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

the Cleveland Muny situation.

MR. LANSDALE: Well, this is important because I intend to compare this to the value of the investment that we made to acquire customers in the Muny conversion system. They will appear in the testimony of another witness, the use of these figures.

THE COURT: Say that again, please.

MR. LANSDALE: I am going to show what it cost CEI as of the relevant period in actual investment to add a new customer, a specific investment. I wish to compare this with the specific investment made to acquire customers for Muny Light in the Muny Conversion Program, about which complaint is made here.

THE COURT: In that sense it would seem to be relevant.

Overrule the objection.

MS. COLEMAN: I don't see how.

{End of bench conference.}

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MR. LANSDALE: May I have the question read, please?

THE COURT: Read the question back.

(Question read by the reporter as follows:

"Q Looking to allotments or places where the facilities were installed overhead, what did you find to be CEI's average actual investment per customer?")

A I found that overhead developments, the average cost per customer was $424 in 1971.

Q What did you find to be the investment in a development where the lines were installed underground?

A This was $394 per customer.

Q Why is the installation underground less than that for overhead?

A In underground developments the contractor must furnish the trench for us to put our cables in.

MR. LANSDALE: I have no further questions.

THE COURT: Ladies and gentlemen, due to the necessity of addressing certain matters that must be discussed outside your presence, at this time we will give you a long lunch hour. So you can go to lunch at this time and return here at 1:30, and hopefully at that time we will be prepared to proceed.

During the lunch hour keep in mind the Court's

admonition. With that you are free to go.

{The jury was excused.}

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THE COURT: Would you, at this time, make a determination as to whether or not Ms. Coleman has all of her necessary working papers so she can conduct or complete her examination of those papers so she may proceed with cross-examination at 1:30.

MR. LANSDALE: Yes, sir.

THE COURT: Very well.

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{Luncheon recess taken.}

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TUESDAY, OCTOBER 21, 1980, 1:40 P.M.

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

THE COURT: Yes.

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{Bench conference ensued on the record as follows:}

MS. COLEMAN: I just want to enter an objection on the record to proceeding on this hurry-up basis. I will do the best I can.

MR. LANSDALE: Can't you raise your voice? The jury isn't here yet.

THE COURT: If you need additional time, I will bring him back. I have no problem with that. He can put on another witness. You can examine him tomorrow morning if you want.

MR. LANSDALE: It's all right with me.

MS. COLEMAN: You are saying delay the cross-examination of the witness?

THE COURT: It's up to you, Ms. Coleman.

MS. COLEMAN: I see.

THE COURT: Whatever you would like to do.

MS. COLEMAN: Let me check, your Honor.

(Discussion between defense counsel.)

MS. COLEMAN: I will endeavor to proceed, your Honor.

THE COURT: It's your election.

MR. LANSDALE: What's this?

MS. COLEMAN: I will try to proceed.

MR. LANSDALE: I kind of object to the --

THE COURT: I don't want you to try. If you don't feel comfortable going on cross examination at this time, as I say, I have absolutely no concern about your going ahead with it tomorrow because I don't want you to go ahead and say well, the Judge made you go ahead today. I am not making you go ahead today. The election is with you.

Do you have other witnesses?

MR. LANSDALE: Yes, sir. I'm ready to go.

MS. COLEMAN: I will go ahead.

THE COURT: All right.

(End of bench conference.)

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THE COURT: Cross-examination.

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CROSS-EXAMINATION OF ROBERT M. KEMPER

BY MS. COLEMAN:

Q Mr. Kemper, turning first to the last set of studies that you discussed, sir, concerning the calculation of excess facilities, your work papers indicate that your department worked on this study over a period of several years; is that right?

A Actually a couple years, I think. I'm not sure of the exact dates.

Q But you didn't finish it up until last week; is that right?

A Some of the final summaries were prepared last week, yes.

Q And you hadn't done this type of study before where you actually set out to map Muny and CEI facilities before?

A I'm not sure I understand quite what you mean.

Q Well, this study was prepared for the purpose of this litigation, was it not?

A Yes, ma'am.

Q Now, when you did this work, if I understand your

testimony correctly, you said, "Let's pretend there is just one system serving the area. How much will it cost"; is that right?

A Our second alternative was that assumption, yes, ma'am.

Q But that is not actually the case, is it?

A It is not the case, ma'am.

Q If there were only one system, customers wouldn't choose to switch from one to another; right?

A It would be difficult, I guess.

Q Yes, it would.

Now, in making your study, you didn't study the entire CEI system and the entire Muny system, did you?

A No, ma'am, we did not.

Q In fact, you just selected a few what you called grids of CEI; is that right?

A We selected certain areas within a grid. It was not the size of a grid.

Q Now, was this a random sampling?

A No, it was not a random sampling.

Q Are you familiar with the concept of random sampling from your extension courses or your college education, whatever?

A Yes, ma'am.

Q And you are familiar with the fact that that is

generally considered an approach for statistical study to make sure you can use the results of your little study to deduce something about the entire population; is that right?

A It is an accepted technique.

Q And that is not what you used here?

A We did not use that.

Q Now, are you fully acquainted with the extent of physical duplication of facilities throughout the City of Cleveland as opposed to just the little neighborhoods that you studied?

A I have been over the whole system or service area.

Q You have ridden the line or whatever it is called?

A Pardon?

Q You rode the line?

A That would be a good expression, yes.

Q And the percent of places where there is a Muny line and a CEI line on the same street varies from place to place, doesn't it?

A That is correct.

Q In fact, your colored map shows that, does it not?

A Well, the colored map shows the density of customers, which is not necessarily related to the density of physical facilities. I couldn't make a statement that --

Q It has some relation, but not entirely consistent one with the other?

A It is not entirely consistent. I mean, I can't say that it is.

Q Now, you are familiar, I assume, sir, with the particular neighborhoods that you did look at in your study?

A I have been there, yes, ma'am.

Q And those fell within, if I count accurately, nine different grids?

A I don't remember the number of grids, but it could have.

Q And three of them are in this purple area right here?

A No. There is -- how many? Pardon?

Q Three of the neighborhoods you studied are in this purple area; is that right?

A I didn't check the grids precisely on that.

Q You are not really sure where they are located there on the system?

A Not on that map, I couldn't tell you. I would have to look at one with the street addresses, with the streets on it.

Q So you are not able to say generally where they would be; is that right?

A Well, there is I think three on the east side and then four on the west side, as I vaguely recall.

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

Q If I understood your testimony correctly, Mr. Kemper, you said you were looking at service to residential customers only in these nine neighborhoods; is that correct?

A That was the biggest grids. There might have been one or two small commercial.

MS. COLEMAN: Would you read the answer back, please.

(Record read.)

MS. COLEMAN: I still didn't understand. What's the third word?

(Record read.)

BY MS. COLEMAN:

Q It is your testimony that the customers located in -- that the areas you studied, you focused on residential customers, is that correct?

A Yes, ma'am, primarily.

Q Now, the nature of the customers in any particular grid or any subgrid will vary from place to place, will it not?

A Generally it will. There will be some that are adjacent. For example, mostly residential, very similar.

Q Some are mostly residential?

A Small stores, this type of thing.

Q Some have all factories, some places in the flats?

A There are some grids that are primarily industrial, yes.

Q Some grids have a mixture of industrial, residential and commercial, right?

A Right. Depending on where they fall.

Q But your study focused on just selected ones which were residential consumers, right?

A Primarily, right. The reason for this was, we were interested in duplication of overhead distribution by facilities. You get into the industrial areas, generally these are served by higher voltages and it is called transmission, which is a different higher voltage class.

Q That's a CEI classification as to whether they call it distribution or transmission, is that right?

A Actually it is a Federal regulatory commission definition.

Q But the line serves the same function, bringing the energy to the consumer, be he Mr. Jones in his house or Mr. Jones in his factory, is that right?

A They serve the same function, but different voltages, right.

THE COURT: Keep your voice up, Mr. Kemper. You seem to have a tendency of letting your voice drop.

BY MS. COLEMAN:

Q Now, do I understand correctly you didn't study the question of underground distribution facilities?

A Other than to make a general observation of where the underground -- our underground distribution facilities were and where the Muny Light underground facilities were. We did compare certain streets and found both to be on the same street or the same general areas.

Q That's not a part of the study that you discussed this morning, is it?

A No, it was not part of this study.

Q That's not part of the analysis you presented this morning?

A Not a part of the cost analysis.

Q Now, when you did your study, you also looked at the distribution cost without street lighting, is that right?

A The figures that we finally developed per customer excluded street lighting.

Q That's because you assumed street lighting is going to be needed regardless?

A Regardless of which company would serve, the street light would have to be maintained.

Q If the street lights were there they needed to be mounted on poles, right?

A Right.

Q So the poles would have to be there?

A The poles, some of the poles were serving a duplicate function, they were both distribution and street lighting. Some were exclusively street lighting. We made sure there was poles for the street lights in our study.

Q Now, I believe you testified, Mr. Kemper, that your study was looking at the question of comparative costs assuming everything in 1971 costs; is that right?

A Yes, ma'am, that's right.

Q That's based on dollars out of the electrical catalogue from 1971?

A That is based on our actual costs for 1971 from our continuing property record.

Q Let me understand. That is based on your actual cost by a pole in 1971?

A To install a pole in 1971.

Q You are talking about the installation only, not the cost of the facility?

A The reason I say installed, we could have bought the pole a year or two earlier and we installed it in 1971, but every job order in which poles were installed is included in the average cost in 1971.

Q So the cost then has two components. It has an installation component in 1971 labor dollars, is that right, and it has a cost of the pole at that time?

A That's correct, plus some other charges.

Q Does that include the financing charge to buy the pole?

A No.

Q The catalogue that you ordered the pole from?

A To explain more fully, it includes the direct labor -- that would be the field crew, including the first line supervisor -- to install, drill the holes, put the pole into it and install the other facilities. Then it would include the material costs which could be through our stockroom which is at stock average pricing, or it could be directly purchased for that specific job, although in the case of overhead jobs this is relatively rare.

Then we also have equipment costs -- the trucks, the pole digger. We have costs per hour for this sort of equipment that is used for installing the pole.

Then we have the stock handling costs. If it

went through the stockroom, there are certain charges added.

Then we have overhead such as supervision and engineering costs.

Then we have what we call other overhead which includes a proportionate share of that labor for vacation, holidays, sick time, this sort of thing.

Q So you try to account for every single dollar?

A We call them job orders. Many companies call them work orders.

What we do is all the work that went into service in this specific year, say went into the work we had job orders for installing poles say in 1971 and those jobs went into service in 1971, in our continuing property record effort we add all those costs for those poles by height and then divide by the total number of poles that went into service that year, and that gives us the average cost per pole, 35-foot pole, 45-foot pole.

Q If I recall correctly, for 35 feet, you said $153.18? Sound about right to you?

A I don't remember ever saying.

Q Well, just use that as an assumption.

A That would be quite low.

Maybe I am thinking of up-to-date costs which are considerably higher.

Q Let me take something actually out of here so we know we are talking about the same thing.

35-foot pole -- maybe I misspoke -- $153.18 on page 129 of your work paper.

A You are correct. I'm sorry. You are correct.

Q And the $153 represents how much it costs, all costs taken into account in 1971, to install a new pole, right?

A Correct.

Q Your costs are all done in terms of those dollars, right?

A 1971 dollars.

Q Your poles which you actually did install in 1971 have had depreciation taken on them in the past nine years; right?

A Correct.

Q So, actually, they are going to show on your books as something less than $153.18?

A We maintain the original cost on our books. We don't associate depreciation back against any property unit or account.

Q Not against the individual pole. You look at it for

accounting purposes against the collection of poles out there in the field?

A Correct.

Q In fact, as you did your survey around a few neighborhoods you looked at, you made note of the ages of the poles, at least those of CEI; is that right?

A We knew the ages of the CEI poles.

Q Because you have a record of that?

A We have a record in the office of the age.

Q And you made a note of the ages of the poles as part of the inventory in preparing this study?

A Correct.

Q And it turns out, doesn't it, that some of those poles were installed as early as 1913; right?

A I wouldn't doubt it. I don't remember, specifically.

Q And a whole bunch of them went in in the 1920's?

A This was a period of big expansion, yes.

Q And they cost a whole lot less than $153 in 1913, didn't they?

A I'm sure they did.

Q But you have assigned a cost to that 1913 pole of $153 if it was a 35-foot pole; right?

A Right. We were trying to get, you might say, a cost as of 1971.

Q If you took that pole as it was rather than if you replaced it in 1971 with a new pole and you consider that an excess pole, that would tend to mean that your calculation of the amount of excess was somewhat larger than it actually was, wasn't it?

A Well, we may have installed some after 1971 and with the inflation factor, it's gone up considerably higher, so we don't show the average age of the poles in the study.

