
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

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Volume 07 (Part 4)

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

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2 where the filling station is selling to the customers
3 with their cars?

4 A Those are the retail markets.

5 Q There is an easel and some markers there, Dr. Wein.
6 Could you go to the easel and diagram the
7 relationship of wholesale and retail markets, please?

8 {Witness complies.}

9 Q Now, what is the first, the top diagram you have
10 drawn?

11 A Well, I started at some point in the chain. That's a
12 refinery. He buys crude and he makes gasoline. He
13 then sells to a gasoline wholesaler.

14 These are the big tanks that you see where you
15 hold these products of gasoline. And this wholesaler,
16 they will sell to the filling station -- these are
17 supposed to be pumps -- and the filling station sells
18 to you and to me and to others.

19 So you go from the producer to the wholesaler
20 to the gasoline filling station to the ultimate
21 consumer. This is the retail level {indicating}.
22 This is the wholesale level {indicating}.

23 Q Dr. Wein, can there be more than one wholesale level?

24 A Yes, there can. It varies. Depends on the industry.

25 Q What does your diagram show in terms of the number of

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1
2 wholesale levels?

3 A That shows only one wholesale level but there can
4 be, of course, several. There can be a small
5 wholesaler who may only have a capacity to hold,
6 say, 10,000 gallons or 50,000 gallons of gasoline.
7 There may be a very much larger one than him who
8 can hold several million gallons of gasoline, and
9 there can also in this particular industry, there
10 can be refineries who have their own storage
11 facilities, their own tanks, who sell to some of
12 their own filling stations.

13 Q I think perhaps I misunderstood you.

14 There are how many wholesale markets shown in
15 your diagram?

16 A Well, there is this refinery selling to this
17 wholesaler, and this wholesaler sells to this retailer.

18 Q So your diagram shows how many wholesale markets?

19 A Well, I have shown one.

20 Q And the retail market is where?

21 A Right here.

22 Q At the point where the filling station sells to the
23 consumer?

24 A To the consumer. This fellow is selling to this fellow.
25 So this is a subwholesale market, if you will, because

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1
2 the filling station is buying in terms of thousands
3 of gallons or hundreds of gallons, depending on the
4 size. But he is also buying from a refinery at a
5 wholesale level. This happens to have two wholesale
6 levels in this particular diagram.

7 Q I see. Now, can a business participate in more than
8 one product market?

9 A Yes, it can.

10 Q How is that possible?

11 A Well, in this particular case, suppose I drew the
12 following. This refinery owns its own gasoline
13 filling stations. It can't sell gasoline in hundreds
14 of thousands of gallons, let's say, to the filling
15 station just from the refinery because the refinery
16 is turning off thousands of barrels a day, let's say,
17 of gasoline and there must be some place for the
18 refinery to store this gasoline, and then it has got
19 to have trucks to deliver this gasoline to the filling
20 station.

21 So the refinery can itself be a wholesaler for
22 its own filling stations. It sells to its own
23 filling stations by performing the wholesale function,
24 the big wholesale function of buying from the
25 refinery, down to the second level of wholesaling,

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2 which is selling from this area, the big tanks with
3 the trucks delivering it to the filling stations, who
4 then deliver it to the final thing.

5 He might also be selling it independently to
6 other filling stations who he doesn't own. He might
7 then be going actually not that way, but actually
8 through here and then that way, because he can't
9 sell directly from the refinery without going through
10 a tank truck, at least, or actually more likely
11 going from the big storage tanks that you see
12 occasionally around and then selling to a set of
13 independent retail filling stations. He could do
14 that.

15 So he could be in all the markets from
16 manufacturing, refining, to let's call it gross
17 wholesaling, microwholesaling, and retailing.

18 Now, these terms vary, of course, with the
19 nature of the industry.

20 Q The refinery is in retailing through the filling
21 stations that they own; is that correct?

22 A Yes, the refinery is in retailing through the filling
23 stations which it owns.

24 Q Now, you have, with your additional drawing, shown
25 a situation where the refinery owns or operates a

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wholesaler and owns filling stations.

Is there a term that economists use or a situation where one firm owns different levels of a product market, owns businesses which operate at different levels in the product line?

A Yes. They use the term "captive." If the refinery owns the filling stations, this is a captive retail market because this wholesaler over here, let's suppose, cannot sell to these filling stations. These filling stations are owned by this refinery. This wholesaler might be getting his gasoline from another refinery over here in some other city, say, or some other location, and this group of filling stations are foreclosed to him. They are captive to this refinery.

Now, there is another thing which is captive, and that is this wholesale function which the refinery itself is performing. The refinery must, in order to get to its own retail stations, its filling stations, must have tank trucks, for example, must have metering equipment, it must have a place to hold gasoline coming out of the refineries. It has all that equipment.

So it has its own wholesale segment, and that is

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2 captive wholesale. So that you can have captive
3 wholesale and captive retail markets owned by the
4 refinery.

5 Now, this fellow over here may sell to these
6 other refineries and he may possibly buy from this
7 refinery, that is one, or he may buy from other
8 refineries.

9 Q If you were looking at the wholesale market, which
10 you defined at the second level, with the wholesaler
11 selling to the retail units, which sales would you
12 count in the wholesale market?

13 A Well, suppose -- let me use some numbers to do that.

14 Suppose that refinery A sold a thousand gallons
15 to its own filling stations and it sold 200 gallons
16 to this wholesaler, who we will call B. Let's forget
17 about the other refinery for the moment and let's
18 assume that there is no wastage going from the
19 wholesaler to the filling station, and I was
20 interested in that wholesale market.

21 Now, this refinery A had to break the bulk,
22 which is the term, essentially what the wholesalers
23 do, the same term as you have, for example, in the
24 post office where hundreds of thousands of letters
25 come in and you have to break them up and send them

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2 to a particular point. So you have all the zip
3 codes and things of that nature.

4 Well, you are doing the same sort of thing
5 here. The refinery is selling a thousand gallons
6 and a thousand gallons. It may have been 50,000
7 gallons at 500,000, but let's say a thousand is
8 coming off of this tank and it is going here. So
9 he has got a thousand gallons of wholesale.

10 He also sold 200 to this fellow. So there is,
11 in this case, the wholesale market consists of a
12 thousand to himself and 200 to this other
13 wholesaler. So there would be 1,200 gallons in
14 this wholesale market.

15 Q For the purpose of calculating the wholesale market
16 you would count both the sales he makes to himself
17 and the sales he makes to --

18 A To anybody else.

19 Q -- to any other buyer?

20 A That's right.

21 If this refinery were selling 500 to this
22 fellow, then the wholesale market would be a thousand
23 plus 200 plus 500. So there would be 1,700.

24 It is essentially what you sell through your own
25 wholesale units, plus what you sell to the others,

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2 plus what other competitors buy from others or from
3 you, and that would be the way you would count it up.

4 Q You may be seated, Dr. Wein.

5 A Can I tear this off?

6 THE COURT: No, you can leave it.

7 MS. COLEMAN: You can leave it.

8 Q When a seller in a wholesale market owns a seller
9 in the retail market, is there a term for the market
10 structure?

11 A I am sorry, I didn't hear the beginning of the
12 question.

13 Q When a seller in the wholesale market owns a seller
14 in the retail market, is there a term that is used
15 for that market structure that results?

16 A Well, yes, we generally refer to that as a vertically
17 integrated structure.

18 Q Vertically integrated?

19 A Vertically integrated. It goes down from some level
20 to succeeding levels to an ultimate level of sales.

21 Q Is there vertical integration as you have described
22 in the electric industry?

23 A Yes.

24 Q Would you please explain how that occurs?

25 A Well, in the electric industry you have, as I

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1
2 mentioned, three functions: Generation, transmission
3 and distribution. So if you have a company which
4 generates its electricity, which transports it
5 through transmission lines, which takes the power
6 from these transmission lines and sends it through
7 substations so as to cut down the voltages and then
8 goes from those substations to distribution stations --
9 I mean distribution lines which then subdivide and
10 finally come to your house, such company performs
11 all the functions and is a vertically integrated
12 electric company.

13 Q Would it be helpful if we removed the oil industry
14 and diagrammed the electric industry to explain what
15 you are describing?

16 A Did you ask me a question as to whether it would be
17 helpful or do you want me to do it?

18 Q Is your answer yes?

19 A Well, it might be.

20 Q Why don't you go to the easel and show vertical
21 integration in the electric industry?

22 {Witness complies.}

23 A Well, I have drawn a generating plant that could,
24 of course, be many generating plants, and most large
25 companies will have more than one. These

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2 generating plants may have one or more generating
3 units.

4 This is where the fuel comes in {indicating}.
5 Let's just assume there are -- that means there are
6 more than one {indicating}. The fuel comes in.
7 The fuel can be coal or oil or natural gas or
8 nuclear fuels or, in the case of a hydro plant, it
9 would be the energy in falling water.

10 This energy is converted into electricity and
11 this electricity is sent out -- I have left out
12 another transformer in here that would boost up
13 the voltages, but it is sent out over cables,
14 transmission cables, which are the big things you
15 see going through the country and they take large
16 amounts of electric power, depending on the size
17 of the generation.

18 They also can tie two generating plants
19 together.

20 Q Are there some electric systems which engage only
21 in generation?

22 A Well, no, you just can't engage only in generation.
23 You've got to transmit it to somebody.

24 Q Generation and transmission?

25 A Generation and transmission, yes.

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2 Q What market would those companies be participating
3 in?

4 A Well, if there are companies that engage in
5 generation and they are tied together by these big
6 backbone transmission lines to other companies
7 that engage in generation, they will have bulk
8 power, that is to say, large masses of power which
9 may be exchanged between them at either these points
10 or at some other point where they are interconnected.

11 That was described, the nature of the bulk
12 power exchanges were described by Vice President of
13 Operations of CEI just the other day.

14 So they engage in these bulk power transactions.
15 For example, a unit may go down on somebody's -- some
16 other firm's system with whom they are
17 interconnected by these transmission lines and,
18 since they are interconnected and they are
19 synchronously interconnected, that is to say, the
20 frequency and the phasing of the current is in sinc,
21 the power would flow instantaneously from one to the
22 other.

23 Or they may be planning some maintenance on this
24 plant and they might engage in receiving energy for
25 maintenance purposes. They would enter a contract.

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2 Or they might be looking around. Let's suppose
3 that this generating plant has four units of unequal
4 efficiencies, that is to say, unequal efficiencies
5 might make the following or would make the
6 following:

7 One unit might, say, require 12,000 BTU's --
8 British thermal units, which is a unit of energy --
9 to make one kilowatt hour of electricity and another
10 one might require and a third might require nine and
11 a fourth one might require eight.

12 THE COURT: Just a moment,

13 Doctor. There is an objection.

14 Approach the bench.

15 - - - - -

16 {Bench conference ensued on the record as
17 follows:}

18 MR. LANSDALE: I'm trying very much
19 not to object. But this is so far distant from
20 the question which was asked that I can't even
21 remember what the question was. It has nothing
22 to do with the question that was asked. He is
23 off in the wild blue yonder about what your
24 case is on interconnection.

25 I object.

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2 MS. COLEMAN: I think he did get a
3 little off track, but I will resume.

4 MR. LANSDALE: Yes.

5 MS. COLEMAN: He is not trying to
6 make argument, John.

7 MR. LANSDALE: I understand. I
8 understand. You are not doing it at all. I'm
9 not suggesting you are.

10 THE COURT: All right.

11 {End of bench conference.}

12 - - - - -

13 THE COURT: Doctor, please listen
14 to the question and respond to the question.
15 Don't go beyond it. The objection was to the
16 scope of your answer going beyond the question.

17 Please place another question.

18 BY MS. COLEMAN:

19 Q Perhaps I got you a little off track, Dr. Wein. You
20 were explaining how the electric industry is vertically
21 integrated. Why don't you complete that explanation
22 and we will go on.

23 A If it has generation, transmission equipment to take
24 large bulk volumes, large volumes of power at high
25 voltages, break it down into much lower voltages and

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2 smaller amounts of power and distribute it to ultimate
3 consumers, it is vertically integrated, and this
4 diagram shows generation, transmission, substation,
5 which is taking bulk and making it into smaller
6 pieces and then distributing it, and finally it comes
7 to each house with a line off a pole.

8 Q You may be seated, Dr. Wein.

9 Are there examples of vertically-integrated
10 electric utilities?

11 A Yes.

12 Q Could you give some examples?

13 A Well, CEI is a large vertically-integrated electric
14 utility, and Munny used to be a small
15 vertically-integrated electric utility.

16 Q Could you speak up a little, please?

17 A I say, Munny used to be a small vertically-integrated
18 electric utility.

19 Q Are there examples of electric utilities which are
20 not vertically integrated?

21 A Yes. Well, the largest electric utility in the
22 United States is not vertically integrated.

23 Q What is that?

24 A That is the Tennessee Valley Authority.

25 Q What functions does the Tennessee Valley Authority

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2 engage in?

3 A It produces and generates electricity and sells it at
4 wholesale to distribution companies.

5 Q You have described electric companies which engage
6 only in the generation and transmission functions.

7 Are there also systems which engage in the
8 distribution function only?

9 A Well, most of the systems in the United States
10 engage in distribution only.

11 Q What inference do you draw from the existence of
12 electric companies which are not vertically integrated?

13 A Well, I draw the inference that you can be in the
14 electric power business without having to be
15 vertically integrated.

16 Q Dr. Wein, we have been talking about the product aspect
17 of the market for some time. You also mentioned the
18 market has a geographic aspect.

19 Would you explain how economists determine the
20 geographic area of a market?

21 A Well, there are several tests.

22 One is the extent of influence on price or
23 terms of sale or reliability or other conditions
24 involved in sales on the inducement. As I mentioned
25 before, by extent, I mean the geographic extent, the

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2 regional extent. So no matter what happened to the
3 price of cement in San Francisco, it could vary a
4 great deal, it would not influence the price of
5 cement in Cleveland. So you couldn't put them in
6 the same geographic market.

7 So one test is the extent of influence of the
8 behavior of one seller on the behavior of another.
9 That's one test.

10 The second test would be to where buyers
11 normally look to suppliers for this and where
12 suppliers normally look to buyers. That would be
13 another test.

14 Q What consideration do economists give in limiting
15 the extent of a geographic market?

16 A Well, the extent of a geographic market is limited
17 or determined by the two factors I just mentioned.
18 There may also be other factors, factors of law, for
19 example, which might prevent sellers from selling
20 in certain markets. So the geographic extent would
21 be, perhaps, limited by law. Many states have
22 territorial laws.

23 Q Dr. Wein, you mentioned the possibility of product
24 submarkets. Can there also be geographic submarkets?

25 A Yes, there can be geographic submarkets.

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2 Q What would lead you to conclude there was a geographic
3 submarket?

4 A If you found a particular area of a wider market
5 where the competition was more intense and where
6 there was a substantial amount of commerce that was
7 involved, you might, for evaluating the effects of
8 conditions or structure, decide to take a piece of a
9 larger market and study it, and it could be a
10 geographic submarket.

11 Q Dr. Wein, you have now described markets as having a
12 product and a geographic aspect. Are there other
13 aspects of market structure which an economist will
14 consider?

