
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

7-22-1980

Volume 15 (Part 2)

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

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Recommended Citation

District Court of the United States for the Northern District of Ohio, Eastern Division, "Volume 15 (Part 2)" (1980). *City of Cleveland v. The Cleveland Illuminating Company, 1980*. 53.
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1 Hinchee - direct

2 enough capacity on its transmission lines to wheel
3 the PASNY power?

4 MR. LANSDALE: Objection.

5 MR. NORRIS: May we approach the
6 bench?

7 THE COURT: Yes.

8 - - - - -
9 {The following proceedings were had at the
10 bench:}

11 MR. NORRIS: I request that
12 Stipulation 49 be read.

13 THE COURT: Okay.

14 MR. LANSDALE: I have no objection.
15 {End of bench conference.}

16 - - - - -
17 THE COURT: Ladies and gentlemen,
18 Stipulation No. 49 reads as follows:

19 "The transmission systems of CEI has had
20 since at least 1970, currently has, and will have
21 the capacity in the foreseeable future to accept
22 and transmit 30 megawatts of power from the Power
23 Authority of the State of New York, {PASNY} to
24 MELP, and the transmission system of CEI has
25 satisfied since at least 1970, currently satisfies,

1 Hinchee - direct

2 and will satisfy in the foreseeable future the
3 reliability criteria of the East Central Area
4 Coordination Council assuming the transmission
5 of 30 megawatts of PASNY power to MELP."

6 MR. NORRIS:

 Thank you, your

7 Honor.

8 BY MR. NORRIS:

9 Q Mr. Hinchee, why was it -- and addressing your
10 attention to PTX-2493 -- why was it necessary for the
11 -- strike that.

12 What were the alternatives open to AMP-Ohio and
13 to the City for satisfying this third requirement of
14 adequate transmission facilities for the PASNY power
15 to be brought into the City of Cleveland?

16 A Well, the only alternative was for the City or
17 AMP-Ohio to obtain a point of interconnection to CEI
18 that would allow the power to be transmitted to the
19 City.

20 Q Did you consider building your own transmission line
21 to Pennsylvania to get the PASNY power?

22 A Yes, we did.

23 Q In order to build such a transmission line, what were
24 the considerations that you studied in trying to
25 determine whether or not that was economically

1 Hinchee - direct

2 feasible?

3 A Well, we looked at the possibility and discarded it
4 as not being feasible.

5 Q Mr. Hinchee, did the amount of power that was
6 available for allocation enter into your determination
7 as to the feasibility of this building of your own line?

8 A Yes, it did.

9 Q In what way?

10 A Well, a line that is not feasible for a small amount of
11 power might be quite feasible if a substantially larger
12 amount of power had been available to the City from
13 that source.

14 Q What were some of the other factors that went into
15 your determination as to whether or not building you
16 own line was economically feasible?

17 A The big thing was the time element involved, which was
18 substantial, a substantial obstacle.

19 The Power Authority of the State of New York
20 would not reserve power for any applicant or potential
21 applicant. They took applications on the basis of
22 first-come-first-served, and that meant that if the
23 City or AMP-Ohio did not get a commitment on this
24 power within a reasonable period of time, then this
25 power would be allocated to some other entity.

Hinchee - direct

1
2 Q In your final determination, Mr. Hinchee, how many
3 different alternatives did you decide, as an engineer
4 and utility manager, were economically feasible
5 options for wheeling the PASNY power into Muny Light?

6 A Well, the only economically feasible action was to
7 use existing transmission.

8 Q In your judgment, Mr. Hinchee, would there have been
9 any benefits or possible benefits to CEI or to its
10 customers that could have been realized from the
11 wheeling of the PASNY power to Muny Light?

12 A Yes.

13 If CEI had transmission in place with available
14 capacity on it, they were not receiving revenue then
15 for that capacity, and if the City used it, it would
16 mean revenue to the company from a source that was
17 not previously in use.

18 Q In your judgment, Mr. Hinchee, would there have been
19 any possible benefit to either CEI or CEI's customers
20 that could have been realized from the establishment
21 of the interconnection between CEI and Muny Light?

22 A Yes. The establishment of an interconnection would
23 have enabled CEI to count some of the City's
24 generation as reserves in its overall operation,
25 and it would have enabled the City to supply power

1 Hinchee - direct

2 to the company in emergencies that actually occurred
3 with the company.

4 Q To your knowledge was CEI ever short of power during
5 the time that you were Commissioner of Muny Light?

6 A Yes, they were.

7 MR. LANSDALE: Objection.

8 Q And when did that occur?

9 A I remember one time in July of 1973, specifically,
10 that CEI -- there was a heat wave, and they were
11 power short, and all of the utilities in the area
12 were buying as much power and generating as much as
13 they could generate, and the CEI officials had gone
14 on the news media, radio and television, and urged
15 people to cut back in their use of appliances and
16 air-conditioning, to enable CEI to meet their load
17 without going to blackouts and brownouts.

18 When I heard this on the news media, I went to
19 Director Kudukis, and I asked him to call CEI and
20 advise them that we had some reserve capacity that
21 we would be glad to make available to them to meet
22 that seven- or eight-hour period, whatever it was,
23 when they had those horrendous demands on their
24 capacity.

25 MR. NORRIS: Would you give the

1 Hinchee - direct

2 witness Exhibit No. 829.

3 {After an interval.}

4 BY MR. NORRIS:

5 Q Can you identify PTX-829?

6 A Yes. This is a letter from Director Kudukis to Mr.
7 Rudolph, the President of the Illuminating Company.

8 Q What is the date of that letter?

9 A July 23, 1973.

10 Q And did you receive a copy of that at or about the
11 time that was delivered?

12 A Yes, I did.

13 Q And what is the purpose of the letter?

14 A The letter is offering power supply assistance to CEI.

15 Q And what was CEI's response to that offer?

16 A They refused the offer.

17 Q Addressing your attention, Mr. Hinchee, to the 1973
18 operations chart, which is up on the easel; to what
19 extent were you buying power from CEI during the year
20 1973?

21 A The fourth quadrant in this location indicates power
22 being purchased over the load transfer points and
23 shows that we were buying over all those transfer
24 points earlier in the year, in January, and we were
25 also buying power over the 69,000-volt line which

1 Hinchee - direct

2 had been completed in December.

3 Q December -- excuse me -- December of what year?

4 A Of 1972; and that we continued those purchase for a
5 period of time in January, and then discontinued the
6 69 KV altogether for the balance of the year and
7 disconnected and reduced the use on the load transfer
8 point for most of the balance of the year to begin
9 again in October and November and December, the load
10 -- that the load transfer points were activated.

11 Q What was the reason that you reduced your purchases of
12 power from CEI during 1973?

13 A Well, our generation had substantially improved at this
14 point, and we were able to carry our own load without
15 buying power from CEI.

16 Q During 1973, did you purchase any maintenance power from
17 CEI?

18 A No, we did not.

19 Q What condition did CEI place upon purchases of power by
20 Muny Light during the year 1973?

21 A They require that there be an emergency, and that all
22 of the load transfer points be energized before they
23 would consider a request for power over the 69,000-volt
24 interconnection.

25 Q Were there any other conditions attached to CEI's

1 Hinchee - direct

2 willingness to sell power to Muny Light with respect to
3 the amount of equipment that must be in line operation?

4 A Yes. CEI required before any load transfer points
5 were energized that all available generating equipment
6 of the utility be on the line.

7 MR. LANSDALE: Objection.

8 THE COURT: Approach the bench.

9
10 {The following proceedings were had at the
11 bench:}

12 MR. LANSDALE: I object on the grounds
13 that it is perfectly clear that this limitation
14 was inserted in the Federal Power Commission order
15 and not at CEI's request, and there is a stipulation
16 to this effect, and I object to having the witness
17 testify that CEI put this limitation on it.

18 MR. NORRIS: I agree with you that
19 the FPC established certain preconditions before
20 you were required to sell emergency power, but that
21 wasn't the question.

22 The question was, what conditions did CEI
23 place upon the sale of power, and it is a fact
24 that no agency, including the FPC, put any
25 restrictions upon your sale of anything but

1 Hinchee - direct

2 emergency power. They said under certain
3 conditions you had to sell emergency power, but
4 they didn't say that those conditions had to be
5 operational before you sold any power, and ti is
6 not the same thing.

7 THE COURT: Well, it goes to
8 credibility, and you may cross-examine him on
9 that.

10 MR. LANSDALE: The stipulation is --

11 MR. NORRIS: Which one?

12 MR. LANSDALE: 248.

13 THE COURT: Wait until I get it.

14 MR. LANSDALE: This is the FPC
15 order, and it contains the following terms. It
16 is a long stipulation.

17 THE COURT: Wait a minute. Okay.

18 MR. NORRIS: I don't see that
19 that stipulation is relevant to this issue.

20 THE COURT: Well, here, "The
21 City would operate all of its own generating
22 capacity before, or within three hours of,
23 making the request of CEI to energize the
24 interconnection;

25 "{2} The City would take immediate steps to

1 Hincree - direct

2 relieve the emergency conditions that necessitated
3 the March 8th order;

4 "{3} The City would at all times maintain the
5 spinning reserve equal to 15 percent of its system
6 load and at no time would carry its total load
7 on one generating unit;

8 "{4} CEI would continue to provide service
9 to the City over the five 11 KV load transfer
10 points."

11 MR. NORRIS: If your Honor please,
12 the leading sentence on the conditions that your
13 Honor just read are the conditions on the order
14 to the 69 KV. That doesn't read on the conditions
15 that CEI imposed on the 11 KV load transfer
16 points.

17 That has to do with the 69 KV.

18 They ordered -- no question about it -- they
19 ordered the 69 as a temporary condition, and it
20 was to be utilized under certain circumstances,
21 but that doesn't mean that it is required by
22 either to enter into such a voluntary arrangement,
23 and it goes on to the exercise of market power
24 and monopolistic power --

25 THE COURT: Well, your question

1 Hinchee - direct
2 was -- read the question again.

3 {The record was read by the court reporter
4 as follows:

5 "Q Were there any other conditions
6 attached to CEI's willingness to sell power to
7 Muny Light with respect to the amount of equipment
8 that must be in line operation?

9 "A Yes. CEI required before any load
10 transfer points were energized that all available
11 generating equipment of the utility be on the
12 line."}

13 THE COURT: I will sustain the
14 objection.

15 If you want a time element in there, you are
16 going to run into a problem there, because in
17 1973, obviously these conditions imposed by the
18 Federal Power Commission were in effect.

19 MR. NORRIS: Your Honor, if I
20 may disagree with the Court's statement, what
21 the FPC did was to put a floor that they only
22 had limited authority under the FPC act, and they
23 could only exercise the limited authority to
24 impose upon a privately-owned utility company
25 the requirement to sell emergency power under

1 Hincbee - direct

2 certain circumstances, but that statutory authority
3 for the FPC didn't say anything about maintenance
4 power or firm power or anything else, and the
5 City's position is that in a Section 2 Sherman
6 Act case where we are dealing with monopoly
7 intent, that the City has to show, and that the
8 generalized intent it must show is that this is
9 relative to that purpose, and --

10 THE COURT: In what respect?

11 MR. NORRIS: Well, I submit that
12 Mr. Lansdale's position is the same as if he were
13 trying to hide behind the FPC order.

14 It only went to emergency power, and the
15 City's position is that it is far beyond the
16 emergency power and far beyond the limited authority
17 of the FPC, and what we are dealing with is an
18 exercise of market power to withhold the means
19 of its having reliability, and it goes also to
20 essential facility, your Honor, with respect to
21 whether or not there was any feasible alternative.

22 THE COURT: He already answered
23 the "essential facility."

24 There was a whole series of questions that
25 went in either without or over objection. Well,

1 Hinchee - direct

2 do you want to respond?

3 MR. LANSDALE: I want to respond to
4 one more thing:

5 There is not the slightest bit of evidence
6 that CEI imposed anything with respect to the use
7 of the City's generation.

8 THE COURT: That is right.

9 MR. NORRIS: He just testified --

10 MR. LANSDALE: You asked him a
11 leading question.

12 THE COURT: Read the question and
13 listen to your question again. You are getting
14 back into that leading posture. You incorporate
15 conclusions in the question.

16 {The record was read by the court reporter
17 as follows:

18 "Q Were there any other conditions
19 attached to CEI's willingness to sell power to
20 Muny Light with respect to the amount of equipment
21 that must be in line operation?

22 "A Yes; CEI required before any load
23 transfer points were energized that all available
24 generating equipment of the utility be on the line."

25 THE COURT: That is just what I

1 Hinchee - direct

2 said.

3 These conditions were not attached by CEI,
4 and that is your question.

5 MR. NORRIS: The question, your
6 Honor, meant to --

7 THE COURT: -- and there is no
8 time frame.

9 MR. NORRIS: I did not ask --

10 THE COURT: Gentlemen, please,
11 if you would like to pursue it in the proper form,
12 you are free to do so.

13 I think both sides have had adequate opportunity
14 to place their arguments on the record. Let's
15 proceed.

16 {End of bench conference.}

17 - - - - -

18 THE COURT: Ladies and gentlemen of
19 the jury, the jury will disregard the answer to the
20 last question, and you may rephrase the question
21 in another form, Mr. Norris, and let's proceed.

22 BY MR. NORRIS:

23 Q Mr. Hinchee, during 1973, what requirements did Munny
24 Light have to fulfill in order to be able to purchase
25 power over the load transfer points from CEI?

1 Hinchee - direct

2 A Well, the requirement was that all of the municipal
3 power generation that could be placed in service be
4 placed in service before any power could be received
5 or purchased from CEI over load transfer points.

6 Q Were there occasions during 1973, where Muny Light
7 needed power over the load transfer points without
8 being able to fulfill the conditions of having all of
9 its generating equipment on the line?

10 A Yes, there were.

11 Q And what were the consequences of these conditions
12 that Muny Light needed to satisfy before it could
13 purchase power over the load transfer points?

14 A Well, it was an even more stringent requirement that
15 we had previously had placed on us, in that at this
16 point it restricted our ability to even buy emergency
17 power.

18 In other words, if we had a breakdown and we had
19 a piece of equipment that was not operating, that
20 equipment had to be brought on the line and operating
21 before we could receive power over the load transfer
22 points.

23 Q Mr. Hinchee, under those conditions, were you able to
24 carry out your maintenance program on your generating
25 equipment?

1 Hinchee - direct

2 A No, sir. We could not perform maintenance on the
3 large unit, and we could not perform maintenance on
4 some of the smaller units under those conditions.

5 Q And were you able to perform maintenance on the gas
6 turbines?

7 MR. LANSDALE: I object.

8 THE COURT: Yes; sustained, Mr.

9 Norris. You are leading the witness.

10 BY MR. NORRIS:

11 Q Mr. Hinchee, what maintenance were you able to
12 perform -- strike that.

13 Was there plant maintenance that you were able
14 to perform, notwithstanding these conditions?

15 MR. LANSDALE: I object- I am going
16 to object to this every time, to every one of them.

17 THE COURT: Ladies and gentlemen,
18 it is now 4:00 o'clock, and we will recess for
19 the day.

20 You are free to go into your jury room and
21 review the exhibits of the day, and thereafter
22 go on your way to your homes, and we will return
23 in the morning at 8:30.

24 Please keep in mind the Court's admonition.
25 You are not to discuss this case either among

1 Hincbee - direct

2 yourselves or with anyone else. You are not read
3 any newspaper accounts of this case, nor are you
4 to listen to any radiobroadcasts or view any
5 television broadcasts of this case, and you are
6 to keep an open mind until you have heard all of
7 the evidence in the case and the Court has
8 instructed you on the law and the matter has
9 been submitted to you for your final judgment.

10 With that, thank you, and good night.

11 See you tomorrow.

12 - - - - -

13 {The jury left the courtroom and the
14 following proceedings were had out of their
15 hearing and presence.}

16 THE COURT: Approach the bench.

17 {The following proceedings were had at the
18 bench:}

19 MR. LANSDALE: I'm beginning to
20 believe Mr. Norris really doesn't know the
21 difference between a legal question and another
22 question.

23 I don't see why you can't ask him what, if
24 any, problems he had, for example.

25 He's your witness, surely you know what he's

1 going to say. But for you to go on question after
2 question like you were on cross-examination, I
3 find it offensive, and it's objectionable, and
4 it required me to get up in front of the jury
5 and appeared to be making petty objections
6 from time to time, and I resent being put in that
7 position by somebody who ought to know better.

8 THE COURT: Yes.

9 You revert right back into the same pattern,
10 Mr. Norris, your questions are leading.

11 Each question incorporates the sought-after
12 answer.

13 Granted, under certain circumstances -- very
14 limited circumstances, you are permitted to lead
15 on direct examination; but if you go back through
16 the record, any day's record, of the direct
17 examination, you will find that there is a whole
18 series of leading questions your witness answers
19 "yes" and "no."

20 When a witness answers "Yes," it is obvious
21 that you're incorporating -- you're testifying
22 in place of the witness, and it does place counsel,
23 your adversary, in a tactical position of having
24 to either waive his objection or permit objectionable
25 testimony to go to the jury, or to create the

1 impression that he is trying to suppress evidence,
2 and it is highly prejudicial, and that's why we
3 have to rule against leading questions.

4 And I don't know what to do beyond what I
5 have done, namely, to request you from leading the
6 witness.

7 My only alternative here is, if required, in
8 the closing argument -- in the closing, I should
9 say, instructions at the conclusion of the case,
10 comment upon it to the jury, which I am reluctant
11 to do. But unless we refrain from it, probably
12 there is no other alternative. I don't know
13 what to do.

14 You know, if you have a witness that has
15 difficulty understanding and does not know and is
16 not conversant with the subject matter which is
17 the basis of the inquiry, that's one thing. In
18 that circumstance, you are permitted some
19 latitude, very limited albeit, to lead the
20 witness.

21 But, here, my gosh, you have a very knowledgeable
22 witness. He is an expert in the field, and he
23 certainly doesn't need any assistance. I'm sure
24 that if you ask him the straight questions, the
25 objections will be that he's going beyond the

1 questions.

2 {Laughter.}

3 MR. NORRIS: Well, the earlier
4 questioning went to the generating equipment --

5 MR. LANSDALE: What?

6 MR. NORRIS: I say, the earlier
7 questioning went to the generating equipment and
8 the maintenance of the generating equipment;
9 and it was my attempt to give him a neutral
10 question with respect to what maintenance of any
11 kind was affected by these conditions.

