I believe power started
23 flowing into Cleveland -- Niagara project power for
24 the account of AMP-Ohio -- on June 1st of this year.

25 Q If CEI had wheeled in 1974, when would that power have

Duncan - direct

1
2 begun to flow into the City of Cleveland?

3 A In my opinion, at that time.

4 Q When was that?

5 A In 1974, when we -- '73 or '74 when we made the initial
6 application.

7 MR. WEINER: Excuse me just one
8 minute.

9 {After an interval.}

10 MR. WEINER: No further questions.

11 THE COURT: Cross-examination.

12 - - - - -

13

14 CROSS-EXAMINATION OF WALLACE L. DUNCAN

15

16 BY MR. LANSDALE:

17 Q Mr. Duncan, would it be correct for me to assume that
18 in your various communications to the Cleveland Electric
19 Illuminating Company, both written and oral, you attempted
20 at all times to speak accurately and according to your
21 best information and belief?

22 A I believe that's right.

23 Q Will you please refer to PTX 836 which, I believe, is
24 your May 1st, 1973 letter to Mr. Rudolph requesting --
25 first letter requesting the company to engage in

Duncan - cross

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wheeling.

Have I correctly identified --

A I have Exhibit 836, which is my letter to M. Rudolph.

Q All right. Please refer to page 2 of the last paragraph that reads as follows, does it not?

"While there may be other means of securing the delivery of PASNY power to members of AMP-Ohio, the arrangement outlined above would appear to be the most economical and desirable."

Do I correctly read that?

A That last line --

Q Do I correctly read it, sir?

A I assume you are correctly reading it.

The last line is obliterated on my copy.

I wrote that letter in the original --

MR. LANSDALE: Can somebody hand --

THE COURT: Mr. Leo -- give him

your copy {addressing Mr. Weiner.}

{Mr. Weiner hands his copy to the clerk who,

in turn, hands it to the witness.}

A {After examining the exhibit} That's correct.

Q That's correct.

MR. LANSDALE: I have no further

questions.

1 THE COURT: Thank you.

2 You may step down.

3 MR. WEINER: Excuse me just one
4 minute, your Honor.

5 I'm sorry. Could I just see the document?

6 {The document was handed by the Clerk to
7 Mr. Weiner for his examination.}

8 {Mr. Weiner and Mr. Norris conferred out of
9 the hearing of the jury and off the record.}

10 MR. WEINER: No questions, your
11 Honor.

12 Thank you.

13 THE COURT: Thank you, Mr. Duncan,
14 you are excused.

15 THE WITNESS: Thank you, your Honor.

16 - - - - -

17 THE COURT: Please call your next
18 witness.

19 MR. WEINER: William Wise, your
20 Honor.

21 - - - - -

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25

1 W I L L I A M C. W I S E,

2 of lawful age called as a witness on behalf

3 of the plaintiff, being first duly sworn, was

4 examined and testified as follows:

5
6 DIRECT EXAMINATION OF WILLIAM C. WISE

7
8 BY MR. WEINER:

9 Q Mr. Wise, would you state your full name and home
10 address, please?

11 A William C. Wise, 4701 Willard Avenue, Chevy Chase,
12 Maryland.

13 Q And your business address, Mr. Wise?

14 A 1200 18th Street N.W., Washington, D.C.

15 Q And your occupation?

16 A I'm an attorney.

17 Q In private practice?

18 A Pardon?

19 Q In private practice?

20 A In private practice.

21 Q How long have you been an attorney in private practice?

22 A Well, this time, since 1953.

23 Q What kind of practice do you maintain, Mr. Wise?

24 A General utility practice, representing cooperatives and
25 municipalities chiefly.

1 Wise - direct

2 Q And your offices are where?

3 A Washington, D.C.

4 Q Could you give us a brief sampling of clients you have
5 represented over the years?

6 A Seminole Electric Cooperative, Tampa; Marsh Basin
7 Electric Cooperative in South Dakota, Wabash Electric
8 Association in Indiana, Northern Michigan and Michigan
9 Wolverine in Michigan.

10 How many do you want?

11 THE COURT: Miss Holzapple, did
12 you hear the witness?

13 MS. HOLZAPPLE: Not too well.

14 THE WITNESS: You can't hear me?

15 THE JURORS: No.

16 THE COURT: You will have to speak
17 up, Mr. Wise, so everyone can hear you, please.

18 THE WITNESS: I'm sorry.

19 I apologize to you.

20 BY MR. WEINER:

21 Q What are the general functions you perform on behalf of
22 your clients?

23 A Well, I spend about three fourths of our time at the
24 Federal Energy Regulatory Commission, the NCR, negotiate
25 the contracts with power companies, generally utility

Wise - direct

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practice.

Q Have you become familiar with the Niagara River hydroelectric project?

A Yes, sir.

Q How did you become familiar with that?

A Originally, I represented cooperatives attempting to get the Federal development of that project.

Q Could you please describe the general nature of that project?

A Well, it's a hydro project located at Niagara Falls; has a capacity of about 1,800,000 kilowatts of firm capacity and a few hundred thousand of different types of not so firm capacity; very cheap power.

Q Would you describe what is unique about hydro power?

A Well, hydro power, generally, if it's in a favorable site is cheap.

Incidentally, the Niagara power is the cheapest in the country, I believe.

Q Have you had an opportunity in connection with your professional representation to study the history of that project?

A Yes, sir, and I participated in some of it.

Q How did you participate?