15 A Yes.

16 Q Could you please identify what those are?

17 A Well, one thing is to find out how many sellers there
18 are. It is a very important aspect of the market.

19 The second, of course, is to find out how many
20 buyers there are. In some markets there may be only
21 one buyer.

22 So, for example, in the market for certain
23 kinds of military hardware the United States would
24 be the only buyer.

25 Q Would you still consider that a market if there were

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2 only one buyer?

3 A Yes, it is a market -- economists have a fancy term
4 for such a market, they call it a monopsonistic market.
5 It means there is only one buyer. That means one
6 buyer.

7 A number of sellers, of course, are very
8 important.

9 Secondly, one looks to see whether there are any
10 legal factors which would restrict the entry of sellers
11 into the market. Some markets are very hard to get
12 into because there are legal barriers that you must
13 get over to get into the market.

14 Q Are there other types of barriers to the entry of
15 other sellers into the market?

16 A Yes.

17 Q What might some of those be?

18 A Well, sometimes there are patents. More often there
19 are the existence already in the market of a very
20 few or maybe even only one seller who is so firmly
21 entrenched that it is very risky for anybody else to
22 try to get into the business.

23 Another reason may be the business requires so
24 much capital to enter that it is very hard to get
25 such an aggregation of capital together and enter

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2 the market.

3 Another possible barrier may be what economists
4 term product differentiation. That is to say, there
5 is so much advertising that is required to sell a
6 new toothpaste, so that even though your toothpaste
7 is as good as anybody else's toothpaste, you can't
8 get into the market unless you are willing to spend
9 many millions of dollars of advertising. This is a
10 barrier that is kind of the economic analogue of
11 spending money to get into an industry where there are
12 legal barriers, you have to go through a lot of
13 litigation in some industries to get in.

14 So these are, in general, the kinds of barriers
15 that help you.

16 And I finally did say that in the electric
17 power industry there are many states, including the
18 State of Ohio, which have laws on territorial
19 boundaries. So it may be very difficult to get into
20 an industry where there are state laws which prevent
21 new entrance into the industry.

22 Q Dr. Wein, are you familiar with the term "economies
23 of scales"?

24 A Yes.

25 Q Would you please explain what that is and how that is

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2 considered in market structure?

3 A Well, there are two senses in which economists use
4 the term.

5 One is essentially borrowed from the engineers
6 and refers to equipment or plant.

7 Engineers used to have a rule of thumb which was
8 called the 6/10 rule. What that meant was that you
9 can double capacity and it will only cost you 6/10.
10 Instead of doubling the cost, it would cost you 6/10.
11 But what it means is simply that if you build a
12 machine or a plant larger, the cost per unit of
13 capacity for that machine would go down and also,
14 under certain conditions, the operating costs per
15 unit would go down. So that refers to machines or
16 plants.

17 Big airplanes, for example, are cheaper per
18 passenger mile than small airplanes. That doesn't
19 mean they are actually cheaper when it comes to
20 producing them. They are cheaper if you would fill
21 them up at a certain amount of load.

22 So this is what the notion of economies of
23 scale in the equipment or plant sense means. The
24 bigger the machine, up to a certain point, the more
25 cheaply it will produce a given unit of capacity.

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2 There is no rule which says all you have to do is
3 make machines bigger and bigger and they will get
4 cheaper and cheaper. That fact every engineer and
5 every economist knows not to be true.

6 The second sense of economy of scales, which is
7 much more the economic sense, says something about
8 firms, not machines but about organizations. And what
9 it says then is that as the organization grows
10 larger, it will produce its products cheaper, and
11 that is the sense in which economists are concerned
12 with because we are not really concerned just with
13 machines. We are concerned with whether a large
14 organization can produce something more cheaply than
15 a small organization. When it does, then you say
16 economies of scale.

17 But these terms ought to be understood. They
18 are ideal terms, particularly when we are dealing
19 with organizations, because what it is saying is,
20 assuming that the organizations are operating at their
21 optimal efficiency -- optimal really means the best
22 efficiency that they can obtain, that they have made
23 no mistakes, and so on and so forth -- then if you've
24 got two firms, each producing the same kind of
25 product, and economies of scale prevail and they

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2 both were operating at optimal efficiency, then the
3 larger firm would be producing the product cheaper
4 than the smaller firm.

5 That is essentially what it means.

6 Q Dr. Wein, are economies of scale in the engineering
7 sense that you described found in the electrical
8 industry?

9 A Yes, they are.

10 Q Could you explain? Are they found in the generation
11 of power?

12 A Yes, they are found in the generation of power.

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2 Q Would you explain the instance where they are found
3 in the generation of power?

4 A Please repeat that question.

5 Q Could you explain when economies of scale are found
6 in the generation of power?

7 A Well, if you take a generating unit, let's suppose it
8 is a generating unit designed to work on coal, designed
9 to work on a particular kind of coal, and it is in a
10 particular section of the country, in a particular
11 place, and I had a machine using this coal that is
12 100 megawatts, can produce 100,000 kilowatts of power,
13 and I had another one that was 200 and I had another
14 one that was 300 and all the way up to 1100, roughly
15 the size of Big Alice, the big one that Consolidated
16 Edison has in New York, and I said, "How would the
17 costs first of capacity, that is to say, the
18 investment per unit of capacity per megawatt of power,
19 and two, its actual operating costs vary," assuming
20 that they were all being operated at the same load
21 factor, let's say they are operated at 60 per cent of
22 their capacity, and I tried out all of these machines,
23 I would find that it costs less dollars per unit of
24 capacity for the big machine that it does for the
25 small machine. That would be one way in which it

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would work.

The second way in which it would come to bring economies is that the heat rates, that is to say, the amount of BTU's you use or the pounds of coal you use to make one kilowatt hour of electricity, would generally decline for the larger machines. Not quite as dramatically as the investment cost would after a certain point.

So --

Q Are there -- pardon me. Please finish.

A So these two things together give you the idea of economies of scale in generation.

Q Are there limits to the benefits of large scale units in generation of electric power?

A Yes. At every period in technology there are limits. Before World War II, a 250-megawatt plant was a pretty decent sized plant. It is now a pretty small sized plant.

So if we are talking about coal-fired equipment, 700, 800 are about as good as you are going to get, and probably better than Big Alice, which has never been able to operate very effectively. It is always down for repairs, even though it is 1100 megawatts.

So that once you get beyond a particular point,

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2 like, say, 700 or 800 in a coal-fired plant, you are
3 not going to get a great deal more by going bigger.
4 And in fact, if you go out to 1500, you aren't likely --
5 there aren't any that I know of in the United States --
6 you are not likely to get a great deal of improvement.

7 So the technology, the state of the art at a
8 particular time is always limiting the amount of what
9 you can put in in generation and in everything else.

10 Q Are there disadvantages to the units of the larger
11 scale that you have mentioned?

12 A Yes. There are disadvantages of them.

13 Q What might some of those be?

14 A Well, they generally have higher outage ratios. Whether
15 this is because we have not had that much experience
16 with the bigger units or whether it is something
17 inherent in the design, I don't know. But the
18 experience has been that very large units have much
19 higher outage rates than smaller units. That adds,
20 of course, to the maintenance cost and reduces the
21 amount of their load factors.

22 Q If I understand you correctly, you are saying that the
23 total cost of operating a unit may not be the least
24 with the largest unit?

25 A Yes. That is correct.

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There is another reason, of course, for that.

Q What is that?

A Well, that, of course, goes to the whole question of the load factor, which means: How often can you operate this?

If I had a big machine that produced, say, 700 or 800 megawatts of power and I operated it five hours a day, it is going to be an awfully expensive machine.

So it depends upon the relationship between the load that you have and the size of the machine. You wouldn't just put in big machines if you didn't have big loads.

Q Dr. Wein, you have spoken now about economies of scale in generation.

Have economists found that there are economies of scale in transmission of electric power?

A Well, I think I would not give that discovery to economists. The engineers have found that there are economies of scale in transmission, yes.

Q Are you familiar with what the engineers have found in that regard?

A Yes. They are very much greater even than they are in generation. I remember and I jotted down some of that data, which is interesting, from the 1964 Federal

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Power Survey which illustrates that very graphically.

Q Are you indicating you are able to illustrate what some of the economies of scale in transmission are?

A Well, yes. For example, if you take it in terms of the load-carrying capacity, a 765,000-volt line is equivalent to five 345's and 30 138's. So that you can see that 30 times 138 is a very much bigger number than 765.

In general, the capacity of a transmission line goes up as the square of its voltage, whereas its costs don't go up anywhere near the square of its voltage. So you have this great economy.

In terms of distance, for example, if you took a given load, a large load on a 765 KV transmission line, it could carry that load at the same cost for 300 miles compared to a 345, which would carry it 60 miles, compared to the 138, which would carry it 10 miles.

Or if you took what is now very important, the amount of space that is required, if you took a 765 KV line, it would require 200 feet of right of way, whereas five 345's would be required to produce the same load and they would take more right of way. Then to get to the 138's, you would require 3,000 feet to transmit the same amount of energy that you would get with one 765.

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2 Q Are you referring to 3,000 feet of right of way?

3 A Right of way.

4 Q Or distance from the line?

5 A I mean right of way. Take a path wherever the line
6 is going 200 feet wide.

7 Q I see.

8 Are there some comparable economies of scale on
9 the distribution level in the electric industry?

10 A No. The distribution level does not have comparable
11 economies of scale.

12 Q Dr. Wein, is there a relationship between experience
13 of economies of scale in the industry and the number
14 of firms that one might expect to find operating in
15 the industry?

16 A Well, yes, there is. It is not the only factor which
17 explains the number of firms, but it is certainly one
18 of them.

19 Q What relationship would economists predict?

20 A Well, you mean where the economies of scale are
21 significant?

22 Q Yes.

23 A Well, you would predict that there would be few firms
24 or fewer firms in that industry than if economies of
25 scale weren't significant, provided -- and you always

1 Wein - direct

2 have to put the "provided" in -- provided that it was
3 difficult to get into the industry. If it was easy to
4 get into the industry you could have lots of economies
5 of scale, very dramatic economies of scale. But if it
6 is easy to get in, that's not going to keep anybody
7 out. Everybody will go in and have the economies of
8 scale.

9 So the economies of scale is necessary, but not
10 a sufficient condition to explain why there are few
11 firms in the industry. It requires then the barriers
12 have to be high as well.

13 Q In the electric industry, Dr. Wein, to take advantage
14 of economies of scale at a single level, let's say
15 generation, must there be a single firm?

16 MS. COLEMAN: Your Honor, I am
17 changing subjects. Perhaps this would be a good
18 time for the break.

19 THE COURT: Very well, we will
20 take a short recess.

21 Ladies and gentlemen, please keep in mind
22 the Court's admonition.

23 {Short recess taken.}

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1 Wein - direct

2 THE COURT: You may proceed.

3 BY MS. COLEMAN:

4 Q Dr. Wein, you stated before we recessed that there
5 are not economies of scale and distribution.

6 Why are there not economies of scale in
7 distribution of electric power?

8 A Such economies as you get in distribution depend
9 primarily on the density of customers per mile of
10 line. So that if you have more customers per mile
11 of line, you are going to become -- you will show
12 lower costs than another distribution system which
13 has less customers.

14 Now, if you take customers and translate that
15 into kilowatt hours then, essentially, the more
16 kilowatt hours you can get per mile of line, the
17 lower your costs will be.

18 Now, a great deal, of course, depends upon the
19 structure of the municipality or city that is
20 involved. Some cities have more area per inhabitant
21 or per commercial enterprise than other cities, and
22 those cities would be more expensive to serve even
23 though they may, in total, use more kilowatt hours
24 but the number of miles of lines they have is much
25 greater than in certain other cities.

1 Wein - direct

2 Or, alternatively, in very large cities where
3 you have to distribute with underground distribution
4 lines, that becomes very expensive. Repair and
5 maintenance of these facilities are expensive. And
6 even though you may have very dense loading, you may
7 still find it very expensive.

8 If you look at the City of New York, the last
9 time I looked at Consolidated Edison it had about as
10 high a cost of distribution as one could find and
11 that was because of many reasons but one of them,
12 of course, is a great deal of it is underground.

13 So, in short, the economies of distribution,
14 because you are always using low voltages in
15 distribution, you can't then get the great
16 economies which come in transmission when you are
17 going up at very high voltages. In distribution you
18 are going down smaller and smaller and you do not get
19 a great deal of economies in substations. So,
20 essentially, the economies you get are really a
21 function of the densities.

22 Now, I have studied just recently approximately
23 42 rural electric cooperatives in the State of
24 Indiana, and the most important single factor affecting
25 their cost, excluding correcting for the cost at which

Wein - direct

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2 they buy their power supply, was their loading, the
3 density of power on them.

4 So I think it is well recognized and it was
5 pointed out in the power survey of the Federal
6 Power Commission that the economies of sale
7 in distribution essentially depend on that.

8 Q Dr. Wein, you have spoken about vertical integration
9 in the electric industry, about geographic markets.

10 Is vertical and horizontal integration
11 necessary to obtain economies of scale in the
12 electric industry?

13 A Well, if you mean by horizontal integration the
14 situation in which, for example, a company has many
15 distribution centers, that is to say, it distributes
16 in the City of Cleveland, distributes in Berea,
17 distributes in lots of cities in Ohio, and if it had
18 many plants scattered throughout, if you mean by that
19 horizontal integration, then the answer is you do not
20 need both vertical and horizontal integration to gain
21 economies of scale. The major IOU's, the
22 investor-owned utilities, are both vertically and
23 horizontally integrated. They are not solely
24 vertically integrated.

25 Q Is vertical integration necessary to obtain economies

Wein - direct

1 of scale at any one of the levels that you have
2 described, generation, transmission, or distribution?

3
4 A Well, you don't need distribution to gain the
5 economies of scale in generation. You could sell at
6 wholesale and you would have the same economies.

7 Q What do firms in the electric industry do to obtain
8 economies of sale in generation?

9 A Well, there are two things they do, or have done
10 historically and what they do now. The first thing
11 they did historically, of course, was to acquire
12 markets; that is to say, acquire many different
13 municipalities or small private companies. That is
14 the basis of getting loads. They are able to do that
15 because the technology of transmission has increased,
16 and so they could extend out to get a lot of loads.

17 Once they get enough loads, then they could
18 build larger generating capacity. Now, the two
19 processes go together.

20 The second thing they do and what they do today,
21 and to some extent they have done this for many, many
22 years, is that they engage in coordinated operations
23 and they engage in facility coordination. In this
24 way, they gain the most that they can achieve to
25 achieve economies of scale.

Wein - direct

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2 Q Dr. Wein, I am going to place a transparency of
3 Plaintiff's Exhibit 3094 on the screen.

4 Are you able to see that from where you are?

5 A Yes, I can see it, but I would push it to the right,
6 we can lose one of the little megawatt generators.
7 Get the 10 megawatt.

8 Q Using Plaintiff's Exhibit 3094, can you explain how a
9 single firm can take advantage of economies of scale
10 acting alone?

11 A Well, take system A. According to the diagram it has
12 10 megawatts, it has two units each of 10 megawatt
13 capacity.