12 Certainly, I did not attempt to suggest the
13 answer that should be given to any question I
14 asked.

15 MR. LANSDALE: I beg your pardon.

16 By question after question, "Could you do
17 so and so, could you do this, could you do that?"

18 Even if I objected and the Court sustains
19 the objection, he's already been given the bait,
20 and you go back and ask him a general question.

21 I think it's a dirty operation.

22 MR. NORRIS: Well, I take exception
23 to that.

24 THE COURT: Let's not get into
25 personalities, gentlemen.

1 So let's proceed accordingly in the morning.

2 What about the exhibits?

3 {End of bench conference.}

4 - - - - -

5 {The Court and Law Clerk Schmitz conferred
6 off the record.}

7 THE COURT: As I understand it,
8 gentlemen, there is no objection to Plaintiff's
9 Exhibits 2849, 3225, 2142, 3021, 3022, 3209,
10 2808, 2809, 3178, 2138, 3029, 3030, 3031, 48,
11 551, 548, 554, 536, 1512, 1513, 2976, 2860,
12 1516, 1518, 1515, 2141, 1528, 1531, and 831,
13 and they may go to the jury.

14 There are objections to Plaintiff's Exhibits
15 3237, which is a Plain Dealer article dated
16 12/19/71 which was used to refresh the witness's
17 recollection.

18 I don't know if that's offered; if it's
19 offered, an objection is sustained -- the
20 objection is sustained.

21 And Plaintiff's Exhibit 1509, minutes of the
22 4/23/71 meeting.

23 MR. NORRIS: Here's a copy of it,
24 your Honor.

25 THE COURT: Well, give it to me,

1 please.

2 LAW CLERK SCHMITZ: You have a copy, Judge.

3 THE COURT: He has it here.

4 {Exhibit handed by Mr. Norris to the Court.}

5 THE COURT: Is there an objection
6 to this 1509 and, if so --

7 MR. MURPHY: We withdraw our
8 objection, your Honor.

9 MR. WEINER: What was the objection
10 to the newspaper article?

11 THE COURT: I don't know if it was
12 offered into evidence and --

13 MR. NORRIS: We'll offer it.

14 THE COURT: Well, sustain the
15 objection if there is an objection.

16 MR. MURPHY: An objection is being
17 made, your Honor.

18 MR. NORRIS: What is the basis of
19 it?

20 THE COURT: Well, it's obvious,
21 isn't it?

22 What reliability is there in a newspaper
23 article? The best evidence is what he said here,
24 and he testified as to what he said.

25 MR. WEINER: I just want to know

1 the ground rules, because a lot of newspaper
2 articles went in the other day that were
3 offered by the defendant.

4 THE COURT: There was no objection,
5 number one.

6 It depends on the context in which they're
7 offered.

8 MR. WEINER: I just wanted to know
9 what the ground rule was.

10 THE COURT: There is no ground
11 rule.

12 MR. WEINER: Okay.

13 THE COURT: We rule on each thing
14 as it comes up.

15 MR. WEINER: Well, I just wanted
16 to know what --

17 THE COURT: There is no general
18 rule, Mr. Weiner.

19 MR. WEINER: I know; I just wanted
20 to know why it was ruled upon the way it was.

21 THE COURT: Now, we have one
22 outstanding exhibit, which I don't know if it's
23 offered or not.

24 It's Plaintiff's Exhibit 829, and that is the
25 Kudukis letter to Rudolph offering excess City

1 generation to CEI during this period in July of
2 1973 and, from the testimony, CEI has fallen
3 short, and that was the thrust of the letter; and
4 Mr. Rudolph, from the testimony, I take it,
5 refused.

6 MR. NORRIS: Yes; we offer the
7 letter, your Honor.

8 MR. LANSDALE: We have no objection.

9 THE COURT: It may go in.

10 See you tomorrow morning, gentlemen.

11 Good night.

12 {Court was adjourned until Thursday, July
13 23, 1981, 9:00 o'clock a.m.}

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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 —

Thursday, July 23, 1981

KF
228
.C43
1980

1 THURSDAY, JULY 23, 1981, 9:30 O'CLOCK A.M.

2
3 THE CLERK: The City of Cleveland,
4 Plaintiff, versus the Cleveland Electric
5 Illuminating Company, Defendant; Civil Action
6 No. C75-516.

7 MR. NORRIS: May I approach the
8 bench?

9 THE COURT: Yes.

10 - - - - -

11 {The following proceedings were had at the
12 bench:}

13 MR. NORRIS: It doesn't have to be
14 at the bench, I suppose, but it will be easier for
15 you.

16 We want to question Mr. Hinchee with respect
17 to coordination, the principles of coordination
18 and why it was important for Muny to be able to
19 coordinate through CEI; and this letter of April 4,
20 1973, is a request directed to CEI that deals with
21 the subject matter.

22 However, Exhibit No. 22, the CAPCO Power Pool
23 -- I showed it to Mr. Lansdale this morning, a
24 revised copy of PTX-22. With the part blacked
25 out about the reference to the admission to the

1 CAPCO Power Pool; and I seek permission to use
2 that so I may have the witness describe to the
3 jury how it was that Munny needed coordination
4 through CEI with getting into the CAPCO area.

5 MR. LANSDALE: If the matter is
6 otherwise admissible, I wouldn't object to using
7 the blackout method of eliminating the reference
8 to CAPCO; however, it is my position that this
9 entire letter relates to CAPCO.

10 I don't know of any case in which coordination
11 as it is defined as a generic matter is other than
12 a one-on-one basis.

13 It doesn't have any reference to coordination
14 outside of the CAPCO organization, and CAPCO is
15 out of the case, and I object to using this letter
16 as evidence of the City's desires for coordination
17 of some kind.

18 THE COURT: I don't understand the
19 matter in which you are desirous of utilizing it.

20 Certainly it appears to me that if you were
21 talking about coordination, you have a gentleman
22 here, or perhaps through other witnesses, that
23 could testify to the request for coordination,
24 the benefits of coordination, and limit it to
25 these specifics of the evidence as thus far

1 evolved, and in which you intend to evolve in
2 the future.

3 Obviously, the letter, the context of the
4 letter and the tone of the letter is established
5 by the first paragraph:

6 "The City of Cleveland, Division of Light
7 and Power, requests admission to participate in
8 the CAPCO Power Pool."

9 And then it goes on to say, to discuss
10 power pooling arrangements, and the four companies
11 that are involved in the power pooling arrangements,
12 and so forth.

13 MR. HJELMFELT: I would suggest that
14 the coordinated operations take place in pools
15 that don't engage in coordinating development.

16 THE COURT: I am sure you can do
17 it in some other way than this letter, but I would
18 have to sustain the objection.

19 MR. NORRIS: Our position is that
20 it is important for us to be able to demonstrate
21 that the City requested coordination, and this was
22 one of the things that would have flowed from the
23 interconnection.

24 THE COURT: What kind of
25 coordination?

1 MR. NORRIS: Well, the economy
2 exchange, and the reserve sharing, and the kind of
3 things, if you please, that CEI has done for many
4 years was its neighbor utility companies, and we
5 want to be able to prove a request, and it so
6 happens PTX-22 is a two-headed request:

7 It is a request for coordination through CEI,
8 and also a request for admission to the CAPCO
9 Power Pool, and we would like to request some
10 defice in accordance with your Honor's ruling
11 that we not talk about the CAPCO Power Pool, but
12 be permitted to demonstrate there is a one-on-one
13 request to CEI for coordination.

14 MR. LANSDALE: My response it that
15 this simply is not a one-on-one request to CEI
16 for coordination.

17 THE COURT: Well, I have ruled on
18 this.

19 MR. LANSDALE: I understand. What I
20 want to add is that I know of nothing in this case
21 or the last time nor any exhibit in which this
22 sort of thing has been requested of CEI or anybody
23 else.

24 You are talking about an economy interchange
25 and the speculative possibility, and this witness

1 may testify about them. I don't know.

2 THE COURT: Gentlemen, please, I
3 have ruled on it, and the parties will take their
4 exceptions.

5 One other thing, while you are here, that has
6 come to my attention: On occasion some of the
7 jurors have been bringing newspapers into the jury,
8 and here we go right back into the same situation
9 that occurred during the first trial.

10 Now, I have not been reading the accounts of
11 the trial in the newspapers. I have on occasion,
12 coming down with my wife, when she was reading the
13 newspaper, I have seen headlines which anybody
14 cannot miss, and I wasn't even reading. I just
15 happened to glance over when I was driving down.

16 MR. LANSDALE: Up-to-date the
17 coverage has been rather modest, your Honor.

18 THE COURT: I don't know.

19 MR. LANSDALE: Even I haven't found
20 anything offensive in it.

21 THE COURT: Gentlemen, I am
22 suggesting this {indicating} to deal with the
23 problem.

24 {Thereupon the Court showed the attorneys a
25 proposed instruction to the jury.}

1 MR. NORRIS: That is a good
2 approach.

3 MR. LANSDALE: I think so, too.

4 THE COURT: I will just send it
5 in to the jury, and it says as follows:

6 "Members of the Jury, it has come to the
7 attention of the Court that on occasion daily
8 newspapers have been brought into the jury room.

9 "To eliminate any question as to the jury's
10 adherence to the Court's admonishments, it is
11 requested that no newspapers be brought into the
12 jury room at any time."

13 MR. LANSDALE: Yes.

14 MR. NORRIS: I have one more thing
15 to raise:

16 In view of the Court's sustaining Mr.
17 Lansdale's objections to my proposals about
18 modifying PTX-22, I now reoffer PTX-460 and 459,
19 which are the Ohio Edison - CEI contracts that
20 Mr. Lindseth signed, that an objection was
21 sustained to, 460 at transcript 10,664, and I now
22 reoffer those as being in context with the evidence
23 as presented, and that is an example of one-on-one
24 coordination; and that we should have an
25 opportunity to demonstrate that this is the kind of

1 thing that is one of the benefits coming out of
2 an interconnection.

3 THE COURT: Well, I am not going
4 to reverse my ruling.

5 I am saying to you, Mr. Norris, that I am
6 not precluding you from going into, if you want
7 to, at this juncture, the benefits, these
8 benefits you are talking about.

9 As a matter of fact, if my recollection serves
10 me correctly, there is testimony already in as to
11 the benefits of coordination, both by Mr. Bednar
12 and by Mr. Lindseth and by Mr. Besse.

13 All I am saying is that I am not going to admit
14 those exhibits.

15 MR. NORRIS: Okay.

16 THE COURT: Now, one other thing:
17 I understand that there has been some question as
18 to counsel's conduct when they meet the jury.

19 I don't see anything wrong with saying
20 "Good morning," but I don't expect you to go up to
21 them and say, "Gee, don't you think the evidence I
22 handed in today was really damaging."

23 MR. LANSDALE: Brad spoke to me about
24 this a little earlier, and yesterday I ran into two
25 jurors in the washroom, and they were in the middle

1 of a deep conversation, and I said, "Wait, I am
2 not supposed to talk to you guys," and I chased
3 out.

4 THE COURT: You can at least say
5 "Good morning."

6 MR. NORRIS: Well, there is no
7 problem, but I thought there could arise a
8 situation where they say, "Gee, why are they being
9 so rude to me."

10 THE COURT: I appreciate your
11 concern, and if you are desirous of having me say
12 something --

13 MR. LANSDALE: We thought you ought to
14 do it next time you go into the jury room, to make
15 them feel good.

16 MR. NORRIS: Don't you brew the
17 coffee for them, Judge?

18 THE COURT: And sweep the floor
19 and dust the furniture and put the magazines back.

20 MR. MURPHY: And pick up old
21 newspapers.

22 THE COURT: And empty the ashtrays.
23 Let's go.

24 {End. of bench conference.}

25 - - - - -

1 {Thereupon the jury entered the courtroom
2 and the following proceedings were had in their
3 hearing and presence.}

4 THE COURT: Good morning, ladies
5 and gentlemen of the jury.

6 Please be seated.

7 - - - - -

8
9 W A R R E N D. H I N C H E E

10 resumed the stand and testified further as
11 follows:

12
13 DIRECT EXAMINATION OF WARREN D. HINCHEE {Resumed}

14
15 BY MR. NORRIS:

16 Q Good morning.

17 A Good morning.

18 THE COURT: You may proceed,

19 Mr. Norris.

20 Q Mr. Hinchee, what were your objectives in mid-1971
21 when you were projecting \$14 million worth of capital
22 improvements for Munny Light?

23 A Well, the best of my recollection, the \$14 million that
24 I projected included between -- as I stated earlier --
25 between \$4 and \$5 million rehabilitation and.

1 Hincbee - direct

2 reconstruction within the power generating plant
3 itself; and it included re-outfitting eight vehicles
4 of the division, probably between 800,000 and a
5 million dollars for that.

6 And it included transmission substations --
7 additional transmission substations, enlarging the
8 transmission grid system, between five and six
9 million for that, which included line extensions for
10 large customer services that we anticipated we would
11 get, such as Easterly and Westerly Sewage Pumping
12 Stations, perhaps Southerly; and -- water pumping
13 stations around the city; and it included other
14 distribution modifications so that we could acquire
15 additional customers.

16 Q Did this \$14 million worth of capital improvements
17 include anything for interconnection?

18 A Yes, it did.

19 I'm sorry, I overlooked that.

20 Q And after passage of the \$5 million bond ordinance by
21 City Council on June 28, 1971, did any of those capital
22 funds become available to Muny Light?

23 A Yes, they did.

24 Q And how much?

25 A \$2 million in notes were issued.

Hinchee - direct

1

2 Q Were these funds spent by Muny Light?

3 A Yes, they were.

4 Q And what were they spent for?

5 A Well, for plant work in the generating plant, and for
6 interconnection, and the first cut at replacing some
7 of the vehicles of the fleet, to the best of my
8 recollection.

9 Q When you say "interconnection," what do you mean by
10 that?

11 A Well, the 69,000-volt temporary service and the
12 conversion to 138,000 volts.

13 Q When did you commence the rehabilitation of the power
14 plant?

15 A Well, the first day I got there.

16 Q Was this rehabilitation work contracted out?

17 A Some of it was.

18 Q And how was the balance of the work performed that was
19 not contracted out?

20 A I would say most of it was performed with maintenance
21 people that were already in place on the plant payroll.

22 Q What funds did you use to pay your internal work force
23 that was doing this rehabilitation work?

24 A Just our regular payroll, funds from revenues.

25 Q Was the Muny Light work force able to perform its

1 Hinchee - direct

2 day-to-day operations operating functions while, at the
3 same time, doing this rehabilitation work on the power
4 plant?

5 A Yes, it was.

6 Q How was that accomplished?

7 A Well, the operating people are separate from the
8 maintenance people, and in consolidating some of the
9 remaining forces from East 53rd Street and eliminating
10 duplicate positions, many of the workers who had been
11 working across the street where the plant was now
12 closed, were channeled into maintenance activities
13 on the Lake Shore side.

14 Q And were some of the additional engineering professionals
15 that you hired involved in the rehabilitation work in
16 the power plant?

17 A Yes, they were.

18 Q And who of the management-level personnel, Mr. Hinchee,
19 were involved in the maintenance and rehabilitation work
20 which you have been describing?

21 A Well, of the people I mentioned yesterday, primarily
22 Mr. George Chuplis; but ahead of him, I had employed
23 an engineer, Saul Cushnick, who was an aerospace
24 engineer, a quite competent engineer; but,
25 unfortunately, the aerospace business picked up and

Hinchee - direct

1
2 Mr. Cushnick left us for his chosen profession.

3 Q Were any of the other engineering professionals that
4 you hired similarly involved in the rehabilitation work
5 in the power plant?

6 A Yes.

7 To a certain extent, Mr. Hal Ackmann was involved --

8 THE REPORTER: Who?

9 THE WITNESS: Mr. Hal Ackmann was
10 involved, A-c-k-m-a-n-n.

11 MR. NORRIS: Pat, would you kindly
12 give Mr. Hinchee PTX-2384?

13 {The exhibit was handed to the witness by
14 Mrs. Richards.}

15 BY MR. NORRIS:

16 Q Mr. Hinchee, have you ever seen PTX-2384 before?

17 A Yes, I have.

18 Q What is it?

19 A It's a Preliminary Official Statement for a \$9,800,000
20 bond issue for the City of Cleveland dated May 10th,
21 1974.

22 Q Who prepared the engineering information set forth in
23 this document?

24 A The engineering firm of R. W. Beck & Associates.

25 Q And who hired R. W. Beck to do this work?

1 Hinchee - direct

2 A I did.

3 Q What contact did you have with Beck during the
4 performance of that work?

5 A Well, I supplied or caused my staff to supply all of
6 the background information on which the report is
7 based.

8 Q Who identified for Beck for which the \$9.8 million
9 was going to be spent?

10 A I did.

11 Q Now, did this include plant modification?

12 A Yes, it did.

13 Q What modifications to the Lake Road Generating Plant
14 did you identify for Beck for which this money was
15 going to be spent in part?

16 A Well, I can't recall the details on the apparatus,
17 but there were modifications and changes to Boilers 2,
18 3, 4, 5, and 6, and either repair, replacement,
19 rebuilding of auxiliaries for those boilers, and there
20 was a turnaround scheduled or anticipated in
21 scheduling for Turbine No. 9.

22 Q Would you take PTX-2384 and turn to page A-1?

23 A -- I'm sorry -- A --

24 Q A-1; it's numbered down at the bottom of the page.

25 {After an interval.}

1 Hinchee - direct

2 A I have it.

3 THE COURT: Is this an appendix?

4 MR. NORRIS: It's right after page
5 24, your Honor; it is an appendix, yes.

6 THE COURT: I'm sorry, A-1?

7 MR. NORRIS: It's about halfway
8 through.

9 THE COURT: I see it.

10 BY MR. NORRIS:

11 Q Mr. Hinchee, addressing your attention to the pages
12 marked A-1 through A-24, inclusive, can you identify
13 that part of the exhibit?

14 A Yes.

15 This is the specific report and analysis supplied
16 by the R. W. Beck Company and submitted to the Department
17 of Public Utilities on May 10th, 1974.

18 Q Address your attention, please, to A-14, the heading
19 being "Lake Road Generating Plant," continuing on
20 A-15, and continuing on the first six lines of A-16.

21 Do you see that material?

22 A Yes.

23 Q I ask you whether those modifications to the Lake Road
24 Generating Plant are what you identified to Beck as
25 the facilities for part of the 9.8 million dollar bond

Hinchee - direct

funds?

MR. LANSDALE: May I approach the bench?

THE COURT: Yes, you may.

- - - - -

{The following proceedings were had at the bench:}

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

There is no reason why Mr. Norris can't ask him what that is in place of giving him the answer.

Now, I just object to this stuff, and I'm going to get this right on the table every time you do it today.