A Cooperatives and municipalities attempted to have the

1 Wise - direct

2 Federal Government develop that project. We didn't
3 succeed.

4 How much more do you want me to tell you?

5 Q Let me ask you, when was that?

6 A Oh, it started in about 1950, I imagine.

7 Q When you talk about the "project," what do you mean by
8 the "project"?

9 A The Niagara project, the project at Niagara Falls that
10 produces hydroelectric power.

11 Q What goes into a project?

12 What physical things are there in a project -- in
13 that project.

14 THE COURT:

Mr. Weiner, again, I'm

15 prompted to ask:

16 This is really interesting, but how is it
17 material to the issues here?

18 Please approach the bench, gentlemen.

19 - - - - -

20 {Bench conference ensued on the record as
21 follows:}

22 THE COURT:

23 What has the history of
24 this project got to do with whatever he's going to
25 testify to?

MR. WEINER:

He's going to testify

Wise - direct

1
2 that Ohio was a preference customer for this
3 project power.

4 THE COURT: I think that is in the
5 record.

6 Why don't you ask -- why don't you ask him
7 the question.

8 Sustain the objection.

9 Now, please, Mr. Weiner, let's direct
10 questions that are material to the issues before
11 us.

12 Now, will you, please?

13 MR. WEINER: Yes.

14 {End of bench conference.}

15 - - - - -

16 THE COURT: Please ask a material
17 question; will you do that for me, please?

18 BY MR. WEINER:

19 Q What was your role with respect to the legal
20 organization of that project?

21 A By "legal organization," I assume you mean how it was
22 created by Congress, that project?

23 Q Yes.

24 THE COURT: I just finished telling
25 you, Mr. Weiner, to get to the point with this

1 Wise - direct

2 witness.

3 Would you do that, please?

4 MR. WEINER: I thought I was, your
5 Honor.

6 THE COURT: Well, you're not.

7 MR. WEINER: Okay.

8 BY MR. WEINER:

9 Q Mr. Wise, are you familiar with the legislation that
10 created this project?

11 A Yes, sir.

12 Q When was that passed?

13 A That was passed in '57, I believe.

14 Q What was the role of the States of Pennsylvania and
15 Ohio in the process?

16 A Well, we were fighting to have the project developed
17 by the Federal Government.

18 The investor-owned companies in the area were
19 also fighting to have it developed, and the Energy
20 Power Authority was fighting to have it developed.

21 THE WITNESS: Your Honor, there is a
22 little background here which I think must be
23 understood in order to understand the Act and the
24 provisions which appear in the Act.

25 THE COURT: Mr. Wise, your lawyer

1 Wise - direct

2 has asked the question. You are free to answer the
3 question so long as there is no objection and so
4 long as the matter is material.

5 If there is an objection, I will consider it.

6 A Niagara Falls is on the borderline between Canada and
7 the United States.

8 Neither side could develop the power on their side
9 without having an agreement between the two.

10 The United States and Canada differed over this
11 for several years. Finally an agreement was entered
12 into, I think, about 1950 -- or, I mean, a treaty was
13 entered into providing for the development of it.

14 The United States provided in that treaty that
15 any development of the hydro capacity on the United
16 States side would have to be authorized by Congress.
17 That's why it became a Federal project; it could not be
18 built unless Congress authorized it.

19 Q Excuse me. And that authorization from Congress was
20 passed in 1957?

21 A In '57, I believe.

22 Q Can you hear me all right, Mr. Wise?

23 Can you hear me all right?

24 A Yes, I can hear you all right.

25 But I do want to say that there was no project

1 Wise - direct

2 after the treaty about seven years or several years
3 past nobody could get in there except through Congress;
4 we could not get Federal development, the companies
5 couldn't get the authorization for company development,
6 and the New York Power Authority couldn't get --

7 THE COURT: Is this material to what
8 he is ultimately going to testify to?

9 MR. WEINER: Yes, it is, your Honor.

10 THE COURT: You may proceed.

11 I keep telling you: Why don't you ask him the
12 question that you brought him here to ask.

13 Go ahead.

14 MR. WEINER: I don't want to argue
15 with the Court.

16 THE COURT: Please, please.

17 Q Are there preference provisions in the Act which was
18 passed to create this project?

19 A Yes, sir, they are.

20 Q Have you had occasion to examine those preference
21 provisions?

22 A I have.

23 Q Could you describe those preference provisions for us,
24 please?

25 A The Niagara --

1 Wise - direct

2 MR. LANSDALE: Objection.

3 THE COURT: Overruled.

4 This is material, Mr. Lansdale.

5 Proceed.

6 A The Niagara Development Act was -- which represented a
7 compromise has this preference provision in it which is
8 the compromise between the Federal preference, that
9 is, complete preference to preference customers.
10 By "preference customers," we mean municipalities and
11 cooperatives and other public -- and public-owned
12 agencies.

13 The compromise is this, and this is the language
14 in the Act now:

15 That language provides that 50 percent of the
16 power developed at Niagara Falls must be sold to
17 preference customers; preference customers being
18 cooperatives, municipalities, and other public agencies.

19 Q Were there other preference provisions in the Act?

20 A Well, not other preference provisions; but that same
21 preference provision provides that of that 50 percent,
22 20 percent was to be sold to out-of-state preference
23 customers, or 10 percent of the total project must go
24 to out-of-state preference customers.

25 Q How much power would that be, then, Mr. Wise?

Wise - direct

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A Well, of the firm power, the million eight hundred thousand, that would be 180,000 kilowatts.

Q And is that 180 megawatts?

A 180 megawatts, right.

Q What connection did you have -- have you had for your clients with the PASNY power after the Act starting off the project got going?

A Excuse me, I'm sorry, I didn't hear the last part of the question.

Q What involvement did you have with PASNY on behalf of any of your clients after the project was underway?

A Well, I represented Allegheny Electric Cooperative in all of its negotiations with PASNY and with all the hearings before PASNY.

Q And what was Allegheny's interest in the hearings?

A As soon as or shortly after the Act passed or after the project went into operation and began, I informed PASNY -- PASNY stands for the Power Authority of the State of New York, the agency which owns this Niagara project -- Allegheny informed PASNY that it would like to buy all of its requirements from PASNY.

wise - direct

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Q When was that?