14 It has, since we have assumed in this example that
15 the units are all of equal size, which are very simplifying
16 assumptions, that the firm in system A, though it has
17 20 megawatts in two units of 10 each, it has 20 megawatts
18 of dependable capacity, really only 10 megawatts of
19 firm capacity, because there is always an inherent
20 probability, which depends on the nature of the unit,
21 that it will be down for forced outages.

22 Let's assume that the 10 megawatt has an inherent
23 probability of 2 per cent that it would be forced out
24 sometime during a year. Well now, on that standard,
25 on that assumption, this system A could only offer 10

1 Wein - direct

2 megawatts of firm capacity for sale, that is to say,
3 firm capacity being defined as providing a continuous
4 supply of electricity under adverse conditions. All
5 it could do is offer 10 megawatts, but it has got two
6 machines of 20 megawatts and it has got to keep one
7 of them idle.

8 That thing is known in the industry as largest
9 unit down standard. In this case, the largest unit
10 is 10 megawatts and it has two of them.

11 So if you look at that system A, it has as much
12 capacity in reserve as it does that it is selling.
13 That's like saying I have two trucks but I am going
14 to use one of them only and keep the other one in
15 reserve, because the first one will break down. That's
16 a very expensive way to operate an electric system.
17 But that is what firm A has. So it has 100 per cent
18 of its capacity -- it has 100 per cent of reserves equal
19 to firm capacity. They are equal.

20 So essentially one unit is sort of kept not
21 operating.

22 Q How much firm capacity does system B have?

23 A I am getting to system B.

24 Now, we have assumed another system, and it has
25 smaller units, each of them are five megawatts. It

1 Wein - direct

2 has dependable capacity of 15 megawatts, but it only has
3 10 megawatts of firm capacity, because on the largest
4 unit down standard it can keep one five megawatt in
5 reserve.

6 Now, the reason for that is, let's assume that
7 for that one the probability of a forced outage is 2
8 per cent. Well now, the forced outage of any two of
9 those machines are going to be independent events,
10 we will assume that they are independent events. So
11 that the probability of getting two of them down at the
12 same time is .02 times .02, which is .004. That's a
13 pretty small number. Four out of 10,000 times would I
14 ever get two of them down.

15 So that means I can sell two of those units, the
16 two five megawatt units as firm and I can keep one five
17 megawatt unit in reserve.

18 Now, that means that I have a great reduction in
19 the amount of idle reserves. I can sell 10 and I can
20 keep only five. So I can sell 10 as firm and five as
21 idle.

22 So now I have gone from a hundred down to 50, five
23 divided by 10 is 50.

24 So now I have made a reduction, a reduction in the
25 proportion of my idle reserves.

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2 Then the last one, system C, it has got a lot more,
3 or teeny-weeny units of one megawatt. Assuming the
4 probability of any two of them down simultaneous is
5 .02 times .02 comes out to four ten-thousandths. It
6 finally shows up in that system that I can sell everything
7 but one unit, in which case I can sell 10 megawatts and
8 I only keep one unit as reserve.

9 Now, that shows the essential dilemma, as it were,
10 that an isolated system is in.

11 Q Now, you said that each one of these firms has the same
12 firm capacity; is that correct?

13 A Um-hum.

14 Q Which firm is able to take advantage of economies of
15 scale?

16 A Well, system A. System A can take advantage of it but,
17 you see, it pays a penalty by having 100 per cent
18 reserves.

19 Q What could system A do to reduce that penalty, Dr. Wein?

20 A Well, it could hope to share reserves with another
21 company.

22 Q Dr. Wein, I'm going to place Plaintiff's Exhibit 3095
23 on the screen. You prefer the two systems?

24 A Yes, that's fine.

25 Q All right. What does the first diagram in Plaintiff's

1 Wein - direct

2 Exhibit 3095 depict?

3 A What does it show now? Two systems, A-1 and A-2. They
4 each have two units, we will assume, and each of the
5 units are 10 megawatts apiece, so that the systems
6 combined have four units.

7 Q The system A-1 on the left and system A-2 on the right
8 are two different companies here?

9 A They are two different companies but they now have
10 decided to interconnect with each other and share
11 reserves.

12 Q What firm capacity can the two companies combined offer
13 when they are in this arrangement?

14 A Well, now, as you can see, they can sell 30 megawatts
15 of firm because the largest unit down standard requires
16 them to keep a unit of 10 megawatts in reserve. And
17 again, the same law of probability of independent
18 events says as the product of their own separate
19 capabilities they can sell 20. Each could sell 10, so
20 both together they can sell 20. So now the reserves
21 for both systems pooled are down to one-third. When
22 they were operating isolated, it was 100 per cent. So
23 that's a saving of a lot of money.

24 Q Dr. Wein, is there any benefit from another system
25 joining with these two?

Wein - direct

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2 A Well, yes. The principle, I think, is pretty obvious
3 that when you get six of them -- we now have three
4 systems, each with two units apiece -- you finally get
5 down to where reserves are now only 20 per cent. Where
6 they were selling it isolated, it was 100.

7 It is, in short, like the principle of insurance.
8 If you've got a lot of people in the insurance company,
9 the cost is much less. If you've got a few people, the
10 cost goes higher, and if you've got one person, you are
11 stuck. You can't insure yourself unless you have a
12 great deal of money.

13 And that is what is happening in reserve sharing.

14 Q Dr. Wein, you mentioned that an electric utility can
15 take advantage of economies of scale by coordinated
16 operations or coordinated facilities, I believe you
17 used the term, coordinated construction.

18 Which label do you apply to the discussion you
19 have just had concerning reserve sharing between two
20 utilities?

21 A Well, in this case it would be coordinated operations
22 because two utilities happen to have their own units.
23
24
25

1 Wein - direct

2 Q What is an example of coordinated facilities? What
3 does that mean?

4 A Well, you take the idea of economies of scale and
5 you take the other idea that I have mentioned that
6 you don't buy a big machine unless you have a big
7 load. You don't buy a Boeing 747 to haul 30 people
8 around. You better have a couple of hundred or it
9 doesn't make any sense to have such a machine.

10 Well, suppose you are stuck and you are a small
11 utility but you want to have a big machine. What do
12 you do?

13 Well, you can buy the big unit and hope that
14 your load growth will eventually make it economical
15 for you to have that big unit. Well, it is going to
16 have to be a pretty fast load growth.

17 So for example, if you were to take Toledo
18 Edison, which I guess is the smallest of the
19 capital companies, if you take a system, let's say,
20 of a thousand megawatts or 1,500 megawatts and it
21 wants to buy and utilize a 700 or 800 or even a
22 thousand megawatt machine, if it only sells a thousand
23 megawatts and it is increasing at 5 or 6 percent a
24 year and it buys a thousand megawatts, it can't
25 really sell firm capacity unless it had another

Wein - direct

1 thousand megawatts. Well, that is impossible.

2
3 So what systems do, except the very larger
4 systems such as perhaps TVA or American Electric
5 Power, which is a holding company which has a lot of
6 members, what the systems do is jointly buy a big
7 unit where they then share their loads so they can
8 get, then, the economies of the big units. If they
9 tried to do it by themselves, they would have to
10 settle on much smaller units.

11 So instead of 10 megawatts, if we put on the
12 diagram a thousand megawatts, you couldn't do that
13 unless you were a system, let's say, of 7,000 or
14 8,000 megawatts. You couldn't put in such a machine.

15 So you join together in order to plan these
16 big generating units, and each company will own a
17 piece of it and each company will then have a share
18 of it and each company will benefit in the economies
19 which the big unit is supposedly to give you.

20 Now, the same thing, of course, goes for
21 transmission. You wouldn't necessarily build --

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

24 THE COURT: Approach the bench.

25

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1 Wein - direct

2 {Bench conference ensued on the record as
3 follows:}

4 MR. LANSDALE: I'm trying very hard
5 not to object.

6 This gentleman says the same thing three
7 times, and now he is launching off into
8 transmission. The question was about generation.

9 I object.

10 MS. COLEMAN: We will proceed with
11 the discussion.

12 {End of bench conference.}

13 - - - - -

14 THE COURT: Doctor, again the
15 objection is to your departure from the question.

16 Please be responsive to the question. Don't
17 go beyond the question.

18 THE WITNESS: I'm sorry if I did.

19 BY MS. COLEMAN:

20 Q Dr. Wein, are there instances in the electric
21 industry where we find utility companies joining
22 together in coordinated operation as you have described
23 it?

24 A Yes. That is very common.

25 Q And are there instances in the electric industry where

1 Wein - direct

2 we find utilities joining for coordinated development
3 in the construction of machines as you have described
4 it?

5 A Yes, that is also common.

6 Q What is a power pool?

7 A Well, a power pool is an example of where utility
8 companies engage in certain contracts with each
9 other, certain arrangements in order to get either
10 the economies of operations, coordinated operations,
11 or the economies of coordinated facility development,
12 or both.

13 Q You described, in terms of coordinated operations,
14 the reserve sharing and we looked at Plaintiff's
15 Exhibits 3094 and 3095 on that point.

16 Are there other aspects of coordinated operations
17 which two electric systems working together might
18 benefit from?

19 A Yes, there are many aspects.

20 Q Would you describe some of the benefits which two
21 systems working together could attain?

22 A Well, I think perhaps a very easy example might be
23 the purchase of economy energy, for example.

24 Q What do you mean by economy energy?

25 A Well, supposing you had one system which had, say,

1 Wein - direct

2 five machines and another system which had seven or
3 eight. And the load, that is to say, the demand for
4 electricity on any individual system is going to vary
5 each hour of the day. At some hours it will be very
6 high, and that will be known as the peak, and in
7 some it will be very low.

8 Well, let's suppose that System A, which has the
9 five machines, has got a demand, surging of demand
10 on its system and it is operating four machines and
11 it has to bring in the fifth one. Let's suppose
12 that the fifth machine would produce, would cost,
13 say, 30 mills.

14 Q What is a mill, Dr. Wein?

15 A A mill is a tenth of a cent.

16 Q Electricity is priced in mills?

17 A Generally electricity is priced in mills, at least
18 amongst the companies. As customers you will get it
19 probably in cents, but in any case it is a tenth of a
20 cent.

21 Suppose the fifth machine which Company A needs
22 to satisfy this demand on its system which comes at,
23 say, 2:00 o'clock in the afternoon, maybe it has an
24 industrial, big industrial plant which comes on, or
25 whatever, and it is going to go on for three hours

1 Wein - direct

2 and it has to bring this fifth machine on, and this
3 fifth machine can only produce that energy at 30 mills.
4 If it is interconnected with other companies, it could,
5 as Mr. Williams said the other day, shop around.

6 "Shop around" means to find one of its
7 interconnected partners who may have the requisite
8 capacity in a more efficient machine. Well, if he
9 finds it, suppose he gets a machine that one of his
10 partners has, a machine that can produce that power
11 and has it available for that time at 20 mills. Well
12 then, no point in generating the power at 30 mills
13 when you can generate it at 20 mills.

14 So the systems exchange energy, and depending
15 upon the nature of the pool, as to how they price it.
16 Some system, such as the one that I am familiar with
17 in Michigan, have this done automatically, there is
18 no shopping around by telephone or anything of that
19 sort. The system is interconnected and the
20 efficiency of every machine is known on it, and the
21 computer simply kicks them in when it is necessary.

22 You have that sort of arrangement.

23 Q Are there other types of energy purchases which a
24 utility which is interconnected with another might
25 make?

1 Wein - direct

2 A Oh, sure, there are lots of them.

3 I don't know if there is one around here in Ohio,
4 but seasonal power is a very common one. TVA at
5 least used to be a winter-peaking system, and the
6 Alabama Power Company is a summer-peaking system,
7 and they would exchange this seasonal power, because
8 when Alabama Power's peak is high, TVA's is low.
9 So it pays for Alabama to buy TVA and vice-versa.

10 There are a whole variety of bulk power
11 exchanges which take place in pools, emergency
12 energy, limited term energy, all the things that Mr.
13 Williams said would be included.

14 Q Thank you.

15 Dr. Wein, you testified earlier that one of the
16 purposes of defining relevant markets is to give you
17 a context for looking at market power.

18 Would you explain to the jury what you mean by
19 the term "market power"?

20 A Well, essentially a market power involves two things,
21 which are connected, these elements are not independent.

22 The first is a firm, company can be said to have
23 market power if it controls a substantial part of the
24 supply of any particular product or service.

25 And, secondly, it has market power insofar as

1 Wein - direct

2 this supply gives it influence over the market price.

3 When it can do either of those things or both,
4 it will have market power.

5 THE COURT:

Perhaps this would be

6 an opportune time for us to recess for lunch.

7 Ladies and gentlemen, you are free to go to lunch.

8 Return at 1:30, at which time we will resume.

9 During the recess do not discuss the case
10 either among yourselves or with anyone else.

11 You should keep an open mind until such time as
12 you have heard all of the evidence, the Court's
13 instruction as to the law and the application of
14 the law to the facts and until such time as the
15 matter is submitted to you for your final
16 deliberations and judgment.

17 With that, ladies and gentlemen, you are
18 free to go to lunch.

19 {The jury was excused.}

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1 Wein - direct

2 {Bench conference ensued on the record as
3 follows:}

4 THE COURT: Mr. Weiner.

5 MR. WEINER: Yes, your Honor.

6 THE COURT: As concerns the
7 constitutional issue that is involved here, as
8 discussed briefly yesterday or the day before,
9 namely, whether or not the City had legal authority
10 to become a member of CAPCO or to participate in
11 nuclear power through membership or through a
12 proportionate purchase or otherwise, it is my
13 understanding that your position is there is a
14 question as to that issue?

15 MR. WEINER: Well, your Honor, I
16 actually thought the issue we were discussing
17 and you asked us to look at was the issue raised
18 by the City's ability to make wholesale transactions.

19 THE COURT: Well, really, we
20 will get to that one next. What about the first
21 one?

22 MR. WEINER: As to the --

23 THE COURT: Is it the City's
24 claim that, legally, it has authority to enter
25 into joint ownership with other companies, be they

1 Wein - direct
2 private stock companies or not?

3 MR. WEINER: At the time, in August
4 of 1973, that probably would not have been -- that
5 would not have been possible to do that type of
6 transaction, to do an ownership type transaction
7 with another company.

8 THE COURT: Well, then that takes
9 that contention out of issue, does it not, as a
10 matter of law?

11 MR. WEINER: No, I don't think
12 it does, your Honor, because the City's position
13 is there are alternatives available, too.

14 THE COURT: Let's take one thing
15 at a time.

16 MR. WEINER: I understand.

17 THE COURT: We will get to whether
18 or not you can share in the benefits of CAPCO
19 as another issue. Let's address each issue as a
20 single issue.

21 MR. WEINER: There was opportunity
22 between the time in August and when the transaction
23 would have had to be completed, whenever that was
24 down the road when the negotiations were completed,
25 for the law to have been changed to allow that

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Wein - direct

type of transaction to be completed by the City.
In fact, the law was almost changed --

THE COURT: Has the law been
changed?

MR. WEINER: No, it has not.

THE COURT: What are we doing,
then, dealing in speculation?

MR. WEINER: Well, it is not
speculation. It didn't happen.

THE COURT: It didn't happen,
and the constitution specifically, in unambiguous
terms, precludes it, does it not?

MR. WEINER: That is correct,
your Honor.