Q The vast majority of them were installed before 1971, were they not?

A I never really checked that.

Q Well, let's take a look.

You have a work paper that is called "CEI Inventory." I just opened the book to page 62. It's for East 124th to Cleveland between St. Clair and Gross Streets.

A What page?

Q Page 62 in your book.

A I have it.

Q Now, the third column there under "Pole Data" -- which says here that means the year the pole was installed, right?

A Correct.

Q Just looking down that list we have 35, 35, 35, 73, 35, a whole bunch of 35's, and I don't have a very good copy but as I look through there there is only one installed after 1971; isn't that right?

A On that page, yes.

Q Well, it is true, generally, in the neighborhood you studied, isn't it, that most of the poles were installed way before 1971?

A The chances are pretty likely they were.

Q Mr. Kemper, you assigned a value of a 35-foot pole of $153.18, and that's a new 1971 pole and all the post costs to put it in?

A Correct.

Q Now, if in fact the pole was a 1935 pole, same height, the actual cost of that pole, I don't know, half, quarter?

A I would guess it would be 60 percent, perhaps.

Q 60 percent.

A Inflation really didn't hurt us badly until starting about '71 in this type of equipment.

Q Well, why don't we say $80?

A Roughly.

Q Assume the actual cost of that pole in 1935.

Now, in your study let's say you assumed this

pole here was an extra pole. So you concluded that there was $153.18 worth of excess cost in the system because of that pole, right?

A Right.

Q Now, if the pole actually cost only $80, that would mean that you have overstated the amount of extra property in there by $73.18, isn't that right?

A The problem that you are saying, if we had to replace that pole, say in 1980, it would be, of course, about four times that $153.

But to do -- using the original years, really, you can't make a reasonable comparison, which we were trying to do with the Muny facility. So we had to have a constant year.

Q Is my math correct or isn't it, Mr. Kemper, if the pole actually cost $80 and you assumed its value $153.18, you have actually made an overstatement of $73 plus, right?

A If you are talking original cost only, yes. But if you are talking cost as of a certain point in time, no.

Q Well, we are talking about dollars out of pocket, isn't that right?

A I am not sure I know what dollars out of pocket are.

Q You are saying there was an expense here. You are

saying there was $153.18 extra money paid, isn't that right?

A This is what we -- it would have cost us in 1971 to install it.

Q But your conclusion of your study, this pole is the only thing we arelooking at, this pole and the four others that everybody decided were fine, and this pole is the excess pole, and you said that's $153.18 too much, right?

A We have to give some value, if I understand what you are saying, "$153 too much.

Q Your whole study was excess property, if I understand it correctly, and if this pole was the excess property, you are saying that was $153 excess; right?

A I see what you mean. We would have said in 1971 costs, it would be $153 excess.

Q But in terms of what it actually cost, it was really only $80?

A In terms of the original cost, that is correct.

Q Now, let's just look at that 1935 pole for one more minute. That pole would be about 45 years old today; right?

A Yes.

Q And it would be fully depreciated; right?

A No.

Q It would be substantially depreciated?

A The average life we use for poles is -- I don't handle the depreciation, but the average life I think is, for that account -- I was trying to think. I'm really not positive, because I don't handle depreciation. But it would not be fully depreciated.

Q You would count on using it for further years in the future?

A We can find some around the system that go prior to 1900. So we still have some in the system.

Q And those ones that go around 1900 are already paid for, aren't they?

A I guess we are in semantics.

They may be fully depreciated under our curve.

Q They may be fully depreciated.

And some of them that are newer than that may be fully depreciated, also?

A Newer than what?

Q Newer than turn of the century.

A As I say, I'm not that familiar with our curve for the pole account for depreciation. So I can't say when the final ones would be.

Q Well, in any case, CEI's investment in these poles,

including this excess pole, is sunk cost, is it not?

A I guess -- you are using it in engineering, economic sense?

Q You have already laid out the money for it; right?

A Correct.

Q Now, if CEI were to acquire the Muny Light system, which was one of your hypotheticals, you once made a study of what would happen in that circumstance, did you not?

MR. LANSDALE: Objection.

THE COURT: Approach the bench.

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{Bench conference ensued on the record as follows:}

MR. LANSDALE: I hesitate, but the assumption was not the acquisition of the Muny system. The assumption was the acquisition of all Muny customers, which is a different thing.

I assume the witness will take care of himself on it, but this is so far from the facts that I object to this, to your suggestion of the assumption.

MS. COLEMAN: Well, there was one study he did where I understand that was the case. But under the other study, he is saying what if

there were one system.

MR. LANSDALE: That's right, and we acquired all of the Muny customers. We didn't buy the Muny system in his theory.

MS. COLEMAN: He has got two different theories.

THE COURT: Well, you can rehabilitate him on redirect examination.

MR. LANSDALE: All right. All right.

THE COURT: You may proceed.

{End of bench conference.}

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THE COURT: You may proceed.

BY MS. COLEMAN:

Q Mr. Kemper, you some time ago had occasion to make some kind of a study of the Muny distribution and transmission system in connection with CEI's looking at adding that system to its own; is that correct?

A That is correct.

Q Are you familiar with what CEI would have planned for the Muny distribution system if it had acquired it?

A Not really, because I'm not involved in that area of responsibility.

Q Well, it is true, isn't it, that CEI would have tried

to make use of those poles that were there?

A The problem, the basic problem with the Muny system, it is very obsolete. It is a 2,300-volt system, which has been taken out of practically every utility that I know of.

Q That is not the question that I asked you.

A Well, I was just getting to the point.

We would have had to operate it for a while, but we would have operated it by having various pockets where we would have had to put in special transformers to pick up these 2,300-volt pockets until we could get around to reconductoring and rebuilding the system to our new standard voltage of 13,200 volts. 2,300 volts is a very uneconomic operation, and we would have had to change it as quickly as we could. But it would have taken some time, obviously, to convert to our voltage.

Q Well, you are talking about voltage conversion, Mr. Kemper, and I asked you about the poles.

Isn't it true that if CEI were to acquire the Muny system, they would have tried to make use of those poles?

A We would try to make use of those which we can. But since many were duplicate, we would have removed those, of course.

Q They weren't going to remove them immediately, were you?

A Not until we could get around to the various areas. Obviously we couldn't do it overnight.

Q In fact, you weren't going to do it for a long period of time; right?

A I don't know.

Q You didn't personally make the estimates of what was excess, did you?

A I did not personally make them. We talked about our feeder engineering unit, who took the maps that we had marked up when we were in the field to show the Muny Light facility, and our grid maps, and they determined which they felt were excess, whether it be CEI or the Municipal Electric Light Plant.

Q Now, these notebooks which are marked "Seven Area CEI Muny Duplication Study" that your counsel gave me yesterday, these are supposed to include all the estimates that both you and the people in your department used, is that right?

A That we used, yes, ma'am.

Q Now, the information about the subject that I just asked, the estimate of what was extra, would also appear in these books, is that right?

A Yes, ma'am.

Q That would be under the tab here "CEI MELP Excess Investment by Area", is that right?

Do you have the same book there?

A Yes, ma'am, I have it. Page 142.

Q Page 142.

Now, page 142 in this book is the work papers of your Feeder Department, is that right?

A No, these are our work papers.

Q The work papers of your Feeder Department aren't included in here?

A No. They merely told us on the drawings which facilities they felt were excess and we determined what the pieces and parts were and priced them.

Q Well, this page 142 has one sentence on it, "MELP is excess not including loops and meters $19,130."

That's what your feeder people told you, is that right?

A Correct. They said MELP was excess, no matter which company serves them, we need loops and meters to the houses.

Q They didn't do any figuring of them to figure out what was excess, they just looked at it and they said, "We feel it was excess," is that right?

A There were two lines, one down the street, one at the rear lot line. They said, "We need to keep the street lights, so the rear lot line is excess." Would be an example of the manner in which they determined -- with which they considered excess. And we priced it, made the inventory and priced the excess.

Q So basically their procedure, as you understand it, because you requested that work to be done, was just to take a look at the maps that you had drawn up?

A They studied the maps.

Q They studied the maps and they said, "Well, looking at these maps we think the Muny line is excess," or "We think the CEI line is excess," is that right?

A That is correct.

Q They didn't do any loading studies, did they?

A No, they did not.

Q You don't know whether there would be enough capacity on the remaining system if you subtract the excess to handle the extra customers, do you?

A We -- really the only problem that was present was the transformation capacity, and in our study we added -- in fact, we enlarged the transformers one size to take up the -- in other words, 15 KVA transformer,

we say, "Okay, what's the extra cost to put in a 25?" That would pick up the extra capacity of those customers which would be added to whichever system was remaining.

Q Let me make sure I understand you.

When you did your study of adding Muny customers to the CEI system --

A Correct.

Q -- you had a cost for the meters to those customers and that was one --

A The loops and meters.

Q -- of the elements of the costs was a larger transformer on the poles, is that right?

A Correct.

And in some field grids we had to add some poles and wire, because there was a little bit of gap in some of the areas. So we did have to add some additional poles and wires in several of the areas.

Q But you didn't study whether the wires could actually hold the electricity to serve that additional 820 some customers, right?

A The wires were adequate.

Q You didn't study that?

A I did not study it, no.

Q You just know that?

A They are overdesigned.

Q They are overdesigned so that CEI would have enough capacity to compete with Muny Light, isn't that right?

A No. Actually you build in a factor of safety, and there is plenty, usually plenty of power to pick up. We are talking small customers not large customers.

Q Well, your factor of safety is what, about 50 percent?

A I'm not really positive because I don't do the engineering, but I would guess it would be 50 to 75.

Q Well, you have got CEI system in these little neighborhoods serving 1,500 people and you have assumed that they add 820 Muny customers, that kind of takes up the 50 percent, doesn't it?

A 860, I think it was.

But if you go to the first book, on page 9, in these seven areas there were 2,300 KVA total capacity of the Muny transformers, which in standard practices were 50 percent low, I suppose to take care of some peaks or future expansions.

When we did the study we added about 2,000 KVA. If you will notice under "CEI Equipment" we had 4,550 KVA, and by changing the size of the transformers we came up with 6,500 KVA. So that would take care of the transformation.

We have added that cost back in.

Q That takes care of the transformation. That doesn't take care of the line itself, right?

A Pardon me, the what?

Q It doesn't take care of the line itself?

A Well, the poles obviously are added.

Q I didn't ask for poles.

A The wire, I think it would be adequate. There certainly is a Muny case, where we said that was the system that would remain, they were using one-ought copper wire, which is much too large.

Q And similarly you think CEI lines have enough to make this submission; is that right?

A I would think we wouldn't have to change very much, but without making a study I couldn't tell you precisely because I see some number 2 wire in here and --

Q If you did have to make a change, you would have to add some more units of property; right?

A You may have to replace some things such as a wire, but it wouldn't be many.

Q And that would mean the additional cost of serving those additional customers would be higher?

A I would think it would be so few it wouldn't matter.

Q But you don't know?

A I have not made a study.

Q As you got finished looking at the neighborhoods and doing the mapping and making some calculations we have been talking about, you came down with the conclusion that of these seven areas there was about $95 per customer of what you called excess capacity; is that right?

A That is right.

Q And then you undertook to multiply that by all of the customers in the City of Cleveland to come up with a total dollar figure; is that right?

A All the customers in the common area, in the Municipal Light Service area.

Q Muny customers plus CEI customers?

A Correct.

Q Residential, small commercial and industrial?

A Right. Well, very, very small commercial and industrial.

Q In the entire area as served by Muny and CEI?

A Oh, I see. I'm sorry. I misunderstood you.

That's right.

Q When you multiply your $95 by $100,000 customers, there's residential, small commercial and industrial?

A You are right.

Q And I suppose common high traffic as well?

A I suppose that would be in there.

Q When you derived that $95 excess cost per customer, you were looking mainly at the residential; right?

A Mainly, right.

Q And you did show, even though there were other types of customers in the neighborhood you studied, there were a few that were not residential? They are even pictured in your workbook, aren't they?

Look at page 17 and page 21.

A You are talking both customers? I mean both CEI and MELP customers in the area?

Q Well, your study is based on the residential customers in these seven neighborhoods; right?

A The customers in the seven neighborhoods.

Q And you said there were only one or two small commercials that you picked up; is that right?

A As I recall, that's it.

Q And one of those small commercials happens to be shown in the picture on page 17 in your book?

A There's a store there, yeah.

Q And on page 21 of your book, showing Seltzer Avenue looking west, there's not a residential consumer in

sight, is there?

A I don't see any. That's just a little end before you get to West 25th.

Q That's that last block just before you get to West 25th, right?

A Correct.

Q And if, instead of just looking at the residential commercial customers, you looked at all the customers in your sample, then you would have a lower excess cost per customer, wouldn't you?