A Early in the '60's, maybe '61 or so.

Q Was that successful?

A It wasn't immediately.

We negotiated and negotiated and haggled and haggled.

In 1966 there was an allocation of 100,000 kilowatts made to Allegheny.

Q In 1966?

A I think so.

Q What was your involvement in that?

A Well, I participated in all these negotiations during the '60's, and I succeeded in getting a few changes made in the contract that PASNY submitted to us for that 100,000 kilowatts.

Q Was there anything in the legislative intent created in the project at Niagara that indicated where the power should go to?

MR. LANSDALE: Objection.

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

MR. LANSDALE: He is asking the

Wise - direct

1 witness to say what the legislative intent was,
2 and I object to that.
3

4 THE COURT: How is he going to
5 testify to that?

6 MR. WEINER: He is an expert on
7 legislative intent.

8 THE COURT: How can he substitute
9 his impression? Legislative intent is set forth by
10 Congress.

11 MR. WEINER: We are not offering that
12 into the evidence. We are offering what he knows
13 from the legislative intent.

14 THE COURT: I will sustain the
15 objection.

16 Mr. Weiner, why don't you follow the rules of
17 evidence. You know what you are doing. You ought
18 to know better than some of these things that you are
19 doing. They are just completely uncalled for.

20 MR. WEINER: I thought I established
21 that he was an expert in the law.

22 THE COURT: How can I tell what you
23 are thinking.

24 I will sustain the objection.

25 Please, proceed in the proper manner.

1 Wise - direct

2 {End of bench conference.}

3 - - - - -

4 THE COURT: I will sustain the
5 objection as to what the intent of Congress was.

6 The Congressional Record speaks for itself.

7 BY MR. WEINER:

8 Q Are you familiar, Mr. Wise, with the legislative
9 intent as to what the intention of the Act is as to
10 where the preference power should go?

11 THE COURT: I just sustained that.

12 MR. WEINER: I asked a different
13 question.

14 THE COURT: Please, I sustained the
15 question before. It is the same question now.

16 If you are desirous of asking him what the
17 preference power is or how it is allocated, you are
18 free to do so.

19 MR. WEINER: Could I have a minute,
20 your Honor?

21 THE COURT: Absolutely.

22 MR. WEINER: Thank you.

23 I do have a document in the witness room. May
24 I get it?

25 THE COURT: I would suggest that you

Wise - direct

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2 go get it.

3 MR. WEINER: Do I have time?

4 THE COURT: Certainly.

5 Ladies and gentlemen of the jury, perhaps this
6 is an opportune time to take our afternoon recess.

7 Please, during the recess, do not discuss the
8 case, either among yourselves or with anyone else.

9 Keep an open mind until you have heard all of
10 the evidence and my instructions on the law, and
11 until the matter is submitted to you for your
12 deliberations and judgment.

13 With that, we will take a short recess.

14 {Recess taken.}

15 THE COURT: Please be seated.

16 - - - - -
17 {Thereupon the following proceedings were
18 conducted out of the hearing of the jury.}

19 MR. LANSDALE: May we take up a
20 brief matter?

21 THE COURT: Yes.

22 MR. LANSDALE: I am advised --

23 THE COURT: Come up to the bench --
24 well, did you call the jury? Oh, all right. Stay
25 where you are.

1 Wise - direct

2 MR. LANSDALE: I am advised, if your
3 Honor please, that plaintiff proposed to introduce
4 evidence, to introduce into evidence a statute of
5 the United States relating to the Niagara River
6 power project, and to interrogate the witness as an
7 expert as to the construction, and I thought that I
8 should interpose my objection now to save confusion
9 with the jury.

10 I object to bringing on {a} to introduce into
11 evidence a statute of the United States and {b} to
12 bring on expert testimony as to its construction or
13 meaning.

14 I submit that is a question for the Court, and
15 that if there is a meaning of the law or instruction
16 of the law to be conveyed to the jury, that that is
17 part of the instructions to the jury, and I object
18 to the testimony.

19 MR. WEINER: My intention is to
20 offer the statute into evidence, and not to have
21 the witness testify as to it, but I would like the
22 statute to be in evidence.

23 THE COURT: I will overrule the
24 objection as to permitting the statute into evidence
25 for whatever its value, but I would sustain the

Wise - direct

1 objection to permit this witness to interpret the
2 statute.

3 You don't need this witness to introduce the
4 statute.

5 Mark it, and I will admit it.

6 MR. WEINER: It is marked as 2173.

7 THE COURT: I know.

8 MR. LANSDALE: All right.

9 MR. WEINER: Just in case there are
10 other preliminary problems, I intend to introduce
11 the Congressional Record, and I am going to have the
12 witness read from it.

13 THE COURT: You would like to have,
14 but you are not going to be permitted to have the
15 witness read from it.

16 The document speaks for itself. It is a question
17 of law, Mr. Weiner, and you should know that.

18 MR. WEINER: Some documents' have
19 been read from and some haven't.

20 THE COURT: Not statutes.

21 MR. WEINER: This is the
22 Congressional Record.

23 THE COURT: I understand that.

24 MR. WEINER: Do you want to admit
25

1 Wise - direct

2 that at the same time?

3 MR. LANSDALE: I object.

4 THE COURT: If there is any
5 objection to the Congressional Record, that
6 objection is sustained.

7 MR. WEINER: You will not allow
8 the Congressional Record into evidence?

9 THE COURT: If I sustain the
10 objection, that means I am not permitting it in.

11 MR. WEINER: I have to admit I am
12 confused. I thought before the break you indicated
13 the legislative intent was found in the
14 Congressional Record. I may have misheard.

15 THE COURT: No. I think I said
16 that I don't think this gentleman can testify to
17 the thoughts of the legislatures, at least I know
18 of no rule that permits it in the Federal Rules
19 of Civil Procedure, nor do I know of any rule in
20 the Federal Rules of Civil Procedure that permit
21 the introduction of the Congressional Record to
22 bear upon a question of law that comes within the
23 prerogative of the Court.