THE COURT: And that is State v.
Hance as decided by the Supreme Court of Ohio at
159 Northeastern 741.

Now, let's go on to the next issue; namely,
whether or not the City can purchase power in
and above its needs to service its consumers
or customers and dispose of it at wholesale as
surplus.

What is the City's position as to that?

MR. WEINER: The City certainly

1 Wein - direct

2 has the right to do that.

3 THE COURT: What does State v.
4 Hance say?

5 MR. WEINER: State v. Hance does
6 not apply, your Honor, to that particular
7 situation. The situation in that case, as I
8 believe it, was that at the time that contract
9 came before the Court, the City of Piqua, which
10 I think was involved in that particular case,
11 was already exceeding its constitutional authority
12 to sell over 50 per cent of its power outside
13 the city limits of Piqua, and the Supreme Court
14 said in that situation where you are already
15 exceeding the 50 per cent limit that the
16 constitution sets, that you may not enter into
17 another contract that would further exceed that
18 50 per cent limit.

19 THE COURT: Well, apparently we
20 are not reading State v. Hance in the same light.

21 Are you desirous of commenting, Mr. Lansdale?

22 MR. LANSDALE: Yes, if your Honor
23 please.

24 The constitution provides, and I believe it
25 is State ex rel. Wilson against Hance, that the

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1
2 surplus that the constitution refers to is the
3 surplus generated by the ownership and operation
4 of its facility to serve its inhabitants, which
5 is the constitutional grant to it, and the surplus
6 must arise from that transaction.

7 To say that they can purchase power for the
8 purpose of selling outside of the limits is not
9 to say that they are selling outside the limits
10 of the city.

11 The surplus to which the constitution refers --
12 and I submit that this is exactly what State ex
13 rel. Wilson against Hance says, where it says that
14 "It is obvious from a consideration of that
15 constitutional limitation," they are referring
16 to Article 18, Section 6, "that although the
17 framers of the constitution believed it would be
18 advantageous for municipal corporations to have
19 power to provide public utility services to
20 inhabitants and recognized that such an operation
21 could create a surplus product which would be
22 disposed of outside the corporate limits of the
23 municipality, they clearly intended to limit
24 municipalities primarily to the furnishing of
25 services to their own inhabitants and to prevent

1 MR. LANSDALE: I don't know what
2 the facts are, if your Honor please, but I
3 submit that the mere fact that somebody else
4 violated the law doesn't make it right.

5 THE COURT: I will be pleased
6 to entertain your brief as to the second issue.
7 But I don't think there is any issue as to
8 whether or not the City could participate in
9 the joint ownership in any facility, nuclear,
10 conventional or transmission with a private
11 stock company or any other company, and thereby,
12 the question of the City's membership in CAPCO
13 would appear to be no longer in issue.

14 MR. WEINER: I don't think so,
15 your Honor, because the very fact is that
16 CAPCO had great flexibility. You did not have to
17 be a joint owner at those plants to be a member
18 of CAPCO. You did not have --

19 THE COURT: Mr. Weiner, I am in
20 the process right now of researching whether or
21 not the City's contention that it should have
22 been permitted to share in the benefits of
23 CAPCO, namely, the subject that we discussed
24 yesterday as to who has the burden of proof of
25 showing legal ability, intention, preparedness

1 and action taken as a condition precedent
2 to the introduction of any of this testimony
3 as it relates to the access to the power
4 exchange market.

5 In my early research it seems to indicate
6 that that burden rests upon the city, and absent
7 a showing of such foundation material, the city
8 will not be able to join that as an issue in
9 this case. Now, I hope that perhaps you may
10 have something in your brief that would reflect
11 upon this subject.

12 MR. WEINER: Our brief doesn't go
13 to that, your Honor, but I refer the Court to
14 Hecht vs. Pro Football, Incorporated, which is
15 570 Fed. 2d 982 at page 987, I think the Court
16 will find --

17 THE COURT: I will be pleased to
18 review that.

19 We shall resume at 1:30, gentlemen.

20 - - - - -
21 {Luncheon recess taken.}
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1 WEDNESDAY, OCTOBER 8, 1980; 1:40 P.M.

2
3 THE COURT:

You may proceed.

4
5 DIRECT EXAMINATION OF DR. HAROLD H. WEIN {Cont'd}

6
7 BY MS. COLEMAN:

8 Q Dr. Wein, I would like first to go back, just briefly,
9 to some areas which you discussed this morning.

10 When you were talking about barriers to entry,
11 you mentioned various kinds of barriers which were
12 possible. Is control over supply also a barrier to
13 entry?

14 A Yes.

15 Q What would be an example of control over supply?

16 A Well, in the steel industry, for example, control over
17 supply might be control of iron ore deposits, coke
18 and coal deposits, that sort of thing.

19 Q When we discussed this morning a coordinated operation,
20 we talked briefly about pools.

21 How common are pools in the country in the
22 electric industry?

23 A Well, according to the recent study done by the
24 Department of Energy on the national grid study, they
25 put it at between 25 and 30. They also mention that

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2 there are many informal arrangements which they don't
3 know about which have some element of pool operation.

4 Q You described that there are publicly-owned utilities
5 and investor-owned utilities.

6 Are utilities of both kinds involved in pools?

7 A Yes, in some pools there are utilities of both kinds.

8 Q Must an electric company be a member of a pool to
9 obtain the benefits of coordination of prices that
10 you were discussing earlier?

11 A Well, not if we define a pool as more than two
12 companies. Two companies which are interconnected
13 can obtain substantial benefits such as you find in
14 pools. Not perhaps to the same extent, but of the
15 same kind.

16 Q Could you speak up a little, Dr. Wein. I'm having
17 some trouble hearing you. Thank you.

18 In discussing your qualifications yesterday and
19 in some of our discussions this morning, you referred
20 to examining markets to look at competition in the
21 market.

22 What are the advantages of competition?

23 A Well, the advantages of competition, in my opinion, are
24 many.

25 First, they give consumers a choice. The more

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2 sellers you have, the greater choice consumers have.

3 If General Motors were the only ones who
4 produced cars in the United States and we didn't have
5 imports of cars, consumers would have only the choice
6 that General Motors would give them.

7 So that competition brings a maximum of consumer
8 choice.

9 Secondly, and also very important, since you have
10 competition between and amongst different sellers,
11 each anxious to gain sales from customers, they offer
12 them a variety of inducements. These inducements, as
13 I have mentioned, include price, quality, conditions
14 in terms of service and sales, credit, and things of
15 that nature.

16 Thirdly, because you have this kind of rivalry
17 to gain the sales of customers, the companies must
18 attempt to operate as efficiently as they can,
19 because one of the important tools and methods of
20 gaining customers, of course, are prices. So if one
21 company lowers a price, another company must try to
22 meet the price, in which case, then, it must try as
23 best it can to obtain the most efficient operations.
24 It tries to cut its costs.

25 So that competition is a built-in regulator for

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2 efficiencies of companies.

3 Fourthly, when there are competitors in the
4 market, many companies try to make innovations,
5 either in its products, they improve their products,
6 or else they make innovations in the ways by which
7 they make their products so that their costs can go
8 down.

9 So that ultimately, to use economists' language,
10 which is perhaps not so clear, but I'm an economist,
11 so I have to use it, competition is alleged to bring a
12 proper allocation of all the inputs within a firm so
13 that it puts them together in order to try and get
14 the lowest combination it can for its products and
15 its services, and secondly, it acts to make sure
16 that the resources over the whole country are
17 allocated in the ways that consumers want them.

18 So that it has all these desirable effects.

19 Q Dr. Wein, in a market which has competition, does a
20 company ever fail?

21 A Yes, companies often fail in markets where there is
22 competition.

23 Q Is competition reduced in that market when a firm
24 goes out of business?

25 A Well, if it is a competitive market, that is to say,

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2 if there are many sellers or, alternatively, it is
3 very easy for a new company to be formed, the fact
4 that a particular company fails doesn't reduce
5 competition. It just means that the company hasn't
6 been able to keep up with its competitors. The
7 amount of competition among the competitors is still
8 there.

9 So that when it is easy to enter an industry,
10 the fact that one company fails is of no great
11 consequence, because competition still exists. The
12 advantage that economists see in this process is
13 that weaker companies, that is to say, companies whose
14 costs are too high or whose products are inferior,
15 or for some combination of those reasons are simply
16 weeded out and new companies may take their place.
17 Q Now, you described that competition is not reduced
18 in an industry which has many sellers.

19 What about an industry where there are only a
20 few sellers involved; if one fails is competition
21 reduced?

22 A If the barriers to entering the industry are high,
23 and usually where you have only a few sellers it is
24 pretty good evidence that the barriers to get into
25 the industry are high. So that where you have a few

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2 sellers and one is eliminated, it usually involves
3 the elimination of substantial competition.

4 Q If there are two companies in an industry, Dr. Wein,
5 in a market, and one fails and is acquired by the
6 other, is competition reduced?

7 A Well, if there are only two companies in the industry,
8 I draw that the barriers to entry must have been or
9 are very high, so that no new companies will enter.
10 So it follows that, in that case, if you eliminate
11 one of the competitors, either because it fails or
12 because it is acquired, then, of course, the
13 competition is completely eliminated in that industry
14 because there is only one company left. It is now a
15 monopolist.

16 Q Dr. Wein, is the possibility of the influence of one
17 competitor upon another the same in a market no
18 matter what the structure of that market is?

19 A No.

20 MR. LANSDALE: May I have the
21 question read, if your Honor please.

22 THE COURT: Read the question
23 back.

24 {Record read.}

25 Q How does the possibility of influence of one

1 Wein - direct

2 competitor upon another vary?

3 A Well, in a competitive market, essentially, no
4 particular company, by itself, has significant
5 influence. It doesn't matter, for example, that a
6 wheat farmer in Iowa goes out of business because
7 there are so many wheat farmers in Iowa and Kansas
8 and Nebraska and other places that one wheat farmer
9 going out of business, or even if he stays in
10 business, has no influence, essentially, on what the
11 price or the policy of any other wheat farmers are.

12 Q You used the term "competitive market."

13 A Yes.

14 Q What would be the features of a competitive market?

15 A The features of a competitive market are a market
16 where there are very many sellers, none of whom have
17 a substantial or significant or perceptible effect on
18 prices and where they are not in collusion, that is,
19 where they are not agreeing to sell at a certain
20 price.

21 Q In what type of market would you see an influence of
22 one competitor upon another?

23 A That's in the market where there are very few
24 sellers and where the sellers have a substantial
25 proportion of the total capacity of the total output

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2 in the industry in the particular market in which they
3 operate.

4 In that case each seller has to take into account
5 what the other seller is going to do and each of the
6 sellers has a substantial influence on the price
7 because they have such a big influence on the supply.

8 So that if one seller wanted to sell all it
9 could, it would be affecting the market price
10 because it has such a big amount, whereas, in a
11 competitive market where there are very many sellers,
12 that wouldn't happen.

13 So in a market where there are few sellers, each
14 of whom has a substantial amount of supply, then they
15 must take into account each other's action and so
16 they have influence on each other.

17 Q Dr. Wein, you used the term "competitive market."

18 You referred to the market with many sellers.

19 Can there be competition in a market which has
20 only a few sellers?

21 A Yes, there is competition in a market which has only
22 a few sellers.

23 Q I just wanted to clarify. When you use the reference
24 "competitive market" to the market with many sellers,
25 that doesn't exclude the possibility of competition in

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2 markets with fewer sellers?

3 A No, it doesn't exclude the possibility of competition
4 in the market with few sellers because you rarely
5 will find --

6 Suppose you had a market with four sellers in it.
7 It is very unlikely that each will have 25 percent of
8 the market. One might have 50 percent and another
9 might have 30 percent and the other two might have
10 10. It's quite possible and very likely that the two
11 who have 10 might wish to increase their share of
12 the market. If they wish to increase their share of
13 the market, they must do things in order to induce
14 customers to buy it.

15 So it is very common in the history of American
16 industry to find competition and varying market
17 shares amongst sellers.

18 United States Steel used to have 70 percent of
19 the ingot capacity of the United States when it was
20 first formed. I think now it has 25 percent. So,
21 obviously, other companies have moved up and it has
22 moved down.

23 Q Dr. Wein, you mentioned when firms are in competition
24 with each other they must do things to compete with
25 each other.

1 Wein - direct

2 Is there then a variety of means by which firms
3 can compete?

4 A Yes, there are a variety of means by which firms can
5 compete.

6 Q Do all of these means accomplish the same purpose?

7 A No, not all of them accomplish the same purpose.

8 Q What distinctions do economists make among the types
9 of competitive means which a firm might use?

10 A Well, there are, essentially, two kinds of strategies
11 that firms might use where there are few sellers or
12 few firms.

13 One is to aim your strategy at the buyers, that
14 is to say, you try and give them better products or
15 lower prices or better service. You try things
16 which customers, you think, would like. Or you try a
17 great deal of advertising. But you try things aimed
18 at customers. You hope then, by inducing them, that
19 you will get some of the sales from the other firm
20 by appealing to the customers because you have
21 offered them a better mousetrap.

22 Now, the other class of tactics and strategies
23 that might be used are where the firms engage in
24 behavior not aimed directly at the buyers but aimed
25 directly at the competing seller.

1 Wein - direct

2 And those are the two kinds of tactics. Certain
3 of those tactics aimed at sellers rather than buyers
4 are sometimes viewed and sometimes are destructive.

5 Q What do you mean that they are destructive?

6 Destructive of what?

7 A They are intended to either seriously weaken or to
8 eliminate the competing sellers.

9 MR. LANSDALE: I object, your Honor.

10 THE COURT: Approach the bench.

11 - - - - -

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

14 MR. LANSDALE: The question was the
15 character of the acts.

16 The witness is talking about the intention of
17 the actor.

18 I object.

19 THE COURT: Read the question back.

20 {The last question and answer were read by
21 the reporter.}

22 MR. LANSDALE: "Destructive of what?"

23 He is saying what the intention of the actor
24 is.

25 MS. COLEMAN: I thought it was

1 Wein - direct

2 responsive.

3 We can re-ask him the question. But I think
4 it is nitpicking.

5 THE COURT: All right.

6 {End of bench conference.}

7 - - - - -

8 THE COURT: The question is
9 destructive of what, Doctor, not the intention
10 of the movers.

11 A The tactics are destructive of the ability of the
12 other sellers to compete. They may result in the
13 elimination of the other sellers.

14 Q Dr. Wein, you have previously given us a description
15 of modes of competition like price variations or
16 advertising.

17 Can you describe some examples of the type of
18 competition which is aimed at the sellers and weakening
19 sellers, as you have described?

20 A Well, there are a variety of such types of behavior,
21 which over the course of business history economists
22 have been able to classify.

23 One is known as cutthroat competition.

24 Another is known as price squeeze.

25 A third is known as imposing conditions under

1 Wein - direct

2 which the target firm will find it difficult to
3 operate or unprofitable to operate.

4 A fourth is the foreclosure of markets.

5 Q Dr. Wein, before we discuss each one of those, perhaps
6 I should ask you; how is it possible for an economist
7 to distinguish between competition which is aimed at
8 buyers, as you have described it, and competition
9 which is aimed at weakening sellers?