A Somewhat, I suppose.

Q And it would be a smaller total when you applied that back to the system; right?

A Somewhat, yes. Whatever it came out to.

Q Now, are you familiar enough with what your feeder people, I think you referred to them as, did to know what standards they applied in determining whether something was excess or not?

A No. We basically relied on their judgment as being in the position, doing that type of work all the time.

Q Is it your understanding that if they found there was one line going down one street and one line of the other company going down the other street, they wouldn't consider either of those excess lines?

Is that right?

A In their separate streets?

Q Yes.

A I wouldn't think so but --

Q West 23rd and West 24th?

A If they were both on the streets, I wouldn't think so.

Q Maybe I'm not making myself clear.

If they looked at the situation and they found that there was a CEI line going down this street, there was a Muny line going down this street, then they wouldn't consider either of those an excess facility; right?

A I wouldn't think so.

Q Now, the second approach that you took to analyzing these excess facilities was to ask how much it would cost to add the Muny customers in 1971; is that right?

A That is correct.

Q Now, if you had done that in terms of the costs to add the Muny customers in 1973, you would have come out with a higher dollar figure; right?

A Yes.

Q And if you had looked at the situation today, it would have been even higher; right?

A Correct, because of inflation. That is true.

Q And it could well be so high that the added increment would make the total cost to serve those additional customers not much different than the total costs that there are to serve them presently with one system serving one group and one serving another group; right?

A Well, at the same time, the other system costs would be increasing just as fast. So I don't think either would ever catch up with each other. I mean, the one would not -- picking up the additional customers in the common area would never catch up with outside the area.

Q Now, the costs that you looked at of serving the new customers wouldn't be the only cost of serving these customers, would there be?

A No. You are right. There are other costs.

Q You have to have the power to sell to the customers?

A You would have a power plant.

Q Generation, fuel?

A Step up, step down, subtransmission stations, distribution stations, and feeders from the distribution substations to the areas, yes.

Q The costs of things like fuel now, to add the next unit of fuel to serve these customers, costs more than the

average to serve the existing group, doesn't it?

A The fuel?

Q I'm sorry. The generation.

If you had to expand the generation to serve these additional customers, that unit of expansion would cost more than the cost of the generation you have got serving the existing group; right?

A Because of inflation, yes.

Q Now, your study took the point of view of saying, "What if CEI took over the Muny customers"; right?

A Right.

Q If Muny took over the CEI customers under the same assumption, the incremental costs would be about the same as you projected, wouldn't they?

A I don't really know. We would have to go back and see what additional facilities would have to be built if CEI was not there to take and pick up the facilities. We did not figure the converse study.

Q The converse should be about the same result, shouldn't it?

A Well, you don't really know until you do it because you may have to build more lines to replace the CEI lines that would not be there than CEI has to build to replace the MELP lines.

Q But you don't really know?

A We did not make that converse study.

Q Now, you testified that in 1971 dollars, that CEI's average cost to serve its then-existing customers would be $259 per customer?

A Correct.

Q And you further testified that if you added on the Muny customers to the CEI system and made the expenditures for meters and bigger transformers necessary, that even when you added in all those costs, you would find that CEI's average cost per customer was $194; is that right?

A $197, wasn't it?

Q $197? All right. $197.

Now, in either case, these are investments in units of property to serve the customers; right?

A Correct.

Q And they have a lifetime; is that correct?

A Correct.

Q Of more than a year? They are depreciated over a period of time; is that right?

A Over a long period of time, yes.

Q About 30 years, would you say?

A Oh, I would say I'm not that familiar with our

depreciation studies. But I would guess it would be closer to 40 for an average lifetime.

Q So that is $42 over 40 years; is that correct?

A But you are -- oh. Okay.

Q Is my math correct?

A It would be 62.

Q $62 over 40 years, which is about a dollar and a half per customer a year difference; is that right?

A Why I'm hesitating is I'm -- there are different bases for figuring the two unit costs.

Q Well, roughly speaking, it works out to about a dollar and a half per year difference; is that right?

A Per customer, I suppose.

Q The last study that you spoke about this morning, Mr. Kemper, concerned the cost of new construction to serve customers. Do you recall that?

A Yes, ma'am.

Q And that is based on a study of first cost to serve customers through overhead lines, and you looked at 378 lots; is that right?

A I think so, yes, ma'am.

Q Do you know where those lots are?

A Well, generally they would be in the area surrounding the City of Cleveland.

Q But you don't know with precision how many developments we are talking about?

A No. We just got the number of lots, and I don't know the number of developments.

Q Your study of new construction costs for underground service to customers was based on 1,709 lots; is that correct?

A That is correct.

Q And that, also, you don't know precisely where those lots are located?

A I don't know, no. I would have to dig them out to do that.

Q You know it is more than one development?

A It would be. I can't think of any development that is larger than 1,709. So it must be a number of developments.

Q That is all 1971 construction?

A That is the construction in 1971, yes, ma'am.

Q Now, if the development were adjacent to an area where CEI already had an extensive transmission and distribution system, that would make a difference in costs to extend out to the new development, wouldn't it?

A Well, these costs that are cited there are the costs within the development itself. In other words, the

feeder to the development, substation costs, and so forth are not included in here.

Q Not even the substation to serve that development, if it is of a size to require that, you are just looking at the lines?

A The distribution system right at the development.

Q You don't know, do you, whether the developments we are talking about include schools or churches, do you?

A These are residential developments, UD's, underground developments. We call them UD's in the case of underground. They are all residential.

Q You don't know, do you, whether these developments include a community center or a swimming pool or a church, do you?

A They may include a community center, that I don't know. But I doubt if they include a church.

Q The kinds of costs that you are talking about $424 per customer reflects sizing of feeders for consumption by the suburban community, isn't that right?

A That is correct.

Q They consume more power than, on the average, than the Cleveland residents, isn't that right?

A I have to admit I really don't know. I have never looked at --

Q You have a lot more all-electric homes out in these developments, don't you?

A We don't have as many as we would like.

Q That's one of the things you try to achieve, isn't it?

A Pardon?

Q You try to achieve that, an all-electric development?

A We try to sell all-electric homes, yes, ma'am.

Q Which would mean the consumption of these homes would be different than the consumption of homes where the heat comes from gas, isn't that right?

A That would be true. But there aren't many all-electric developments, and I doubt in 1971 were there very many, because gas at that time was relatively cheap.

Q At any rate, you don't have in mind the continuing developments that were used to derive these costs?

A No, I cannot cite them.

Q Whether they are all-electric developments or not?

A I don't know if there are any all-electric developments.

Q Now, I should not have turned over this page, because when I asked you here about the excess cost per customer, I also wanted to ask you what you thought that would amount to in terms of the customers bill in a month.

A I guess you would have to ask our rate engineer. I

don't really know.

Q It is going to be a matter of cents, isn't it?

A I really don't know.

Q Mr. Kemper, let's turn to the other study on customers that you discussed this morning.

The procedure for calculating customers which you described this morning is only one of two approaches you used, is it?

A I am not sure exactly -- I may be thinking of "all" as one approach and you are thinking of it as several. We did it for several years, two years.

Q Well, you have a set of papers, I assume you have this same bound volume "R. Kemper Papers"?

A Right, I have it.

Q The kind of work that is done in this measures the number of CEI customers and then compares that to the total Muny customers taken out of a published source, isn't that right?

A That is right in an overall basis, right.

Q Whereas the procedure you described is not the one --

A The papers concerning the MELP subdivision into the grids is not in this book.

Q In fact, to make the calculations shown here you didn't even use MELP customers in subgrids, you just used the

total number of MELP or Muny customers, right?

A We were determining the percentages of MELP customers within the common service area, the overall percentage of this set of work papers.

Q This term that you are using "common service area," is that your term?

A Well, it is a MELP service area. It is where both companies are serving customers, is what I mean by it.

Q That's your term?

A Well, I have heard other people express it, but maybe --

Q You define the service area as a place where a company actually has customers sitting right there, isn't that right?

A Or in the immediate vicinity.

By "immediate vicinity" there could be certain pockets within a service area where one or the other company is not involved.

MS. COLEMAN: Mr. Leo, would you put Plaintiff's Exhibit 2066 on the easel, please.

Q Are you able to see Plaintiff's Exhibit 2066, Mr. Kemper?

A Somewhat. Maybe if I lean, if I lean over I guess I can.

MS. COLEMAN: Mr. Leo, maybe you should flip up the plastic, I think that's creating a glare.

Q Now, I assume you recognize the jagged outline running

through about the center of Plaintiff's Exhibit 2066, do you not?

A Yes, ma'am.

Q That is supposed to describe roughly CEI's service area, right?

A It looks like it, approximately.

Q That's a familiar shape to you?

A Yes, ma'am.

Q But you don't know whether, in fact, there are customers who are right outside that boundary line, do you?

MR. LANSDALE: What boundary line?

MS. COLEMAN: Pardon me.

Q That black stepstair line around the middle?

A We have a few customers outside that boundary line. That is a generalized boundary line. Very few, actually.

Q Now, when you make the study using the CEI grid system, that involves taking a map like that, or any other map, and you have a geographic area and there's a CEI grid system and you lay that over the area to bring it up into relief; is that right?

A Yes, ma'am.

Q Now, the grid CEI uses is 4,000 foot by 5,000 foot; is that correct?

A That's correct.

Q If the grid CEI used was 4 miles by 5 miles, you would have -- let's just say this would be one grid, right?

{Drawing}.

It would be something bigger than what you've got?

A Considerably, yes.

Q And if you used that type of a bigger-sized grid, it's going to mean what is inside the grid has a little bit different characteristics than it did when you used little grids to bring it up; isn't that right?

A Well, obviously, because it covers a different area.

Q Well, I'm not a very good drawer. Maybe I can make myself clearer.

If this is the area you are studying and you have one grid like this, you are going to get one set of information about -- I wish I had colors -- about what percentage of this circle thing is in the grid and what percentage of, let's say, this other area is in the grid; right? If that's your grid?

A Correct.

MR. LANSDALE: I object. Let the witness answer the question.

THE COURT: Just a minute, Mr. Lansdale. If you have an objection --

MR. LANSDALE: I object.

THE COURT: I will see you when you stand up, if you stand up. You have been in between two or three times.

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{Bench conference ensued on the record as follows:}

MR. LANSDALE: My specific objection is cutting the witness off in his answer.

MS. COLEMAN: I apologize for that.

MR. LANSDALE: But, moreover, I object to the questions about the hypothesis of 4 miles by 5 miles or anything else. We know what we did in this case and I submit the question should be confined to it.

MS. COLEMAN: It's going to the methodology, your Honor, and whether the methodology has relationship to the results here.

THE COURT: You can hypothecate any set of circumstances. You can hypothecate into perpetuity. Unless there is some basis --

MS. COLEMAN: I can assure you I don't intend to do that.

THE COURT: Well, you certainly are. Certainly, it is obvious that the results of

a four mile by five mile area are going to be different than a 4,000 by 5,000 square-foot area.

MS. COLEMAN: Your Honor, it is obvious to you and to me but I worry about the jury here. That's why I try to take these steps to help them understand what is going on.

THE COURT: I would suggest you watch the jury as far as your cross-examination is concerned.

Go ahead. Finish it up. As I say, you can hypothecate until perpetuity.

MS. COLEMAN: Well.

THE COURT: This is not the fact. The fact is he used 4,000 by 5,000 voot grid, but go ahead.

MS. COLEMAN: And the fact is it makes a difference.

{End of bench conference.}

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THE COURT: You may proceed, Ms. Coleman.

BY MS. COLEMAN:

Q If, instead of your large grid, Mr. Kemper, you used a smaller set of grids, you get a different set of

information of how much of the white part is in the grids and how much is outside the grids; right?

A For that specific grid, right.

Q And, similarly, if you have a situation where you have located the customers at their addresses in the area and your CEI grids hit that group of customers in this fashion {drawing}, you would report, based on your analysis, that there were no Muny customers in this grid and no Muny customers in that grid and none out here and none out here and none out here and none out here and none here but there were in this area right here if that's the way the CEI grid hits the map; right?

A Correct.

Q And yet, if the grid actually started at a different place --

THE COURT: Let's approach the bench now.

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{Bench conference ensued on the record as follows:}

THE COURT: See, you keep going on and on and on. Certainly, you can come up with any number of hypothecations but the fact of

the matter is he used a 4,000- by 5,000-foot grid.

MS. COLEMAN: That's what I'm talking about right now.

THE COURT: You certainly are not.

MS. COLEMAN: I am, your Honor.

THE COURT: Please limit yourself to the 4,000- by 5,000-foot grid.

Let's proceed.

{End of bench conference.}

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THE COURT: Let's limit the examination to what the facts actually show, that he used a 4,000- by 5,000-goot grid.