24 I may be wrong as to that one, too, but you
25 are going to have to show me, Mr. Weiner.

Wise - direct

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2 MR. WEINER: Am I correct then that
3 there is no way of getting the legislative intent
4 before the jury?

5 THE COURT: Mr. Weiner, you are
6 the gentleman that is trying the case, not me.

7 MR. WEINER: That is what I thought
8 the Court suggested, and that is why I asked for a
9 break, to get the legislative history.

10 THE COURT: You are attempting to
11 have a question testify to questions of law.

12 MR. WEINER: I am not going to do
13 that any more. I said I wouldn't do that. I was
14 going to offer the legislative history from the
15 Congressional Record, and may I make that as a
16 proffer?

17 THE COURT: Very well. The entire
18 testimony stands as a proffer, Mr. Weiner, and that
19 is the way I would prefer it to be.

0 Now, I don't know, are we prepared to bring
1 the jury back?

2 MR. WEINER: Let me make sure we
3 get the proffer, get what the proffer was to be.

It would be that if Mr. Wise were to testify
on the basis of his knowledge of the legislative

Wise - direct

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2 intent of that act, that the neighbors -- he would
3 state that the neighboring states of Pennsylvania
4 and Ohio were to receive 10 percent of the
5 allocation of the Niagara project. That is the
6 proffer.

7 THE COURT: If that is the proffer,
8 it stands on the record. I can't read on your mind
9 and put on the record what you want to proffer.

10 MR. WEINER: All right. I have put
11 it on the record.

12 THE COURT: If that is the entire
13 purpose of this gentleman's testimony, it appears to
14 me that this aspect of it is already in evidence
15 through another witness.

16 MR. WEINER: Okay.

17 THE COURT: And as I recollect, there
18 was no objection to it.

19 Is there an objection to the amount of power
20 that is allocated to each of the states?

21 MR. LANSDALE: No, sir.

22 THE COURT: So why are we bringing
23 somebody on and putting him on to testify to that
24 which he obviously cannot testify to according to
25 the rules of evidence, when the other side is

1 Wise - direct

2 willing to stipulate; so what would you like us to
3 stipulate into the record?

4 MR. WEINER: That the congressional
5 intent --

6 THE COURT: Not the congressional
7 intent.

8 MR. WEINER: Okay; that 10 percent of
9 Niagara power, of the Niagara power project is to be
10 allocated to the neighboring states of Pennsylvania
11 and Ohio.

12 MR. LANSDALE: I can't go that far.
13 It is "neighboring states," and it is not limited
14 to Pennsylvania and Ohio.

15 THE COURT: What are the figures?

16 MR. WEINER: I think we are getting
17 into a problem on that.

18 THE COURT: Why should there be a
19 problem if it is so clearcut?

20 MR. LANSDALE: May I ask another
21 question?

22 The whole contest is about 30 megawatts of
23 power.

24 THE COURT: That was my
25 understanding.

1 Wise - direct

2 MR. LANSDALE: -- to come to
3 Cleveland.

4 PASNY allocated 30 megawatts of power to
5 Allegheny as a surrogate for Cleveland, and later on
6 when the contract expired, they changed it somewhat,
7 and as a result of that change, plus the contracts
8 between PASNY -- between Allegheny and AMP-Ohio,
9 they got an amount, and I believe they got 19 and
10 a fraction megawatts of firm power and 5 megawatts
11 or 5 and a fraction of peaking power, and we don't
12 contest this.

13 Have I stated the amounts correctly?

14 MR. WEINER: 19 firm and 4 peaking.

15 THE COURT: Is that the record for
16 the jury?

17 MR. WEINER: I think it is in the
18 record.

19 MR. LANSDALE: I do, too. We are not
20 raising a question about it.

21 MR. WEINER: How do I know he is
22 going to say that until I put the evidence on?

23 MR. LANSDALE: Well, objection.

24 THE COURT: I don't follow you --
25 how do you know that he is not going to object to

1 Wise - direct

2 what?

3 MR. WEINER: The plaintiff has the
4 burden of showing exactly what Mr. Lansdale has now
5 described.

6 MR. LANSDALE: And I admitted.

7 THE COURT: He admitted it and it
8 is in the record.

9 MR. WEINER: He didn't admit it until
10 three seconds ago.

11 MR. LANSDALE: It doesn't make any
12 difference. I admit it now.

13 THE COURT: All right. He admits
14 it now.

15 Let's get the language correct that you want me
16 to read to the jury, and then I will read it to the
17 jury, and we can go on to something else that may
18 be material.

19 MR. WEINER: Well, are we going to
20 read something to the jury?

21 THE COURT: Tell me what you want
22 me to tell the jury.

23 MR. WEINER: Could we have the
24 court reporter read back what Mr. Lansdale said.

25 {Discussion ensued off the record.}

Wise - direct

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

5 THE COURT: Ladies and gentlemen
6 of the jury, during your absence counsel have agreed
7 on certain facts that should be presented to you,
8 and the court reporter will now read the agreement
9 of counsel as to these facts.

10 {Thereupon the court reporter read the agreed
11 stipulation as follows:

12 "It is agreed that 10 percent of PASNY power
13 was to be allocated to adjoining states; that is,
14 other than the State of New York, and out of this
15 allocation PASNY awarded 30 megawatts to Allegheny
16 Co-op as surrogate for the City of Cleveland through
17 AMP-Ohio in 1974.

18 "Later, when this allocation expired by its
19 terms, it was revised to allocate 19 megawatts of
20 firm power plus 4 megawatts of peaking power to
21 the Allegheny Co-op as surrogate again for the
22 City of Cleveland through AMP-Ohio. This was done
23 in November of 1977, which became effective in
24 February, 1978."