10 A Well, it is difficult sometimes to distinguish these,
11 because many of the actions sort of merge. It is hard
12 to tell.

13 The way economists do that, the way I do it, is
14 to examine the entire context in which these acts
15 take place.

16 An act viewed in isolation might, without putting
17 it in context, without looking at the history, without
18 examining the industry structure, would be very
19 difficult simply to take a particular act and say
20 "Is this aimed at the customers or is it aimed at
21 competitors? Is it intended to eliminate the
22 competitors or is it intended to attract customers?"

23 It is very difficult to do that. But when you
24 examine the context, when you examine the history,
25 when you examine the structure of the industry, then

1 Wein - direct

2 it becomes not at all that difficult.

3 Q Dr. Wein, you mentioned four different classes of
4 conduct which might be aimed at weakening sellers.
5 I would like you to briefly describe the first you
6 mentioned, which you called cutthroat competition.
7 What is that?

8 A Well, cutthroat competition is the practice of one
9 seller setting a price so low that it would not
10 itself be able to continue to keep selling at that
11 price, it is not profitable for it to sell at that
12 price. It wouldn't keep that price given its --
13 it wouldn't set that price given its current cost
14 and prospective cost conditions.

15 It does this, when it engages in it, only
16 because the firm feels that the target companies that
17 it is aiming at have less financial strain or
18 alternatively cannot subsidize the particular product
19 from some other product or market in which it is
20 making a lot of money. So that cutthroat competition
21 then is a price which the company itself would not
22 ordinarily and would not, for any long period of
23 time, sell its product given its particular costs
24 or its prospective costs.

25 Q Dr. Wein, you mentioned as the second type of practice

1 Wein - direct
2 something that you called price squeeze.

3 Would you briefly explain what that is.

4 A Well --

5 Q Do you wish to use a drawing to do that?

6 A I wanted to go back to the refinery example, if I may,
7 and I think I might be able to show it pretty easy
8 there.

9 Q I think that was the next chart in front of that.

10 THE COURT: Couldn't we just do it
11 with the electrical industry since that is material
12 here, Doctor?

13 THE WITNESS: Yes, I could do it
14 with that.

15 THE COURT: That way we don't have
16 to go over it twice.

17 THE WITNESS: Fine. Fine.

18 Q Why don't you take a new page.

19 A All right, I will take a new page.

20 Suppose I had a vertically- and
21 horizontally-integrated electric company. Remember,
22 vertically engages in generation, transmission,
23 distribution, sells to ultimate customers.

24 And if that company has many different cities
25 that it serves, it would be also horizontally

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integrated.

And suppose in a particular city there were two companies operating, the vertically- and horizontally-integrated company, which means that it sells to a certain number of electric customers.

And suppose there also in that city was a distributor who did not produce its power, but had to buy it from its competitor, who was also a vertically- and horizontally-integrated company.

So now it depends on the wholesale price.

Suppose the wholesale price were 35 mills.

Q Dr. Wein, why don't you put the price in terms of dollars and cents. That would be helpful to me.

A Well, okay.

Q 35 cents?

A Suppose the wholesale price were 3-1/2 cents a kilowatt hour that it sold to the distributor and the retail price that this company sold to its ultimate customers was three and a quarter cents.

Well, now, if this company were trying to compete for those customers, it can't really compete because it is paying 3-1/2 cents for the electric power that it is buying at wholesale, but its supplier is selling at retail at 3-1/4 cents. Well, you can't

1 Wein - direct
2 stay in business if what you buy is 3-1/2 cents and
3 what you have to sell will only fetch 3-1/4 cents.
4 So that is known as a price squeeze.

5 Q Thank you.

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

8 THE COURT: Yes.

9 - - - - -
10 {Bench conference ensued on the record as
11 follows:}

12 MR. LANSDALE: I have not heard any
13 contention that there is any price squeeze
14 involved in this case.

15 Is there such a claim?

16 MS. COLEMAN: I don't think so.

17 MR. LANSDALE: Well, then, why do
18 we go into it?

19 I object and ask that it be stricken.

20 MS. COLEMAN: It is an example of
21 the type of competition he is talking about.

22 MR. LANSDALE: I beg your pardon.
23 It is not relevant to this case and I object to
24 it.

25 THE COURT: Sustained.

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2 {End of bench conference.}

3 - - - - -

4 THE COURT: Ladies and gentlemen
5 of the jury, price squeeze as a form of competition
6 is not a part of this case. So the jury will
7 disregard Dr. Wein's testimony as it relates to
8 price squeeze. It is not an issue.

9 You may proceed.

10 BY MS. COLEMAN:

11 Q Dr. Wein, I believe there were two other forms of
12 competition aimed at sellers which you described, and
13 if my notes are accurate, one of those was called
14 preempting of markets.

15 Could you explain what you meant by that as a
16 strategy? Do you wish to use the diagram for that?

17 A No. I'm trying to think of a good example in the
18 electric industry without having to go from one to the
19 other.

20 We-1, the preempting of markets in the electric
21 power industry is a fact of long occurrence. It has
22 to do with buying up markets, essentially is what it
23 has to do with.

24 So that if I bought up all of the markets in the
25 State of Ohio -- suppose I were one great big power

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1
2 company, as big as Ohio Power and all the other ones
3 in the State of Ohio combined, and I had bought up all
4 the municipal markets -- there may have been small
5 municipal systems in there, and I would buy them
6 up -- then it is impossible for anyone else in the
7 State of Ohio to enter into the power business
8 because all the finer markets have been acquired.
9 This is the preemption of markets.

10 Another way in which it can take place, a slight
11 variant of this condition is you may have control of
12 access to some vital source of supply which another
13 company needs. You have acquired control of that.

14 It is as if you had one bridge across a river
15 and you had to get across the river and there was
16 only one bridge and there was no alternative ways of
17 getting across the river. If you bought up that
18 bridge, you would have preempted a vital means of
19 access between both sides of the river.

20 So that if you control the sources of access to
21 particular markets, you have preempted any other
22 company from getting it. This imposes the
23 disadvantage of whatever advantages you have from
24 having access to those markets.

25 Q Dr. Wein, the last type of strategy that you mentioned

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you called imposition of anticompetitive conditions.

Would you explain what you meant by that term, please?

A Well, in the electric power industry in some areas of the country there were conditions imposed, for example; on certain rural electric cooperatives that have been known as dual rates.

This was a condition which said, "We will sell you wholesale power at this lower rate if you do not attempt or go after large customers. On the other hand, if you go and try to sell to large customers, you have to pay a higher rate or, alternatively, if you want an interconnection you have got to raise your price."

That would be an example of a destructive or anticompetitive practice in the tying of these kinds of conditions.

Q If I understand you correctly, you are talking about a tie, linking the sale of a product in the market to some other conduct by the buyer; is that it?

A Linking the sale or provision of some service which you buy to some other condition whose effect is anticompetitive.

Q Why would the effect of the condition be

1 Wein - direct

2 anticompetitive?

3 Take the example you used of the rural co-ops.

4 A In the dual rates, what it meant there was they
5 couldn't compete for large loads because they had to
6 pay higher wholesale prices but the supplying company
7 was willing for them to compete for small loads and,
8 therefore, gave them lower prices.

9 MR. LANSDALE: If your Honor please --

10 Q Dr. Wein --

11 THE COURT: Approach the bench.

12 - - - - -

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

15 MR. LANSDALE: If your Honor please,
16 I submit testifying about the structure of the
17 industry in general and general competitive
18 conditions is fine, but to continually go into
19 these specific examples of alleged
20 anticompetitive conduct which are not in this
21 case by any stretch of the imagination, I think
22 is prejudicial and the dual rate is one of them
23 and I object. It's like the price squeeze
24 situation.

25 MS. COLEMAN: The dual rate isn't in

1 Wein - direct

2 this.

3 MR. LANSDALE: Of course, it isn't.

4 MS. COLEMAN: The other condition
5 he offered is. I will emphasize the other one.

6 THE COURT: Sustained.

7 {End of bench conference.}

8 - - - - -

9 THE COURT: Ladies and gentlemen
10 of the jury, the "do-away" testimony that you have
11 just heard, and "do-away" as a competitive factor
12 is not an issue in this case. Consequently, the
13 jury will disregard that testimony and treat it
14 as though you have never heard it.

15 Please proceed.

16 BY MS. COLEMAN:

17 Q Dr. Wein, you have spoken now generally about
18 features of market structure, vertical integration,
19 horizontal integration, barriers to entry and others.

20 Could you describe the features, not to repeat
21 yourself, the features of the market structure of the
22 electric industry using the concepts that we have
23 discussed here this morning?

24 THE COURT: Isn't that what we
25 have just been through, Doctor?

1 Wein - direct

2 THE WITNESS: I am not sure.

3 THE COURT: If I am wrong, you go
4 right ahead.

5 THE WITNESS: I am not sure of the
6 question.

7 A The electric industry in the United States is a very
8 big thing, and I thought I described some features of
9 the electric industry of the United States.

10 Does the question refer to the whole electric
11 industry of the United States?

12 Q I think perhaps you did, Dr. Wein, and I didn't ask a
13 very good question.

14 We talked about markets with many sellers and
15 markets with few sellers. What type of market is
16 most often found in the electric industry?

17 A Well, the market that is most often found in the
18 electric industry is the monopoly market, that is to
19 say, one firm is generally involved in a particular
20 relevant market area.

21 Q Is it possible for there to be competition in a
22 market in the electric industry?

23 A Well, yes, there is.

24 Q Can there be competition at the level of retail sales?

25 A Well, yes. There is competition at the level of

1 Wein - direct

2 retail sales.

3 Q What types of competition might one find for retail
4 sales to consumers?

5 A Well, where there is only one firm in a city, say,
6 the kind of competition you find are as follows:

7 First, there is what the public utility economists
8 would call franchise competition. That is to say, in
9 many states and in Ohio, I am informed, there are
10 no exclusive franchises given to electric companies
11 to serve in a particular area. So when the franchise
12 terminates, or if the City wishes to acquire the
13 electric company, all the entire set of retail
14 customers are up for grabs, that is to say, a new
15 company may come in. The City itself may come in.
16 The City may condemn the system that is there.

17 The reason why this is competition, it goes back
18 to the notion of potential competition, which
19 franchise competition is a form of.

20 Q Perhaps you should, at this juncture, describe what
21 you mean by "potential competition"?

22 A A potential competitor is a competitor who stands, as
23 it were, on the edge of the market, that is to say,
24 it is an organization, private or public, which is
25 already in the business.

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2 Two, since it is in the business, it has a
3 certain amount of resources, a certain amount of
4 knowledge about that business.

5 Three, it has the capability of obtaining
6 additional resources if it needs it.

7 Four, there is nothing which prevents it from
8 getting into the business in this relevant market,
9 and

10 Five, the customers are free to choose any
11 particular seller they wish.

12 Now, that would be a potential competitor.

13 Q Now, how does that concept relate to the franchise
14 competition that you were discussing?

15 A Well, insofar as a city can withdraw its franchise
16 and give it to another utility company, that utility
17 company is a potential competitor. Insofar as the
18 city itself has a system, it is already in the
19 market, it is also then a potential competitor and
20 it may be a potential competitor in the entire city
21 if the city wishes to do so, or if the city wishes
22 to condemn the utility which is already there.

23 Or, alternatively, if the city happens to have
24 a municipal system, the potential competitor is the
25 private system that may serve on the edge of the city

1 Wein - direct

2 or around the city. The citizens of the city may
3 decide to get rid of the municipal utility system,
4 and so the private company is a potential competitor.

5 Q You have just been describing now, Dr. Wein, franchise
6 competition.

7 Are there other types of competition which may be
8 found in the electric industry?

9 A Yes.

10 Q Would you describe one of those, please?

11 A Well, public utility economists as well as industry
12 executives call this yardstick competition. Yardstick
13 competition is the comparison of rates and service,
14 reliability of one seller with that of another. It
15 is much the same thing that one does when one decides
16 whether to buy one car or another. You make comparisons
17 of its features.

18 Well, yardstick competition is the comparison
19 of one system with another in terms of the things that
20 are relevant to the customers, if they are doing the
21 comparison; to the City Council, if it is doing the
22 comparison; to a regulatory commission, if it is doing
23 the comparison; to industry executives themselves, if
24 they are doing the comparison, and industry executives
25 do do such comparisons.

1 Wein - direct

2 Q You mentioned, Dr. Wein, that in the electric
3 industry in many instances there will be only one
4 customer serving a market.

5 Are there instances where there are two
6 electric systems serving the same market?

7 A Yes, there are. I think this figure is approximately
8 right, might not be exact. I think there are
9 approximately at least 120 cities in the United
10 States in which there are two companies serving
11 in the same city, and there are some in which there
12 are even three.

13 Q Are there other types of competition that one might
14 find at the retail level of the electric industry?

15 A Yes, there is what is known as head-to-head
16 competition such as you have in the City of Cleveland.

17 What that means is that in some areas or in
18 some streets in some areas two companies have
19 distribution facilities and a customer can decide to
20 switch from one to the other.

21 Q Dr. Wein, you have been discussing competition at the
22 level of selling to consumers. Is there competition
23 at the level of an electric system purchasing its
24 power?

25 A Yes.

1 Wein - direct

2 Q How would that competition occur?

3 A Well, a distribution system, for example, may have
4 several alternatives to buy wholesale firm power.
5 When it has those alternatives, there is competition.

6 So, for example, the City of Cleveland can buy
7 wholesale firm power now from the Power Authority of
8 the State of New York, it can buy wholesale power
9 from the Buckeye Rural Electric Company, it could
10 conceivably buy wholesale power from other systems
11 so long as there were access to these other systems.

12 In many regions of the country there is such
13 access.

14 Q Dr. Wein, you mentioned first thing this morning the
15 assignment which was given to you by the City, the
16 information which you reviewed.

17 On the basis of the data and the documents that
18 you have reviewed and your professional knowledge,
19 your experience as an economist, have you formed an
20 opinion as to the definition of the relevant product
21 market in which we should study market power and
22 conduct in this case?

23 A Yes, I have.

24 Q What is your opinion?

25 MR. LANSDALE: May I have the question

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2 read, if your Honor please?

3 {The reporter read as follows:

4 "Q Dr. Wein, you mentioned first thing
5 this morning the assignment which was given to
6 you by the City, the information which you
7 reviewed.

8 "On the basis of the data and the documents
9 that you have reviewed and your professional
10 knowledge, your experience as an economist, have
11 you formed an opinion as to the definition of the
12 relevant product market in which we should study
13 market power and conduct in this case?"}

14 THE COURT: And the answer was,

15 "Yes, I have."

16 BY MS. COLEMAN:

17 Q What is your opinion, Dr. Wein?

18 A Yes, I have, and there are, I think, three relevant
19 product markets.

20 Q Would you briefly state what those product markets are?

21 A The first is the retail market, which is the sale of
22 firm power at retail to ultimate users.

23 The second is the wholesale market, wholesale
24 firm market, which is the sale of wholesale firm
25 power by a generating utility to another utility,

1 Wein - direct

2 usually a distribution utility.

3 The third is the market which has been termed
4 the regional power exchange market. This is a market
5 for bulk power services which generating companies
6 engage in with each other or with others through
7 intermediate systems such as Mr. Williams described.