BY MS. COLEMAN:

Q Let's assume this is your CEI 4,000- by 5,000-foot grid, Mr. Kemper. Will you assume that with me?

A Yes, ma'am.

Q Although maybe the proportions aren't exactly right.

If this is the way the grid hits the map, your report, based on your study, is that there are Muny customers in these four grids; is that right?

A Correct.

Q Now, if the grid actually hit the map when you placed the grid over the map so that the grid lines were

actually somewhat above, you would actually find out that you had Muny customers in this grid and this grid and this grid and that grid and you would be comparing different sets of information, would you not?

A I don't quite see how, because it is all tied back to the area. When we got into where there were just partial or a few MELP customers in the grid, we then went down to our subgrid basis to determine if it, you know, was a partial -- the 4,000- by 5,000-foot grid was on the perimeter and only part of it was in the MELP service area.

We then went to the 100 subgrids, ten on each side making a hundred, which came down to a 400 by 500 foot grid so we could determine the CEI customers in those subgrids so we would know that they corresponded to the Muny customers in that grid.

Q But it still all depends on where the grid line cuts, doesn't it?

A It is all relative.

Q It is all relative?

A I mean, if you shift everything up or down, sure, and use the same numbers, you are going to get different answers by the same numbers. But all you are doing is shifting it up and down and you will end up with the

same end result even though by individual grid it might be a little different.

Q Well, if the grid lines are the green grid lines here, then all of a sudden I'm comparing this Muny customer to the CEI customers in this area; right?

A Right.

Q And before, when the grid line was the black line, I was comparing this Muny customer to the CEI customers up in this area; right?

A Right.

Q So the comparison is different depending on where the grids fall?

A But not when you get done with the whole thing. It will come back to the same -- the area doesn't change. It is still the same area, and the fact that we put the grids 100 feet one way or the other really doesn't make any difference. It does by individual grid, but it doesn't in the overall map because the map, the MELP service area is a specific piece of ground in the City of Cleveland, and how we start or stop the grids really doesn't make any difference to determine what we were trying to determine.

Q Well, how you set the grids, you will agree with me, does affect which group of customers you are examining? It frames a neighborhood, does it not?

A True. The important thing is that we use the same base line, the same grids for determining the CEI customers as we use for the MELP customers so that we end up in the same grid if they are in that grid. If we shift it, one may end up in the next grid and the other one in the other one. But there will be a different set of customers.

And when you get all done, it is going to be the same thing except the individual grids will be different. Percentages by individual grids will be different. But overall, it is going to come back to the same thing. We only have a selected piece of ground which we call the MELP service area.

Q And that piece of ground you identified in two ways; is that right? You looked at where this 1976 list of Muny customers was located; is that right?

A Correct. And we used our grid system to identify them, which is the same thing we identify our customers with. So the customers on the same street end up in the same subgrid.

Q They may or may not, depending where the subgrid line is; isn't that true? The subgrid line maybe falls between one house and the next?

A Well, it could. It could. But --

Q It may even split a house in half?

A It could, I suppose. But it would only be one customer.

Q Now, let me get back to the question, Mr. Kemper, which was; your basic point of departure was what you identified as the location of actual Muny customers in 1976; is that right?

A That is correct.

Q Another approach you used was to look at the City planning map, is that correct?

A That is correct.

Q The map that was part of your study -- is this the City planning map that you are talking about that you used {indicating}?

A That is a map of the City of Cleveland showing the MELP common area or service area with our grids superimposed on it.

Q Is this a map you prepared?

A This is our map.

Q This is your CEI map?

A Right.

Q You placed that darkened area on this map; is that correct?

A From the City Planning Commission map.

MS. COLEMAN: Do we have Plaintiff's Exhibit 2064, Mr. Leo? I thought I had it sitting out there.

BY MS. COLEMAN:

Q Is that the City Planning Commission map that you are referring to, absent the colors?

A 5/9/73, yes, ma'am, that is the City Planning map.

Q You took information off this map and placed it on this map, is that correct?

A Mr. Pofok gave us the map -- actually he gave us a wash-off tracing.

Q You used this map in your study, is that right?

A Yes, ma'am.

Q That was part of the subgrid analysis; is that correct?

A That is part of the grid and subgrid analysis.

Q Now, when you were looking at Muny customers you looked at customers of all classes, isn't that right?

A It included all Muny customers, as I understand it, which includes all classes, yes.

Q The residential, commercial as well as municipal and street lighting?

A That is my understanding.

Q Now, generally your approach was every time you

identified a CEI grid where you found, because of its plotting or because of the map you looked at, there were Muny customers, you counted the actual number of CEI customers in that grid, isn't that right?

A We actually ran it twice. In our revenue system we have all our customers identified to grids. So we don't really have to assign them. We can just look through and count them by grid.

In the case of the Muny customers, we had to write a program to identify the streets by-- we have a street index guide which identifies all streets by our grids, 4,000 by 5,000 foot grids, and we took the street addresses in the tape that we received from Muny and ran it againsr our street index guide, which gave us which grid that customer was in. Then we counted them up by that fashion.

Q Well, I understand that. But that's the manner in which you identified which grids to focus on, is that right?

A That told us where the Muny customers were, in which grids, yes.

Q Once you had identified a grid, your procedure then was to find out how many CEI customers were in that grid, is that right?

A Right. In a separate program, but it was done separately from the Muny program, but it was done -- there we actually just looked up the grid numbers. We did not have to use the street index guide.

Q Your purpose in doing your study was to count the CEI customers in every grid where you found Muny had facilities, is that right?

A That was our ultimate goal, yes.

Q Now, based on what you know of Muny Light facilities from riding the line, you are aware that Muny serves the Baldwin Pumping Station up on Fairhill?

A It may. I don't know.

Q Well, assuming that it did, you would want to make sure to count the number of CEI customers in the grid where Baldwin falls, wouldn't you?

A We counted the grids in which the City Planning Commission said Muny served. If Baldwin pumping plant was in a grid that is not shown on that map, we did not count the Baldwin pumping plant because it was not in the Muny service area as defined by the City Planning Commission.

Q The City Planning Commission map didn't have definitions on it, did it?

A It's sufficiently detailed enough that you can take the

streets and plot it on another map or most -- you can tell what streets are within the Municipal service area.

Q. If Baldwin falls in a grid which you didn't count because you didn't see it in the darkened area on the map, then you also didn't count the CEI customers in that grid, did you?

A Right. It was not in the Municipal Light Plant's service area.

Q Therefore you have understated the number of CEI customers in the same neighborhood as the Muny customers, isn't that right?

A No. Because we were looking for the CEI customers in the Muny service area as defined by this exhibit.

Q I thought you just told me that your purpose was to identify all CEI customers in the same area that there were Muny customers or facilities.

A Within the municipal service area as defined by the --

Q Well, the service area was your terminology, wasn't it, Mr. Kemper?

MR. LANSDALE: I object.

A It seems to me it was on a previous exhibit.

THE COURT: Let's not be argumentative. He has answered the question three times.

Sustain the objection.

BY MS. COLEMAN:

Q Let me understand you correctly, Mr. Kemper. If you did not find from the map that a particular facility was within the darkened area -- the dark-yellow area on this map, is that correct?

A Yes.

Q If you didn't find from looking at the dark-yellow area or the dark-gray area the facility was within that area, you didn't look at that grid, is that correct?

A That is correct.

Q Are you aware that there is a Muny Light street lighting circuit extending the length of Broadway going in the southeast area of the city?

A Does it show on the map?

Q Are you aware of that from riding the line?

A I can't remember the whole 30 square miles that I rode. That was a long time ago.

Q Well, your procedure would dictate that there is such a circuit that you should also look at the number of CEI customers in the grid that line passes through, doesn't it?

A If it was in the defined municipal electric service area.

Q Now, in conducting your analysis you said you not only looked at the grids where you assumed from the map Muny had facilities but also looked at those grids broken up into 100 subparts?

A The peripheral or perimeter, yes, ma'am.

Q That's called a subgrid?

A Subgrid part, yes.

Q You gave us a picture of a subgrid in your paper, did you not, and this is what it looks like?

A Yes, ma'am, that's a subgrid to be used with the map you previously displayed.

Q And you would use this subgrid and lay it on top of the map in order to identify the subparts which have Muny's services, correct?

A That's correct.

Q And that's a procedure somebody does by hand, actually taking this screen and laying it over a map?

A That was done by a draftsman, yes, ma'am.

Q Then after a draftsman lays this over a map, he then reads off the information about the grid by using this numbering system; isn't that right?

A Correct.

In other words, four or five would be -- grid number 4-5 would be that grid number 4-5.

Q Grid 4-5 would start on the fourth row here and go all the way across to the fifth column and that would be Grid 4-5, right?

A Subgrid 4-5, yes.

Q Now, when someone lays this over a map, they use this method to figure out which subgrid they ought to study closer; is that right?

A We use it to define which subgrids were within the Muny Light Plant service area as defined by the City Planning.

Q Then you use a computer program that you have to count off the number of CEI customers you have in each of the little subgrid areas that you identified; isn't that right?

A We have what we call any distribution load management system, transformer load system, per se, is another name used for it, in which every CEI customer that is on our distribution facility is identified by subgrid. We tie each customer back to a transformer and we study the loading on that. It is used to study the loading on the transformer to see whether it ought to be replaced because the loading is too much or, if there is too little loading, maybe we ought to replace it with a smaller one.

So we do know the subgrids for all the customers on the distribution system.

Q The way this procedure works, when you did your study, was somebody laid this grid on top of a map and then read off the grid where they found there was a Muny area and produced this list which is part of your papers; is it not?

A That is correct.

One thing I might add, when looking at the map and with the subgrid, if more than 50 percent was in the MELP service area, we counted it as a MELP, as being in the service area and would pick up the CEI customers. If less than 50 percent of a subgrid was within a MELP service area within the subgrid, we did not count it, the basis of which is the subgrid is 400 by 500 feet -- it's 7/1,000 of a square mile -- and it was such a small area we said either the subgrid is in or it's not in.

Q You made this kind of a working rule of thumb?

A This was given to the draftsman who went through the map and measured, determined what the partial grids in the service area and determined what subgrids they were.

Q What we actually have here is down the side where it

says "Grid," that's the main grid number?

A That's the 4,000 by 5,000 grid.

Q And that is read off in the same way as the subgrid. The correct number here is 51, if I am reading that right?

A I can't see it.

Q You can't see it and I can't see it, but the first two digits are going to tell you the number down the vertical of the map; is that right?

A Vertical, north-south, and then east-west.

Q And the second is going to tell you along the east-west of the map; is that right?

A Yes.

Q Then the numbers we see lined up along here, as it says, all that means is the person working under your supervision concluded all the subgrids should be studied?

A Right, the whole grid was in the MELP service area.

Q And if there's a series of numbers, as there is right here, that's a list of the little subgrids you decided to study based on overlaying the grid map; right?

A They were within the common service area.

Q Now, you testified earlier that the work with the

subgrids was an important part of the process of narrowing down which CEI accounts to focus on; is that right?

A To determine which CEI customers were in the common service area.

Q Now, by the way, when you did your analysis and you had your computer printout of the subgrids where there were CEI customers, you found there were some subgrids chosen to study where CEI had no customers; isn't that right?

A I'm sure there were. I didn't run down them, but I'm sure there were.

Q You called these part of the common area, nevertheless, isn't that right?

A Correct. They were surrounded by CEI facilities.

Q In other areas there were subgrids where Muny Light had no customers?

A Right.

Q And you didn't consider those part of the common area?

A We did consider them.

Q Where Muny Light had no customers?

A We did consider the whole grid in the case of Muny as being in the common area.

Q Where Muny had no customers in the grid, you considered

it part of the common area?

A If there were any, yes.

Q If it was within that dark-yellow area, then it was in the service area. So whether Muny had customers or didn't have --

Q If it was outside the area, you didn't count it?

A We did not count it unless it was within the Muny Light Plant service area.

Q Now, when you give this analysis with the subgrids and the maps, if there were some grids that you didn't count where both Muny and CEI had facilities, that would change your tallies and your counts, wouldn't it?

A If both -- Well, I find that hard to visualize except out in the lake, but we don't consider that.

There might be some numbers that showed up on the lake but we later found out which ones they were and assigned them to the proper grid or subgrid, whichever the case may be.

Q Well, if it were a situation that Muny had a small part of the grid and CEI had the rest, you didn't count it at all? Is that your testimony?

MR. LANSDALE: I object.

A Could I hear that again?

Q I may have misstated myself.

THE COURT: Read the question back, please.

Would you like to rephrase it instead?

MS. COLEMAN: I would like to restate it, your Honor. I think I mixed up the terminology.

THE COURT: Very well. Rephrase it.

Q If you have a situation in your analysis where Muny has a small part of the subgrid and CEI has the remainder, you didn't count that subgrid in your analysis at all?