25 THE COURT: Very well. You may

Wise - direct

1
2 proceed Mr. Weiner.

3 MR. WEINER:

Thank you.

4 BY MR. WEINER:

5 Q Could you hand the witness Plaintiff's Exhibit 2196.

6 {After an interval.}

7 Q Mr. Wise, could you identify Plaintiff's Exhibit 2196
8 for us, please?

9 A Yes, sir. That was a contract entered into between the
10 Power Authority of the State of New York and the
11 Allegheny Co-op on August 23, 1975, which covered the
12 100,000 kilowatts, which had been previously allocated
13 and the 30,000 kilowatts of additional allocation for a
14 total of 100,000 kilowatts.

15 Q When did that power begin to flow to Allegheny?

16 A The 100,000 had been flowing since 1966 or thereabouts,
17 and the additional 30 was shortly after this.

18 My recollection is it would be about October 1
19 of 1974 -- I am not certain of the exact date, but it
20 was roughly around that.

21 Q All right.

22 Mr. Wise, are you familiar with E-8746, the
23 number involving the proceedings in the Power Authority
24 of the State of New York?

25 A Yes.

1 Wise - direct

2 Q Did you participate in those proceedings?

3 A Yes. I represented Allegheny in that proceeding.

4 Q Who were the other parties?

5 THE COURT: Are you going into the
6 same thing we just stipulated to?

7 MR. WEINER: No.

8 THE COURT: Proceed.

9 Q Who were the parties?

10 A The Public Service Board of Vermont was the party
11 fighting to try to get the 30 kilowatts, and I believe
12 AMP-Ohio intervened, and I believe Massachusetts and
13 Connecticut, I believe a Massachusetts and Connecticut
14 group intervened.

15 Q Please hand the witness No. 2191.

16 Can you tell me what that is?

17 A It is a little difficult to read.

18 Q Is that a bad copy, Mr. Wise?

19 A Pardon me?

20 Q Is that a bad copy?

21 A Well, it is not a good copy.

22 THE COURT: Are you standing to
23 object?

24 MR. LANSDALE: Yes. I would like to
25 approach the bench.

Wise - direct

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THE COURT: All right.

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{Bench conference ensued on the record as follows:}

MR. LANSDALE: I submit that the fact that there was a proceeding before the FPC involving an attempt by Vermont to get the same power is totally irrelevant and simply encumbers the record and diverts the jury.

Cleveland got the power, and they held it for Cleveland, and we have the dates; and what more do we need?

THE COURT: What is the purpose of this?

MR. WEINER: To show PASNY's position with respect to this power. We have nothing of that on the record.

THE COURT: What purpose are you attempting to show that goes beyond the stipulation?

MR. WEINER: That PASNY would have given the power to Cleveland. Maybe I am misreading the stipulation. Do I misread it?

MR. LANSDALE: You got him here testifying.

1 Wise - direct

2 THE COURT: Duncan just testified.

3 MR. WEINER: He is not PASNY.

4 THE COURT: Let me ask you this:

5 Where in this does it say that?

6 MR. WEINER: Where does it go to

7 that point? -- page 3 and 4, it says here --

8 THE COURT: What do you claim for
9 this? What does that language say you are claiming?

10 MR. WEINER: The fact that Ohio may
11 get the power down the road as a consideration in
12 granting it to Allegheny interim.

13 THE COURT: What does that -- what
14 has that got to do with this case? How does that
15 go beyond the stipulation?

16 This is a known exhibit and deals with the
17 Allegheny program.

18 MR. WEINER: Maybe I don't understand.

19 Do we have a stipulation that PASNY would have
20 given it to Cleveland?

21 THE COURT: All I know is what the
22 last witness testified to.

23 MR. WEINER: Well, I think he is not
24 PASNY.

25 Now, will you stipulate?

1 Wise - direct

2 THE COURT: All I am telling you
3 is this language does not say what you purport it
4 to say, and it is not material here, and I am
5 sustaining the objection.

6 Now, if you gentlemen want to stipulate, you
7 are free to stipulate.

8 MR. LANSDALE: I have stipulated as
9 far as I am going to right now. I am not sure
10 where he is going.

11 THE COURT: I don't know, either.
12 I am having difficulty following what you are
13 saying.

14 You are trying to put together a sentence out
15 of context and come up with a conclusion and have
16 somebody testify as to what the conclusion should
17 be.

18 I have sustained the objection.

19 MR. WEINER: I am going to have him
20 identify this exhibit, and this exhibit cannot go in.

21 THE COURT: If you can tell me on
22 what basis it should go in, I would be willing to
23 let it go in, but thus far you haven't told me.

24 MR. WEINER: This is a position
25 paper filed with the Power Authority of the State

1 Wise - direct

2 of New York, and the position paper speaks for
3 itself.

4 THE COURT: Mr. Weiner, I am not
5 getting through to you.

6 MR. WEINER: I guess not.

7 When something actually doesn't happen, then
8 you have got to prove the circumstances relating to
9 it, to show it would have happened but for the other
10 act.

11 THE COURT: Where does it say it
12 would have happened?

13 MR. WEINER: The inference is there.

14 THE COURT: I will sustain the
15 objection.

16 {End of bench conference.}

17 - - - - -

18 THE COURT: You may proceed, Mr.
19 Weiner.

20 BY MR. WEINER:

21 Q Would you hand Plaintiff's Exhibit 2221 to the witness.
22 That may not have been pulled out in advance.

23 {After an interval.}

24 Q Mr. Wise, can you identify that document, please?

25 A Yes.

1 Wise - direct

2 Q What is that document, please?

3 A This is a statement that I made before the Board of
4 Trustees of the Power Authority of the State of New
5 York on April 26, 1978, at a hearing which the
6 Governor of New York requested the trustees to hold on
7 the question of what was a reasonable amount of power
8 to allocate outside of the State of New York under
9 the Niagara Development Act, and how should that power
10 be allocated among the various claimants.