MR. NORRIS: I will withdraw the question. I stand corrected.

MR. LANSDALE: Withdrawing the question now doesn't do any good.

THE COURT: Shhhh.

{End of bench conference.}

- - - - -

BY MR. NORRIS:

Q Mr. Hinchee, specifically what facilities did you identify for Beck with respect to modifications to be

1 Hinchee - direct

2 made to the Lake Road Generating Plant?

3 A Well, I identified the facilities that are shown on
4 these pages of the report, A-14, A-15, and A-16.

5 Q What modifications, if any -- strike that.

6 Did you identify any modifications to facilities
7 to Beck with respect to the subject of interconnection?

8 MR. LANSDALE: I object.

9 THE COURT: Sustained.

10 Q Did you make -- did you identify modification to any
11 other facilities to Beck for which some of the
12 \$9.8 million bond funds were to be spent?

13 A Yes.

14 Q What were those other modifications that you identified
15 for Beck?

16 A Well, the interconnection, and the changes in the
17 distribution and transmission systems, and purchase of
18 additional vehicles.

19 Q Are those set forth in PTX-2384?

20 A Yes, they are.

21 Q Will you tell us where?

22 A Well, beginning on page A-14 and continuing through page
23 -- and including page A-19.

24 Q Thank you.

25 Mr. Hinchee, what years were you at the Columbus

1 Hincbee - direct

2 Municipal System?

3 A From 1961 until 1971.

4 Q Bring your attention to the middle of the 1960's, the
5 period 1965 to 1967:

6 During that period, did you have contact with other
7 municipal utilities in the State of Ohio?

8 A Yes, I did.

9 Q How did these contacts occur?

10 A Well, largely through the Ohio Municipal Electric
11 Association and my activities on the Board of
12 Directors of that Association.

13 Q During this same period of years, 1965 to 1967, did you
14 have contact with the Painesville Municipal System?

15 A Yes, I did.

16 Q Did you have occasion during those years to visit the
17 Painesville Municipal System?

18 A Yes, I did.

19 Q Do you have personal knowledge of whether the
20 Painesville Municipal System in the period 1965 to
21 1967 was interconnected to any power grid?

22 A Yes.

23 MR. LANSDALE: I object.

24 THE COURT: Approach the bench.

25

1 Hinchee - direct

2 {The following proceedings were had at the
3 bench:}

4 MR. LANSDALE: Ordinarily I wouldn't
5 object to a question like that, but apparently you
6 don't know how to -- I'm sorry -- apparently counsel
7 doesn't know how to ask questions.

8 It's a leading question, and I want to do
9 something to try to interfere with this continual
10 use of leading questions.

11 Obviously it's a preliminary question and
12 under ordinary circumstances I wouldn't object to
13 it; but just one thing leads to another: "Bing,
14 bing."

15 "Yes, yes, yes, yes."

16 MR. NORRIS: It's a preliminary
17 question.

18 THE COURT: It really doesn't make
19 any difference if it is a preliminary question,
20 Mr. Norris.

21 Obviously the issue of leading questions is
22 becoming critical. I don't know what else to say,
23 except to instruct the jury that questions should
24 not be leading and that the reason that I am
25 sustaining the objections is because the questions

1 Hinchee - direct

2 incorporate the desired answers.

3 MR. NORRIS: If I may, your
4 Honor.

5 When I had Mr. Sarisky on the stand, I put a
6 question to this same effect with respect to
7 Painesville, and your Honor said, "If you want to
8 qualify this man, of course you can."

9 And I don't know how I can qualify Mr.
10 Hinchee without asking him whether or not he had
11 personal knowledge --

12 THE COURT: Read the last series
13 of questions.

14 {The record was read by the reporter as
15 follows:

16 "Q During this same period of years, 1965
17 to 1967, did you have contact with the Painesville
18 Municipal System?

19 "A Yes, I did.

20 "Q Did you have occasion during those years
21 to visit the Painesville Municipal System?

22 "A Yes, I did.

23 "Q Do you have personal knowledge of
24 whether the Painesville Municipal System in
25 the period 1965 to 1967 was interconnected to any

1 Hinchee - direct

2 power grid?

3 "A Yes."}

4 MR. LANSDALE: Why can't you say,

5 "Do you know whether or not they were
6 interconnected?"

7 Why can't you ask a question that gives an
8 option.

9 THE COURT: Sustain the
10 objection.

11 Let's proceed.

12 {End of bench conference.}

13 - - - - -

14 BY MR. NORRIS:

15 Q Mr. Hinchee, with respect to the Painesville Municipal
16 System in the mid-1960's, 1965 to 1967, what if anything
17 did you know about the Painesville Municipal System
18 being interconnected?

19 A The system was not interconnected.

20 Q Did you have occasion to visit the Orville Municipal
21 System at any time during the 1965-1967 period?

22 A Yes, I did.

23 Q What if anything do you know about whether the Orville
24 System was interconnected?

25 A It was not interconnected.

Hinchee - direct

1
2 Q After you came to Muny Light in 1971, did you
3 consider attempting to link Muny Light with any other
4 municipal system?

5 A No. Consider, no, but investigate, yes.

6 Q What did you investigate?

7 A I was aware that the report that had been written by
8 the staff, I was aware of that, which the engineers
9 suggested an interconnection between Painesville and
10 Orville, and I went out to those systems, who were
11 then under different managers than the ones I had
12 known previously, and I made inquiry of them as to
13 their interest in that type of activity.

14 Q When did this occur?

15 A As soon as I got aboard here in the City, as soon as
16 I had time to get out there.

17 Q What conclusions did you reach with respect to this
18 subject matter?

19 A They had no interest in pursuing the matter.

20 Q What other conclusions did you reach?

21 MR. LANSDALE: Objection.

22 A It would not have been practical in any event.

23 Q Mr. Hinchee, would the difference in size between
24 Muny Light and CEI have prevented an interconnection
25 between those two electric power companies?

1 Hinchee - direct

2 MR. LANSDALE: Objection.

3 THE COURT: I will sustain the
4 objection. It is leading.

5 BY MR. NORRIS:

6 Q Mr. Hinchee, are there any constraints on interconnections
7 between electric utility companies based upon the
8 relative size of the two utilities in question?

9 MR. LANSDALE: Objection.

10 THE COURT: Sustained.

11 Q Mr. Hinchee, how big is the Columbus Municipal System
12 compared to the Cleveland Municipal System?

13 A Less than half the size of Cleveland.

14 Q At the time you were at the Columbus Municipal System,
15 was it about the same size then as it is now?

16 A I am not sure. I don't know how large it is now.

17 Q At the time you negotiated the interconnection between
18 the Columbus Municipal System and the C&S, the
19 privately-owned utility company, what was the relative
20 size of these two companies?

21 A Well, there was hardly any relationship at all. The
22 Columbus and Southern Ohio Electric Company was much,
23 much larger than the municipal. The municipal was
24 perhaps 2 percent at the outside of the size of the
25 Columbus and Southern Ohio Electric Company.

1 Hinchee - direct

2 company.

3 Q Did you have discussions with any other CEI executives
4 on this subject other than Mr. Howley?

5 A Not that I recollect.

6 Q After the letter was written to CEI by the Law
7 Director that you have testified to, was there any
8 response received from CEI?

9 A No. At least if there was a response, it was negative.

10 There was some indication that we would have a
11 meeting and discuss the matter, but the meeting never
12 happened.

13 Q Other than what you have testified to, did you make any
14 other efforts to meet with CEI to discuss an agreement
15 for additional interchange transaction?

16 A Not that I recall.

17 Q With respect to the matter of PASNY power that you
18 testified to yesterday, Mr. Hinchee, did you foresee
19 any problems associated with Muny Light in building a
20 line to bring that power in over its own line to the
21 City of Cleveland?

22 MR. LANSDALE: Objection.

23 THE COURT: I will sustain the
24 objection. I think that is repetitious.

25 MR. NORRIS: May we approach the

1 Hincbee - direct

2 bench?

3 THE COURT: Yes.

4 - - - - -

5 {The following proceedings were had at the
6 bench:}

7 MR. LANSDALE: My objection is on
8 the grounds that it is leading.

9 Mr. Norris just doesn't understand that a
10 non-leading question is one designed to give the
11 witness an option as to how he answers, and I must
12 -- I just can't believe that counsel -- on the one
13 hand it is hard for me to believe that counsel is --
14 doesn't know the results of all this going back and
15 just saying, "To hell with you."

16 I only can conclude that counsel doesn't know
17 how to ask a direct question, and I would be glad
18 to spend time with you on this subject if you wish.

19 MR. NORRIS: I gave him the option
20 of saying yes or no.

21 MR. LANSDALE: You sure did.

22 THE COURT: That is not the option.

23 The characteristics of a leading question is
24 that it can be yes or no in most instances, and
25 because there is no option.

1 Hinchee - direct

2 If you ask a simple question instead of
3 incorporating the answer that you are attempting to
4 elicit into the question, that is giving the option,
5 but I have reviewed the record yesterday, and I
6 went down through the record, and it is "yes,
7 yes, no, yes, no, yes, yes," and that is what he
8 is objecting to.

9 MR. NORRIS: On the repetition
10 point, I checked the points, and I found the only
11 testimony along this line was with respect to the
12 Ohio Power possibility, and I have not asked this
13 question of this witness.

14 MR. LANSDALE: I am not objecting to
15 the substance.

16 THE COURT: Yes, you are right.
17 Very well. I will sustain the objection on
18 the basis that it is leading.

19 Let's go back. Place a proper question.

20 {End of bench conference.}

21 - - - - -

22 THE COURT: The objection is
23 sustained. You may proceed.

24 BY MR. NORRIS:

25 Q Mr. Hinchee, why did Munny Light -- strike that.

1 Hincbee - direct

2 Did Muny Light build a transmission line of its
3 own to the Pennsylvania border to bring power back
4 from PASNY?

5 A No, it did not.

6 Q Why did it not?

7 A There were a number of reasons:

8 It was not a matter of practicality. The amount
9 of power was only 30 megawatts, and it was available to
10 the first applicant who applied for it, and then they
11 had a preferred designation. That meant that in the
12 10 or 12 years lead time required for building the
13 line of this kind to establish and request
14 right-of-ways and getting clearances from the Siting
15 Commission, and that power would not be available at
16 the end of the construction period.

17 Furthermore, in looking at the practical
18 alternatives, it was only a mile and a half over to
19 CEI's 69 KV and 138 KV lines, right adjacent to us,
20 with capacity to spare on the 138 KV system, so there
21 was not really justifiable, no justifiable way that the
22 construction of a large amount of transmission could be
23 contemplated.

24 Q In mid-1971, were you familiar with the total number
25 of customers that Muny Light was serving?

1 Hincbee - direct

2 A Yes.

3 Q Do you know whether -- strike that.

4 Was Muny Light serving a total number of customers
5 in mid-1971 greater than or less than the year before?

6 A Less than.

7 Q Do you know, or what about the same question for
8 still another year back; did you check that?

9 A It was less each year back to about 1967 or '68, I think.

10 Q At the time you arrived in March of 1971, was Muny Light
11 doing anything with respect to acquiring new business?

12 A No, they were not.

13 Q Did Muny Light have a sales effort at that time?

14 A No, it did not.

15 Q Was your competition in the City of Cleveland doing
16 anything by way of sales effort to get customers?

17 A Very much so.

18 Q What was it doing?

19 A They had a very substantial sales staff, sometimes
20 numbering as high as 25 or 30 in personnel, and they
21 were involved in that sales effort, and they were
22 actively soliciting municipal customers whenever the
23 occasion presented itself.

24 Q Did you do anything in an effort to compete with CEI
25 after you arrived in March of 1971?

1 Hinchee - direct

2 MR. LANSDALE: Objection.

3 THE COURT: Sustained.

4 BY MR. NORRIS:

5 Q Mr. Hinchee, what if anything did you do about this
6 situation?

7 A Well, I recognized the need to retain the customers
8 that the system had and to try to get a recapture of
9 some of the ones we lost, and also in addition to gain
10 new customers, so I looked for people within the
11 organization to fulfill a sales function, and I found
12 a person there -- and I think we mentioned his name
13 yesterday -- Mr. Ray Cristell, and then I hired from
14 the outside, I hired a man of quite good credentials,
15 Mr. Bob Balzer.

16 Q Where did Mr. Balzer --

17 MR. LANSDALE: Objection.

18 THE COURT: Approach the bench.

19 - - - - -

20 {The following proceedings were had at the
21 bench:}

22 MR. LANSDALE: This is the exact same
23 thing he testified to yesterday.

24 THE COURT: Yes. It is repetitious.

25 MR. NORRIS: On Balzer, it is.

1 Hinchee - direct

2 MR. LANSDALE: So is Cristell.

3 {End of bench conference.}

4 - - - - -

5 THE COURT: That is already in
6 the record.

7 Proceed.

8 BY MR. NORRIS:

9 Q Were you successful in your sales efforts starting --
10 strike that.

11 When did this sales effort get started at Muny Light?

12 A We started it as early as possible, and of course the
13 impact was not shown statistically until 1973.

14 Q How would you describe the success of the program?

15 A Well, it was successful, and in 1973 the statistical
16 reports indicated that the Municipal System had gained
17 a substantial number of its customers back, and in
18 addition, it picked up a substantial number of new
19 customers.

20 Q What classes of customers was Muny Light interested in
21 obtaining?

22 A Well, I was personally interested in the larger type
23 industrial and commercial accounts that would improve
24 our base load and improve our power factor, the kind
25 of loads that would operate around the clock and give

1 Hinchee - direct

2 us a stable base, but the sales force was interested
3 in commercial and residential people and worked
4 vigorously to obtain those kind of accounts.

5 MR. NORRIS: Pat, please put up
6 2064 on the easel; and I would request that the
7 clear plastic overlay, marked 3234, be placed on
8 top of 2064.

9 {After an interval.}

10 BY MR. NORRIS:

11 Q Addressing your attention to these exhibits, Mr.
12 Hinchee, 2064 and 3234, will you please designate
13 on the map locations where Muny Light was attempting
14 to obtain larger load customers.

15 A Well, yes.

16 The larger load services that we were primarily
17 interested in were Easterly Sewage Pumping Station,
18 which I believe is this point right here {indicating},
19 and also Westerly -- there was an addition in the
20 Fairmount Water Pumping Station in the near east side,
21 and I am sure I can pick out the exact location, but
22 in this general vicinity {indicating}.

23 Then on the east side the Division Water
24 Pumping Station, and beyond that was the -- I am sorry
25 -- the Division Water Pumping Station, and just beyond

1 Hinchee - direct

2 that was the Easterly Sewage Treatment Plant.

3 Q Would you take the blue dots that have been provided
4 to you and place those dots on the plastic overlay in
5 the locations that you have indicated.

6 A {The witness complies.}

7 Q Now, you are placing the dot in the upper right-hand
8 corner, and would you identify that?

9 A That is the approximate locateion of Easterly Pumping
10 Station.

11 This is the approximate location of the Division
12 and Fairmount Water Pumping Stations {indicating}, and
13 this is the approximate location of Division
14 {indicating}, and the approximate location of Westerly
15 Sewage Treatment Pumping Station, to the best of my
16 recollection, and there was another one, and I forget,
17 which was in the early planning stages, and that was
18 Southerly, which generally would be in that
19 location {indicating}.

20 Q Were there any other large load customers that you were
21 considering while you were there?

22 A Yes. We were very active in pursuing the service to the
23 new Justice Center being built downtown, and also to
24 several new buildings downtown.

25 Q Would yqu place a blue dot on the Justice Center on the

1 Hinchee - direct

2 overlay, 3234.

3 A {The witness complies.}

4 It is approximately just there {indicating}.

5 Q What kind of a facility modification would have been
6 necessary to have served these various customers --
7 strike that.

8 Could you have served all of these customers with
9 the existing facilities that Muny Light had?

10 A No. All of these would require substantial additions,
11 even to the transmission system or the distribution
12 systems or in some cases to both systems.

13 We had fairly good proximity to Collinwood, so
14 the least amount of work involved would be at Easterly,
15 but it would still require that the electrification
16 of Easterly would require building additional lines
17 out to Easterly and building a new substation at
18 Easterly.

19 For the generating station, the Lake Shore
20 Generating Station, to serve the Justice Center and
21 improve the service to the downtown substation, it
22 would require an additional 69 KV line to be brought
23 into this location {indicating}, and in addition to
24 serve these facilities at the Westerly and Division
25 Pumping Station, it would be necessary to extend the

1 Hinchee - direct

2 69 KV lines in a generally westerly direction, and
3 then back down and back to the West 41st Street
4 station.

5 Q Would the extension of those transmission facilities
6 have been adequate to serve beyond the service to the
7 individual loads that you have now identified?

8 A Yes.

9 MR. LANSDALE: Objection.

10 THE COURT: Sustained. It is

11 leading. It incorporates the answer, Mr. Norris.

12 That is what the objections have all been directed
13 to.

14 Q Mr. Hinchee, what was your approach to obtaining
15 additional classes of customers beyond those that you
16 have identified?

17 A Well, as I mentioned, I had two salesmen working full
18 time, contacting people such as the Holiday Inn and
19 the Associated Estates, and in answering phone
20 inquiries about service and going out and calling on
21 customers and following up whenever we had an outage,
22 following up with customers to make sure that they
23 knew and understood the reasons for the outage, and
24 also when we lost customers to CEI, to go out and talk
25 to the people and find out why we lost them and what

1 Hinchee - direct

2 we could do to improve our operation.

3 MR. NORRIS: Mrs. Richards, would
4 you hand to the witness -- and this is the only
5 copy -- Exhibit PTX-3233. Counsel have been
6 shown it, and you may give it to the Court and
7 then show it to the witness.

8 {After an interval.}

9 BY MR. NORRIS:

10 Q Can you identify PTX-3233?

11 A Yes.

12 Q What is it?

13 A It is a memorandum, a departmental memorandum from
14 Herb Phillips, Electrical Engineer, to me, dated
15 February 3rd, 1972, and the subject is, "Federal
16 Power Commission Report Request, dated January 26,
17 1972."

18 Q And what is shown on that exhibit?

19 A Shown on this exhibit are five large loads that I think
20 we have previously shown on the map.

21 One shows as under construction, and showing the
22 service that we are furnishing there, and the other
23 four are proposed.

24 Q Do you know what municipality the Southern Sewage
25 Treatment Plant is located in, the blue dot down on the

1 Hinchee - direct

2 bottom of the map?