A If the subgrid was within the rules which we defined of the yellow area, we counted all the CEI customers in that subgrid whether Muny had a customer in there or not. As long as it was within the subgrid or within the municipal service area as defined by the City Planning Commission map.

Q. I thought you said that if Muny occupied less than half of the subgrid, you just kicked the subgrid out of the study?

A No. If CEI occupied less than -- I see.

I mean, I'm sorry. If the line from this map, the area was less than half of a subgrid, the line went through the subgrid and less than half of the subgrid was covered by the service area, then we did not include it. But if it covered more than 50 percent,

we did include it.

We were somewhat using the principle of calculus of infinitizing the perimeter bounders. The smaller you make it, the closer you come to the precise area.

Q Let's look at the actual procedure that you used. I have a copy of a section of the map here, Mr. Kemper. I will ask you to take a minute to verify with me that we are both talking about the same thing. I have put some marginal numbers here for reference.

THE COURT: While we are verifying that, Ms. Coleman, why don't we take a break.

MS. COLEMAN: All right, sir.

THE COURT: Supposing we take a short recess, a short stretch, and we will come back and resume.

(Recess taken.)

THE COURT: You may proceed.

BY MS. COLEMAN:

Q Mr. Kemper, I was, just before the break, showing you a map section. Have you had a chance now to examine that map section?

A Yes, ma'am, I have.

Q Will you agree with me that this is a copy of the map

which you used to do your grid analysis?

A Yes, ma'am.

Q Now, I want to focus on subgrid 3829.

Now, the 38, we take the 38 and read across and 3829 would be this one right here on the Lake Shore?

A That would be a whole grid, not a subgrid.

Q Now, when we lay the subgrid overlay on this, we are following the procedure that your staff was following figuring out which subgrids to focus on, is that right?

A That is correct.

Q You sort of fit it in like this so the two boxes square with each other?

A I can't exactly see it, but I think --

Q You cannot see it from there?

A It is a little too much of an oblique there.

Q Let's try to turn it so you can see it. I would like to be able to ask you some questions about it.

Does that help at all?

A That's better, yes.

Q I see I have worked so hard to lay this over the wrong grid.

3829. Now, what you would do, you lay this subgrid over the map and then you focus in on which

subgrids the dark areas fall in, is that right?

A Right.

Q Now, following this procedure we then look at the map and we look for where the dark areas are and to read them off, you see a dark area there, so that would be subgrid 44, because it is at the inner section of 4 and 4. There is a little bit of a dark area there.

A Correct.

Q And 45 the same?

A Right.

Q 46 and 47 and also 54 and 55 and 56 and 57 and 63, 64, 65, 66, 67, 68; is that right? Are you following me?

A Right.

Q Then for 70 we look -- for this row, the seventh row we look and find a little dark area here so we count subgrid 73, is that right?

A You are at 74.

Q Well, my pointer isn't very good, Mr. Kemper. You would want to count Subgrid 73 as part of your study?

A No, it is less than 50 percent.

Q Less than 50 percent.

You would count 74?

A I can't tell from here.

Q 74 right here.

A Well, that would be -- 74 -- I guess it is in the dark area. It is a little hard to distinguish.

Q 74 right here.

A It looks like more than 50 percent.

Q 75, 76, 77, 78 and 79 has some of this dark area, also?

A Now, whether it is 50 percent or more I can't tell.

Q If the dark area is less than 50 percent, you just didn't count it; is that right?

A We did not use those subgrids.

Q Even though they had Muny customers in them; is that correct?

A That is correct, because we had to draw some way of doing this problem. We didn't want to get down to splitting such a small area as a subgrid into partial or half grids or something.

Q Well, your subgrid map laid over this map showed that there was Muny customers in that subgrid, didn't it?

A There are.

Q But you just decided not to count that?

A Yes. But there were probably CEI customers in some of the ones with less than -- I mean Muny customers -- let me say that right. But there were some where CEI was only 45 percent of the grid but we counted it,

CEI by itself was only 45 percent of it, because 55 percent was in the MELP service area, so we counted the whole subgrid.

So with the number of subgrids involved in the whole study, the presumption of the law of large numbers is used and you would even out so that you would come to a very close answer if you did it with a -- well, I don't know what you would do with it. Subgrids or something.

Q Of course, the law of large numbers relates when you have a random set, does it not?

A I would guess this borders pretty random.

Q Well, this isn't a random set at all, is it? It is a specific area that you are looking at?

A Well, it is the whole population.

Q Well, it is just the specific area as defined by the map; isn't that right?

A I guess I don't understand what you are asking me.

Q This isn't an area chosen at random, it is a specific area that you are studying?

A What I'm saying is the development of the perimeter line of the Muny service area probably was random and was not planned.

Q We just went through the subgrids on the seventh row,

and there are also subgrids on the eighth and the ninth rows that you would pick up for your study; is that right?

A That is correct.

Q Under the fifth column, that would be 85 and 95, 86 and 96 --

A I don't know if 85 was more than 50 percent or not. I don't know. I can't tell from here.

Q 87 and 97, 88 and 98, 89 and 99; is that right?

A Well, assuming that they were more than 50 percent within the municipal service area, we would have picked them up. But I can't tell from here whether I would estimate that the subgrid was 50 or more percent within the municipal service area.

Q Well, let's look at 74, right here. That is one that you would want to count in your study, isn't it?

A I find it hard to distinguish from here.

Q Well, you have a copy of the map there, don't you, and you have a copy of the subgrids?

A Yes.

Q If that will help you, why don't you lay your own subgrid over your own map.

A It could be, couldn't be. Depends on what the fellow did. There is a road that goes right along there that --

apparently it was open area. So it depends on whether you consider the road, the southwest side of the road in the area or not. So I could determine it either way.

Q In fact, he did not include that subgrid?

A He did not include it twice. The man who did it decided that it was less than 50 percent in the Municipal service area.

Q And he didn't include a number of other subgrids that we just looked at, did he?

A Well, from what was done by the draftsman, that he determined from much more precise evidence, too. It is offered -- because the reproduction process distorts the picture and you sometimes can't get good registration. So we did find it would be better off and subject to interpretation both ways, I'm sure, that he could call one that shouldn't be in in just as well as he could call one that should be in not in.

Q If that little block 74 is not in the study, and you and I agree that it is not, then those CEI customers aren't counted in the study, are they?

A But the rest of the grid, the subgrid, is Villa Maria Academy and it's probably an open field.

Q That's Villa Angela, isn't it?

A I can't read it. There's a line there.

It's probably an open field, the rest of that.

Q And Villa Angela isn't considered in this study at all, is it?

A No. It would be out because it's outside the service area as defined by the City Planning Commission map.

Q Let's take 85. That's another one that wasn't counted, was it?

A Well, does Miller Road go right along there?

Q It's got a street running right along there, does it not?

A I'm looking at the wrong one.

I would say that's less than 50 percent, from this.

Q So that wasn't in there?

A That was not included.

Q The CEI customers from that area were not included?

A Right.

Q But the Muny customers were counted because you counted all the Muny customers when you made your analysis; isn't that right?

A Within that total grid, that's right.

Q While we are looking at this map -- and let me take

this grid map off just to clarify things -- this is part of the Collinwood system, isn't it?

A Part of the other --

Q Collinwood area?

A Right. It's up in the northeast corner of the City of Cleveland, yes.

Q Your distribution load management system shows CEI has customers in almost every subgrid of the grid we were just looking at and the one below it. Both these are in Collinwood, right?

A Right.

Q There is 3829 and 3929 right here.

A That would be 3829 -- no, I'm sorry.

Q 3929.

A 3929, you are right.

Q 3929 here.

Now, this is also an area that you looked at when you did your neighborhood study, isn't that right?

A You are talking about the seven areas?

Q Yes. You looked at 3929, this one?

A 3929.

Q This one right here.

A What part of it? You are talking about 3928.

Q 3929.

A 3929. I was looking for 3829.

Q Your records show that CEI has some poles there dating as old as 1928, isn't that right?

A What year did you say?

Q 1928.

A '28, yes, ma'am.

Q Yet for those 1928 poles you also assumed a 1971 cost for them, right?

A We did a 1971 pricing of all the facilities, yes.

Q If you were going to actually purchase those facilities, you wouldn't pay for them at the 1971 price for all of them, would you? You wouldn't expect to?

A It depends. That's a hard question to answer.

Q You would take into account their depreciated value, would you not?

A If we were buying a whole system versus just buying a few poles. It makes a considerable difference in how it would be priced.

Q Of course there are other considerations involved?

A Right. If we are buying a whole system the consideration tends to be rate base.

Q You do have information in your section, do you not,

of the depreciated value of all of this product that you examined?

Q We do not keep any property by its depreciated value. We only had the original cost.

Q You have an FPC account for poles and towers, don't you?

A Yes, ma'am.

Q You have the information about the depreciation on that account, don't you?

A We do not keep our depreciation reserve by account. We only keep it by total company.

Q You have no information about the depreciated value of those pieces of equipment; is that right?

A Of any one individual item, no, we do not.

Q But we can agree that those which are older than 1971 have a depreciated value less than 1971 cost, is that right?

MR. LANSDALE: May I object, your Honor.

THE COURT: Approach the bench.

- - - - -

{Bench conference ensued on the record as follows:}

MR. LANSDALE: This is repetitious

and I object, because some concession has to be made to the shortness of human life, and I am beginning to think we are being subjected to a deliberate stall. I object.

MS. COLEMAN: That's not accurate.

MR. LANSDALE: This is now repetitious, clearly repetitious.

THE COURT: It does seem to be repetitious.

MS. COLEMAN: I am trying to pick up a loose end and not trying to stall.

THE COURT: Where are we going with this examination?

MS. COLEMAN: I am just about done, your Honor, trying to wrap it up.

THE COURT: We have been on it for almost two hours, an hour and 45 minutes.

Go ahead. Let's not be repetitious, please, Ms. Coleman.

{End of bench conference.}

- - - - -

THE COURT: It is a bit repetitious, but you may answer the question again. Read it back.

{Record read.}

A Yes.

Q Mr. Kemper, with regard to that excess property study, you testified that your sample was not a random sample, did you not?

A That is correct.

Q Yet you used it to blow up to a conclusion about the entire system situation, didn't you?

A That is correct.

Q If you are going to make that sort of conclusion, really the only valid basis for it would be if you had a random sample, is that right?

A I suppose there would be other ways of doing it, but not necessarily would it have to be random. You can do the whole population study.

Q You didn't study the whole population?

A No, that's much too big to do.

Q You just picked seven areas?

A Right.

Q Now, I apologize for jumping back, but the study you did on customers which we just looked at with the maps, that analysis was done just for the purpose of this antitrust suit; is that right?

A That is correct.

Q And in fact, it wasn't done until some time earlier

this year; isn't that right?

THE COURT: He has testified to this already, Ms. Coleman. He testified that this entire survey was made for the purposes of this litigation; however, the survey was commenced some two years ago.

MS. COLEMAN: That was the other survey, your Honor.

THE COURT: Well, I thought he was referring to the entire survey.

Go ahead. I'm asking you to please not be repetitious.

You may answer.

BY MS. COLEMAN:

Q The customer study, Mr. Kemper, was done at the beginning of this year, was it not?

A The final study was done early this year. We had had several other starts.

Q You completed it early this year?

A But it was completed early this year, yes.

Q You don't routinely make a study which shows the number of CEI customers in a so-called common area, do you?

A We don't keep anything by the common area or the --

none of our property records, none of our customer records are kept by the Municipal Light Plant service area.

MS. COLEMAN: No further questions.

MR. LANSDALE: No questions, your Honor.

THE COURT: You may step down. Thank you.

(Witness excused.)

THE COURT: Do you have another witness?

MR. LANSDALE: Yes, sir. Mr. Bingham.

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W I L L I A M B I N G H A M,

called as a witness by the defendant, being previously duly sworn, was examined and testified as follows:

MR. LANSDALE: This witness has already been sworn, if your Honor please.

THE COURT: Yes.

Mr. Bingham, you will be testifying under the same oath that has heretofore been administered. Do you understand that, sir?

THE WITNESS: Yes, sir.

THE COURT: You may proceed.

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DIRECT EXAMINATION OF WILLIAM BINGHAM

BY MR. LANSDALE:

Q You are the Illuminating Company's principal rate engineer, are you not?

A Yes, I am.

Q Mr. Bingham, in connection with the cross-examination of Mr. Kemper which we have just heard, some examination was made relative to the annual cost per customer of accounting for depreciation relative to

the excess cost in the Muny area that Mr. Kemper referred to.

Are the annual costs of depreciation the entire costs related to the amount of property to serve a particular customer?

A No. As a matter of fact, they are a relatively minor part of the cost.