11 Q Did you prepare this statement?

12 A Yes.

13 MR. WEINER: No further questions,
14 your Honor.

15 - - - - -

16
17 CROSS-EXAMINATION OF WILLIAM C. WISE

18

19 BY MR. LANSDALE:

20 Q Mr. Wise, you are familiar, are you not, with the
21 standard provisions and the contracts which PASNY
22 requires with the recipients of its preferential power
23 allocation?

24 A Yes, and generally I could recite them to you.

25 Q Mr. Leo, would you hand the witness CEI Exhibit 641.

Wise - cross

1
2 Looking at the cover, do you recognize this as a
3 contract for the sale of power from the Power Authority
4 of the State of New York to the American Municipal
5 Power of Ohio, Inc.?

6 A Yes.

7 Q Would you please turn, Mr. Wise, to page 8 of that
8 contract, if you can find it. It is page 8 on there
9 which is 1, 2, 3, 4, 5, 6, the 7th sheet over. The
10 reproduction is in double pages.

11 Do you see Section F on the left -- upper left
12 hand?:

13 A F?

14 Q Did you find the section, Section F?

15 A Entitled, "Payment of Estimated Bills"?

16 THE COURT: No. It is on page 9,

17 Mr. Wise.

18 Q Section F is entitled "Resale of Power and Energy."

19 If you look at the top of the page, you will find
20 it on the upper left-hand corner.

21 THE COURT: Here it is. Use mine.

22 THE WITNESS: Thank you, your Honor.

23 Q Do you have it?

24 A Yes, sir.

25 Q Now, would you please read that, or at least scan it,

Wise - cross

1
2 and see if it is not a paragraph that you find you are
3 familiar with and you find in virtually all contracts
4 with PASNY, with people like Allegheny Power and
5 AMP-Ohio?

6 A Yes, sir; I think it is a standard provision.

7 Q It is standard, is it not?

8 A Yes.

9 Q And it has a provision in it that "No resales to other
10 utilities will be permitted," does it not?

11 A Yes, sir.

12 Q It also provides that resales to retail customers will
13 be made without profit; does it not?

14 A What?

15 Q Without profit, does it not?

16 A I am sure it does. I don't see it here. Is that in
17 that first paragraph?

18 Q Well, look about two thirds of the way down.

19 A Yes, sir.

20 Q And certainly it requires that the retailer of this
21 energy do so in accordance with the principles of
22 certain regulations of the power authority, which
23 principles require that power and energy be made
24 available at the lowest possible cost to rural and
25 domestic consumers?

1 Wise - cross

2 A Yes.

3 Q And this is designed to avoid the retailing of such
4 cheap power to commercial enterprises, is it not?

5 A I don't think I am allowed to testify as to the intent
6 of the authority, when they issued those regulations.

7 Q I am asking you for the meaning of these, of this
8 contract, many of which you participated in the drafting
9 of.

10 THE COURT: Just a moment. If
11 you know, go ahead.

12 Q Do you know what this provision is intended to
13 accomplish, Mr. Wise?

14 A Just what it said, that it be made available at the
15 lowest possible cost.

16 Q To rural and domestic consumers?

17 A Correct.

18 Q And when they say, "domestic consumers and rural
19 consumers," they are not talking about department
20 stores or pumping stations of water departments or
21 anything of that kind, are they?

22 A That is correct.

23 MR. LANSDALE: No further questions.

24 THE COURT: Redirect examination?

25 MR. WEINER: No questions, your

1 Honor.

2 THE COURT: Thank you, Mr. Wise.

3 You are excused.

4 Please call your next witness.

5 MR. NORRIS: Your Honor, may we have
6 a moment?

7 THE COURT: Yes.

8 {After an interval.}

9 MR. WEINER: Your Honor, with the
10 Court's indulgence, may we ask Mr. Wise one further
11 question?

12 THE COURT: Certainly.

13 - - - - -

14

15 REDIRECT EXAMINATION OF WILLIAM C. WISE

16

17 BY MR. WEINER:

18 Q Mr. Wise, with respect to the cross-examination
19 question that just ended, one of the sources, one of
20 the typical types of customers mentioned in the question
21 was a pumping station and also a department store was
22 mentioned in that question.

23 If you know, would there be a difference under
24 that contract provision where the pumping station is
25 a private pumping station or the pumping station is a

1 Wise - redirect

2 public pumping station?

3 A Not that I know of.

4 Q It wouldn't make any difference whether it was a public
5 pumping station?

6 A Not that I know of.

7 Q Okay. Thank you, we appreciate that.

8 THE COURT: Recross-examination?

9 MR. LANSDALE: No, sir.

10 THE COURT: Thank you, Mr. Wise.

11 Now you may step down.

12 Please call your next witness.

13 MR. NORRIS: We call Mr. E mer
14 Lindseth.

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1 E L M E R L I N D S E T H ,

2 having been called as if on cross-examination
3 by the plaintiff, after having been duly sworn,
4 was examined and testified as follows:

5
6 CROSS-EXAMINATION OF ELMER LINDSETH

7
8 BY MR. NORRIS:

9 Q Mr. Lindseth, kindly state your full name.

10 A Elmer L. Lindseth.

11 Q And what is your address, Mr. Lindseth?

12 A 21187 Sidenham, Cleveland, Ohio, 44122.

13 Q Mr. Lindseth, what colleges did you attend in your
14 educational career?

15 A I attended Miami University, Case Institute of
16 Technology, and Yale University.

17 Q And did you matriculate with a graduate degree in
18 engineering?

19 A Yes.

20 Q And when did you receive your engineering degree?

21 A I received a Bachelor of Science degree in mechanical
22 engineering in 1925, from Case Institute of Technology,
23 and I received a Master of Science degree in Mechanical
24 Engineering from Yale University in 1926.