3 A I do not recollect that, no.

4 Q Do you know whether it is in the City of Cleveland?

5 A It is outside the City of Cleveland.

6 Q During your period as Muny Light's Commissioner, Mr.
7 Hinchee, were arrangements completed for Muny Light
8 to serve any of these large loads that you have
9 identified?

10 A To the best of my recollection, yes.

11 The Fairmount installation was completed, and
12 also Easterly. If it wasn't completed, it was well
13 underway.

14 Q What size of cable extensions were you contemplating
15 for sending the service out to Easterly?

16 A Well, initially an 11 KV, but ultimately a 69.

17 Q How large a cable would have been necessary just for
18 that one load, just the easterly load?

19 A Well, I am sorry, I don't recall.

20 Q Let me restate the question:

21 Would you have needed a 69 just to service that
22 easterly load itself?

23 MR. LANSDALE: Objection.

24 THE COURT: Sustained.

25 Q! Let me go back and rephrase the question.

1 Hincbee - direct

2 MR. LANSDALE: If your Honor
3 please --

4 THE COURT: Just a moment, Mr.
5 Norris, I want to have the question and answer
6 read back. Read that last sequence.

7 {The record was read by the court reporter
8 as follows:

9 "Q How large a cable would have been
10 necessary just for that one load, just the
11 easterly load?

12 "A Well, I am sorry, I don't recall.

13 "Q Let me restate the question:

14 "Would you have needed a 67 just to service
15 that easterly load itself?"}

16 MR. NORRIS: I stand corrected.
17 I thought the witness said --

18 THE COURT: Just a moment. You
19 asked the question and the answer was no, and then
20 the next question you incorporate the answer.

21 MR. NORRIS: I didn't hear the
22 witness properly, your Honor.

23 THE COURT: I will sustain the
24 objection, and let's not ask leading questions,
25 and then you will eliminate the objections.

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Hinchee - direct

Shall we proceed?

BY MR. NORRIS:

Q How long would it have taken to extend the transmission system out to Easterly to serve that load?

A Well, underground construction, and including the engineering time and the construction time, it would be 18 months to two years.

Q How long would it have taken to have extended the transmission cable down to the Southerly Treatment Facility?

A Well, substantially longer. That would be in the order of, it would be a major undertaking, and right-of-way acquisitions would be required outside of the city and permits that are not required inside of the city, and my best judgment, it would be not less than five years or possibly a little over that.

Q What discussions did you personally participate in with respect to the Southerly Treatment Facility, the extension of service to that?

A Well, as soon as the engineers were hired for the project, or as soon as I knew of the hiring of the engineers, in their first preliminary meetings with the City, I attended a meeting with them, and with the other members of the City staff, and discussed the

1 Hinchee - direct

2 potential of the City furnishing the service out there.

3 Q Were those discussions on the Southerly Treatment
4 Facility concluded by the time you had left the City?

5 A No, they were not.

6 Q Are there any particular benefits associated -- strike
7 that.

8 Are there any benefits associated for an electric
9 power company serving this size load?

10 A Yes.

11 Q What are the benefits?

12 A The major benefits that would accrue are in the fact
13 that the load is steady, and it could be off peak, or
14 the majority of the pumping can be done at night in off
15 peak hours, and it makes it rather attractive to the
16 utility, and it improves its load factor, and it is a
17 good load to have. It is a profitable load.

18 Q Do those kinds of loads have any effect upon the
19 utility's generating equipment?

20 A Yes, they do. They make a great demand on the
21 utility's generating equipment.

22 The various sizes of the stations that we
23 contemplated were in the order of 30 to 50 megawatts
24 in some cases.

25 Q If service had been provided to these loads that you

1 Hinchee - direct

2 were considering, were there any other marketing
3 benefits that would have been associated with that?

4 A Yes, the extension of the service is to these four
5 points, if you will, and that would then enable us
6 to pick up additional load in those areas.

7 Q Mr. Hinchee, you mentioned Mr. Balzer, and I don't
8 think you answered the question as to where he had
9 worked prior to coming to Muny Light.

10 A Prior to coming to Muny Light, Mr. Balzer was with a
11 consulting engineering company as, I think, a Chief
12 Estimator; and then he was an apparatus salesman,
13 electrical apparatus salesman, which includes switch
14 gear and switches and controls and that type of
15 utility equipment where he was awarded a
16 million-dollar-a-year man. As a producer for a number
17 of years, he was an outstanding salesman.

18 MR. NORRIS: Pat, and Mr. Weiner,
19 would you assist in putting up the 1972 operations
20 chart.

21 MR. WEINER: I will get it, Pat.

22 {After an interval.}

23 BY MR. NORRIS:

24 Q Mr. Hinchee, do you see the legend on the left side of
25 the chart, the bottom part of the fourth band, a

1 Hinchee - direct

2 69 KV?

3 A Yes, sir.

4 Q What is meant by that?

5 A Well, that is the band where any use of the 69 KV
6 interconnection would be shown the same as the
7 operations of other apparatus. It would show with a
8 line the same as the load transfer points.

9 THE COURT: Mr. Norris, I don't
10 think it was put on the record what number the
11 exhibit is.

12 THE WITNESS: It is Exhibit No.
13 2823, PTX-2823.

14 Q Thank you, Mr. Hinchee.

15 Mr. Hinchee, when did Muny Light first take
16 service over the 69 KV?

17 A In December, 1972.

18 Actually it started on December 16, 1972.

19 MR. NORRIS: May I approach the
20 bench?

21 THE COURT: Yes.

22
23 {The following proceedings were had at the
24 bench:}

25 MR. NORRIS: I would request that

1 Hinchee - direct

2 the Court read Stipulation 226.

3 MR. LANSDALE: I have no objection
4 to that.

5 MR. NORRIS: And then also
6 Stipulation 228, your Honor.

7 MR. LANSDALE: All right.

8 THE COURT: Anything further?

9 MR. LANSDALE: No.

10 THE COURT: Okay.

11 {End of bench conference.}

12 - - - - -

13 THE COURT: Ladies and gentlemen
14 of the jury, Stipulation No. 226 reads as follows:

15 "In February of 1972, there were hearings
16 before the Federal Power Commission on the request
17 by the City of Cleveland for an interconnection with
18 CEI."

19 Stipulation 228 reads as follows:

20 "On March 8, 1972, the Federal Power
21 Commission issued an order that there be an
22 immediate emergency interconnection between CEI
23 and Munny Light."

24 BY MR. NORRIS:

25 Q Mr. Hinchee, at any time prior to the FPC order of March 8,

1 Hinchee - direct

2 1972, that Judge Krupansky just referred to, were you
3 aware that there would be an order on the 69 KV?

4 A Yes.

5 Q And how did you become aware of that?

6 A Well, we were at an FPC hearing in February, and
7 during the course of that hearing, we became aware
8 that the order would be issued and generally what the
9 content would be.

10 Q Did you have any conversations in February of 1972
11 with CEI executives about this matter?

12 A I am sorry. Would you read the question back.

13 {Question read.}

14 A Yes.

15 Q Would you describe those conversations and with whom
16 were they?

17 A Well, at the February meeting before the FPC, CEI
18 officials agreed to hold the engineering meeting that
19 we had been pressing for for so long, and agreed to
20 make additional attempts to resolve our differences and
21 proceed with the interconnection, and scheduled a meeting
22 at that time for February 21 in the CEI offices here
23 in Cleveland.

24 Q Well, now, do you recall the CEI executives that you
25 were discussing this with?

1 Hinchee - direct

2 A Well, there were several. Mr. Howley was present, and
3 Mr. Williams, Harold Williams, and Mr. Davidson, and
4 perhaps Mr. Sener. I am not sure.

5 Q Was there a discussion in Washington between you and
6 those CEI executives as to what the purpose of the
7 meeting would be on February 21?

8 A Yes.

9 Q And what was the purpose of the meeting stated to be?

10 A To proceed with the engineering on the interconnection
11 and lay a foundation for future engineering studies.

12 Q What did you do with respect to this matter at that
13 time?

14 A Well, we returned to the City of Cleveland, and I put
15 full impetus on my staff getting information ready for
16 this meeting, and having line drawings and whatever
17 other information that we thought would be appropriate
18 for the meeting ready, so that we could proceed as far
19 as possible in this long-awaited discussion.

20 Q And did the meeting take place?

21 A Well, yes and no.

22 Q Well --

23 A Yes, the meeting took place. We attended the meeting.

24 Q And did the meeting take place on February 21?

25 A Yes.

1 Hinchee - direct

2 Q And what day of the week was that?

3 A That was on a Monday, I believe.

4 Q And during what period of time had your staff been
5 preparing for this meeting?

6 A Well, during the period of time after the meeting was
7 agreed to and specifically over the entire weekend I
8 had the staff working to get everything in order for
9 the meeting.

10 Q Now, where did this meeting take place on February 21?

11 A In the offices of the Illuminating Company.

12 Q And who was present on behalf of Muny Light?

13 A Mr. Bednar, Mr. Mathews, Mr. Erickson, Mr. Phillips,
14 and I believe Mr. Wetzel, and myself.

15 Q Do you know where Mr. Wetzel is?

16 A I think -- no, I am not sure.

17 Q Do you know where Mr. Mathews is?

18 A Yes. Mr. Mathews is deceased.

19 Q Do you know where Mr. Phillips is?

20 A I believe he is retired in California.

21 Q And do you know where Mr. Erickson is?

22 A Mr. Erickson is deceased.

23 Q Now, who attended this meeting for CEI?

24 A Mr. Williams and Mr. Senter, and I believe a Mr.

25 Fitzgerald -- I think a Mr. Fitzgerald, and after the

1 Hincbee - direct

2 meeting had just about started, Mr. Howley came in.

3 Q Did you discuss the engineering for the interconnection
4 at this meeting?

5 A No, we did not.

6 Q Why not?

7 A Well, we were seated to begin the meeting, and I stated
8 the purpose of the meeting, and then Mr. Howley came in
9 and stopped the meeting and advised me that there could
10 not be any meeting until the matter of monies that CEI
11 claimed the City owed them had been resolved.

12 Q Did an engineering meeting subsequently take place?

13 A No, it did not.

14 Q Were there any discussions between the Muny Light
15 engineers and the CEI engineers with respect to the 69
16 KV line?

17 A No; they were effectively stopped at that point.

18 Q Please tell the jury what the 69 KV line consisted of?

19 A The 69 KV line consisted on a temporary basis of an
20 overhead line constructed at 1-1/2 or 1-1/8 miles
21 approximately to connect the Lake Shore -- 69 KV
22 station of the Municipal Company at Lake Shore to the
23 69 KV station of the Cleveland Electric Illuminating
24 Company at their Lake Shore Generating Station.

25 MR. NORRIS:

Mr. Weiner, would you

1 Hinchee - direct

2 put up PTX-2064 again?

3 {Mr. Weiner complies.}

4 BY MR. NORRIS:

5 Q Mr. Hinchee, I would like to have you just show the
6 jury the approximate location of where that line went
7 that you have described?

8 {The witness steps to the easel.}

9 A It is a very short line.

10 This is the Municipal Plant here, and this is the
11 CEI plant here {indicating}; and it just went a mile
12 and a half or a mile and an eighth down the lake
13 shore connecting the 69 KV buss here to the 69 buss
14 there {indicating}.

15 Q Mr. Hinchee, would you explain the relationship
16 between the 69 KV temporary tie and the 138 KV
17 permanent interconnection that became operational later?

18 A Well, CEI had stated that they had smaller capacity
19 available on 69 than the City really wanted, but they
20 had the larger capacity available at the higher
21 voltage, 138 KV; but the 138 KV -- 69-volt systems --
22 69 KV systems, could be tied together without buying
23 transformers or switch gear, only building a line
24 between the two and modifying some of the control
25 apparatus and relaying was all that was necessary;

1 Hinchee - direct

2 whereas, for 138, the same line could be used, but it
3 required the installation of a step-down transformer
4 from 138 to 69 because it didn't supply the 138,000
5 volts, and the 138 was considered to be the permanent
6 interconnection, 69 KV was considered to be the
7 temporary or relief type of interconnection.

8 Q What size cable was strung on the poles for the 69
9 KV line?

10 A Mr. Norris, I don't remember the wire sizes, I can't
11 remember that detail about the system.

12 Q Was the wire size sufficient to carry either 69 or 138?

13 A Yes, the installation was proper for that.

14 Q Now, was the City able to build the 69 KV line in a
15 timely fashion?

16 MR. LANSDALE: I object.

17 THE COURT: Sustained as to form.

18 Q Approximately when did Muni Light commence its
19 construction of the 69 KV line?

20 A Well, almost -- as soon as we could obtain a suitable
21 contractor, almost simultaneously with the issuance of
22 the order.

23 Q Did you obtain a suitable contractor?

24 A Yes, we did.

25 Q What was the name of that contractor?

1 Hinchee - direct

2 A The Collier Construction Company.

3 Q What did you do with respect to Collier Construction
4 Company as it relates to the 69 KV line?

5 A Well, we showed the company the preliminary drawings
6 that we had made and outlined the type of construction
7 we would expect them to perform, and tried to reach
8 an agreement with them on the cost of that service and
9 a starting date.

10 Q Did you reach such an agreement with Collier?

11 A Yes, we did.

12 MR. NORRIS: Pat, would you hand

13 Mr. Hinchee PTX-1544, please.

14 {Exhibit handed to the witness by Mrs.

15 Richards.}

16 BY MR. NORRIS:

17 Q Mr. Hinchee, can you identify PTX-1544?

18 A Yes.

19 Q What is it?

20 A This is a letter proposal from the Collier
21 Construction Company addressed to Mr. Erickson,
22 Chief Electrical Engineer for the Municipal Power and
23 Light. It gives the estimated cost for building the
24 69-138 KV interconnecting line between the two
25 facilities.

1 Hinchee - direct

2 Q And what was the estimated cost?

3 A Not to exceed the figure of \$235,000.

4 Q Was that figure agreeable to the City?

5 A Yes, it was.

6 MR. NORRIS: Pat, would you hand

7 Mr. Hinchee PTX-3216?

8 {Exhibit handed to the witness by Mrs.

9 Richards.}

10 BY MR. NORRIS:

11 Q Mr. Hinchee, can you identify PTX-3216?

12 A Yes.

13 This is the purchase order issued by the City of
14 Cleveland to the Collier Construction Company for the
15 construction of the 138 KV pole line between the two
16 generating stations at a cost of \$235,000, and it's
17 dated March 28th, 1972.

18 Q Did Collier agree to do the work on the basis of this
19 purchase order?

20 A Yes, they did.

21 Q How long did it take for Collier to get to the job
22 site?

23 A About two days.

24 Q What work was done on the 69 KV line during the month
25 of March, 1972?

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1 Hinchee -direct

2 A To the best of my recollection, between a mile and an
3 eighth and a mile and a half.

4 Q Who owned the land on which the line was to be built?

5 A The City of Cleveland owned part of it, and Norwalk
6 Trucking owned part of it, and CEI owned part of it.

7 Q What kind of poles were to be built?

8 A It was a wood pole line interconnection.

9 Q Approximately how many poles were required for the line?

10 A Between 30 and 40.

11 Q How many of these poles were to be placed on CEI's
12 property?

13 A I believe about eight of them.

14 Q Who was to pay for the 69 KV line?

15 A The City would.

16 Q What cost estimate did you receive from CEI as to its
17 costs in connection with this line?

18 A I believe they gave us an estimate of \$62,000 for
19 terminal equipment to be placed on CEI's end of the
20 line.

21 Q And who was supposed to pay that \$62,000?

22 A The City.

23 MR. NORRIS: Pat, please give Mr.

24 Hinchee PTX-2840, please.

25 Why don't we just give him all of the following

1 Hinchee - direct

2 exhibits, to speed it up:

3 2840, 3048, 3235, 3217, 3218, 3219, 2943,

4 and 3220.

5 {Exhibits handed to the witness by Mrs.

6 Richards.}

7 BY MR. NORRIS:

8 Q Address your attention to PTX-2840.

9 Can you identify that for the jury?

10 A Yes.

11 PTX-2840 is a letter from the Cleveland
12 Electric Illuminating Company, dated March 30th, 1972,
13 signed by Harold Williams, Vice-President of Engineering,
14 and it's addressed to me.

15 Q Mr. Hinchee, what was CEI's position with respect to the
16 City's placing poles on the CEI property?

17 A I'm sorry, could I have the question back?

18 THE COURT: Read the question back,
19 please.

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

22 A Well, CEI would require that the City execute a
23 right-of-way agreement, and the route of the
24 transmission line on the CEI property had to be finally
25 determined before the right-of-way could be entered

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1 Hinchee - direct

2 into -- right-of-way agreement could be entered into.

3 Q What had to be done to finally determine the route
4 that the pole line would take on CEI's property?

5 A The exact location of the poles had to be determined
6 and marked by the City for all locations on CEI's
7 property.

8 Q What did the City have to do in order to establish the
9 exact location of the eight poles on CEI's property?

10 A Well, it had to know and had to have the precise
11 location of the CEI underground facilities in that
12 area.

13 Q What information did CEI provide the City?

14 A It provided a number of maps transmitted with this
15 letter, but not the precise information required by
16 the City; general information.

17 Q What additional information did the City need?

18 A Well, the City needed the exact location of CEI's
19 underground facilities.

20 Q What else did you do in an effort to locate -- to
21 establish the exact location of these eight poles?

22 A Well, first of all, we made a demand on CEI for an
23 exact identification of their facilities underground
24 and that was not ever given to the City, and --

25 MR. LANSDALE:

Object, if your Honor

1 Hinchee - direct

2 please.

3 May we approach the bench?

4 THE COURT: Approach the bench.

5 - - - - -

6 {The following proceedings were had at the
7 bench:}

8 MR. LANSDALE: I will have to look up
9 something, but my recollection of the last trial was
10 that we had an episode about this in which Mr.
11 Hinchee asserted that they didn't get any information;
12 that he had to use spy glasses.

13 We produced prints, that was sent to the City.
14 I think it was agreed that the prints showed this
15 underground information and that the City got it.
16 And I think we had an agreement on that at the
17 last trial.

18 MR. NORRIS: We didn't have any
19 agreement on it.

20 The testimony was that -- he just testified
21 that he got maps, but -- it showed some information,
22 but it did not show the information that he needed.

23 {Mr. Murphy approaches the bench and hands
24 an exhibit to Mr. Lansdale, and Mr. Lansdale and
25 Mr. Murphy conferred off the record.}

1 Hinchee - direct

2 MR. LANSDALE: We brought Defendant's
3 Exhibit 1163 and we brought the maps over, and this
4 was during -- while Mr. Hinchee was on the stand,
5 and we all agreed that the maps did show that
6 information.