Q Are you able to approximate the annual costs as they would be used to determine the rates which would be reflected in a customer's bill associated with the property specifically installed for a customer?

A Fairly closely.

Q Will you do so?

A Well, a very quick calculation. Assuming an 18 percent fixed charge rate, which would cover the return to the company, depreciation, property taxes, income taxes, and insurance, the fixed charges alone are something in excess of $11 a year for a $62 investment.

Now, on top of that you would have some operation and maintenance costs which I have not tried to quantify. But the average monthly cost could well be, very likely is in excess of a dollar.

MR. LANSDALE: Thank you.

If your Honor please, may I approach the bench?

THE COURT: Yes.

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(Bench conference ensued on the record as follows:)

MR. LANSDALE: I would like to have Stipulations 92 through 97 read.

The other one is about comparative rates.

THE COURT: And 97 or through 97?

MR. LANSDALE: 92 through 97.

THE COURT: All right.

Do you have any objections, Mr. Hjelmfelt?

MR. HJELMFELT: No objection to 92 and 93.

Have these others already been read? Is that what your checkmarks mean, that they have already been read?

MR. LANSDALE: It means they have already been read. But I want to put them in context.

MR. HJELMFELT: Yes.

I have no objection.

THE COURT: All right.

{End of bench conference.}

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THE COURT: Ladies and gentlemen of the jury, Joint Stipulation 92 reads as follows:

"On September 15, 1969, CEI applied to the Public Utilities Commission of Ohio for approval of a rate increase. Increase was approved pursuant to the stipulation with the City of Cleveland and became effective on August 15, 1970. The new rates extended a fuel charge to residential and commercial customers for the first time."

"Joint Stipulation 93. Ordinance 2163-70, introduced 12-16-70, was passed March 8, 1971, to take effect on April 18, 1971. The effect of this ordinance was to increase most Muny Light rates to change the brackets in residential schedule, to change the calculation of fuel charges and to impose a fuel charge on residential and small commercial customers for the first time customers. It had the effect of reducing billings to some customers."

"Joint Stipulation 94. CEI applied to the PUCO for approval of a rate increase on

October 7, 1971. The staff report of the PUCO was published March 3, 1973, and contained recommendations for increases of CEI rates. PUCO approved this recommended increase on November 28, 1973, effective January 22, 1974."

"Joint Stipulation 95. Subsequent to March 3, 1973, and prior to J ly 11, 1973, Messrs. Hinchee and Mathews prepared a revision of Muny Light's rates based upon the increase proposed by the PUCO and the Commission staff for CEI and such rates were embodied in a resolution of the Board of Control adopted on July 11, 1973. Such rates were included in Ordinance 1629-73 introduced August 13, 1973, passed and effective January 28, 1974, changing Muny Light's rates. The brackets for all schedules were changed and an environmental and ecological adjustment which was added in, 5 percent limitation on fuel charges was removed."

"Joint Stipulation No. 96. By "Ordinance 332-75 passed May 19, 1975, and effective May 27, 1975, Muny Light's rates were changed so that the fuel charge was determined on a monthly basis rather than on a quarterly basis.

"No other change in Muny Light's rates was made by this ordinance."

"Joint Stipulation 97. CEI obtained approval from the Public Utilities Commission of Ohio of a rate increase effective July 12, 1975, pursuant to the mandate of the Supreme Court of Ohio on CEI's appeal from a smaller rate increase approved by PUCO on November 28, 1973, effective January 22, 1974, which rate increase CEI had applied for in 1971."

BY MR. LANSDALE:

Q Mr. Bingham, you have at my request, have you not, studied the rate changes or the changes in the rate levels of CEI's rate schedules over a period of years compared to the size and timing of changes in the rate schedules for Muny Light, have you not, with a view to determining which organization followed the other, or vice-versa, in making these changes, have you not?

A My study was primarily involved with the timing and also with some perhaps special features of the rates rather than directed primarily or largely toward the amount of the increase.

Q I see. All right.

Over what periods of time, what period of time

did you look at?

A Essentially 1920 to date.

Q Are you able to make any determination, Mr. Bingham, as to what the history shows or indicates as to CEI's rate changes were influenced by those of Muny Light or vice versa?

A Largely we found the reverse to be true, that the Muny Light rate changes tended to be influenced by CEI changes.

Q Tell me what general pattern you based this conclusion on?

A Well, the first changes I found really were sort of inconclusive. For example, CEI reduced its rate, eight days later Muny Light increased rates.

That doesn't tell me much of anything.

But starting in 1926 CEI had a rate reduction on January 1. Muny Light had a rate reduction on January 11, 10 days later.

In 1928 CEI had a reduction on January 1, Muny had a reduction on April 21, 111 days later.

In 1930 CEI had a reduction March 1, Muny had a reduction on May 21, 81 days later.

In 1933 CEI had a reduction on April 1, Muny had a reduction on April 13th, 12 days later.

In 1937 CEI had a reduction on May 1, Muny had a reduction on May 21, 20 days later.

Now, in the five cases these were all of the rate changes I was able to find between 1926 and 1937.

Following that period I find one that appeared to go the other way. Muny had a reduction on August 27, 1939 and CEI had one July 7, 1940.

Following that CEI had an increase in 1951 and '55. Muny had one in 1957.

CEI had a two-part increase in 1951 and '60, all part of the same rate case, but part of it became effective in January of '59 and the remainder in February of 1960, and a slight reduction in 1965. However, the combined effect of those three was an increase. Muny had an increase in 1968.

CEI had another increase August 15, 1970. Muny had one April 18, 1971, 123 days later.

CEI next had an increase January 22nd, 1974 and Muny had an increase January 28th, 1974, six days later.

CEI next had an increase October 1, 1976 and Muny had no direct rate increase or no change in their base rates following that, but within the year following CEI's increase, the Muny fuel adjustment or

energy adjustment clause, whatever they called it, increased very materially to a large extent making up for about the amount of the CEI rate increase.

Q What if anything do you conclude from these statistics, Mr. Bingham, about whose rates influenced who?

A From the timing of the rate changes, my conclusion is that Muny changes their rates after we do.

Q How long have you been responsible for the design of CEI's rates, Mr. Bingham, approximately?

A Since 1959 with one exception.

Q You were away for a couple of years?

A They designed some rates while I was gone.

Q During the period that you had responsibility for this, Mr. Bingham, what is the fact as to whether or not, in designing CEI's rates, you were governed by what Muny Light's rates were either by design or otherwise?

A We pretty much ignored it.

MR. LANSDALE: I'm about to go to another subject.

THE COURT: If that is the case, this is an opportune time to adjourn until tomorrow morning.

So ladies and gentlemen, please, during the recess, do not discuss the case either among yourselves or with anyone else. Keep an open mind until you have heard all of the evidence, the Court's instructions on the law, and until such time as the matter is submitted to you for your final deliberation and your judgment.

With that, you are free to return to the jury room. We will submit to you some of the exhibits of the day, and then you are free to leave and return here tomorrow morning at 8:45.

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(The following proceedings were had out of the presence of the jury.)

THE COURT: I'm informed that the following exhibits may be submitted to the jury and they are admitted: CEI 1037, 1050, 1051, 1041, 1040, 1044, 622, 623, 570, 571, 572, 573, 574, 534, 535.

The following Plaintiff's exhibits may be submitted to the jury and are, therefore, admitted: Plaintiff's Exhibits 3107, 1973, 1538, 1548.

Mr. Leo, you may submit those to the jury.

I also understand that the following exhibits are tendered to which no objection is taken and are, therefore, admitted: CEI exhibits 27, 32, 38, 40, 47, 51, 52, 71, 74, 76, 81, 84, 88, 99, 102, 105, 108, 117, 129, 134, 140, 244, 247, 254, 259, 264, 270, 271, 272, 273, 280, 296, 300, 301, 302, 303, 306, 307, 308, 317, 318, 321, 322, 324, 329, 337, 343, 344, 347, 353, 354, 359, 360, 362, 367, 368, 370, 372, 375, 378, 379, 383, 384, 385, 389, 430, 439, 454, 455, 458, 459, 463, 469, 488, 490, 494, 506, 540, 541, 542, 544, 548, 550, 560, 568, 575, 576, 577, 578, 605, 610, 620, 624, 625, 626, 627, 648, 649, 650, 651, 652, 653, 654, 655, 661, 662, 694, 713, 771, 1104.

Objection is taken to CEI's tendered exhibit 246, which is -- I'm going to have to read this document.

What is the objection predicated upon?

MR. NORRIS: The objection is hearsay, your Honor. The material listed in the exhibit does not relate to the statements attributed to Goralski in the first paragraph, the testimony that the Muny practices are

as represented there.

THE COURT: I thought we had agreed that these documents -- there was agreement and stipulation as to the authenticity and accuracy of the documents?

MR. NORRIS: The authenticity of the documents, it's a Walchli memo to Cox. We have no doubt about that. It's on CEI letterhead.

We take exception to the substance of it on a hearsay ground.

THE COURT: Then you are withdrawing your stipulation to the accuracy of the content?

MR. NORRIS: Our stipulation went to authenticity, your Honor, and we agreed that where a document --

THE COURT: Mr. Norris, please don't say that. It was authenticity and accuracy, and you can go back in this record and you will find I have always referred to authenticity and accuracy. So don't tell me it referred only to authenticity.

If you are desirous of withdrawing your stipulation as to the accuracy of it, you are

Bingham - direct

free to do so. Don't put words in the Court's mouth.

Are you desirous of withdrawing your stipulation as to accuracy?

MR. NORRIS: We do not agree that this is an accurate representation of the --

THE COURT: Very well. You are free to do so.

MR. NORRIS: And it is also hearsay.

THE COURT: If you are desirous of qualifying the document, you are free to do so with the appropriate witness.

MR. MURPHY: Your Honor, I wonder if I can speak to it.

THE COURT: Yes, you may.

MR. MURPHY: Two things. Mr. Lindseth testified yesterday that Mr. Walchli's memorandum was reporting on a discussion Mr. Walchli had with his counterpart at Muny Light, thereby taking it from the hearsay rule.

Secondly, and more importantly --

THE COURT: Would you repeat that, please?

(The record was read by the reporter.)

THE COURT: That does take it out of the hearsay rule, Mr. Murphy?

MR. MURPHY: Your Honor, not exactly, but I think it's --

Secondly, and more importantly, the purpose for which the document is offered is to show the reaction of CEI and the motivation for the reaction of CEI simply in the fact that it had received a report of this sort from one of its employees.

THE COURT: I'm sure you can qualify it properly.

Sustain the objection.

MR. MURPHY: May I make inquiry concerning one other exhibit?

THE COURT: Yes.

MR. MURPHY: It's CEI 434. It should have been on the first list and I'm not sure if it was received or not.

THE COURT: Our records indicate that that exhibit has already been admitted some time ago.

MR. MURPHY: I didn't have that.

Thank you, your Honor.

THE COURT: On 9-30.

MR. NORRIS: Your Honor.

THE COURT: Yes.

MR. NORRIS: With respect to our memorandum of authorities with respect to Defendant's exhibits filed on September 2nd, the last sentence states: "The City reserves its right to challenge the accuracy of statements contained in any exhibit, to object to the relevance or hearsay nature of the exhibit and to make any other appropriate objections at trial."

THE COURT: If you go back through the record, Mr. Norris, the Court has always alluded to accuracy and authenticity. I stand on that. So there is no issue before us. I have permitted you to withdraw your stipulation as to the accuracy of it.

If there is nothing further, gentlemen, thank you and good night. We will see you tomorrow morning at 8:30.

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(Court adjourned for the day.)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

Transcript

Wednesday, October 22, 1980

Bingham, Fawkes, Kilroy, Markos, Cheney

WEDNESDAY, OCTOBER 22, 1980, 8:55 A.M.

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

MR. MURPHY: Your Honor, before the jury is brought in --

THE COURT: Yes.

MR. MURPHY: -- I would request permission to introduce to the Court Miss Mary Jane Reynolds, an attorney with the Federal Energy Regulatory Commission, and Mr. Edward Fowlkes. I think Ms. Reynolds would like to enter an appearance in this case for the sole purpose of when Mr. Fowlkes testifies.

THE COURT: Very well. Everybody is represented by legal counsel except the judge. I will have to get my legal counsel.

I am very pleased to meet you both, and you are admitted for the purpose of this case.

MS. REYNOLDS: Thank you, your Honor.

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

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

THE COURT: Good morning, ladies and gentlemen. We are prepared to proceed.

He may proceed, Mr. Lansdale.

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W I L L I A M B I N G H A M,

a witness called on behalf of the defendant, having been previously sworn, resumed the witness stand and was further examined and testified as follows:

DIRECT EXAMINATION OF WILLIAM BINGHAM (Cont'd)

BY MR. LANSDALE:

Q Mr. Bingham, somebody invited my attention to the fact that you were the only witness who hasn't been asked what your education was, and I now ask you.