8 Q Dr. Wein, on the basis of the documents you have
9 reviewed and your knowledge and professional
10 expertise, have you formed an opinion as to the
11 geographic market which should be considered in this
12 case?

13 A Yes.

14 Q And what is your opinion?

15 A I believe that there are several geographic markets.
16 One, I believe that for retail firm power, the entire
17 service area of the Illuminating Company is a market.
18 I think within that market --

19 THE COURT: I'm sorry. Read that
20 back.

21 {The last answer was read by the reporter.}

22 THE COURT: All right.

23 Q Please continue.

24 A The second, I think that the City of Cleveland is an
25 important submarket of that total market.

1 Wein - direct

2 Q What is your opinion as to the relevant geographic
3 market for wholesale firm power in this case?

4 A I think the City of Cleveland is a geographic market
5 for the sale of wholesale firm power.

6 As far as the sale of bulk power for exchange
7 between generating systems, the geographic area there
8 is hard to define. It extends at least to all the
9 gateways, all the interconnections that CEI has with
10 Ohio Edison and with Toledo through Ohio and with
11 Duquesne and it sort of merges off like a fishtail.
12 It fishtails out so that it essentially can go even
13 to further distances. It is essentially the locus
14 of interconnections.

15 So any system which can be interconnected,
16 either directly or indirectly, can reach out and
17 engage in bulk power transactions.

18 Mr. Williams used a good term "shop around."
19 They can shop around within the companies they are
20 most closely connected with or they can shop outside.
21 Thus, they are interconnected by means of other
22 systems.

23 So that is the regional power exchange market.

24 Q Dr. Wein, to your left there is a poster, and I'm
25 wondering whether that exhibit might help you

1 Wein - direct

2 indicate the geographic extent of the regional
3 power exchange.

4 A Well, let's see. Okay. The green and the blue lines
5 are apparently 345 KV transmission lines.

6 The blue are existing and the white are proposed.

7 These salmon-colored ones are 500 KV.

8 Q Looking more at the area rather than the lines, Dr.
9 Wein.

10 A I want to note that there are interconnections at
11 various points between these systems.

12 So if we took CEI, CEI has a connection all the
13 way over in Pennsylvania to its pump storage plant,
14 the Seneca Pump Storage Plant.

15 It also is interconnected with Ohio Edison down
16 here.

17 And it has other interconnections. Toledo is
18 connected with Ohio Edison.

19 As a consequence, you have these great
20 superhighways which are interconnected. So if you
21 wanted to shop around for economy energy, for
22 example, if you were in the City of Cleveland, say,
23 you could shop around with not only Ohio Edison and
24 Toledo Edison and Duquesne Lighting or Pennsylvania
25 Power, but you might conceivably shop around to

1 Wein - direct

2 Ohio Power, which is to the south of these companies,
3 or as far as the Indiana-Michigan pool, which is to
4 the northwest, because Toledo is connected with the
5 Indiana-Michigan pool.

6 As has been mentioned, you can go as far as the
7 Pennsylvania-Jersey-Maryland pool through
8 interconnections down with Duquesne.

9 So that you have this entire network at which
10 you could presumably, if it paid you to, obtain bulk
11 power transactions. So that to ask for the geographic
12 market, regional power exchange market is like saying
13 what is the geographic market of the Penn Central
14 Railroad? Well, it is not only the places which the
15 Penn Central Railroad operates, but it is all the
16 interconnections that the Penn Central has with other
17 railroads so that it can both send and receive
18 carloads from different parts of the country.

19 Q Please take your seat, Dr. Wein.

20 In discussing or describing your opinion as
21 to the wholesale power market, you stated it was
22 your opinion that the City of Cleveland was a market.

23 Do you believe that there is any other market
24 for wholesale power?

25 A Well, as I indicated before, you have to make the

Wein - direct

availability at all times during a specified period, even under adverse conditions."

BY MS. COLEMAN:

Q What factors have you used in determining that retail firm power is a distinct product market?

A Well, first, it is not substitutable from the point of view of users with wholesale firm power, because most retail users take their power in very small voltages, like 110 or 220. They can't get it in at 11,000 volts, it will blow up the house. So they can't use it.

They are a distinct kind of market and they cannot substitute any other power, either wholesale or the kind of bulk power transmissions. So there is a distinct product for which there are no ready electrical substitutes.

Secondly, there is a set of sellers who are competing for that particular product.

So I concluded that retail firm power is a separate product market. It has unique characteristics, unique buyers and unique sellers.

Q Would you describe who the unique buyers are for retail firm power?

A Well, every household in the City of Cleveland,

Wein - direct

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2 commercial enterprises, industrial plants, some of
3 them.

4 Q Dr. Wein, what business relation do Muny Light and
5 CEI have to the retail firm power market as you have
6 described it?

7 A Well, they both sell retail firm power in the City of
8 Cleveland.

9 Q The second product market that you defined, Dr. Wein,
10 you called wholesale firm power.

11 Would you please explain what considerations led
12 you to identify wholesale firm power as a separate
13 product market?

14 A Well, it has a certain set of unique characteristics.
15 It is firm, just as the definition of retail firm;
16 it is power intended to have continuous availability
17 even under adverse conditions.

18 The City of Cleveland is a buyer of such power.
19 The City of Cleveland, when it was a generating
20 plant, had its own captive wholesale firm power
21 just as the CEI does. CEI assures, has this kind
22 of power, and it is simply the same product at a
23 different level of market, just as buying gasoline
24 in 100,000 barrels as against 10 gallons. The
25 gasoline is the same, physically, but the users

Wein - direct

cannot use it at the retail market.

Similarly, if you are in the wholesale market, you wouldn't be buying power at 220 or 110 volts. You would be buying it at relatively high voltages so you break it down.

CEI has its market which is captive. The City of Cleveland, the Muny Light Plant, when it was generating, had its captive market. The City of Painesville has a generating plant, has its captive market.

And insofar as the City of Cleveland now buys wholesale firm power, it is now a customer of the CEI.

Q So the City is a customer in the wholesale market?

A The City is now a customer in the wholesale market.

Q The third product market that you identified, Dr. Wein, you called the regional power exchange.

What does that market consist of?

A Well, it consists of bulk power exchanges amongst generating companies for the purpose of getting greater economy in operation, of gaining greater reliability and of saving capital.

I can't do any better, if as well, as Mr. Williams did in describing it.

Q In the regional power exchange are there identical

1 Wein - direct

2 products or do products differ?

3 A Well, they differ. Seasonal power is not the same
4 as short-term firm power.

5 Q On what basis have you concluded that regional
6 power exchange is a distinct market from the
7 wholesale power market that you just described?

8 A Because the wholesale power market is a market in
9 which distribution companies are involved. They are
10 interested in wholesale firm power, whereas, in the
11 bulk power exchange this is a market which
12 generating companies engage in for the purpose to
13 combine the factors of production.

14 Amongst these factors of production, apart from
15 fuel and labor, are these bulk power exchanges. So
16 only generating companies can take advantage of these
17 markets. Nobody is in the bulk power exchange market
18 to make money out of it. They are in it to reduce
19 the cost of making firm electricity and to increase
20 the reliability.

21 So it, too, has unique sellers and buyers. In
22 this case they are all generating companies.

23 Q What relation does CEI have to the regional power
24 exchange market, Dr. Wein?

25 A Well, with respect to the Muny Light plant, when it

1 Wein - direct
2 was a significant generating entity --

3 Q No, I am referring to CEI.

4 A What relation does it have?

5 Q What relation does CEI have to the regional power
6 exchange?

7 A Well, it is both a buyer and a seller in that market.
8 It engages in buying bulk power and it engages in
9 selling bulk power to other power companies.

10 Q Based on your study of the documents in this case,
11 do you find that Muny Light was a participant in the
12 regional power exchange market?

13 A No. It was not a participant.

14 THE COURT: Would you like to take
15 a recess?

16 THE WITNESS: I would appreciate
17 one, your Honor.

18 THE COURT: All right. Take a
19 short stretch, ladies and gentlemen. Don't
20 discuss the case, as I have so often admonished you.
21 We will be back shortly.

22 {Recess taken.}

23 - - - - -

24 {The following proceedings were had out
25 of the presence of the jury.}

1 Wein - direct

2 MR. LANSDALE: If your Honor please,
3 may I, before we call the jury, just put on the
4 record that I have furnished to counsel for the
5 plaintiff a revision of the tabulation of
6 contractors' payments classified by customer
7 which we now think to be correct.

8 THE COURT: Very well.

9 Call the jury.

10 How long are you going to be with this
11 witness?

12 MS. COLEMAN: Your Honor, I suspect
13 the direct will take most of the remaining hour.
14 There may be some time remaining at the end.

15 THE COURT: Most of the remaining
16 hour? Does that mean a half hour, 45 minutes?

17 MS. COLEMAN: I haven't looked at
18 my watch.

19 THE COURT: Let's proceed.

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

22 - - - - -

23 BY MS. COLEMAN:

24 Q Dr. Wein, turning now to the geographic markets which
25 you described before the recess, and first the

1 Wein - direct

2 geographic market for retail firm power, you stated
3 first that it is your opinion that the City of
4 Cleveland is a relevant geographic market for
5 retail firm power sales.

6 What is the basis for your conclusion?

7 A Well, there are numerous reasons which persuaded me
8 that it was the City of Cleveland that was the
9 relevant market.

10 Number one, and not necessarily in order of
11 importance, but just simply as they occur to me now,
12 the City of Cleveland, that is to say, the Muny Light
13 Company, has customers in 139 out of the 200 census
14 tracts into which the City of Cleveland is divided
15 by the U.S. Census. In these 139 tracts, about
16 70 percent of the total population of the City of
17 Cleveland lives.

18 Q May the Muny Light System provide service to
19 customers in the remainder of the census tracts?

20 A No, it does not provide service as far as I recall
21 in the remainder of the census tracts, or if it does,
22 it is very little. But essentially, it does not.

23 It does provide it in these 139.

24 A census tract, of course, is a set of streets,
25 areas which the Census Bureau divides the city into

Wein - direct

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2 in order to take the Census when it does that every
3 ten years. That is one reason.

4 Q Were there any other considerations?

5 A Oh, yes.

6 The second reason is that I believe the
7 influence that the Muny Light Company has in the
8 City of Cleveland, in terms of either rates or
9 conditions of service, whatever those conditions
10 include, affects CEI in the entire city; just as
11 CEI, which in some areas has very few customers,
12 affects Muny Light.

13 Both of these systems are competitors and they
14 must take into account the actions of each other.

15 Q What evidence do you rely on for your conclusion
16 that CEI does take into account the actions of Muny
17 Light?

18 A Well, there is a variety of evidence.

19 First, there are many documents which I have
20 seen in which CEI is comparing, in great detail,
21 that is to say, the rates by each customer class and
22 other terms and conditions of service which Muny
23 Light has, and comparing them with their own rates
24 and conditions of service.

25 Secondly, the offer of the CEI top

Wein - direct

1
2 management to provide the Muny Light system with a
3 synchronous interconnection if the Muny Light system
4 would raise its prices so as to equal CEI's prices,
5 indicate to me that there is influence of Muny Light
6 over a CEI.

7 Q Dr. Wein, you stated that you reviewed some documents
8 showing CEI compared the rates of Muny and CEI.

9 Did you yourself make such comparisons?

10 A Yes, I, myself, made such comparisons.

11 Q What did you find?

12 A I found that Muny Light's rates in the residential,
13 small and large commercial, at least from the period
14 of '74 to '79 were somewhat lower than CEI's rates,
15 and the historical documents, which I discovered in
16 CEI's -- or CEI's historical documents which were
17 furnished to me, showed comparisons going quite a
18 distance back from 1959, for example, there was a
19 memorandum which compared these rates.

20 I also used other kinds of data. Among this
21 other data were surveys which were taken by CEI
22 fairly periodically, and to customers, those that,
23 for example, that had left CEI, to find out what
24 those customers thought of the comparable service
25 and why they left.

1 Wein - direct

2 And essentially the reason why they left was
3 that for this period, I believe I saw in this
4 document it may have referred to 1974 but there were
5 earlier ones, where the same sorts of surveys were
6 taken, the customers left because they thought the
7 service was okay, that is to say, Muny Light service
8 was all right and the rates were lower.

9 Q Dr. Wein, how did you make use of your observations
10 about the difference in rates in coming to your
11 conclusion that the City of Cleveland is a relevant
12 market for retail sales?

13 A Well, I looked at it in this way. If you start out,
14 for example, with the offer that was made from, I
15 think, as early as 1962 for the rate equalization in
16 return for a synchronous interconnection together with
17 Muny Light lowering its street light rates, I asked
18 myself the following question:

19 Why would a company make that offer for Muny
20 Light, hoping that the City would raise its rates
21 and rather than meet the rates of Muny Light and not
22 give them the synchronous interconnections?

23 Q What would be the consequence of CEI lowering its
24 rates to the level of Muny Light?

25 A Well, there would be a variety of consequences.

Wein - direct

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2 One probably would be that customers who were
3 switching from CEI to Muny would not switch but then,
4 because of the CEI's historic policy of charging the
5 same rates within the entire City of Cleveland, if
6 the CEI lowered its rates in order to prevent several
7 hundred customers switching each year, they would
8 then have to lower their rates in the entire area of
9 the City of Cleveland.

10 Well, to lower the rates in the entire area of
11 the City of Cleveland is precisely what one means by
12 price influence. So that what one has is a choice
13 which the CEI management, or any management, would
14 face.

15 The logical alternatives of a lower rate of a
16 competitor could be {1} meet it, but if one meets it,
17 you have to lower your rates in the rest of the City
18 of Cleveland. That is certainly price influence.

19 The second, of course, is to ignore it.

20 Q What would be the consequence of ignoring the price
21 difference?

22 A Well, I suppose the consequence of ignoring the
23 price difference would be that customers would
24 continue to switch from CEI to Muny Light. That
25 would be the consequence of ignoring it.

Wein - direct

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Q What impact would that have in the market?

A Well, the effects of that, of course, would be to increase the competitive viability of the Muny Light plant and it appeared that the management of the CEI, as I understood Mr. Rudolph's testimony, was that loss of 400 customers from CEI to Muny was something which he viewed as threatening the entire position of CEI within the city. If he didn't do that, if he had simply ignored it, then he would have taken the consequence of losing these customers. So that would be the consequence.

Now, as I said, there are other alternatives you can use when you don't wish to use customers and you don't wish to lose customers.

Q What alternatives are available to a business?

A Well, as I said, the first alternative which was offered and refused was for the City to raise the rates in return for this permanent interconnection.

The next alternative, of course, would be to try and raise the costs of the competitor, and if you can't get him to lower the rates, it is possible that if the City's costs would increase -- I'm sorry. I misspoke. If you can't get him to raise the rates, that is to say, Muny Light, it is possible that if

Wein - direct

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2 the cost of the Muny Light system were increased that
3 Muny Light would therefore have to raise their rates
4 which, of course, that would be, from the point of
5 view of CEI, desirable. So that's another
6 alternative.

7 The third alternative was to attempt to
8 capture the customers or capture Muny Light's
9 customers by means of what appears to be non-price
10 competition, that is to say, you do not lower the
11 rate but you give certain other inducements which
12 have valuable monetary considerations.