7 MR. NORRIS: I'm sorry, I do not
8 recall any such agreement.

9 The thing that I recall is that those maps
10 showed locations of the pole yard and the switch
11 yard, but they had nothing to show the location
12 of the underground cables and the underground
13 facilities.

14 MR. LANSDALE: Well --

15 MR. NORRIS: I'm not done.

16 Those maps that you're referring to that
17 were delivered to Mr. Lansdale with the April --
18 what was the date of that letter?

19 MR. LANSDALE: April the 12th --

20 {Mr. Norris looking at the date on the
21 letter.}

22 MR. NORRIS: -- April 12th, 1972,
23 it's CEI's Exhibit 1168, is it?

24 MR. LANSDALE: -63.

25 MR. NORRIS: 1163.

1 Hinchee - direct

2 Well, my recollection is that those maps
3 did not show the precise location of the cables
4 and the underground facilities; and, of course,
5 you would have to know about that before you
6 started to dig a hole.

7 MR. LANSDALE: I apologize for
8 interfering.

9 I will take care of it later.

10 THE COURT: The objection is
11 overruled. It is subject matter of cross-
12 examination.

13 And I'm sure that the record of the previous
14 trial will disclose precisely what the position of
15 the parties was at that time, including this witness,
16 and you will be permitted to bring it out on
17 cross-examination.

18 MR. LANSDALE: Yes, you're actually
19 correct.

20 I was trying to forestall it.

21 {End of bench conference.}

22 - - - - -

23 MR. NORRIS: Your Honor, could the
24 reporter read back the question, please?

25 THE COURT: Read back the question.

1 Hinchee - direct

2 please.

3 {The record was read by the reporter as
4 follows:

5 "Q What else did you do in an effort to
6 locate -- to establish the exact location of
7 these eight poles?

8 "A Well, first of all, we made a demand
9 on CEI for an exact identification of their
10 facilities underground and that was not ever
11 given to the City, and --"

12 THE REPORTER: And then Mr.

13 Lansdale objected.

14 A {Continuing} -- it therefore required that the City
15 enter the CEI property and make its own determination
16 of the exact location of the CEI's facilities and then,
17 from that information, revise or finalize its drawings
18 and then stake the whole line.

19 Q Did you participate in any of that activity, Mr.
20 Hinchee?

21 A To a certain extent.

22 Q What was your participation?

23 A Well, I was disturbed by the fact that CEI would
24 require the precise pole location from the City but
25 would not give the City precise information as to the

1 Hinchee - direct

2 location of its facilities.

3 And we were informed that CEI was in fact out in
4 the coal yard and on the premises staking the
5 location of their underground facilities or staking
6 something; and we then went to a point of observation
7 and observed the CEI engineers do this staking through
8 the medium of field glasses, and we got a pretty fair
9 idea then of where the facilities were, and we
10 surmised that these were the underground facilities
11 in question.

12 And then we proceeded with a new layout based on
13 that information.

14 Q What would, normally, utility practice have been to
15 establish pole locations?

16 A Normally, in a sensitive area that way and in a
17 cooperative atmosphere, the utility with the underground
18 facilities would have staked the pole locations in order
19 to guarantee that its facilities were not disturbed.

20 Q What did Muny Light do with respect to designing the
21 pole line?

22 A Well, they designed the pole line -- 69 KV pole line
23 in accordance with the National Electric Code and
24 submitted the plans to CEI.

25 Q And what did CEI do in response to Muny Light's

Hinchee - direct

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submission?

A Well, the first submission, CEI stated that the line did not meet the CEI standards and would have to furnish additional information and make some changes.

Q What was the effect of this?

A Well, the City then requested CEI to furnish its pole line standards, and we were then informed that CEI did not have any.

Q What happened then with respect to the design of the pole line?

A Well, we were referred to some other document -- and I don't recall the precise document at this time -- and we obtained a copy of that document and looked at our design and, in fact, it did conform with the document in question.

Q Address your attention, Mr. Hinchee, to PTX-3048.

Can you identify that?

THE COURT:

What is this exhibit

number?

MR. NORRIS:

3048, your Honor.

A Yes, I have it.

Q What is that?

A This is Ordinance 642-72, and it is an emergency

Hinchee - direct

1 ordinance directing the Director of Utilities to enter
2 into a contract without competitive bidding with the
3 Cleveland Electric Illuminating Company for necessary
4 items of labor and material to be provided for the
5 intertie.
6

7 Q Addressing your attention to PTX-3235, can you identify
8 that?

9 A Yes.

10 Q What is it?

11 A This is a purchase order issued to the Cleveland
12 Electric Illuminating Company on August 8, 1972, in
13 the amount of \$62,000 for labor and material as required
14 on CEI's plant for the 69 KV emergency temporary
15 electrical interconnection.

16 Q Mr. Hinchee, was any other work necessary to complete
17 the 69 KV temporary intertie?

18 A Other than building the connecting line, terminal
19 facilities had to be installed.

20 Q What are terminal facilities?

21 A Well, terminal facilities in this case amounted to
22 installation of switching apparatus on CEI's end of
23 the line and some elements of relay control.

24 Q What was the City's position with respect to terminal
25 facilities in this situation?

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1 Hinchee - direct

2 A Well, the City utilized existing terminal facilities,
3 and by doing that it would cost their cost of
4 installation very much.

5 Q What was CEI's position with respect to these
6 terminal facilities?

7 A Well, CEI's position was that they would not proceed
8 with the installation of the terminal facilities until
9 all of the matters of pole location and right-of-way --
10 and then an ordinance passed by City Council, and not
11 just the issuance of a purchase order, to cover their
12 expenses would be in place.

13 Q Addressing your attention to PTX-3217, please. Can
14 you identify that?

15 A Yes.

16 Q What is it?

17 A This is a letter from the Illuminating Company dated
18 September 18, 1972, and it is from Mr. Sener,
19 Supervising Engineer to H. H. Ackmann, Chief Electrical
20 Engineer for the City.

21 Q What is the subject of this letter, Mr. Hinchee?

22 A The subject of the letter is -- well, first of all, the
23 request for as-built drawings of the interconnection
24 line; but secondly, to supply to the City a revision
25 of an earlier layout for metering apparatus; and a

1 Hinchee -direct

2 request, a request for a revision concerning the Ohio
3 Bell telephone lines which were the means of
4 communciation between the City and CEI for operation
5 of the 69 KV line.

6 Q How were the telephone lines utilized in connection
7 with an interconnection of this kind, and what was the
8 function of the telephone lines?

9 A To provide communication between the City's Dispatch
10 Center and CEI's System Dispatch Center.

11 Q Had the City received specifications from CEI concerning
12 these telephone lines prior to the date of this letter,
13 September 18, 1972?

14 A Yes.

15 Q And was anything forwarded along with this letter,
16 dated September 18, 1972?

17 A Yes. There is an attachment called "Proposed Meter
18 Facilities for CEI Municipal Light Plant's
19 Interconnection."

20 Q What was CEI's position as of the date of this letter,
21 September 18, 1972, concerning the telephone lines?

22 A Well, this was a change. Originally the City had
23 been asked to lease a certain number and type of
24 telephone lines for meeting the CEI control requirements
25 out of its system dispatch office, and at this point

1 Hinchee - direct

2 the matter was changed so that the City load would be
3 dispatched out of the CEI's Systems Operations Center,
4 and the leasing of additional telephone facilities
5 was required.

6 Q Were those centers in the same location that you
7 described?

8 A No.

9 Q Where were those two centers that you described
10 located?

11 A I can't tell you that now.

12 Q Addressing your attention to PTX-3218, can you identify
13 that document?

14 A Yes.

15 Q What is it?

16 A This is a letter dated September 21, 1972, and it is
17 from Mr. Harold Ackmann, Chief Electrical Engineer,
18 Division of Light and Power, to Mr. Sener, General
19 Supervising Engineer of the Illuminating Company.

20 Q And what was the purpose of this letter?

21 A This was to inform Mr. Sener that the City would
22 lease the telephone lines and change its order with
23 Ohio Bell Telephone Company and lease the lines for
24 the new location, and it made a demand on CEI to
25 know what our obligations for the system's operation

1 Hinchee - direct

2 Center would consist of, because it affected the order
3 that was going through for material and control
4 apparatus.

5 Q You mentioned the term "new location."

6 What were you referring to when you used the term
7 "new location"?

8 A I would have to have that read back to me.

9 THE COURT: Please read it.

10 MR. NORRIS: It is in his answer.

11 {Record read by the court reporter.}

12 A The System Dispatch Center for CEI was at a different
13 location than the Systems Operations Center.

14 Q Addressing your attention to PTX-3219, please, Mr.
15 Hinchee, can you identify that letter?

16 A Yes. This is a letter from the Cleveland Illuminating
17 Company to Harold Ackmann, Chief Electrical Engineer
18 for the Division of Light and Power, and it is from
19 Mr. Sener, General Supervising Engineer, and it is
20 dated October 16, 1972.

21 Q And what was the purport of that letter?

22 A This was a further revision in CEI's requirements for
23 apparatus that needed to be installed to effect the
24 interconnection.

25 Q What effect did these revisions have on the City?

1 Hinchee - direct

2 A Well, each revision caused a further delay in the
3 proposal to Westinghouse Electric Company, that they
4 were attempting to make, to furnish the necessary
5 apparatus for the City.

6 Q How did the City plan to do the work on the terminal
7 facilities?

8 A Well, it had entered into a contract with Westinghouse
9 Electric Company to provide the terminal facilities
10 and do the installation.

11 Q Do you recall when the City first entered into a contract
12 with the Westinghouse Company for that purpose?

13 A To the best of my recollection, we had agreed to enter
14 into a contract with Westinghouse, and they were to
15 make a proposal to the City, and the information here
16 in these constant revisions were the materials
17 necessary for the final proposal which would then
18 become the basis of an order for Westinghouse.

19 Q I am sorry. Were you through?

20 A -- and so I don't think that Westinghouse order -- they
21 were working to prepare a proposal, but the order was
22 not placed until I think 1973.

23 Q Mr. Hinchee, earlier in your testimony you made
24 reference to stakes that you observed being placed on
25 the CEI property and the removal of those stakes.

1 Hinchee - direct

2 Kindly state who removed the stakes on the CEI
3 property that you were testifying about.

4 A Well, Mr. Sener, I think, was in charge of the
5 operation, but I am not sure who the other personnel
6 were that were there.

7 Q Did Muny Light play any part in the removal of those
8 stakes?

9 A No, sir. CEI staked the location, which were wooden
10 stakes, and they removed those stakes after some
11 study of the location.

12 Q Addressing your attention, please, to PTX-3220, can
13 you identify that, Mr. Hinchee?

14 A Yes. This is a letter from the Cleveland Electric
15 Illuminating Company, written by Mr. Sener, and it is
16 addressed to Mr. Ackmann, and it is dated February the
17 5th, 1973.

18 Q What was the purport of that letter, Mr. Hinchee?

19 A Well, this is, I suppose -- yes, it is a revision on
20 the specifications and proposal for some of the
21 apparatus with Westinghouse Electric Corporation.

22 Q What was the date of that letter?

23 A February 5th, 1973.

24 Q When was the 69 KV tie first energized?

25 A In December, 1972.

Hinchee - direct

1
2 Q Why did the City ask that it be energized at that time?

3 A Well, there was an imminent failure of Boiler No. 6,
4 and the City was without capacity to meet its
5 December load.

6 Q Mr. Hinchee, what was CEI's position with respect to
7 the City's request to energize the 69 KV line in
8 December of 1972?

9 A Well, it was not an operating decision. It was a
10 management decision, and they refused to consider --

11 MR. LANSDALE: Objection.

12 THE COURT: Approach the bench.

13 - - - - -

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

16 THE COURT: Read the question.

17 {Question read.}

18 MR. LANSDALE: I object. I have been
19 letting these things pass. The witness doesn't
20 answer the question. He goes off and
21 editorializes about it.

22 I object to the answer as not being responsive,
23 and I will ask that it be stricken and the witness
24 directed to respond to the question.

25 THE COURT: The objection is sustained.

1 Hinchee - direct

2 {End of bench conference.}

3 - - - - -

4 THE COURT: Now, listen to the
5 question and make your answer responsive.

6 Read the question back to the witness, and
7 the witness will respond to the question.

8 {The pending question was read by the court
9 reporter as follows:

10 "Q Mr. Hinchee, what was CEI's position
11 with respect to the City's request to energize
12 the 69 KV line in December of 1972?"}

13 A They would not energize the line until the City removed
14 its opposition to the street lighting rate increase
15 that they had pending before Council.

16 Q How long was it from the time the City made the request
17 for the energizing of the 69 KV line until it was
18 energized?

19 A The request was early morning, and the line was not
20 energized until nearly midnight or perhaps a little
21 after that in the late night.

22 Q What was the nature of the street lighting increase
23 proposal you just identified in your answer?

24 A Well, CEI had requested a rate increase, and the
25 Division of Light and Power had been asked to review

1 Hinchee - direct

2 it and make a recommendation to City Council as to
3 whether or not the rate increase was appropriate for
4 the street lighting service.

5 Q And what recommendation did Muny Light make to City
6 Council?

7 A That it was not appropriate.

8 Q Did Muny Light remove that recommendation prior to
9 the energizing of the 69 KV on that occasion?

10 A Yes.

11 Q What was CEI's position with respect to the further
12 operation of the 69 KV line?

13 A Could I have that again?

14 {Question read.}

15 A Once the line was removed from service, the emergency
16 condition was satisfied, and CEI refused to supply
17 power over the 69 KV interconnection until all of
18 the load transfer points had been energized and all
19 of the City's generating apparatus available had been
20 placed into service.

21 Q What effect did that have on Muny Light's operation?

22 A Well, we were never able to use the 69 KV line again
23 during my tenure of office.

24 Q Were there any differences, Mr. Hinchee, between the
25 way the 69 KV temporary tie was operated when it was

1 Hinchee - direct

2 operated and the way in which Muny Light operated
3 the auxiliary generating stations at West 41st
4 Street and Collinwood?

5 A Well, yes.

6 Q What was that difference?

7 A The generating stations at Collinwood and at West
8 41st Street were usually not in operation, and when
9 they were needed, they were brought up to operating
10 temperature and speed, and then they were
11 synchronized into the Muny System and produced power
12 for the System as a synchronized operation.

13 Although the same thing could have been done over
14 the 69 KV tie, the required operation was that at no
15 time would the 69 KV of CEI be connected onto the 69
16 KV load of the City, and therefore it meant that the
17 City, instead of feeding that power that it needed into
18 its generating system, still had to operate, and they
19 split off Collinwood and let CEI supply that
20 part of the system on the 69 KV.

21 Q Mr. Hinchee, at any subsequent date -- strike that.

22 Did you at any time subsequent to June of 1971,
23 seek additional financing for the rehabilitation and
24 expansion of Muny Light?

25 A Yes, I did.

1 Hincbee - direct

2 Q When?

3 A In 1972.

4 Q Can you remember what part of 1972?

5 A To the best of my recollection about -- initiated the
6 action in the early spring or summer of 1972.

7 THE COURT: Perhaps this would be
8 an opportune time for us to recess for the lunch
9 hour.

10 Ladies and gentlemen of the jury, you are
11 free to go to lunch, and please, during the noon
12 recess, do not discuss the case, either among
13 yourselves or with anyone else.

14 Keep in mind the Court's admonishments, that
15 you are to keep an open mind until all of the
16 evidence has been adduced and the Court has
17 instructed you on the law and the application of
18 the law to the facts and the matter is submitted
19 to you for your deliberations and judgment.

20 You are free to go to lunch and return at the
21 usual 1:30 hour.

22 Thank you.

23 {The jury was excused from the courtroom.}

24 - - - - -

25

1 MR. NORRIS: For the purposes of
2 scheduling, your Honor, I would let opposing
3 counsel know that I am on the last series of
4 questions that I will have for this witness.

5 THE COURT: Gentlemen, the Court
6 senses a certain degree of tension that has
7 developed in the courtroom since the last recess,
8 and the Court wishes to remind counsel in as
9 diplomatic a fashion as possible that these
10 proceedings are being conducted in a Federal
11 courtroom; that the function of the Court is to
12 maintain the dignity of the courtroom at all times,
13 including recesses, and thereby insuring to all of
14 the parties a forum for the orderly production
15 and presentation of their respective cases.

16 I intend to provide the parties with such a
17 courtroom and forum.

18 I also would like to remind counsel in as
19 diplomatic a fashion as possible of their
20 professional duties as lawyers practicing before
21 this Bar. Needless to say, there is no necessity
22 for me to indulge counsel with a lengthy review of
23 those responsibilities.

24 I would also like to remind counsel of the
25 Court's authority and responsibility to invoke

1 summary proceedings where there is a departure
2 from the practices and procedures mandated by the
3 Federal Rules of Civil Procedure, the Federal Rules
4 of Evidence, and the Code of Ethical Conduct.

5 And also I would like to emphasize that in
6 the courtroom the sanctions available to the
7 Court are summary in nature.

8 On the lighter side, I would like to say that
9 with a few exceptions the case has been proceeding
10 expeditiously, and I would hope that the case would
11 continue to proceed expeditiously and in an orderly
12 fashion and in accordance with the Federal Rules
13 of Civil Procedure.

14 Accordingly, gentlemen, I request that there
15 be no further oral or physical confrontations in
16 this courtroom, and that the parties and counsel
17 and the witnesses conduct themselves in a manner
18 in which I have just outlined, so that the parties
19 to this action will have a forum where there can be
20 an orderly presentation of evidence.

21 Invoking summary powers and authorities of
22 this Court is a distasteful process. Hopefully,
23 gentlemen, the Court will not have to resort to
24 such actions in insuring a forum for the orderly
25 presentation of evidence.

1 I might say, gentlemen, a word to the wise
2 is sufficient.

3 Thank you very much, and I appreciate your
4 attention.

5 {Luncheon recess had.}

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1 THURSDAY, JULY 23, 1981, 1:50 O'CLOCK P.M.

2
3 THE COURT: Please be seated.

4 {The jury entered the courtroom and the
5 following proceedings were had in their hearing
6 and presence.}

7 THE COURT: Please be seated.

8 - - - - -

9
10 W A R R E N D. H I N C H E E.

11 resumed the stand and testified further as follows:

12
13 THE COURT: You may proceed, Mr.
14 Norris.

15 MR. NORRIS: Thank you, your Honor.

16
17 DIRECT EXAMINATION OF WARREN D. HINCHEE {Resumed}

18
19 BY MR. NORRIS:

20 Q Mr. Hinchee, subsequent to June, 1971, when was the next
21 occasion that Munny Light sought additional capital
22 funds?