25 Q When did you join the Illuminating Company?

1 Lindseth - cross

2 A I first started working for them in 1924.

3 Q In what capacity was that in?

4 A Well, it was a pretty menial capacity. I think it was
5 as a test helper. It was during the summer when I was
6 attending engineering school.

7 Q And then you joined CEI on a permanent basis after you
8 got your degree; is that correct?

9 A Yes, in 1926.

10 Q Would you kindly describe what offices that you held
11 at CEI?

12 A Well, I began as a test helper in what was then known
13 as the Test Department, and I became Production Engineer,
14 which was the head of the Department about a year later,
15 and I became an assistant to the Executive Engineer in
16 about 1937, and I became technical assistant to the
17 President in 1939, and I became Vice President in 1942,
18 and I became Executive Vice President in 1945, and a
19 few months later, on the death of the President, I
20 became President in 1945, and I became Chairman of the
21 Board in 1960.

22 Q And you served as Chairman of the Board until 1967?

23 A Correct.

24 Q And in your capacity as Chairman of the Board, I take
25 it that you were the Chief Executive Officer?

1 Lindseth - cross

2 A Yes.

3 Q And you then remained a Director of the Company for
4 some period of years after you retired as Chief
5 Executive Officer; is that correct?

6 A Yes.

7 Q And can you tell us when you ceased being a director
8 of the company?

9 A In 1974.

10 Q Mr. Lindseth, are you receiving a pension from CEI?

11 A No.

12 Q Are you receiving any salary as a consultant from the
13 company?

14 A No.

15 Q Are you a stockholder of the company?

16 A Yes.

17 Q Addressing your attention to the period of time that
18 you were the Chief Executive Officer, and so I can be
19 sure that I am clear, from 1960 to 1967; is that correct?

20 A No.

21 When I became President in 1945, I acted as
22 Chairman of the Board as well, there being none, and I
23 was the Chief Executive from 1945, May, until February,
24 1967, when I retired.

25 Q Thank you. All right. Then during that period of time

Lindseth - cross

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2 I take it that the company was organized as most
3 companies are with the Vice President heading different
4 sections of the company; is that correct?

5 A Well, we would have to overgeneralize if we are to
6 attempt to describe the organization over the entire
7 span of 22 years.

8 Q Let me withdraw that question.

9 During the period of time that -- well, when was
10 the next President appointed? Was there a President
11 appointed in 1945?

12 You became Chairman of the Board, did you not, in
13 1945?

14 A I became President in 1945.

15 Q And who was the next President who succeeded you as
16 President?

17 A Ralph Besse.

18 Q When did he become President?

19 A In 1960.

20 Q Okay.

21 Now, I am on the same wavelength.

22 So that from 1945 until 1967, for 22 years, you
23 were the Chief Executive Officer, and for a period of
24 time you were both President and Chairman, and from
25 1960 until 1967, you were Chairman of the Board and

Lindseth - cross

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Chief Executive Officer?

A Yes.

Q During that period do I take it, do I take it that Mr. Besse in his capacity as President was reporting to you from 1960 to 1967?

A Yes.

Q And you were then in turn responsible to the Board of Directors; is that correct?

A Yes.

Q In your role, Mr. Lindseth, as Chief Executive Officer, am I correct that you had the final responsibility for the company's overall operation?

A Yes.

Q During your 22 years as Chief Executive Officer, is it a fair statement that this was the greatest growth period in the company's history?

A Well, I have no statistical data, but I would be of the belief that this could have been true.

I have no substantiation for it.

MR. NORRIS: May I approach the bench?

THE COURT: Yes.

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{Bench conference ensued on the record as follows:}

1 Lindseth - cross

2 MR. NORRIS: I would like to renew
3 the request to read Joint Stipulation 37.

4 This is something that the Court has taken
5 under advisement.

6 MR. LANSDALE: What is 37?

7 MR. NORRIS: It is the acquisition
8 history of CEI over the years.

9 THE COURT: Yes. I thought I
10 indicated to you that I was going to read that.

11 MR. NORRIS: Well, I must have
12 missed it. I appreciate your reading it now.

13 THE COURT: That could go to
14 relevant market and go to intent. I am sorry if
15 I didn't convey that.

16 Where is the stipulation?

17 {After an interval.}

18 THE COURT: Let's see if it is
19 what I am thinking of -- yes. You are taking your
20 exceptions?

21 MR. LANSDALE: Yes. I take my
22 exceptions.

23 {End of bench conference.}

24

25 THE COURT: Ladies and gentlemen

Lindseth - cross

1
2 of the jury, Joint Stipulation 37 reads as follows:

3 "CEI acquired the following electric systems
4 in the year indicated, some of which were
5 distribution-only systems, and some of which also
6 generated their own power in whole or in part when
7 acquired, and some of which were facilities of
8 individual business enterprises for generating their
9 own power:

10 "1907, Lakewood Municipal Plant; 1911,
11 Cuyahoga Electric Light and Power Company; 1913,
12 Bedford Light and Power Company; 1916, Rocky
13 River Light and Power Company; 1923, Rocky River
14 Municipal; 1925 Chesterland Light and Power
15 Company; 1925, Village of Brecksville; 1925,
16 West Claridon Light and Power; 1925, Village of
17 Independence; 1926, Burton Public Service; 1925,
18 Village of Richmond Heights; 1925, Village of
19 Mayfield; 1925, Village of Valley View; 1925,
20 Middlefield Electric Light Company; 1925,
21 Village of Chardon; 1926, City of Conneaut;
22 1926, Thompson Light and Power; 1926, Suburban
23 Utilities; 1926, Diamond Alkali Company
24 {CP&ARR}, 1926, Grand River Light and Power;
25 1926, Cleveland Painesville and Eastern Railroad;

1 Lindseth - cross

2 1926, East Ohio Power and Light Company; 1926,
3 Northeastern Ohio Power and Light Company; 1926
4 Suburban Power Company; 1926 Lake Erie Power and
5 Light Company; 1926, Village of Jefferson; 1927,
6 Village of Olmsted Falls; 1927, Village of Fairport;
7 1927, Chagrin Valley Electric Company; 1927,
8 Solon Light and Power Company; 1928, City of
9 Ashtabula; 1928, Cleveland Southwestern Railroad;
10 1929, Geauga Lake Electric Company; 1929, Coit
11 Road Company; 1931 Hydraulic Power Company; 1946
12 Cleveland Light and Power Company; 1950,
13 Willoughby Village; 1951, City of Berea; 1954,
14 Euclid Doan Power Company; 1956, Brooklyn Acres;
15 1972, Union Carbide Company.