13 This, of course, refers to the Muny Light
14 conversion program, the giving of ancillary
15 inducements. The rates don't change but if you do a
16 good deal of work in return for a promise to buy
17 from Muny Light -- I mean from CEI -- that is
18 another way by which you can offset the lower rates
19 of the city.

20 So that this indicated to me that the scope of
21 the methods used, the fact that a great deal of
22 comparison was continuously made and statistics
23 collected about the financial health of the City's
24 system, about the details of their rates, the offer
25 to interconnect if you were to raise the rates, plus

Wein - direct

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2 the fact that in terms of the potential competition, ~~it~~
3 ~~in terms of the potential competition it was always~~
4 ~~possible,~~ and as I understand it it is still
5 possible, ~~that~~ that the franchise of the Illuminating
6 Company could be withdrawn and -- ~~it~~

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

9 THE COURT: Approach the bench.

10 - - - - -

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

13 MR. LANSDALE: We have briefed the
14 question, your Honor. The franchise of CEI
15 cannot be withdrawn. It is perfectly clear under
16 the constitutional amendments that the franchise
17 and properties may be appropriated by purchase,
18 but it is wrong as a matter of law that the
19 franchise can be terminated.

20 I object to this witness basing any testimony
21 on that point.

22 MS. COLEMAN: I think he misspoke,
23 your Honor.

24 MR. LANSDALE: Whether he did or not,
25 he used this before in his prior testimony.

1 Wein - direct

2 This is Stipulation 45 --

3 MS. COLEMAN: What are we discussing?

4 THE COURT: The same thing.

5 MR. LANSDALE: The same thing. I
6 was just pointing out there is a stipulation
7 that pertains.

8 MS. COLEMAN: No, that really
9 doesn't.

10 But I think he misspoke, Jack. I'm not
11 going to quarrel about that.

12 MR. LANSDALE: Well, just so it is
13 corrected.

14 THE COURT: The City cannot --

15 MR. LANSDALE: Withdraw the
16 franchise. The City could buy all the property
17 and effect it that way.

18 THE COURT: I'm not going to say
19 that. I'm just saying the City can't withdraw
20 the franchise.

21 {End of bench conference.}

22 - - - - -

23 THE COURT: Read that last
24 answer back.

25 In any event, ladies and gentlemen, the

Wein - direct

witness alluded to the City's ability to withdraw or cancel CEI's franchise. That is not an accurate statement and the City cannot withdraw CEI's franchise or cancel it in any way. So you will disregard that testimony.

BY MS. COLEMAN:

Q Dr. Wein, is there a manner in which the City of Cleveland could choose to be served by only one electric company?

A Yes. I am sorry, I misspoke.

I meant that the City could buy up, through condemnation procedures, the properties of the Illuminating Company in the City of Cleveland.

Q Did you consider any other factors in coming to your conclusion that the City of Cleveland is a relevant market for retail sales?

A Well, yes, I think that the importance of relevant markets in terms of an economist is the influence and part of the influence is on the buyers as well as the sellers and the kinds of influence that -- that extends from Muni Light to CEI and from CEI to vice-versa is on all the people who use electricity in the City of Cleveland.

Q Why do you come to that conclusion?

Wein - direct

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2 A Well, I have seen such questions in questionnaires
3 of CEI in which it appeared that a large number, 70
4 percent in 1973 and 80 percent in 1971 of CEI
5 customers believed that Muny Light's rates were
6 lower.

7 My own survey is much consistent with that.
8 The figures are a little higher, possibly because
9 the survey was taken in 1980 and there have been
10 much newspaper publicity about the sale of Muny
11 Light.

12 But in any case, my own survey showed that
13 about 88 percent, or somewhere near that, of all the
14 buyers of electricity, residential buyers of
15 electricity in the City of Cleveland felt that
16 Muny Light's rates were lower.

17 Now, whenever you have in a market this kind
18 of overwhelming opinion on the part of buyers in the
19 entire market, then the possibility of potential
20 competition in the entire city is greatly enhanced.

21 It seems to me that that is another reason that
22 I felt that the entire city was the relevant market,
23 both because of potential competition, where clearly
24 the yardstick and what I have called franchise
25 competition, plus the influence of rates and the fact

Wein - direct

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2 that the options presented to CEI, because of loss
3 of customers due to lower rates, if they had wished
4 to meet that option by lowering their rates would
5 have been spread entirely to the City of Cleveland
6 because of their own policy.

7 Q Did you, based on your own review of documents,
8 find that CEI changed its rates to meet those of
9 Muny Light?

10 MR. LANSDALE: May I have that
11 question read back, your Honor?

12 MS. COLEMAN: It was not very well
13 put and I will rephrase it.

14 MR. LANSDALE: All right.

15 Q Based on your review of the documents, did you find
16 that CEI brought its rates to the same level as Muny
17 Light's rates?

18 A No, CEI's rates were higher than Muny Light's rates.

19 Q What consequences would lowering its rates have for
20 CEI if it took this action?

21 A Well, if it lowered its rates in the areas where it
22 and Muny Light jointly served, it would have to
23 lower its rates if it were to maintain what it
24 called its historic ~~competition~~^{policy} of the same rates
25 for all the City. It would have even further

Wein - direct

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2 consequences which would be rather difficult.

3 Mr. Bingham, as I recall, testified that the
4 costs of service outside the City of Cleveland were
5 about the same as inside the city.

6 So you have a chain of effects if you lowered
7 the rates to meet the lower rates of Muny in the
8 City of Cleveland, you are now stuck with justifying
9 why your rates are higher outside the City of
10 Cleveland, if you have argued that your costs of
11 serving outside the City of Cleveland are the same
12 as the costs of serving inside the City of
13 Cleveland.

14 Every municipality, I suppose, in the CEI
15 service area, if such an eventuality had occurred,
16 that is to say, CEI chose to meet the lower rates of
17 Muny, would then wonder why it was they were paying
18 higher rates than the City of Cleveland if, in
19 fact, the cost of service outside were the same as
20 inside. That makes for difficult public relations,
21 it makes for difficult arguments in a regulatory
22 commission, where cost of service is considered to
23 be important.

24 Q Dr. Wein, based on your review of the documents and
25 of the testimony in this case, were there other

Wein - direct

factors which you considered in coming to your
conclusion that the City of Cleveland is a relevant
market for retail sales?

A Well, the City of Cleveland had from time to time
tried to obtain the customers in various portions of
the city outside where they happen to have
distribution lines.

MR. LANSDALE: I object.

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as
follows:}

MR. LANSDALE: I object. There is
no evidence of this.

MS. COLEMAN: There certainly is.

MR. LANSDALE: Where?

MS. COLEMAN: Mr. Hinchee's
testimony.

THE COURT: The testimony is that
there was no planning to do this kind of thing.

MS. COLEMAN: Your Honor, he gave
the testimony on direct, if you would like a
citation I will provide it. We have an exhibit
in evidence showing the customers that were

Wein - direct

under consideration by Mr. Hinchee.

THE COURT: That's not the point.
See, we are getting back into that same
argument, Ms. Coleman.

MS. COLEMAN: What argument?

THE COURT: You have to have the
intent coupled with the act. You keep going back
to that.

Yes, Hinchee did testify that there was some
intent, but who was that fellow, Pofok?

MR. LANSDALE: Pofok testified that
he never had.

THE COURT: He testified that the
City never had any plans to extend their
service beyond, what I take it, is the 20 percent
area. And I have got that underlined and double
starred in my notes.

MS. COLEMAN: I think we are
nitpicking. We are talking about plans. Mr.
Hinchee gave testimony that there were customers
beyond the city who they spoke to about providing
service.

THE COURT: Some overt act.

MS. COLEMAN: Overt, discussing

1 Wein - direct

2 with the customers is an overt act, your Honor.

3 THE COURT: You have to have that
4 coupled -- I am not going to argue the point with
5 you. I don't think it is in the evidence. I am
6 going to sustain the objection and I am going to
7 have the testimony stricken. Let's proceed,
8 please.

9 Do you have that last answer?

10 Please proceed to the lectern, Ms. Coleman.

11 MS. COLEMAN: Can I approach the
12 bench, your Honor?

13 THE COURT: Would you please go
14 to the lectern? We have discussed it.

15 Read it back for me.

16 {The last answer was read by the reporter.}

17 THE COURT: Approach the bench.

18 - - - - -

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

21 THE COURT: Did you hear the
22 answer where they attempted to approach customers
23 where they had distribution lines?

24 MS. COLEMAN: No. There is an
25 omission.

1 Wein - direct

2 THE COURT: One other thing. The
3 next time I tell you to go to the lectern, I
4 expect you to go to the lectern forthwith.
5 Do you understand what I'm telling you?

6 MS. COLEMAN: I understand what
7 you are telling me, your Honor, but I had some
8 additional information.

9 THE COURT: Well, if I need it,
10 I will ask you for it.

11 Will you read the question and answer back,
12 please.

13 {The last question and answer were read by
14 the reporter.}

15 MS. COLEMAN: That is consistent
16 with Mr. Hinchee's testimony, your Honor, at
17 page 1134.

18 THE COURT: He did testify to that.

19 MS. COLEMAN: 1134 to 1139.

20 MR. LANSDALE: He testified to that.

21 THE COURT: Yes, he did.

22 MR. LANSDALE: However, if your
23 Honor please, he also testified a minute ago and
24 he testified elsewhere that as of the relevant
25 period we are dealing with, they had no intention

Wein - direct

1 of expanding the service area --

2
3 MS. COLEMAN: You used the word
4 "plan," John, and we are talking about were
5 customers approached. There was testimony to
6 that effect.

7 THE COURT: Yes, there was
8 testimony to that effect.

9 MR. LANSDALE: I agree with that.

10 THE COURT: Because I can tell
11 you the customers that were approached. I think
12 there was Southerly that was approached.

13 MR. LANSDALE: There was the
14 Westerly Plant, the Westerly Sewage Disposal
15 Plant and the Southerly Sewage Disposal Plant.

16 THE COURT: There were two where
17 they had lines.

18 MR. LANSDALE: No, they didn't have
19 them.

20 THE COURT: Yes.

21 MR. LANSDALE: They had lines to
22 the Easterly.

23 THE COURT: Wherever it was that
24 they had lines to. So there is testimony.

25 What page is that on?

Wein - direct

MR. LANSDALE: But it wasn't from --

MS. COLEMAN: 1134 through 1139,
your Honor.

MR. LANSDALE: It wasn't this sweeping
stuff that he is talking about.

MS. COLEMAN: He didn't say that,
Jack. He said, "approached customers."

THE COURT: Then you can bring
that out on cross-examination, Mr. Lansdale.

The answer may stand.

MS. COLEMAN: Thank you, your
Honor.

{End of bench conference.}

- - - - -

THE COURT: Read the answer
back.

{The last answer was read by the reporter.}

THE COURT: You may continue with
your answer.

MS. COLEMAN: Your Honor, I can
proceed with the questioning.

THE COURT: Very well. Place
another question.

A Well, I wanted to supplement that but --

1 Wein - direct

2 THE COURT: Very well. Place
3 another question. You are free to proceed as
4 you are desirous of proceeding.

5 MR. COLEMAN: Thank you, your Honor.

6 Q In reviewing the documents, were there other factors
7 which you considered in concluding that the City of
8 Cleveland was the market in addition to those which
9 you have mentioned?

10 A Well, yes, there were several other factors.

11 Q What were those?

12 A Well, when you have the possibility of new customers
13 who have a choice of settling in one area or another
14 in the entire city, and if electricity were an
15 important consideration to them, there would be the
16 consideration on the part of the customers as to
17 whether to settle in one part of the City of
18 Cleveland or another part of the City of Cleveland,
19 and in this case, then, the two electric companies
20 would be in competition, just as Ohio Edison might
21 be in competition with the Illuminating Company in
22 trying to attract new customers who are considering
23 settling either in its territory or in the territory
24 of CEI.

25 That is an argument made by a colleague of

Wein - direct

Mr. Gerber's, which I agree with in this case.

MR. COLEMAN: Mr. Schmitz, would

you hand Dr. Wein Plaintiff's Exhibit 371,

please.

Q Did you review this document in consideration of your opinions offered today, Dr. Wein?

A Yes, I have seen this document.

Q Did this material play a role in your coming to your conclusion?

A Yes, this and similar documents.

I would like to really add to what I said before about the solicitation of business. It is oftentimes the case, particularly in potential competition, that a potential competitor may never enter the market or may not enter it for a long time or doesn't know when he is going to enter it, in any case has no sales in a particular geographic area and yet have great influence on the company that is there. This is the whole meaning of potential competition as economists use the phrase.

I myself, when I was in the air freight business, was always considering potential markets, and our competitors who were serving these markets knew that we were considering them, and even though we

1 Wein - direct

2 didn't enter the market and didn't particularly
3 offer services in the market, it had quite
4 significant effects on the price of our competitors,
5 and the effects were to keep us out because we
6 felt we couldn't meet the competition.

7 But that is what you expect of competition.
8 It has some influence on price. So it doesn't
9 matter that at the moment, you do not have any
10 particular resources to reach a particular geographic
11 spot. If you have approached the buyer and he
12 thinks you might, and if the competing seller thinks
13 you might, then you have had competition. It
14 doesn't really depend upon having the resources in
15 place at a particular moment.

16 Q Dr. Wein, must we find that a buyer switches sellers
17 to identify that there is competition?

18 A No. Absolutely not at all the case.

19 Q Turning back, please, to Plaintiff's Exhibit 371,
20 you had said that you referred to documents such
21 as this in coming to your conclusion.

22 What contribution did this type of document
23 make in your reaching your conclusion that the
24 relevant market is the City of Cleveland?

25 A Well, for example, this is a document -- I will simply

1 Wein - direct

2 read it. It is to Mr. J. Lansdale -- I presume this
3 is learned counsel, and it is from Mr. G. L. Moore
4 and it is dated July 3, 1974, and the first sentence
5 says: "As the attached ^{tabulation} ~~stipulation~~ indicates, CEI's
6 percentage of electric customers in Cleveland has
7 gradually increased over the years and is now
8 essentially 80 percent" -- and so on.

9 Q What does this signify to you?

10 A Well, it's in Cleveland. They are talking about
11 Cleveland.

12 MR. LANSDALE: I object.

13 THE COURT: Approach the bench.

14 Just a moment. There is no outbursts, please,
15 Mr. Lansdale. You will get a chance to put your
16 objection on the record.

17 - - - - -

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

20 MR. LANSDALE: How can this witness
21 know what question was asked of Mr. Moore by me?
22 I am not a part of the CEI organization.

23 I object to him expressing to the jury such
24 conclusions as this without any foundation or
25 any basis whatsoever.

1 Wein - direct

2 MS. COLEMAN: Aren't you a director?

3 MR. LANSDALE: What?

4 MS. COLEMAN: Aren't you a director?

5 I'm sorry. You said you were not a member of
6 CEI.

7 MR. LANSDALE: I'm not a member of
8 CEI's organization. I am a director, not an
9 employee of CEI.

10 I think that the --

11 THE COURT: Read the answer back.

12 {The previous answer question and answer were
13 read by the reporter.}

14 MR. LANSDALE: The suggestion is
15 because this thing says Cleveland, this means
16 Cleveland is a relevant market. How can he know
17 what question was asked and what this was
18 designed to show?