A I graduated in 1945 from the Stevens Institute of Technology with a degree of mechanical engineer. In 1950 I received a Master of Science degree from Stevens with a major in electrical engineering.

Q Mr. Bingham, I want to direct your attention to what has been referred to in this proceeding as the Muny Conversion Program.

Are there other programs which the company h-

with respect to inducements corresponding to competition other than competition offered by Muny Light?

A Yes, there are.

Q And will you outline what those programs are.

A Well, over the years, at least until 1973 when utilities in general curtailed their promotional activities, our primary competitor was East Ohio Gas Company and, to a limited degree, the Columbia Gas Company in the southwestern suburbs.

We carried on during the 1960's and very early 1970's rather extensive programs aimed at competing with that other fuel.

For example, oh, probably starting around '62 or '63 we had what we called, I believe, wiring allowance programs where, at least initially, in conjunction with a dealer or a distributor and I think toward the latter period mainly on our own, we would pay for the installation of the special 240 volt circuit needed to operate an electric range or electric dryer that ordinarily would have been installed and paid for by the customer.

Q This is inside the customer's house?

A Oh, yes. This would be from the customer's main

switch to the kitchen or the laundry area.

I think during that period, oh, the period say '65 to '71 or '2 we averaged about 125,000 -- 120,000 dollars a year in the dryer part of this program and about 30 to 35 thousand a year for the range part.

The obvious purpose of this was to reduce an impediment to the sale of a range or a dryer.

We also have had programs to promote electric water heaters. These weren't as extensive but we, again, paid money to have these wired in. At one point we even had something we called a finder's fee, when someone directed someone to us who installed a water heater, we paid them $5 or something.

We have also had other programs that were primarily aimed at increasing sales. When the outdoor area lighting thing started to become popular in the middle '60's, late '60's, I know we had a program with employees, everyone that they could talk into having an area light installed we paid the employee $5.

Also another major impediment to promoting the use of electricity -- remember, we are back in the '60's when promotion was not a dirty word -- was if the service entrance equipment of the customer was

inadequate to handle the added load of a range or a dryer or an air-conditioner, whatever it might have been, if the customer had to pay to have the electricity piped down the side of the house and the main switch replaced with wires and switches of larger capacity, those costs were greater than the cost of even wiring a range in.

Now, these don't have to be just ranges, they could be any kind of load growth.

So we have had, since before I started with the company in 1950, a standard company rule where on changes of electric service to existing residential dwelling units would be paid for by the company and remain the property of the customer. These expenditures during the, oh, 1965 to '75 period tended to run well over a million dollars a year.

Q Well, Mr. Bingham, one of the things in which you were interrogated in this case earlier had to do with the schedule provisions relative to the amount of property or the things which the company is required to do for customers under the rate schedules.

How, in fact, do these -- I think you expressed them as minimum requirements in the rate schedules compare with what the company actually does for

individual customers in connection with providing service?

A Well, in cases of residential, clearly the range, dryer promotional programs are in excess of anything required. And the service increase promotion that we have had for well over 30 years is in excess of that which we are required to furnish under the rules.

The way we tend, at least the way I look at these rules, they really reflect the minimum amount that the company must furnish and, likewise, the maximum amount that a customer may demand that we furnish. But in actual practice we tend to furnish a great deal more than is provided for in the rules.

For example, in the case of commercial and industrial customers, we will furnish the entire service entrance installation, all of the facilities up to and including the main disconnect required to serve that customer.

In the case of 11 KV underground services, we will furnish, in an industrial area, the underground 11 KV cable on the customer's premise, one section. That means between manholes on the customer's property and lateral to a vault or a mat that would have transformers sitting on it.

Q Mr. Bingham, yesterday Mr. Kemper testified as to the average cost to the company of providing for individual customers, of providing service for a new customer both underground and overhead.

Have you compared these costs to the costs which the average, as were previously in the case shows CEI was expending per customer in the Muny Conversion Program in connection with the transfer of Muny customers to CEI?

If you have, will you please tell us what those figures show?

A Yes, I have.

As I recall Mr. Kemper's testimony, he said that in new residential allotments, and his figures, I understand, were based on all of the residential allotments that went into service in 1971, that the average expenditure in distribution facilities within the confines of the allotment averaged $398 a customer.

He also, in another of his studies, this relating to the seven areas selected for study, determined that we could pick up a Muny customer in those areas for an expenditure of $88 a customer.

Now, as a matter of fact, we spent more than that because of two things. He did not take into

account what I call the loop, pipe and switch -- I am sorry, the pipe and switch. He added the costs of an overhead loop and a meter.

We also furnished the house pipe going down the side of the house, the meter socket in the main disconnect. In 1971 dollars those cost about $133 per installation.

In addition, we had the wiring allowance -- I am sorry -- Muny Conversion Program that we talked about a lot and in the residential -- for the residential customers these expenditures averaged a little bit less than $50. I have used $50 here.

So that the total amount that we would have spent on one of these conversions was about $271 a customer as contrasted with $390 a customer we were spending out in the suburbs.

Q Mr. Bingham, referring again to the Muny Conversion Program, do you have any opinion as to whether the various allowances and expenditures in connection with the Muny Conversion Program results in the provision of any services by the Illuminating Company at less than its cost of service?

A I believe it did not.

MR. LANSDALE: Will you please show

the witness CEI Exhibit 347?

(The exhibit was shown to the witness by the clerk.)

A I have it.

Q CEI Exhibit 347, Mr. Bingham, is already in evidence and it is a memorandum from Mr. Pofok, the Chief Engineer, I believe, of the Muny Light, to Commissioner Bergman respecting the economics of certain payments made by Muny Light in order to secure the business of an enterprise known as Associated Estates.

Will you tell us, briefly, what that memorandum shows as to the relationship of the cost to Muny Light of securing that business and its relation to the revenues which Muny Light expected from it and did, in fact, get from it?

A This memorandum or report, whatever, relates to two different projects, really. One was an apartment development that went in at the site of the old Euclid Beach amusement park and the other part of it was what used to be the old Commodore Hotel, which I think is out --

Q Mayfield and Euclid Avenue, isn't it?

A Yes, it is. It's Mayfield and Euclid.

In those cases, at least in the case of the Euclid Beach Development, there was an ordinance passed by the City of Cleveland which allowed Muny Light, in addition to whatever they normally would have done, to pay to the developer $50,000 a building which, I believe, was to cover the cost of the inside wiring in the building.

This report goes on to analyze the economics of that transaction and it says -- Let me back up a little bit.

The development, to my knowledge, has not been completed to date. Three of the six or seven buildings scheduled for the Euclid Beach Park area have been constructed and, of course, the old Commodore Hotel was already there. But there are three buildings not completed at the time of this memo, three or four buildings.

They had expended up to this point in time $408,000 and a few odd dollars. They next estimate that to complete the installation, that is, for the additional three buildings, the additional estimated cost is $675,000, or $408,000 spent to date, and, if they complete the job, something over a million dollars will be spent.

Q What kind of revenues are indicated?

A He estimates that with the existing building, that is, the three at Euclid Beach and the Commodore, the annual revenues are $183,000. It's something over two times the annual revenue.

Q Does this enable the city to sell energy at a profit, Mr. Bingham?

A I don't believe so. He continues on with an analysis of the existing expenditures and concludes that there is a net loss of roughly a little over $35,000 a year, and that is before taking into account depreciation expenses.

MR. LANSDALE: Mr. Leo, will you show Mr. Bingham Plaintiff's Exhibit 3103.

THE COURT: What number is that, please?

MR. LANSDALE: Plaintiff's Exhibit 3103.

Q Mr. Bingham, that exhibit which is already in evidence is the figures furnished by CEI to the City respecting the number of customers who, during the relevant period, transferred from Muny Light to CEI and each of whom received some inducement in connection with the so-called Muny Conversion Program, and I think it

shows that the number of customers involved was 1,883.

Have you made any study of the records to determine how many of those customers are still customers of CEI?

A Yes, I have.

Q How many?

A I wish you had asked it the other way.

Q All right.

A There are 333 that are not customers of CEI.

Q All right. Thank you.

A That is roughly 18 percent.

Q All right. Now, turning to another subject, Mr. Bingham. You testified in response to a question when you were on cross-examination during the plaintiff's case respecting a study made by the company in connection with its rate litigation which indicated that the costs of service were about the same within the City of Cleveland as outside the City of Cleveland.

What, if anything, does this indicate in respect of whether the actual cost of service per individual customer or per unit of sale is the same within the city or outside of the city or in relationship to the property investment required?

A Well, those studies indicate that the return earned by

the company on its investments inside the city is roughly equal to the return earned by the company on its total system and the investments outside the City of Cleveland.

Q All right, sir. What I'm trying to find out is why this is so in view of the fact that it is usually considered that density, for example, within the City is greater than it is outside the city where there is much suburban and rural territory.

MR. HJELMFELT: Objection.

THE COURT: Approach the bench.

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{Bench conference ensued on the record as follows:}

THE COURT: Read the question back, please.

{The last question was read by the reporter.}

THE COURT: Mr. Hjelmfelt?

MR. HJELMFELT: It seems to me that that factual predicate to testimony should be coming from the witness rather than from counsel.

MR. LANSDALE: Well, I'm sorry. I have been --

THE COURT: Well, granted counsel

should not be permitted to lead.

However, I think counsel is permitted to bring a question within context, and I don't think that this question is overly leading.

Overrule the objection.

MR. LANSDALE: I would like to get on the record also that I have been defending claims for years that because of increased density in the city, the service ought to be cheaper, from the city's claims.

THE COURT: Well, that's fine. I'm glad to hear that.

{End of bench conference.}

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BY MR. LANSDALE:

Q Do you need the question read again, Mr. Bingham?

A No.

Q All right. Would you answer, please?

A Generally speaking, it is true that the more dense the load on the customers or what have you, the lower will be the cost to supply electric service.

However, in the case of the Illuminating Company, there are a couple of factors that are different. We have a very high concentration of underground facilities

in the City of Cleveland. This has been true for many, many years. For example, I believe that over half of the underground facilities in the State of Ohio are owned by the Illuminating Company. That is electrical facilities.

So that the saturation, if you will, of this underground is very high, and it is predominantly in the City of Cleveland. Underground is very expensive to build. I believe Mr. Kemper testified perhaps ten times the cost of overhead.

So that the carrying charges on this very high investment in our case very nearly offsets, almost exactly offsets the benefits that would normally accrue from the increased density.

And then one other minor factor to a degree. The fact that we have duplication in some 40 percent of the City of Cleveland tends to make the CEI costs to serve there a little higher, also.

So that really, those two factors, primarily the underground, offset the benefits of density.

MR. LANSDALE: Will you hand the witness CEI Exhibit 1140, Mr. Leo.

BY MR. LANSDALE:

Q What is CEI 1140, Mr. Bingham?

A This is an exhibit that was prepared under my direction which tabulates outage data from various Muny and CEI reports. These are outages of Muny substations or feeders or customers or whatnot. It covers the period from the beginning of 1970 until May 4th, 1975.

Q Have you analyzed these reports in order to develop -- arrive at conclusions respecting to the time, the duration and number of outages?

A Yes.

MR. LANSDALE: Would you put on the screen, Mr. Murphy, CEI Exhibit 1176.

Q I show you on the screen, Mr. Bingham, CEI Exhibit 1176. Was that prepared by you or under your direction?

A It was prepared under my direction.

Q Will you please tell us what that shows?

A This is the results of our analysis using the various reports I have referred to or sources of the duration of outage that was created or occurred whenever the load transfer services we furnished were either utilized or terminated.

Every time one of those load transfer points was energized it required a dead bus transfer so there would be a short outage.

We went through the Muny major outage reports,

our own dispatcher's logs and the like, and listed every load transfer indicated and the duration of the outage that occurred. The vast majority of this information comes from Muny major outage reports.

We then divided it into the groups indicated there, those that range from zero to five minutes, six to ten, eleven to fifteen and so forth.

Well, during this period there were about 763 instances where we find either full or partial load transfers. There were about 41 where we could find no indication of the duration of the outage, and that's reflected by the blue block on the right-hand side of the chart indicating that it was about 5 percent.

What the chart shows is that the vast majority, 70 percent of the load transfers took less than five minutes -- took five minutes or less to accomplish and that of those over 50 percent of the load transfers took a minute or less. In other words, the outages were of relatively, the majority of the outages, vast majority of the outages were of relatively short duration.

Q Now, these were outages in connection with the operation of the load transfer episodes.

Did you compare these with the outages occurring

on the Muny system from the transmission and distribution events unconnected with the load transfers?

A Yes, we did.

MR. LANSDALE: Will you show Exhibit 1175, please.

Q I show you on the screen CEI Exhibit 1175. Was that prepared under your direction or by you?