23 A They sought additional capital funds with the bond
24 ordinance for \$9,800,000 presented to the City Council
25 in, I believe, December of 1972.

1 Hinchee - direct

2 Q What did you do personally in respect to advising
3 City Council of the purposes for which the funds were
4 being sought?

5 A Well, I did pursue the role of advising the City
6 Council; met with Chairman Zone and Chairman -- of the
7 Finance Committee, and Chairman Duggan of the
8 Utilities Committee, and various other members of
9 Council who were interested or who were on the
10 Committee, to explain the need for the bond issue.

11 MR. NORRIS: Pat, would you kindly

12 give Mr. Hinchee PTX-2951?

13 {Exhibit handed to the witness by Mrs.

14 Richards.}

15 Q Can you identify PTX-2951?

16 A Yes. PTX-2951 is Ordinance 2101-72, to issue and
17 sell temporary light and power plant subordinated
18 mortgage revenue bonds of the City of Cleveland in
19 the sum of \$9,800,000.

20 Q Addressing your attention to the last page, tell the
21 jury when the ordinance was passed?

22 MR. LANSDALE: It speaks for itself,

23 if your Honor please.

24 THE COURT: Well, overruled.

25 A It was passed July the 2nd, 1972, and effective --

1 Hinchee - direct

2 I am sorry -- 1973, and effective August 12, 1973.

3 Q Mr. Hinchee, did you personally attend any meetings
4 where this ordinance was discussed?

5 A Yes, I did.

6 Q What meetings did you attend where this ordinance was
7 discussed?

8 A I attended all of the Council committee hearings and
9 also the Council meeting where the measure was passed.

10 Q Addressing your attention to the date of July 2, 1973,
11 did you have occasion to attend any meetings that day
12 with respect to this ordinance?

13 MR. LANSDALE: May I approach the
14 bench?

15 THE COURT: Yes.

16 - - - - -

17 {The following proceedings were had at the
18 bench:}

19 MR. LANSDALE: I approach the bench
20 at this time, if your Honor please, to ask for an
21 instruction by the Court in view of the tendency
22 of this witness to answer the way he does.

23 If you recall, your Honor, any claims with
24 respect of interference with the \$9.8 million issue
25 were excluded in this case under the Court's order,

1 Hinchee - direct

2 and we seem to be getting closer to making inquiry
3 regarding the details of the page of this ordinance,
4 and it can have no other function other than to
5 attempt to get in a matter specifically excluded
6 by the impact order.

7 THE COURT: The Noerr-Pennington?

8 MR. LANSDALE: Yes, and both your
9 order finding that this issue which was in the
10 complaint was not proved and dismissing it.

11 MR. NORRIS: Mr. Lansdale is
12 correct. That is the purpose of the line of
13 questioning, that this is the line of questions,
14 and the purpose of these questions is to
15 demonstrate what this witness saw with his own
16 eyes as to the source of the amendment that was
17 passed by the Committee considering this ordinance
18 at the Committee meeting on the 2nd of July, 1973,
19 which amendment effectively eliminated the
20 possibility of the \$9.8 million bond ordinance
21 being sold.

22 If the Court would like me to give advance
23 notice of what the witness will testify to, so the
24 Court can make a determination in advance, I am
25 prepared to put the material into the record right

1 Hinchee - direct

2 now.

3 THE COURT: I don't recollect my
4 order. I would have to review my order.

5 MR. LANSDALE: I would like to have
6 an opportunity to get it.

7 THE COURT: All right. Bring it
8 up here, and then, of course, you can proffer
9 whatever you are desirous of proffering.

10 I don't recollect what my order was.

11 MR. LANSDALE: It is the order of
12 October 20th, and we have to go to that.

13 Can you get that for me?

14 THE CLERK: Yes.

15 MR. LANSDALE: I might add also,
16 apart from the fact that your Honor found the
17 issue definitively in the last case, that it is a
18 clear Noerr-Pennington situation.

19 I mean, the claim is that the representatives
20 of CEI persuaded the City Council to adopt an
21 amendment requiring the bonds to be sold in the
22 open market rather than buying them for their own
23 funds with a sinking fund, and they couldn't
24 comply with the provision of their own indenture
25 because Muny's earnings were not sufficient.

1 Hinchee - direct

2 THE COURT: On the open market?

3 MR. LANSDALE: On the open market.

4 This was a clear Noerr-Pennington situation,
5 and the fact that the Board of Directors of the
6 City decided to do it as a result of arguments
7 presented pro and con -- and to have that go to the
8 jury, I submit, is totally beyond the pale.

9 THE COURT: Put on the record that
10 which you intend to prove by the testimony.

11 MR. NORRIS: At the joint meeting
12 of the Finance and Public Utilities Committee on
13 June 2, 1973, Mr. Hinchee took his entire staff
14 over to the Committee meeting, because the
15 ordinance in question was under consideration, and
16 at a recess Mr. Hinchee observed Mr. Gaul in
17 discussion with Mr. Hauser at the recess, and he
18 observed Mr. Gaul receiving from Mr. Hauser a
19 piece of paper, and he observed Mr. Gaul going
20 back to his table, sitting down and reading the
21 piece of paper, and getting up and walking over to
22 Mr. Hauser and discussing the piece of paper with
23 Mr. Hauser.

24 And then as the Committee meeting reconvened,
25 Mr. Gaul read from the piece of paper, which was

1 Hinchee - direct

2 the amendment that was then adopted by the
3 Committee and ultimately that evening adopted by
4 the whole Council in the form of an amendment to
5 the ordinance.

6 The City's position is that while we
7 respectfully submit that the Noerr-Pennington
8 doctrine does not control the situation for the
9 reasons set forth in the brief previously filed in
10 this case, there are several reasons that the City
11 believes Noerr-Pennington does not apply here,
12 but the most important reason is that for the
13 purposes of showing the character and intent in a
14 Section 2 case, the City submits that the
15 Noerr-Pennington doctrine would not prevent this
16 evidence from being adduced in front of the jury,
17 so they could make whatever inferences are
18 appropriate to be made in terms of what was the
19 CEI's intent with respect to the monopolization
20 and attempt to monopolize.

21 THE COURT: Very well. Both
22 sides have now addressed the issue, and the Court
23 adopts and incorporates its previous ruling as it
24 applied in the first instance, incorporating
25 therein all of the arguments of counsel, both pro

1 Hinchee - direct

2 and con, on the issue, and in addition to that,
3 directs the Reviewing Court's attention to page
4 18 of its October 9, 1980 order, wherein the
5 Court stated in this language:

6 "The Court would observe lastly that having
7 reviewed the evidence heretofore adduced in light
8 of the specific allegations of misconduct
9 advanced in the plaintiff's second amended
10 complaint, it concurs with the defendant's
11 assessment that the following allegations fail for
12 lack of proof and are therefore no longer germane
13 to this issue.

14 "2{b}. The City's contention that the
15 defendant has prevented the plaintiff from
16 {b} issuing bonds to finance improvements and
17 extensions of the system" -- and this of course
18 refers to the proof in the first trial. So
19 with that we will proceed, gentlemen.

20 {End of bench conference.}

21 - - - - -

22 THE COURT: You may proceed,
23 Mr. Norris.

24 MR. NORRIS: Thank you, your Honor.

25

Hinchee - direct

BY MR. NORRIS:

Q Mr. Hinchee, subsequent to the rate increase that -- the rate increases that you've testified to that occurred in 1971, when did you next initiate work on changing Muny Light's rates?

A In 1972.

Q What objectives were you pursuing with respect to the projected rate revision?

A Well, I had examined the rates that had been passed in the last proceedings that limited the fuel charge to, I believe, 10 percent of the gross bill on commercial customers and 5 percent on residential and small commercial, and I felt that that restriction needed to be lifted so that the City could recover its full cost of fuel.

But, in addition, I felt that the fuel adjustment charge was not adequate because it did not cover the cost of fuel oil which was burned in gas turbines -- or the natural gas which was burned in the gas turbines, and it did not account in any way for the power purchases which, in effect, substituted for the use of fuel in the plant.

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

Hinchee - direct

THE COURT: Yes.

- - - - -

{The following proceedings were had at the bench:}

MR. NORRIS: I would request the Court read Stipulations Nos. 94, 95 and 96.

MR. LANSDALE: What is it about?

{Document handed by Mr. Norris to Mr. Lansdale.}

THE COURT: I will tell you while you are up here, there is a matter that I have been desirous of discussing with you.

Previously I was approached by Mr. Lawless of the Cleveland Plain Dealer requesting that the Court open up the bench conferences.

Subsequent to that, the City Editor of the Plain Dealer was over here to discuss the matter with me.

I advised them that due to certain contingencies, that bench conferences would not be opened and so counsel would not commit to the papers about what their proffer was intended to be and basically what the agreement was between counsel. And I also indicated that, at the

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1 Hinchee - direct

2 conclusion of the case, the entire record would be
3 opened, as well as the record that was taken in the
4 Court's chambers.

5 I am now being pressed again, -- I don't know
6 if counsel have been approached concerning the
7 situation as it relates to not opening up the bench
8 conferences -- but my comment is going to be that I
9 have already discussed this and that at the
10 conclusion of the case the record will be opened
11 and made public as per the requirements of law.

12 I don't think there is any necessity for me
13 to go into the fact that this is by agreement of
14 counsel or by order of the Court, or what have you.
15 I think that what we have done has been working
16 out very, very well and I think, at least up until
17 this juncture, it has eliminated the necessity for
18 sequestration, and I don't think that -- I don't
19 want to place the burden on counsel to have to
20 explain these things away, but my position is
21 just going to be at the conclusion of the case
22 the entire record will be opened.

23 MR. LANSDALE: We concur.

24 MR. NORRIS: Yes, your Honor.

25 MR. LANSDALE: I have no objections

1 Hinchee - direct

2 to these things.

3 {End of bench conference.}

4 - - - - -

5 THE COURT: Ladies and gentlemen
6 of the jury, Stipulation No. 94 reads as follows:

7 "CEI applied to the PUCO {Public Utilities
8 Commission of Ohio} for approval of a rate
9 increase on October 7, 1971. The staff report of
10 the Public Utilities Commission of Ohio was
11 published March 3, 1973 and contained
12 recommendations for increases in CEI rates.
13 PUCO approved these recommended increases on
14 November 28, 1973 effective January 22, 1974."

15 Stipulation No. 95 reads as follows:

16 "Subsequent to March 3, 1973 and prior to
17 July 11, 1973, Messrs. Hinchee and Mathews
18 prepared a revision of Munny Light's rates based
19 upon the increased proposed by the PUCO and
20 commission staff for CEI and such rates were
21 embodied in a resolution of the Board of Control
22 adopted on July 11, 1973. Such rates were
23 included in Ordinance 1629-73, introduced
24 August 13, 1973, passed and effective January
25 28, 1974, changed Munny Light rates. The brackets

1 Hinchee - direct

2 for all schedules were changed and an environmental
3 and ecological adjustment charge was added. The
4 5 percent limitation on fuel charges was removed."

5 Stipulation 96 reads as follows:

6 "By Ordinance 332-75, passed May 19, 1975
7 and effective May 27, 1975, Muny Light's rates
8 were changed so that the fuel charge was determined
9 on a monthly basis, rather than on a quarterly
10 basis. No other change in Muny Light's rate was
11 made by this Ordinance."

12 MR. NORRIS: Thank you, your Honor.

13 David, I wonder if you would help put up the
14 1973 Operations chart.

15 {Mr. Weiner complies.}

16 BY MR. NORRIS:

17 Q Mr. Hinchee, how did Muny Light carry its load during
18 the year 1973?

19 {The witness steps to the easel.}

20 A Well, as you can see from the chart, the bulk of the load
21 in 1973 was carried by operation of No. 6 turbine,
22 No. 11 boiler, by the operation of Boiler No. 3 and
23 Boiler No. 5 and Turbine No. 8 -- No. 8 and Turbine
24 No. 10, also gas turbines.

25 It was carried -- most of the load for the balance

1 Hinchee - direct

2 of the year -- without the operation of the load
3 transfer points. They were disconnected or
4 substantially reduced in January, and disconnected
5 altogether in March, except for a brief period of
6 time; and then sporadically they were used throughout
7 the year, but not used continuously like they had been
8 before in the early part of the year. Due to the
9 emergency condition on Boiler No. 6 and emergency
10 in the plant, the 69 KV line was energized for most
11 of the month of June, and a few days in February.

12 Q What difference would a permanent interconnection
13 with CEI have made in the way Muny Light carried its
14 load in 1973?

15 A Well, it would have made quite a bit of difference
16 because, for one thing, the base loading would have
17 been considerably reduced on the gas turbines. For
18 another thing, there would have been an opportunity
19 also to perform some maintenance that didn't get
20 performed on the older plant.

21 MR. NORRIS:

 No further questions.

22 - - - - -

23

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25

1 CROSS-EXAMINATION OF WARREN D. HINCHEE

2

3 BY MR. LANSDALE:

4 Q When you went to Tampa Electric in all these many
5 years ago, it was then a utility which was smaller
6 than CEI -- Muny Light was at the time you went to
7 work for Muny Light in 1971, is that correct?

8 A I think that's probably correct.

9 Q And you -- while you were at Tampa Electric, the last
10 two or three years of your tenure there, you said that
11 you were the coordinator, I believe you said, of
12 industrial development; have I got the title right?

13 A Yes.

14 Q In effect, you were a part of the sales organization
15 devoting your time to attempt to persuade industry to
16 locate its plants within the territory of Tampa
17 Electric Company, I take it?

18 A Not exactly.

19 I was part of the executive function, reported
20 directly to the President of the company in that
21 capacity.

22 MR. LANSDALE: May I have the question
23 read, if your Honor please?

24 THE COURT: Read the question back.

25 {The last question was read by the court

1 Hinchee - cross

2 reporter.}

3 THE COURT: You may answer.

4 THE WITNESS: I have answered.

5 THE COURT: Read the answer.

6 {The last answer was read by the court

7 reporter.}

8 BY MR. LANSDALE:

9 Q "In that capacity."

10 In what capacity, Mr. Hinchee?

11 A As coordinator of industrial development.

12 Q What did you do as coordinator of industrial
13 development?

14 A I persuaded major industrial complexes to consider
15 locating their services in the City of Tampa or in its
16 -- the surrounding area.

17 I coordinated the efforts of 11 different
18 chambers of commerce in a unified effort to attract
19 industry; I performed liaison between the company and
20 the State Development Agency at the State Department.

21 Q Wouldn't you call that trying to sell? Isn't that a
22 salesman's job, whatever kind of a title you had or
23 whoever you reported to, wasn't that a salesman's job,
24 Mr. Hinchee?

25 A No, sir. We had salesmen.

1 Hinchee - cross

2 Q Weren't you engaged in selling?

3 A A form of it; but not as a sales -- part of the sales
4 organization where I was characterized --

5 Q Did you have anybody else devoted to trying to
6 persuade industry to move to Tampa?

7 A Myself and a secretary.

8 Q Yourself and a secretary.

9 And your job was to try to sell industry on
10 moving to Tampa?

11 A Yes, sir.

12 Q Then you went there and went to Columbus, where you
13 became sales manager for a company involved in
14 something to do with balancing things.

15 Was that also a salesman's job, Mr. Hinchee, a
16 selling job?

17 A It was a selling job, yes, sir.

18 Q But if I called -- but you would object to it being
19 called a salesman's job, is that --

20 A That is correct.

21 It was an executive position and a general
22 management position.

23 Q All right.

24 It had more dignity than a mere salesman is what
25 you're trying to say?

1 Hinchee - cross

2 A Paid a little better.

3 Q Paid a little better. That's important.

4 Then you went from there to the Columbus Municipal
5 System.

6 You stated today sometime, I believe, that
7 Columbus at that time was less than half the size of
8 Cleveland Muny Light?

9 A Yes.

10 Q In point of fact, it was less than one-seventh of the
11 size of Muny Light, is that not so?

12 A It was a small utility, yes.

13 Q I'm trying to fix how small.

14 Am I correct in my characterization of it as being
15 less than one-seventh of the size?

16 A That would be approximately correct.

17 Q All right.

18 And going back to Tampa, you mentioned your work
19 on a transmission line interconnecting Tampa Electric
20 with Florida Power, I believe.

21 What kind of a line was that?

22 A Best of my recollection, it was -- you mean,
23 voltage-wise?

24 Q Yes; was it a 69 KV wood pole line?

25 A It was a 69 KV wood pole line, yes.

1 Hinchee - cross

2 Q How long was the line?

3 A The line was already in place. Where the connections
4 were made it was -- the location was picked for both
5 utilities were fairly approximate to each other.

6 MR. LANSDALE: May I have that
7 answer read again, please?

8 THE COURT: Please read the
9 question and the answer back.

10 {After an interval.}

11 BY MR. LANSDALE:

12 Q My question, Mr. Hinchee, is, how long was the 69-volt
13 wood pole line built as an interconnection between
14 Tampa Electric and Florida Power -- if I have the name
15 correctly -- that you had something to do with when you
16 were with Tampa Electric?

17 A To the best of my recollection, Mr. Lansdale, not
18 much construction was required, the two units were
19 approximate to each other, and I had no reason to
20 really be concerned myself or at this time recall
21 the length of the line. I don't know.

22 Q I mean, like two miles or three miles?

23 A No. I think it was closer than that, like maybe a
24 quarter of a mile.

25 Q Maybe a quarter of a mile?

Hinchee - cross

1
2 jury what these differences in rates were, did you
3 refresh your recollection as to what was in fact the
4 case, this 12 or 14 years ago?

5 A No, sir, I did not.

6 Q You did not.

7 I will ask you if it is not a fact that in 1967,
8 and the same four subsequent years when you came to
9 the City of Cleveland, the difference between the
10 rate for a 250 KWH was 26 cents, with the Columbus
11 and Southern Ohio rate being 26 cents higher per
12 month than a similar charge for the municipal system?
13 Does this sound right to you now that I have
14 refreshed your recollection?

15 A I have no knowledge of that figure at this time.

16 Q You have no knowledge of that figure.

17 And of course you don't have any knowledge of the
18 5 to 10 percent figure either, do you?

19 A Yes.

20 Q I will refer you to the 500-kilowatt hour typical bill
21 published by the Federal Power Commission, and I will
22 ask you if it isn't the fact that in 1967, and in all
23 years until you left, Columbus and Southern Ohio
24 Electric's bill would have been for this amount of
25 energy, \$11.17, whereas the Columbus Municipal System

1 Hincbee - cross

2 would have been \$11.62, or some 4 percent higher?