19 MS. COLEMAN: It's not trying to
20 pin anything --

21 THE COURT: I think that the
22 answer in its present form is responsive and I
23 think you can counter it on cross-examination.

24 MR. LANSDALE: Thank you.

25 {End of bench conference.}

1 Wein - direct

2 - - - - -

3 THE COURT: Overrule the objection.

4 Place another question.

5 BY MS. COLEMAN:

6 Q Dr. Wein, have you found in other documents a
7 measurement or percentage of electric customers in
8 Cleveland?

9 A Well, in all documents but one I have always found
10 "Cleveland."

11 Q Dr. Wein, let's turn to the second retail firm market,
12 firm power market, which you identified.

13 You stated that that was CEI's service
14 territory; is that correct?

15 A Yes.

16 Q What factors did you consider in concluding that the
17 CEI service territory is also a relevant geographic
18 market for retail firm power?

19 A Well, any buyers of electricity in the 1,700 square
20 miles which CEI designates as its service territory
21 would turn to CEI or they would turn to Painesville
22 or they would turn to the City of Cleveland. It is
23 part of the commercial reality of buying electricity
24 in this area.

25 There are, moreover, very great difficulties

Wein - direct

1
2 for any other electric utility company to enter that
3 market, as I have been informed about the territorial
4 laws of the State of Ohio.

5 Q Does Muny Light serve customers beyond the boundaries
6 of the City of Cleveland?

7 A Yes, there are a few beyond the boundaries of the City
8 of Cleveland.

9 Q Why do you conclude that this wider area is a
10 relevant market if Muny's sales are limited within
11 that area?

12 A Well, the market isn't simply defined by the presence
13 of two sellers or three sellers.

14 The market is the area in which we look to see
15 what sellers there are and to whom buyers would
16 normally look for supply. And as I say, in this
17 entire 1,700-square-mile area there are three
18 sellers and many, of course, thousands of buyers,
19 and CEI has a great share, preponderant share, of
20 this 1,700-square-mile territory and no other
21 investor-owned utility could easily come into this
22 market.

23 Q Is it your opinion that Muny Light effectively
24 competes with CEI in areas in the greater service
25 area of CEI?

Wein - direct

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2 A Well, as I indicated, the influence and the competition
3 comes about because of a policy which CEI, as I
4 understand it, has adopted, and that is to sell
5 retail power throughout its entire service area for
6 a given class of customers, say for residential
7 customers, at the same rate. I do not understand that
8 it is bound to do that, but insofar as it does and
9 insofar as the rates in the City of Cleveland would
10 affect those rates, particularly if the rates were
11 to go on the downside, they would be lowered, that
12 would, of course, extend the influence of the City
13 of Cleveland or, for that matter, the City of
14 Painesville outside to the entire service area.

15 Secondly, as I understand the laws of Ohio,
16 the City of Cleveland could sell as much as 50
17 percent of its sales outside its own limits.

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

20 THE COURT: Just a moment.

21 Approach the bench.

22 - - - - -

23 {Bench conference ensued on the record as
24 follows:}

25 MR. LANSDALE: I object on two

1 Wein - direct

2 grounds. Number one, he's just now telling us
3 what the law of Cleveland and Ohio is about
4 selling 50 percent of its sales outside, which is
5 not the law.

6 Secondly, the question was did Muny Light
7 effectively compete with CEI in the entire area.
8 He hasn't said one word about competing. He
9 said something about if CEI maintains its uniform
10 rates, it would have to lower them to Muny's
11 rates, and I submit the answer is not responsive.

12 THE COURT: Ms. Coleman?

13 MS. COLEMAN: I have the
14 constitutional provision marked as an exhibit
15 and I think that would probably be --

16 THE COURT: No, no. That's a
17 question of law.

18 MS. COLEMAN: -- better than having
19 him testify about it.

20 You have indicated before we should mark
21 provisions of the law if we wanted to bring
22 those to the attention of the jury.

23 THE COURT: Yes, if it is a
24 question of fact to be decided by the jury.

25 That is not a question of fact at this

1 Wein - direct
2 junction. They are not going to be interpreting
3 what the law is. I always thought that was my
4 function.

5 MS. COLEMAN: I agree, your Honor.
6 That is your function.

7 The dispute we were having at lunchtime was
8 the interpretation of the law which permits sales
9 beyond the boundaries. There is no doubt some
10 sales are permitted. The dispute seems to be
11 from whence those sales may be made, whether it
12 is limited to power generated by the utility or
13 purchased.

14 THE COURT: I don't have any
15 problem with that at all. I think they can sell
16 it if it is generated or if it is purchased.
17 I don't think there is any question about that.

18 The question is can Munny Light, in light of
19 the language of the Hance case, intentionally
20 purchased surplus power for purposes of resale
21 beyond its boundaries. That's wherein lies the
22 controversy.

23 MS. COLEMAN: All right, your Honor.
24 Well, I think that --

25 THE COURT: Well, in any event,

1 Wein - direct

2 that is not before us at the moment. What is
3 before us now is that he inaccurately stated the
4 law and drew a conclusion from it.

5 Let's go back and I will have it stricken.

6 MS. COLEMAN: Let me see if I can
7 establish some basis for agreement.

8 THE COURT: As to what?

9 MS. COLEMAN: I take it there is no
10 question that under some conditions Muny may make
11 sales outside the City.

12 THE COURT: We are not going to
13 get into that now.

14 MS. COLEMAN: Well, can we have
15 that statement to the jury and he can proceed
16 from that?

17 THE COURT: No, he can't. The
18 statement has to be corrected and the only way it
19 can be corrected is, first of all, he's been
20 instructed not to testify as to the law. Number
21 two, he inaccurately stated the law.

22 Let's go back.

23 MS. COLEMAN: All right, your
24 Honor.

25 {End of bench conference.}

Wein - direct

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2 THE COURT: Doctor, I requested
3 you previously and I direct you now that you
4 are not to testify as to your interpretation of
5 the laws of the State of Ohio. You have just
6 inaccurately stated the law of Ohio and the
7 constitution, consequently, the last answer will
8 be stricken and the jury will disregard it.
9 Please place another question.

10 THE WITNESS: Your Honor, may I
11 state that I have been informed by counsel about
12 the law.

13 THE COURT: I can understand.
14 Please, you may have been inaccurately informed
15 by counsel. But let's just proceed.

16 BY MS. COLEMAN:

17 Q Dr. Wein, did you consider whether there are any smaller
18 relevant markets for retail power sales that the City
19 of Cleveland or the CEI service area?

20 A Yes, I have considered whether that was a possibility.

21 Q What conclusions have you reached?

22 A I have rejected those.

23 Q Why?

24 A Well, they make no economic sense to me.

25 Q Can you elaborate what you mean by; they made no economic

Wein - direct

sense to you? What considerations did you give?

A Ultimately one might argue, in the case of two utilities such as CEI and Muny Light, which have in some streets of the City of Cleveland they can jointly serve every house on the street, and one might say "Well, isn't that a market?" That's not a market in the economic sense, not a relevant market.

Q Why is that, Dr. Wein?

A Because the price influence extends beyond simply the people who happen to live on that street.

Suppose it were the case that street A Muny Light served, but on street B a CEI served and on street C Muny Light served, and so on. Suppose on any particular street Muny Light had four customers and the other one had ten.

The actual possibility of detaching customers, the only significance it has is insofar as it has price or other influence on the sellers. It is of no significance in and of itself.

Obviously it is of significance to the particular person who switches, but the reason why we tend to think that that's the only kind of competition is because we are accustomed to dealing with things which we can transport. So that we can go back from one automobile

Wein - direct

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2 dealer to another automobile dealer if we don't like
3 him.

4 But the importance for competition is not that
5 you buy from Jones rather than Smith, the importance
6 of the competition is that your purchases will have
7 influence on Jones and Smith, even though you always
8 buy from Jones and you never buy from Smith. So as
9 long as there are potential people who can buy from
10 either one of you and so long as you can show that
11 that must have some sort of influence, the mere fact
12 of switching, the mere fact this so-called head to head
13 competition is not the definition of relevant market.

14 The definition of relevant market is the extent
15 to which the price influence extends, that is the
16 definition. It can extend either because of head to
17 head switching. It can extend because of yardstick
18 competition. It can extend because of franchise
19 competition.

20 That is the importance and that is what is
21 involved, at least to an economist, as to the significance
22 and the way you go about testing what the geography
23 of the market is.

24 Q Dr. Wein, let's turn now to the geography of the markets
25 for wholesale power, the second product which you

1 Wein - direct

2 defined.

3 You stated that the City of Cleveland was a
4 relevant market for the sale of wholesale power.
5 would you please explain why you came to that conclusion?

6 A Well, as I have tried to explain --

7 THE COURT: It seems to me we
8 have been through this before.

9 THE WITNESS: I thought we had.

10 THE COURT: I thought you had.

11 BY MS. COLEMAN:

12 Q Are your reasons for concluding the City of Cleveland
13 is the wholesale market the same as your conclusions
14 for the retail market, Dr. Wein?

15 A Well, yes. There are buyers and sellers and there are
16 questions of price influence, which is involved, or
17 other terms and conditions of sale.

18 I have also indicated, I thought before, that
19 every municipality in the CEI service area is part of
20 the wholesale market, because this same economic function
21 must be performed in a city of 50,000 as it performed

1 Wein - direct

2 same organization or whether they are separate.

3 So the wholesale function extends over the entire
4 territory. It also happens to be of importance to the
5 City of Cleveland because there happens to be a certain
6 amount of competition that is, perhaps, quite intense
7 in that area.

8 Q Have you set forth, then, your reasons for believing
9 that the wholesale firm power market is in the City
10 of Cleveland and in the CEI service area?

11 A Yes, I think I have.

12 Q Did you give consideration to whether the wholesale
13 power market is larger in the City of Cleveland or
14 the CEI service area?

15 A I gave consideration to that, and when it comes to
16 the measurement of what, for example, are the shares
17 of CEI or a Muny Light or a Painesville, one of the
18 things we fall back on in trying to measure market power
19 is the amount -- is the relative size and the relative
20 share in this particular relevant area.

21 Now, that doesn't mean that a buyer would not try
22 to go outside these regions -- this particular region.
23 In other words, a buyer such as the City of Cleveland
24 now is -- could attempt to buy wholesale power outside
25 the City of Cleveland.

1 Wein - direct

2 Well, as you know, it buys it from the Power
3 Authority of the State of New York.

4 Q Why do you conclude the Power Authority of the State of
5 New York is not a part of the wholesale market in the
6 geographic sense?

7 A Well, I would, in getting the total shares in this
8 particular service area, include in that the amount
9 which was sold by the Power Authority of the State of
10 New York. But I am looking at the geography, and I
11 have to limit it to some extent.

12 Insofar as the Power Authority of the State of New
13 York would have influence, let's say, on CEI's rates
14 to the City of Cleveland in selling wholesale firm
15 power, it would be in that market and to that extent
16 it would be a larger market.

17 Q What do you find is the extent of the market, Doctor?

18 A The extent of the market really goes to the extent
19 of the potential suppliers who may have influence on
20 it.

21 Q Have you found there are potential suppliers who do
22 have influence on this market?

23 A Well, I have found that there are potential suppliers.
24 I think they have, and I have found that there are
25 actual suppliers, the City of Cleveland -- I am sorry,

Wein - direct

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2 the Power Authority of the State of New York is an
3 actual supplier as is now Buckeye for a certain number
4 of months of the year, and they certainly constitute
5 a part of the supply. And it is my surmise that in
6 the future they will have substantial influence on the
7 other sellers, particularly a CEI.

8 As the flow of power has been very recent, and I
9 can't really make a definitive conclusion as to how
10 significant it would be, but given the magnitudes of
11 the purchases, it could be a very significant and
12 potential, a potential competitor, a potential influence
13 on other sellers to the City of Cleveland.

14 Q Looking at the time period from 1971 to 1975, Dr. Wein,
15 what do you find is the extent of the geographic market
16 for wholesale power?

17 A Well, from '71 to '75 there were -- so I know and I
18 take it you mean wholesale rather than just bulk?

19 Q Wholesale firm power, yes.

20 A In that time period I would say that the service area
21 of CEI comprises the entire wholesale market.

22 Q Did you find that there was a price influence by the
23 additional power PASNY and Buckeye presently sells
24 to the City?

25 A Was there then?

Wein - direct

1
2 Q Was there a price influence by those potential suppliers?

3 A Well, I think that -- well, other influences are the
4 actions of CEI. I don't know that they influence the
5 price directly. But the influence of competition is not
6 solely price, it is other terms and conditions of
7 service.

8 Q Dr. Wein, the third product market that you defined
9 this afternoon was the regional power exchange market.

10 Would you please explain the basis for your
11 conclusion about the geographic scope of that market?

12 A Well, up until, as far as my examination goes, through
13 the mid '70's, at least, I think more bulk power
14 exchanges took place between the CAPCO members than
15 between the CAPCO members and non-CAPCO members.
16 I'm not sure of that.

17 But in any case, the contractual relationships
18 of the CAPCO pool were all set up, and they are
19 adjoining systems, or at least some of them are, and
20 a great deal of the bulk power would flow from one
21 company to another.

22 Q Dr. Wein, when you were standing at the map before --
23 I'm sorry. I don't have the Plaintiff's exhibit number.
24 But --

25 THE COURT: I'm sorry, Ms. Coleman.

1 Wein - direct

2 How long are you going to be with the witness?

3 It is after 4:00 o'clock, and if you are
4 going to be with the witness for any period of
5 time, I think it best that we adjourn for the
6 day.

7 MS. COLEMAN: All right, your Honor.
8 I have remaining sections to discuss with the
9 witness.

10 THE COURT: Very well.

11 Ladies and gentlemen, it is after 4:00 o'clock,
12 so you are free to leave, and we shall see you
13 tomorrow morning at 8:45.

14 Please, during the recess, adhere to the
15 Court's admonition.

16 Thank you and good night. Have a nice
17 evening. You are free to go.

18 The exhibits of the day -- I don't think
19 there are too many of them -- will be given to
20 you in the jury room for your examination as
21 is the usual procedure.

22 Good night.

23 - - - - -

24 {Bench conference ensued on the record
25 as follows:}

1 THE COURT: Do you have any idea,
2 Ms. Coleman, how long you are going to be with
3 the witness?

4 MS. COLEMAN: Well, I have already
5 proven myself to be a poor predictor, your Honor.

6 THE COURT: Well, I'm not asking
7 you to be accurate, Ms. Coleman.

8 MS. COLEMAN: We will finish the
9 direct sometime tomorrow morning.

10 THE COURT: Well, that doesn't
11 help me.

12 Are you going to be another hour or another
13 two hours?

14 MS. COLEMAN: You are asking me
15 to do something I'm not able to do. One or two
16 hours.

17 THE COURT: I don't know why it
18 is so difficult to project time.

19 Is there anything further that we need
20 consider at this point in time?

21 MR. NORRIS: No, your Honor.

22 THE COURT: Thank you and good
23 night.

24 {End of bench conference.}

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{Court was adjourned at 4:05 p.m.}

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