16 BY MR. NORRIS:

17 Q Mr. Lindseth, among the electric systems acquired by
18 CEI that Judge Krupansky just read, one was the
19 Euclid Doan Power Company that CEI acquired in 1954.

20 Do you recall the Euclid Doan Power Company?

21 A Yes.

22 Q That was a privately owned power company?

23 A Yes.

24 Q Are you aware of the fact that Euclid Doan was a
25 wholesale customer of Muny Light?

Lindseth - cross

A Yes.

Q One other question:

The company acquired in 1946 was the Cleveland Light and Power Company.

That was -- was that a privately or publicly owned company, to your knowledge?

A Privately owned.

Q Mr. Leo, would you kindly hand the witness Plaintiff's Exhibit 2061-A, a map sitting next to the witness box. I think it is the first one.

THE CLERK: This is 2063.

THE COURT: 2061-A.

MR. NORRIS: I am sorry. I have

the wrong number, but that is the map I want; is that 2063?

THE CLERK: Yes, sir.

Q Would you kindly put that up on the easel.

{After an interval.}

Q Mr. Lindseth, I am handing you what has been marked as Plaintiff's Exhibit 2063, which bears the legend ECAR.

Would you kindly identify what ECAR stands for.

A Now, ECAR was organized after the time I retired from the Cleveland Electric Illuminating Company, and I

Lindseth - cross

1
2 really am not very qualified to -- I can answer the
3 question that you have asked, but I don't know very
4 much about ECAR.

5 THE COURT: Answer the question
6 if you know.

7 Q Just identify it for the jury.

8 A I think it means East Central Area Reliability Group,
9 or Organization.

10 Q And this is a group that, if you know, that both Mundy
11 Light and CEI participate in; is that correct?

12 A I don't think so.

13 MR. LANSDALE: Objection.

14 THE COURT: Just a moment. East
15 Central -- what does the "A" stand for?

16 MR. LANSDALE: Area.

17 THE COURT: Okay.

18 Q Now, on that map, Plaintiff's Exhibit 2063 for
19 identification there is a green area, a light-green
20 area in the northeastern corner of the State of Ohio.

21 Can you see that from the witness chair?

22 Would you agree that that represents the CEI
23 service area on that map?

24 A No, that does not represent it, at least not accurately.
25 It may figuratively, but it doesn't represent it

Lindseth - cross

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accurately.

Q Let me ask you the same question about the dark-green shaded area to the left, just underneath the State of Michigan.

Can you identify that as the Toledo Edison service area?

A No. I have no such knowledge.

THE COURT: Perhaps this would be a good time to adjourn for the day, because I would like the jury to review a part of the exhibits that we have utilized today, and the jury will be released at 4:30.

Please, ladies and gentlemen, during the recess or adjournment of the Court, do not discuss the case either among yourselves or with anyone else.

As I keep reminding you, keep an open mind until you have heard all of the evidence and the Court's instructions on the law, and until such time as the matter is submitted to you for your judgment.

You will be free to retire to the jury room and view all of the exhibits, and then when you have concluded, you are free to go, and we will

Lindseth - cross

reconvene tomorrow morning at 8:45.

Thank you very much and good night.

The jury is free to go.

{The jury was excused from the courtroom and entered the jury room.}

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MR. NORRIS: May I approach the bench?

THE COURT: Yes.

{Bench conference ensued on the record as follows:}

MR. NORRIS: I simply wanted to offer into evidence PTX 2841, 2849, and 2843.

These were from the testimony yesterday and this morning.

MR. LANSDALE: I don't think I have any objection to those.

THE COURT: They may be admitted.

MR. NORRIS: On my calculation all of the other exhibits that were utilized -- there were three excluded, and then four others had already been admitted, so I will not offer them again.

Mr. Weiner, do you want to offer any exhibits?

1 MR. WEINER: Yes.

2 MR. LANSDALE: I would certainly
3 offer CEI Exhibit 67, the letter of November 4,
4 1971; and Exhibit 61, the August 13 letter; and
5 Exhibit 64, which is the September 13, Hauser to
6 Dolan letter, and Exhibit 543.

7 MR. NORRIS: That is the brief.

8 MR. LANSDALE: That is the brief.

9 MR. NORRIS: I have no objection.

10 MR. LANSDALE: And 1046.

11 MR. NORRIS: I don't know what that
12 is.

13 MR. MURPHY: 1046 is the chart.

14 MR. NORRIS: I don't have a copy of
15 that beautiful chart. Will you let me have one?

16 MR. LANSDALE: Yes. It is the money
17 chart. And there is one more exhibit 641, which
18 is the contract to AMP-Ohio.

19 THE COURT: All right. Those
20 that you can't agree on tonight, we will give them
21 to the jury the first thing in the morning. So,
22 Mr. Leo, give the exhibits that have been admitted,
23 and counsel kindly monitor the process, but get
24 the exhibits to them as quickly as possible so
25 that they are not delayed too long.

{Thereupon court was adjourned for the
evening.}

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