A It was prepared under my direction.

Q Will you tell us what that shows, Mr. Bingham?

A This particular chart was developed from data all of which I believe came from the Muny major outage reports.

I might add that those are reports that they submit whenever they have anything considered to be a major outage. They list substation outages, feeder outages and so forth.

The data was accumulated in exactly the same manner and this reflects, then, the percentages of the numbers of cases that fell within various bans of outage minutes. It shows that zero to five minute outage category was slightly less than 10 percent. But the over 30-minute category was over 70 percent.

It is almost a mirror image of the one we looked

at a moment ago. And of those over 30 minutes, over half of those were over an hour.

Q I think you told me that there were one or two that were not in that competition, did you not? There were special emergency conditions?

A There were one or two cases involved with 69 KV that resulted in outages of, I think, in one case 16 minutes, another case 102 minutes. They were in the preceding chart, in the load transfers.

Q I see.

A And one or two minutes would have included one of those in the big block -- or small block on the right.

Q Did you subsequently determine the average outage in connection with the 69 KV service?

A Yes, I did.

Q What was said?

A It averaged about 40 seconds and perhaps even less, and it is in that analysis that I excluded these two cases that you referred to a moment ago.

Now, those were two cases, one, the 69 KV was energized following the failure of the big Muny unit, the combination of boiler No. 6 / turbine No. 11 on July 18, 1974.

It is my feeling that had there been a synchronous interconnection, the synchronous interconnection would have tripped out at that time.

The other instance was a case where we had trouble on the CEI system. It was, I believe, at our Pleasant Valley Substation which is down in Independence or Brecksville. We had an insulator flashover on a 138 KV line. It happened to be the line that went up to one of our substations and was the supply for what has been called the N5 cable. That is the cable that supplied Muny.

So when that line tripped off, which it did, it deenergized the cable at the same time and obviously, therefore, the cable would not have been in service.

And when I was developing the 40 seconds, I was trying to get the duration of cases where the City has claimed the line didn't have to be out of service.

Q Thank you.

MR. LANSDALE: You may examine.

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CROSS-EXAMINATION OF WILLIAM BINGHAM

BY MR. HJELMFELT:

Q Mr. Bingham, distribution outages are going to occur on any system; isn't that correct?

A Yes.

Q And isn't it typical that they are of longer duration than outages caused by a generator problem?

A I'm not sure I go along with the generator problem. The municipal system had some very long outages that were associated with generating problems, longer than the typical transmission or distribution outages.

Q Of course, the municipal system is isolated, isn't it?

A It was.

Q And on a system that could obtain emergency power on a synchronous basis, isn't it true that a generation caused outage, if it occurred at all, would probably be of less duration than the distribution and transmission outages?

A I don't think so. I think when you have problems with generation, you have big problems. If you don't have enough generation, you are in serious problem, and you can't create generation instantaneously, either.

I think the northeast blackout was a generation problem. Now, it is true that the transmission

system couldn't handle the problem, but I think the problem initiated with generation.

Q There are not very many blackouts like the northeast blackout; is that correct?

A No, but they are big.

Q CEI has underground facilities in suburban areas also, does it not?

A Yes.

Q Now, you were talking about a number of other promotional practices that CEI engaged in over the years. These promotional practices applied throughout CEI's 1,700-square-mile service area, isn't that correct?

A Generally speaking, yes.

Q The Euclid Beach property that you referred to that the City competed for and obtained, that was a new customer; isn't that correct?

A Yes.

Q That wasn't a conversion of a CEI customer?

A The Euclid Beach project was not. The Commodore was.

Q You indicated that, I believe, 333 of the customers that had been converted under the Muny Displacement or Muny Conversion Program were no longer CEI customers.

Do you know what happened to those customers?

A I think the majority of them had the misfortune to be in the path of a right-of-way for an interstate highway. Our analysis indicates that probably 80 percent of those may have been demolitions.

Q So those people moved some place else and may still be a CEI customer at a different address?

A Sure. But that building no longer exists.

Q That particular building no longer exists?

A That is right.

Q Do you know how long after the conversion before those buildings were demolished?

A No. The analysis I had done was to check the addresses of the 1,883 customers against our customer records. Probably around the end of September.

I would think, though, that the majority would have been associated with the right-of-way for Interstate 90 on the west side of Cleveland.

Q Am I correct that your Exhibit CEI 1140 relied upon data other than the outage reports?

A Yes.

Q Am I correct that you stated that you had discovered there were 730 load transfers?

A Load transfers and what I called partial load transfers.

We ran into instances, for example, where we discovered from the Muny outage reports that they had the capability of transferring loads that we weren't aware of to some other load transfer service that we thought was supplying one substation. They had some flexibility in how they handled it and if, for example, the load transfer point may have been in service continually over some period of time, there was a piece of the load that they can bounce on or off.

Q And there were two outages for each of those 730 load transfers; is that correct?

A No. I think I have already counted the two.

Q All right. That came up to 730, is that correct?

A That is my understanding.

Q Now, after a load was transferred from Muny Light to CEI so that the load was being fed by the CEI system, there were occasions on which there would be an outage cost by failure of a CEI cable; isn't that correct?

A Yes.

Q How did you account for those in your tabulations?

A Well, if a CEI cable failed -- and this happened for a number of reasons. We had a number that failed after they had been overloaded by Muny. But if a cable failed, normally, and perhaps in every case, I'm

not positive, but normally the load would go back to Muny. You can repair a cable pretty quickly, but if the load could be picked up by Muny, they did, and that counted as a load transfer.

If Muny was still in such condition that they couldn't continuously handle that load, it would come back to CEI when our cable was repaired. And that would also count as one instance.

There were, I think, a few other cases where perhaps CEI, through some switching, could temporarily transfer the Muny Load transfer point to another of its cables. There were some cable failures which didn't result in any outages.

For example, we had three cables from our Clinton substation supplying Muny's Denison-Clinton western substations. On a couple of occasions, one of those cables would fault, but the other two could handle the load. Sometimes it couldn't and all three went. I mean, one faulted and the other two tripped out.

But wherever there was an outage, we counted it as a case of a load transfer.

Q Now, how about in a situation if there was an outage and it wasn't transferred back to Muny Light?

A If there was an outage to Muny customers we counted it.

Q Did you count that within the Muny customer other than the load transfer outages?

A No.

Q Even though there was no load transfer you counted it as a load transfer outage?

A Well, what we are really tabulating were outages that were associated or related to load transfer. I think perhaps I was a little unclear. I think I gave the impression we were talking about actual transfers of load, and I think I gave the wrong impression. We were really talking about outages that were related to the load transfer service.

Q Now, would that include outages that occurred because MELP had to drop load before a load transfer could be made?

A If a load transfer resulted, yes.

Q But if the load transfer, an occasion where CEI didn't feel it could make the load transfer at all, that wasn't counted as a load transfer outage, is that correct?

A I would have to check my records on that. I know that in some instances these would generally have been associated with the big generating unit, that the load

transfer services, all of them put together were not capable of handling the total loss of capacity so that those that we could pick up we did. Those that we could not pick up, we obviously didn't. But those areas never had load transfer service anyway.

In other cases where we had to withdraw load transfer service, there were a number of instances where we would have overloaded facilities and we had to terminate load transfer service. Those were counted.

And the one thing I am not sure of is in those cases where we were unable to grant it, whether those were counted. But those were a relatively small number of cases, maybe one to two dozen in the entire period.

Q If those were not counted as load transfers they would have shown up in the other tabulation of MELP outages, is that correct?

A No.

Q No?

A No.

Q They would simply have not --

A The two of our charts that were shown, neither of the two bar charts shown included outages that related to

generation.

Q Now, frequently outages have a distribution nature, a distribution line might go out without affecting any customers, isn't that correct?

A Yes. Very frequently you will have two circuits in some locations. Now, if there is only one line and it goes out, obviously people are going to be affected. But in those areas where you have back-up protection, there may either be no outage or one of relatively short duration.

Q If there is an outage, it may very well affect only a few customers, isn't that correct?

A It depends on the nature of the outage. If it is a line transformer that blows, it is obviously going to affect only the customers on that line transformer. If it is a whole feeder that goes, assuming there is only one feeder available, it is going to affect all of them. The substation will affect everyone supplied by that substation.

Q So there could be a very --

A It is hard to generalize on a thing that could vary over such a wide range.

Q Now, I believe you indicated that you did not consider Muny Light's rates when you designed rates for CEI,

is that correct?

A That's right.

Q Is that because CEI was not concerned with Muny Light competition?

A I am not sure that your question, your two questions go together.

I guess the answer is, we really didn't much care, for whatever the reason was.

Q Was CEI concerned with competition from Muny Light?

A Yes.

Q But it chose not to reflect that in its rates, rate design?

A That's right.

Q Rate design rather than the determination of whether to raise rates, those are two different issues, aren't they?

A Yes.

Q Your concern was with design of rates rather than whether or not CEI would file for a general rate increase, isn't that correct?

A Let me put it this way; my responsibilities are far heavier in the rate design area. The decision as to whether or not we will go for a rate increase and how large that rate increase will be is made at a much

higher level in the company than my position. I have a little bit of say in it, but not much.

Q But you had more say when it comes to designing rates, is that correct?

A Yes.

Q Am I correct that during most of the period when you have been in charge of designing rates, if CEI determined that it wanted, say, a 10-percent rate increase, that in general fashion the way you would design the rates then would be to spread that 10 percent to each of the various rate classifications?

A We have generally done that, because given the nature of cost changes that we know about, we feel that method tends to reestablish equality or relative equality between the various classes of customers as to rate of return.

And across-the-board increase which is what -- what we say the same percentage to everybody will result in a higher increase in the rate of return to the very largest customers than to the small customers, and it is my belief that the impacts of inflation and whatnot tend to erode those high rates of return for big customers more than for small customers. So this method tends to keep that in mind.

I think our cost service studies so indicate.

Q And you had a number of different rate schedules, am I correct?

A Yes.

Q For example, you had about nine different rate schedules under which to serve industrial customers?

A I'm having trouble coming up with nine.

The vast majority of them are served on the general commercial, large commercial, industrial and large industrial schedules. The schedules other than those tend to be special purpose schedules.

Q And in addition you have certain contract customers that you negotiated a contract with?

A Yes.

Q And did those tend to be customers who had previously had their own generation?

A It depends on what you mean by special contracts.

In our rate filings and cost studies, most recent such rate filings and cost studies, we list six customers in a category known as "Special Contracts." They are Jones & Laughlin Steel Corporation, Union Carbide Corporation, IMC Chemicals, the National Aeronautic and Space Administration -- that's NASA out at the airport -- the Cleveland Board

of Education and the Regional Transit Authority. Those are the six we list as special contracts.

In the past we have had -- there could have been others in the past, but currently six.

Of those, Jones & Laughlin stopped generating electricity many, many years ago. I'm not sure how many. I don't know that NASA ever generated electricity. I am pretty sure that the School Board didn't, other than in a laboratory, perhaps. I don't recollect that the Regional Transit Authority ever generated. IMC Chemicals does not generate, Union Carbide did generate until December, 1972.

Q Muny Light's main competitive selling point was its lower rate; isn't that correct?

A It was their only competitive selling point.

Q Would you agree that if the reliability would be comparable between Muny Light and CEI that the one with the lowest rate would have a competitive advantage?

A Absolutely.

Q And do you have any opinion as to how much a rate differential it would take to attract most of the customers?

A Not really.

Q And rather than meeting Muny Light's lower rates,

CEI competed with things like the Muny Displacement Allowance; isn't that correct?

A Yes, to an extent that that can be considered the equivalent of a rate discount.

MR. HJELMFELT: May I have the last part of that answer?

THE COURT: Would be considered as part of a rate discount.

MR. HJELMFELT: I have no further questions.

THE COURT: Redirect?

MR. LANSDALE: No questions, if your Honor please.

THE COURT: Thank you, Mr. Bingham. You may step down.

Please call your next witness.

MR. MURPHY: Your Honor, we would ask Mr. Edward Fowles be called, please.

THE COURT: Very well. Mr. Fowlkes?

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E D W A R D F O W L K E S,

a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF EDWARD FOWLKES

MR. MURPHY: Mr. Leo, would you please give Mr. Fowlkes CEI Exhibits 79 and 549?

(Documents were handed to the witness by the Clerk.)

BY MR. MURPHY:

Q Sir, would you state your name, please?

A My name is Edward J. Fowlkes.

Q Where do you reside, please?

A I reside at 11505 Accolade Terrace in Clinton, Maryland.

Q By whom are you employed?

A I am employed by the Federal Energy Regulatory Commission.

Q In what position are you presently employed, please?

A My present position is Chief of the Interconnection and Special Investigations Branch, which is one of three branches in the Division of Interconnections and