3 I mean, the Municipal System being about 4
4 percent higher than the private company for this
5 amount of energy? I ask you if that is not the fact?

6 A I don't believe so. It is not my recollection.

7 Q This information is readily available, is it not, in
8 published form by the publication of the Federal Power
9 Commission?

10 A Yes, it is.

11 Q And will you do me a favor and check both this figure
12 and the earlier ones over the evening recess?

13 A Yes, sir.

14 Q And we can talk to you about them tomorrow.

15 Now, coming back to the length of transmission
16 lines at the Columbus Municipal System to this private
17 co-op, and I ask you and direct your attention to your
18 direct testimony under questioning by Mr. Norris at the
19 first trial, page 919:

20 "Q You say that you had to go to the co-op.
21 And what distance was involved between the Columbus
22 Municipal System and the co-op for the interconnection?

23 "A Once the co-op had agreed to supply an
24 interconnection and to work with us in the purchase
25 of firm power supply, then it was necessary for the

1 Hinchee - cross

2 City to build approximately 24 miles of transmission
3 line."

4 Is that your testimony that you gave in the last
5 case?

6 A Yes, I believe it was.

7 Q Have you done anything to refresh your recollection
8 since that time?

9 A Well, I had been thinking of what you asked me in
10 this question. The line was built in two separate
11 sections, and the total would be about 24 miles.

12 The second section was what I mentioned in the
13 figure. We had already pre-built most of the line
14 before that negotiation with Columbus and Southern
15 took place.

16 Q Mr. Hinchee, isn't it a fact that the transmission
17 line that you built -- pardon me -- that was built
18 by the Columbus Municipal System while you were there
19 as Assistant Superintendent from the facilities of
20 the Columbus Municipal System to interconnect with
21 this cooperative that you mentioned was 24 miles of
22 69,000 KV wood pole line?

23 A The total length, yes, sir.

24 Q Thank you.

25 THE COURT:

 Approach the bench.

1 Hinchee - cross

2 - - - - -

3 {The following proceedings were had at the
4 bench:}

5 MR. NORRIS: I request, Jack, that
6 you stop interrupting the witness.

7 There have been several interruptions when he
8 has not finished his answer, and I request that
9 you do that.

10 MR. LANSDALE: I plead guilty.

11 {End of bench conference.}

12 - - - - -

13 BY MR. LANSDALE:

14 Q Mr. Hinchee, I want to come back again to your
15 recitation of your experiences and qualifications.

16 You were in Cleveland approximately two and a half
17 years, as I recall?

18 A Yes.

19 Q And from Cleveland you went to Burbank, California?

20 A Yes, sir.

21 Q And did you hold a position in Burbank roughly corresponding
22 to that which you held in Cleveland?

23 A Yes.

24 Q And you were in effect the Chief Executive of the Burbank
25 plant?

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1 Hinchee - cross

2 A That is correct.

3 Q And the general operating station of that plant is
4 right downtown -- I remember seeing towers with steam
5 coming out of them.

6 A Yes.

7 Q And how does that utility compare to Cleveland?

8 A It is approximately the same amount of generation as
9 Cleveland, about 200 megawatts.

10 Q And you stayed there three years?

11 A Yes.

12 Q And then you went to the California Energy Commission?

13 Does that correspond to what we know in Ohio as
14 the Public Utilities Commission?

15 A No. That was a newly-created commission.

16 Q What was its job?

17 A The purpose -- it was for the purpose of utility
18 regulation, plant siting, and energy conservation.

19 Q Did you say that public utility regulations -- does it
20 include rates?

21 A No. There was a separate rate body, a separate
22 utility, regulatory body, for rates. That was the
23 California Public Utilities.

24 Q I don't understand your reference to regulation.

25 What regulatory function did the California Energy

Hinchee - cross

Commission have over utilities apart from rates?

A Approval of power plant siting and also transmission line location and approval of energy conservation measures.

Q I see; and that was a brand-new commission in 1976?

A Brand-new in 1976, yes.

Q What job did you have with them?

A I was an Adviser to the Commission and Manager of Utility Services.

Q Adviser to the Commission of matters of Utility Services -- please be more specific

A Adviser to the Commission and Manager of Utility Services.

Q And in what field was it your job to advise the Commission?

A Well, if they received an application from a plant for a permit to locate a plant in a certain area, I might review the documents on question and give the Commission my opinion of the report.

If an energy conservation measure were presented, I might advise the Commission on what I believed to be the impact on the utility.

Q In this area did you in fact, did you have an occasion to advise the Commissioner with respect to specific

1 Hinchee - cross

2 plants and plant application?

3 A Yes.

4 Q Which ones?

5 A The Sun Desert Nuclear.

6 Q Any others?

7 A Not that I recall.

8 Q Now, the other aspect -- I didn't get the title of it?

9 A I advised the Commission on the impact of energy
10 conservation measures on the utility.

11 Q On the utility?

12 A Yes.

13 Q Well, that is to say whether some specific energy
14 conservation measure proposed to be imposed on the
15 utility would be the economics of it -- you mean how it
16 would impact on the utility?

17 A It could be the economics, yes.

18 Q And what else?

19 A It could be the total effectiveness of the measure and
20 whether or not it was a reasonable thing for the utility
21 to undertake, or whether it ought to be approached in
22 some other way.

23 Q I see; and did you have occasion to actually advise the
24 Commission with respect to any specific matter in this
25 way?

Hinchee - cross

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A Yes.

Q Which one?

A In the matter of off-peak services and billing and in the matters of solar-operated generation and in the matters of geothermal development.

Q And you were there with that Commission somewhat less than three years?

A Yes, sir.

Q And your testimony was that you were manager, you became manager and consultant of a small utility in Iowa. Please tell us what utility.

A Muskateen, Iowa.

Q How big was that utility?

A That has approximately 180 megawatts of generation.

Q How many?

A About 180.

Q And I am intrigued by the title, "Manager and Consultant."

Was this a full-time job?

A It was part of the time. I originally was a consultant to the utility, and then there were certain things they needed done, and I needed to be there full time, so I became their general manager, and then I returned to the consultant status in more recent times.

Hinchee - cross

1
2 Q How long were you with them?

3 A Over a year.

4 Q That brings you to 1980. What did you do then?

5 A Well, in the interim period I have been a consultant to
6 a couple of small utilities, and mostly interested in
7 the development of property that I own.

8 Q The other utilities -- one was Hagerstown?

9 A Yes.

10 Q Did you participate in the arrangement that Hagerstown
11 made to eliminate competition with the private utility
12 adjacent to Hagerstown?

13 A No, I did not.

14 Q Was your consulting work for them before or after that
15 episode?

16 A I am not even aware of that episode.

17 Q You are not aware of it?

18 A No, sir.

19 Q Mr. Hinchee, I asked you about this in the preceding
20 case.

21 A Apparently I have forgotten it.

22 Q We will find it in the record.

23 And what was the other utility for which you did
24 consulting work?

25 A I have worked with the Michigan South Central Power

1 Hincree - cross

2 Agency.

3 Q And when?

4 A Well, last year and this year.

5 Q What did you do for them?

6 A Well, I assisted them in a review of engineering
7 specifications for construction of a power plant, and
8 I have written some job descriptions for personnel to
9 staff the plant, and assisted the General Manager in
10 an advisory capacity in various matters from time
11 to time.

12 Q All right. Did you work for any other utility as a
13 consultant since 1980?

14 A Not in recent months.

15 Q Except, of course, Muny Light in connection with this
16 case?

17 A Yes; I worked for Muny Light.

18 Q Now, Mr. Hincree, you testified -- pardon me a minute,
19 your Honor.

20 You testified in this case specifically at page
21 11,248 of the record, "I was also the Secretary and
22 Treasurer --" pardon me, 11,248. I am reading from
23 line 23:

24 "I was also Secretary and Treasurer of the East
25 Central Area Reliability Council, which is the

1 Hinchee - cross

2 transmission and generation grid covering the State of
3 Ohio."

4 Do you wish to correct that statement, Mr. Hinchee?

5 A Yes, I do.

6 Q Please do so.

7 A They are the group who participate in the grid, and they
8 are all members of the area in which that generation
9 and transmission grid is located.

10 Q The East Central Area Reliability Organization is a
11 rather large organization, is it not, covering
12 utilities in virtually the entire eastern section of
13 the United States, is it not?

14 A It doesn't cover the entire eastern section.

15 Q I said virtually the entire eastern section. Shall I
16 give it to you state by state, or can we shorten
17 this?

18 Do you know, Mr. Hinchee, what that organization
19 comprises?

20 A Generally, but not specifically.

21 Q And where you were -- withdraw that.

22 That involved the States of Michigan, Indiana,
23 Ohio, Kentucky, Virginia, West Virginia, parts of
24 Maryland, and Pennsylvania, did it not?

25 A Yes.

1 Hincree - cross

2 Q And the organization to which you belonged was called
3 ECAR, East Central Area Reliability Liaison
4 Committee?

5 A Yes, sir.

6 Q -- which provided liaison between the municipal
7 utilities in Ohio with this organization?

8 A There were other municipal utilities.

9 Q Withdraw that. I made a mistake in my question.

10 This liaison committee is composed of certain
11 small utilities, and not limited to municipalities,
12 but limited to an organization of both investor-
13 owned and municipal utilities that were quite small
14 and had a liaison function with the Reliability
15 Council organized to contribute to the reliability of
16 the major utilities in this area; is that correct?

17 A It is almost correct.

18 Q You tell me what is right.

19 A The Reliability Council wasn't just for the major
20 utilities. It was for all utilities, and generally
21 the rest of your description is correct.

22 Q Well, the organization chart that I am looking at,
23 Mr. Hincree, lists ECAR as Liaison Committee
24 connected with a dotted line as a sort of advisory
25 group to the Executive Board of ECAR. Wouldn't that

1 Hinchee - cross

2 correctly characterize this Liaison Committee?

3 A Yes. That is partly correct.

4 Q All right.

5 A The smaller utilities were covered in the reports by
6 the larger companies, so therefore they did not appear
7 as significant members of the Reliability Council,
8 nevertheless they were involved in it, and this was
9 the purpose of the Liaison Committee, to exchange the
10 information and to keep the members apprised, both
11 large and small, of the developments.

12 Q All right, sir.

13 Now, Mr. Hinchee, when you first came to
14 Cleveland in 1971, the first thing that you did, as I
15 recall, was to try to orient yourself as to the
16 condition of Muny Light and the problems which you
17 faced there; is that a fair generalization?

18 A Yes, it is.

19 Q And among other things you tried to inform yourself as
20 to the condition of Muny Light, and you have testified
21 that it wasn't in too good a condition, as I remember?

22 A That is correct.

23 Q And did you similarly make an effort to inform yourself
24 of the financial condition of Muny Light?

25 A Yes, I did.

1 Hincbee - cross

2 Q How did you go about that?

3 A Well, I checked with the financial people and the
4 accountants and asked for their opinion as to the
5 financial condition, and I wanted to know how much
6 our revenues were, and I wanted to know how much our
7 expenses were, and I wanted to know if we had any
8 outstanding debts, and I wanted to know everything
9 they could tell me about it.

10 Q Did you find out?

11 A I think I did.

12 Q Mr. Hincbee, from an organizational standpoint, how
13 are the finances of Muny Light handled?

14 That may be too general a question. Let me approach
15 it this way:

16 As I recall the organizational chart of the
17 City's Department of Public Utilities, you had -- I
18 don't know whether it was a division or a department
19 or what have you -- of Fiscal Control.

20 Is my impression correct, that this organization
21 was responsible for at least the accounting matters
22 relating to all of the City's utility operations,
23 water, sewer, electricity?

24 A Yes.

25 Q And where organizationally was this function carried out?

Hinchee - cross

1
2 A Well, organizationally there was a Commission of
3 Fiscal Control who operated this coordinated service
4 for the other utilities.

5 Q And I would like to know the things that he handled.

6 Was he merely a record keeper, an accountant,
7 so to speak, or did he have some executive function?
8 What did he do for you -- tell me that.

9 A Well, he had billing and accounting and customer
10 service contacts where -- when people would phone in
11 and ask about the bill, that that would be under his
12 jurisdiction.

13 Q And suppose -- withdraw that.

14 Did he, whatever may have been in the organizational
15 chart, were you so organized that you had some control
16 over this? Did he report to you with respect to the
17 functions that he performed for Muny Light as a staff
18 man?

19 A Yes, he did.

20 Q When you wished to spend money or to determine how
21 much money that you have available, and so on, how did
22 you do this? Was this a different group of people that
23 handled that?

24 A No. We would go to the Accounting Section and obtain
25 a report or whatever we needed on the financing.

Hinchee - cross

1
2 Q Supposing you had a need to pay a bill, how was that
3 handled? Could you pay it, or could you direct somebody
4 to pay it, or did somebody else have the say-so over
5 it?

6 A Well, there is a lot of checks and balances in an
7 operation like the City, and CEI's bill, for example,
8 could not be paid by negotiating a payment on it.

9 Now, other bills of a lesser import could be paid
10 without my signature on it.

11 Q Routine bills were paid without any particular input
12 from you?

13 A Some where.

14 Q What I want to know is, who paid them? Was it the
15 Division of Fiscal Control, or was it somebody else
16 under you?

17 A No, it would be paid by the general City. There would
18 be a request go over to the Finance Department of the
19 general City.

20 Q So the Treasurer of the City actually paid the bill?

21 A Yes.

22 Q And the request would go to the Treasurer from the
23 Division of Fiscal Control or from your division?

24 A It would normally go from the Division of Fiscal Control.

25 Q And the Division of Fiscal Control would act either upon

1 Hinchee - cross

2 some general rule for routine bills, or on specific
3 directions from you or your deputy?

4 A Yes.

5 Q All right; and one of the problems which you or anyone
6 running Muny Light faced, at least at the time you
7 arrived there, was the length of time between the
8 close of an accounting period and the time when you get
9 any information about the financial status of the
10 organization; is that not true?

11 A Yes, it is.

12 Q And at the time that you arrived at Muny Light in
13 March of 1970, the report, the financial report for
14 the year 1970, was not yet available, was it?

15 A No, sir.

16 Q And in point of fact, I believe it did not become
17 available until sometime in July; is that a fair
18 statement?

19 A That may be correct. I don't recall.

20 Q We will get the thing out in just a minute.

21 MR. LANSDALE: Kathy, would you get

22 out PTX-2172, and if that is not the year 1970,
23 it is either the one immediately before or the
24 one after.

25 {After an interval.}

1 Hinchee - cross

2 Q Do you have that in front of you, Mr. Hinchee?

3 A Yes.

4 Q Do you recognize that as the financial report for the
5 Division of Light and Power prepared by the Division of
6 Fiscal Control for 1970?

7 A I believe it is.

8 Q And the letter of transmittal appears to bear the
9 date of July 29, 1971?

10 A Yes.

11 Q The letter of transmittal is signed by Mr. Caruso,
12 Controller, Division of Fiscal Control, and it is
13 addressed to Mr. Suhajcik.

14 He was the Commissioner of Division of Fiscal
15 Control?

16 A Yes.

17 Q And he was your opposite number as head of one of
18 the Divisions which was a part of the Department of
19 Public Utilities?

20 A Yes.

21 Q And Mr. Caruso, Controller for the Division of
22 Utilities, reported to him?

23 A Yes.

24 Q But also he performed a staff function for you as
25 being in charge of the account?

1 Hinchee - cross

2 A Yes.

3 Q Now, what was available to you in March of 1971,
4 Mr. Hinchee, from which you could ascertain the
5 financial condition of Muny Light in March of 1971?

6 A Well, much of the background information that was
7 verified and went into this report was available at
8 that time, but not all of it.

9 Q And tell me how you went about informing yourself
10 about the condition of Muny Light?

11 A Well, I talked with Mr. Suhajcik, and I talked with
12 Mr. Caruso, and then I employed Mr. Russ Milan to
13 continuously monitor the figures and try to get -- to
14 keep me up to date if I needed current information as
15 opposed to waiting until the report came out.

16 Q You have indicated to us that Muny Light's fiscal
17 condition, except for its transmission and
18 distribution system, was poor, and that it had
19 substantial management defects.

20 What were the financial defects? How would you
21 characterize the financial condition?

22 A How would I characterize the financial condition?

23 Q Yes, sir, of Muny Light when you came to work?

24 A It needed several things. It needed a rate increase,
25 and it needed improvement in cash flow, and some of

1 Hincree - cross

2 the back debts that other divisions owed it needed to
3 be collected, and so it needed quite a bit of
4 attention.

5 Q Mr. Hincree, I will give you an opportunity to tell us
6 about that in detail, but you have seen fit to
7 characterize the fiscal condition of the plant as being
8 poor in some places and good in other places.

9 How do you characterize the financial condition
10 of Muncy Light at the time you came on board, good,
11 bad, indifferent, poor, bankrupt, or what?

12 A Well, it was in sound condition, but it was not
13 providing the sort of revenue that it ought to provide.

14 Q Is it your testimony that it was in sound financial
15 condition?

16 A Yes, sir..

17 Q All right.

18 Please, have you seen this document, Plaintiff's
19 Exhibit 2162 before?

20 A I may have. Was it published? I haven't seen it
21 recently.

22 Q Surely you received a copy when it was published?

23 A Yes..

24 Q And would it not have been a matter of real interest
25 to you?

1 Hinchee - cross

2 A Yes.

3 Q And so it is not unlikely that you have -- that you
4 would have examined this with some care, is it not?

5 A That is a good assumption, yes.

6 Q And the facts that are revealed, as these things
7 are finally set out here, you say were disclosed to
8 you upon the basis of the existing records and
9 conversations with people controlling them at the
10 time that you came to Muny Light; is that not so?

11 A Yes, it is.

12 Q And of course when you came -- by the way, you came
13 when? -- March 15th?

14 A Either March 8th or March 15th.

15 Q And you told us that you had visited Cleveland several
16 times between the first of the year and March to give
17 several items of advice to the City?

18 Did your earlier visits embrace investigation of
19 the financial condition of Muny Light?

20 A Not specifically.

21 Q I know you did a lot of things when you got there.
22 When did you get down to looking at the financial
23 condition?

24 A Well, one of the first or second things I did after I
25 got on board, I made inquiry in this regard.

1 Hinchee - cross

2 Q All right, sir.

3 Now, you discovered, did you not, that with total
4 operating revenues of \$10,917,000, and I invite your
5 attention to page 3 following the letter -- there is
6 the letter of Mr. Caruso, and it has eight or nine
7 pages in it, and then we get to the tabulations, and I
8 am referring to page 3, which is the statement of
9 income and expenses for the year ending December 31,
10 1970.

11 Have you found that?

12 A Yes.

13 Q And it appears from that that the total operating
14 revenues for the year were nearly \$11 million --
15 \$10,917,000; right?

16 A Yes.

17 Q And the net loss for the year was nearly two million,
18 a million nine sixty-nine?

19 A Yes.

20 Q Now, in determining the financial condition of an
21 electrical utility -- you said that Muny Light was in
22 sound financial condition.

23 What factors do you look at, how do you measure
24 the financial soundness of a utility?

25 A Basically I am concerned with achieving a differential

1 Hinchee - cross

2 between income and expenses and cash flow that would
3 pay for the cost of the utility's operation as you go.

4 Q Yes, I am sure of that, Mr. Hinchee, but what I am
5 trying to get you to tell me -- well, withdraw that.

6 Is it your statement then that the financial
7 soundness of the utility is measured by the degree to
8 which the revenues exceed the expenses on a consistent
9 basis over some period of time?

10 A Yes.

11 Q I take it you wouldn't decide the question of soundness
12 on just simply one year?

13 A No; that is right.

14 Q And what else do you look at then or consider to reach
15 the conclusion that Muny Light was on a sound basis
16 financially?

17 A Well, I think I have covered it. I don't know what
18 else you would need to look at.

19 Q You are telling me you only need to look at the figures
20 for the year preceding your arrival; is that your
21 testimony?

22 A Oh, no.

23 Q I want to know what you looked at to reach the conclusion
24 that Muny Light was in a sound financial condition.

25 A Well, looking at these figures, it was obvious that a

1 Hincbee - cross

2 rate increase was needed, and the rate increase was
3 ordered by Council, and it was made effective April 18.

4 THE COURT: Read the question to
5 him.

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

8 THE COURT: Do you understand the
9 question?

10 THE WITNESS: Yes, sir.

11 THE COURT: Please answer the
12 question.

13 A Well, I had already stated that I had access to these
14 figures before they were published in the report.

15 Q Yes, sir.

16 A Utilizing those figures, it was my opinion that certain
17 things needed to be done by the utility to increase
18 cash flow and to increase revenues, and I had stated
19 that previously.

20 Q Well, Mr. Hincbee, it seems to me that your statement
21 that Muny Light was in a sound financial condition
22 indicates a conclusion that you reached after making
23 whatever investigation that you made; right?

24 A Yes, sir.

25 Q Now, you had told me that you consulted the financial

1 Hinchee - cross

2 people, Mr. Caruso, and the people in his department,
3 and Mr. Milan, and you got a full report on the
4 figures which were finally published in July in
5 the form of Plaintiff's Exhibit 2162.

6 Number one, you have told me that; and secondly,
7 you have told me that Council had passed a rate
8 increase?

9 A Yes.

10 Q And do you base your opinion that Muny Light was in
11 a sound financial condition upon those two things?

12 A Not 100 percent.

13 Q Tell me about the rest of the percent.

14 A Well, there were other things that needed to be done
15 to improve the financial condition of the Municipal
16 Electric Power Company in addition to the rate increase.
17 It needed to accelerate its account collections, and
18 it needed to not pay general obligation bonds that it
19 had been paying. It needed to defer those accounts.

20 It needed an increase in the street lighting
21 rates.

22 All of these measures were placed in operation as
23 the sequence and opportunity presented itself.

24 Q Perhaps, Mr. Hinchee -- and do I understand then that
25 you are stating to me that if Muny Light did all of

LIBRARY

Hinchee - cross

1
2 these things that you state, that it would then become
3 in a sound financial condition; is that what you are
4 saying?

5 A No, sir. I am saying we did these things to maintain
6 a sound financial condition.

7 Q All right. I still want to know what other criteria
8 you used to measure the soundness of the financial
9 condition of Muny Light, and not what you need to do
10 in the future, but what other things other than the
11 financial figures for the year 1970, do you need to
12 look at to determine, to reach the conclusion that you
13 have given to me that Muny Light is in a sound
14 financial condition? Is there anything else that
15 you can tell me?

16 A Well, I don't know what you are specifically asking me.
17 I can tell you in answer to any specific question
18 that you have, I believe, Mr. Lansdale.

19 THE COURT: Mr. Hinchee, the
20 question, as I understand it, is, what elements
21 did you take into consideration in arriving at your
22 conclusion that Muny Light was in a sound fiscal
23 condition at the time when you arrived there.

24 Now, it is a simple question. Now, give us
25 the answer.

1 Hinchee - cross

2 A Well, I am sorry, your Honor. I thought I already had.

3 Q Well, you haven't.

4 A All right.

5 Basically I looked at the amount of revenues and
6 the amount of expenses projected, and I looked at the
7 ability of the utility to discharge its debt service
8 and its accumulated reserves and surplusses, all
9 appearing on the financial statement.

10 Q All right, sir.

11 Now, a utility which is in sound financial
12 condition should be able to pay from revenues and
13 resources available to it from its business a number of
14 different things, shouldn't it, Mr. Hinchee, and I am
15 going to name them:

16 One, it should be able to meet its cash operating
17 expenses, shouldn't it?

18 A Yes.

19 Q And these cash operating expenses -- withdraw that.

20 It needs to meet the interest on its debt
21 obligations, does it not?

22 A Yes.

23 Q And it needs to meet the service or contributions to pay
24 off pro tanto or in part its outstanding bonds, does
25 it not, and we call this debt service, don't we?

1 Hinchee - cross

2 Q Didn't I ask you that one first in my list?

3 A Well, I am not sure, Mr. Lansdale.

4 Q Is there anything else you left out?

5 A I don't know, Mr. Lansdale.

6 THE COURT: Go back and read that
7 list again to him, please.

8 - - - - -

9 {The record was read by the court reporter
10 as follows:

11 "Q All right, sir.

12 "Now, a utility which is in sound
13 financial condition should be able to pay from
14 revenues and resources available to it from its
15 business a number of different things, shouldn't
16 it, Mr. Hinchee, and I am going to name them:

17 "It should be able to meet its cash
18 operating expenses, shouldn't it?

19 "A Yes.

20 "Q And these cash operating expenses --
21 withdraw that.

22 "It needs to meet the interest on its debt
23 obligations, does it not?

24 "A Yes.

25 "Q And it needs to meet the service or.

Hinchee - cross

contributions to pay off pro tanto or in part its
outstanding bonds, does it not, and we call
this debt service, don't we?

"A Yes."

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Hinchee - cross

THE COURT:

What is your

question?

BY MR. LANSDALE:

Q Is there anything else that I have left out of the things that a utility must be able to meet from its current revenues if it is in sound fiscal condition?

A I don't think so.

Q We're referring, of course, to a municipa-owned utility?

A Yes.

Q All right.

I say that to avoid any problem about the depreciation, and so on.

Now, I want to ask you a couple of questions about routine capital expenditures.

These, in a system the size of Muny Light, amount to approximately a million dollars a year varying from year to year, doesn't it?

A That could be a good figure, I wouldn't say it was correct or incorrect.

Q I'm not trying to be precise about it. Some years it's more, some years it's less; but this has been Muny Light's experience, has it not?

A I think that's approximately Muny Light's experience.

1 Hinchee - cross

2 yes.

3 Q All right.

4 Now, still looking, Mr. Hinchee, at the
5 Plaintiff's Exhibit 2162, I refer you to my pages
6 14 and 15 of this report.

7 Do you find those in the back?

8 This is the cash receipts and disbursements.

9 A Yes.

10 Q And we see from that that the cost of mortgage bond
11 retirement funds is well over a million dollars, a
12 million one hundred sixty-five thousand, right?

13 A Yes, sir.

14 Q And this shows, does it not, that Muni Light was short
15 of meeting its cash obligation in this particular year
16 by approximately \$219,000, and I refer you, Mr.
17 Hinchee, to the bottom of the cash receipts which
18 shows that, in addition to the -- pardon me -- I'll
19 withdraw this question because the figures I want to
20 present to you here, this is mixed up and I have to
21 reclassify it.

22 MR. LANSDALE:

If your Honor wants

23 to --

24 THE COURT:

Yes, it's beyond 3:00

25 o'clock.

1 Hinchee - cross

2 We'll take a very short recess, ladies and
3 gentlemen, and we'll conclude at 4:00 o'clock.

4 Please, during the recess, keep the
5 Court's admonition in mind, and I'll check on
6 that matter.

7 {Recess had.}

8 THE COURT: Please be seated.

9 {The jury entered the courtroom and the
10 following proceedings were had in their hearing
11 and presence.}

12 THE COURT: Please be seated.

13 BY MR. LANSDALE:

14 Q Mr. Hinchee, still referring to the exhibit, which is
15 the financial statement for the year 1970, Plaintiff's
16 Exhibit 2162, I invite your attention to page 3 again
17 of the tabulations, that's the pagination following
18 Mr. Caruso's letter which we looked at before, that's
19 the "Statement of Income and Expense."

20 THE COURT: Just a minute.

21 Q Do you observe that?

22 A Yes, sir.

23 Q Now, Mr. Hinchee, this shows, does it not, total
24 operating revenues of \$10,917,340, right?

25 A Yes, it does.

1 Hincree - cross

2 which is the depreciation, minus one million 670 --
3 one million 931 depreciation minus one million 670?

4 A Yes, that appears to be correct.

5 Q That's the net cash -- I hesitate to use the word
6 "profit" -- but it's the excess of revenues over cash
7 expenditures for operations?

8 A Yes, sir.

9 Q Now, in addition to that, Mr. Hincree, the municipal
10 system has certain other income which the accountants
11 call non-operating income, does it not?

12 A Yes.

13 Q It has had to, over many years, make deposits into a
14 sinking fund, to pay off bondholders of the revenue
15 bonds, and these funds, in place of being just kept
16 idle, are invested in United States securities and the
17 like and they earn an income, right?

18 A Yes, sir.

19 Q And, similarly, in past years the Light Plant had got
20 a sort of a savings account, that is to say, the amount
21 left over in its operating funds carried over for the
22 year, and that's, likewise, invested by the City
23 Treasurer in obligations of one kind or another, and
24 that earns some money, too, doesn't it?

25 A Yes, sir.

1 Hinchee - cross

2 Q And if you'll observe there the total of those
3 figures is \$570,000, isn't it?

4 A Yes.

5 Q Which is the net cash available, you might say, to that
6 point of \$31,000, right?

7 A Yes.

8 Q Now, we also have another deduction which is the
9 deduction labeled {2}, which we discussed before, and
10 that's the interest on the outstanding bonds, do we not?

11 A Yes.

12 Q And if you'll look down at the bottom, that's
13 \$870,000 plus some odd dollars, right?

14 A Yes.

15 {Mr. Lansdale writing on the page on the
16 easel.}

17 Q And if my arithmetic is correct, that shows that the
18 Muny plant in 1970 lacked \$39,000 of having any cash
19 left over for debt service or routine capital expenses,
20 is that correct, on the basis of this account?

21 A Well, I think it's almost correct, but you've, I think,
22 overlooked deduction from the interest on bonds less
23 amortization of debt expense.

24 Q Well, that's \$1,800.

25 If you want me to -- did I use the wrong figure?

1 Hinchee - cross

2 That's \$1,800, we'll make that 868, you're right,
3 you're absolutely correct, \$37,000, it lacked by
4 \$37,000 of having enough money to meet any of its
5 obligations for debt service or routine capital
6 expenditures, correct, on the basis of this
7 accounting?

8 A It would appear on the basis of this one sheet, but it
9 does not appear that way in the total report. If you
10 go back to the pages that you were looking at earlier,
11 it's different.

12 Q I'm going to give you some chance, Mr. Hinchee, don't
13 worry.

14 A Okay.

15 Q Now, this sheet that we're looking at: "Statement of
16 Income and Expense," is accounted for on what we
17 call the accrual basis, is it not?

18 A I believe so.

19 Q And we mean by that that when a bill comes in for an
20 expense and it's due and owing, it's written down in
21 the account as an expense, as if it had been paid; right?

22 A Yes.

23 Q And, similarly, on revenues, the revenues are written
24 down when the money is owed to you as if it had been
25 received, right?

1 Hinchee - cross

2 A I'm not entirely certain about that.

3 Q You're not sure about that --

4 A No.

5 Q -- but you are sure about the expenses --

6 A Yes.

7 Q -- on the accrual system.

8 All right; that's good enough for our purposes
9 now.

10 And if you will look at the preceding page, Mr.
11 Hinchee, which there are two pages there that give the
12 balance sheet, the balance sheet has assets on one side
13 and liabilities on the other.

14 And if you will look at the item entitled
15 "Current Liabilities," which is on page 2, you'll see
16 an item labeled "Accounts Payable," right?

17 {After an interval.}

18 Q That is --

19 A Yes.

20 Q -- the last item under "Current Liabilities".

21 A Yes.

22 Q And that figure is \$2,460,000 plus some odd, isn't it?

23 A Yes.

24 {Mr. Lansdale writing on the pad on the
25 easel.}

1 . Hinchee - cross

2 Q Now, that represents, does it not, \$2,460,000 of bills
3 payable which are listed in the income account we looked
4 at before as a cash expense as if it had been paid out,
5 right?

6 A Yes, I believe so.

7 Q All right.

8 And of that \$2,460,000, about \$1,300,000 was the
9 bill from CEI, was it not?

10 And I'll find out for you where it says this here
11 so you can be sure of it.

12 {After an interval.}

13 BY MR. LANSDALE:

14 Q I was slightly wrong.

15 Look at page 8-A, which is the last page of
16 Mr. Caruso's letter, and if you'll look --

17 A I'm sorry, I haven't found --

18 Q If you look at page 8-A, -- it's earlier than the
19 thing you have been looking at, it's the last page of
20 Mr. Caruso's letter of transmittal.

21 A All right.

22 Q And, as you'll see, he has liabilities, and he tells
23 you about long-term debt, he tells you about current
24 liabilities, and he reports about this \$2,460,000 of
25 accounts payable; and then he says:

1 Hinchee - cross

2 "The above-mentioned payable of \$2,460,670
3 includes \$1,195,188 for purchased power."

4 Do you see that?

5 A Yes, sir.

6 {Mr. Lansdale writing on the pad on the
7 easel.}

8 BY MR. LANSDALE:

9 Q Now, he also adds that this is considered incorrect
10 and partial payments are being made under protest.

11 That conclusion had been arrived at on your
12 advice, had it not?

13 A I think I had something to do with it, yes.

14 Q Well, it was your advice, wasn't it?

15 A That's what I discovered, they had not acknowledged it;
16 but they were not paying it for that reason when I
17 arrived.

18 Q We'll talk to you -- we'll give you a chance to explain
19 this at length, Mr. Hinchee.

20 My question is:

21 The non-payment -- the item of saying the
22 conclusion that it was considered incorrect was based
23 upon your advice?

24 A I haven't found that conclusion yet, sir, but --

25 Q Well, it's the last paragraph of the heading -- last

1 Hinchee - cross

2 sentence -- the very last item under the heading
3 "II - Current Liabilities".

4 A Yes, I see it, okay.

5 Q Is that right?

6 A That is what it says, yes.

7 Q All right.

8 Now, Mr. Hinchee, I will try, if I can -- perhaps
9 save some time without going through this page by page --

10 {A note was handed to Mr. Lansdale by Mr.

11 Murphy.}

12 BY MR. LANSDALE:

13 Q Mr. Murphy pointed out to me that we didn't get an answer
14 to you as to whether or not the payments under protest --
15 the partial payments are being made under protest at
16 your advice, is that so?

17 A I think that was under advice of the Law Department,
18 but I was the first one to point it out to the company.

19 Q All right, sir.

20 Now, the current position -- the debt service
21 obligation at this time was approximately \$1,300,000,
22 was it not?

23 A At the time --

24 Q In 19 -- year end 1970, this was before you made the
25 arrangements about foregoing certain general obligation

1 Hinchee - cross

2 paid its bills?

3 Be my guest.

4 A Well, I believe that the Municipal Light Plant had
5 enough resources and assets to draw on to pay that
6 amount of money without any problem, and --

7 Q Tell me --

8 A -- I found it to be so when I was there.

9 Q Tell me where it was.

10 A I think it had enough investments and, I think,
11 enough accumulated surpluses.

12 Q Well, now, let's talk about that, Mr. Hinchee.

13 What --

14 THE COURT: Are you going to a new
15 subject?

16 MR. LANSDALE: Well, no, sir.
17 Give me a few more questions.

18 THE COURT: All right.

19 MR. LANSDALE: Your Honor can do
20 whatever he wishes, it won't bother me if you wish
21 to quit now.

22 THE COURT: Well, if we can clear
23 it --

24 MR. LANSDALE: Let me have a couple
25 of more questions.

1 Hincree - cross

2 BY MR. LANSDALE:

3 Q Mr. Hincree, you will find, if you will go back to
4 this sheet giving us the assets, -- that's on page 1.

5 THE COURT: Page 1?

6 MR. LANSDALE: Page 1 of the

7 tabulations in the back.

8 Q Do you see the item "Current Assets"?

9 A Yes.

10 Q Down a little bit more than half the page, do you see
11 that?

12 A Yes.

13 Q That shows that the Muncy Light Plant had on deposit
14 with the City Treasurer in cash revenue funds
15 \$211,739, right?

16 A Yes.

17 Q And investments, but also revenue funds invested in
18 things like certificates of deposit and Treasury bills
19 and the like, 449,600 -- roughly \$450,000, right?

20 A Yes, that's right.

21 Q For a total of 661.

22 So it had in its savings account, so to speak
23 \$661,000.

24 So if we add that to the 37 and say that that
25 savings account is available for this purpose, it had

1 Hinchee - cross

2 \$661,000 for that.

3 {Mr. Lansdale writing on the pad on the
4 easel.}

5 BY MR. LANSDALE:

6 Q What else?

7 You referred to surplus.

8 Now, there is an account on the liabilities side
9 of the balance sheet called "Surplus" isn't there?

10 {Pause.}

11 Q Is it your statement, Mr. Hinchee, that any part of
12 this -- these funds represented by these figures
13 called "Surplus" represent cash available for expenditure
14 for any purpose?

15 A Well, it could.

16 It's an equity that the utility owns in property
17 and other assets, and those -- that can be borrowed
18 against or -- if the need arises; and, certainly, they
19 were in a short cash position, that's why they went
20 forward with the rate increase.

21 Q Mr. Hinchee --

22 A That's when you go for a rate increase.

23 A I've asked you the simple question, and I'll repeat
24 it again:

25 It is the fact that Munny Light could not have met

1 Hincee - cross

2 its debt service or its routine capital expenditures if
3 it had paid its bills in the year 1970; that is the fact,
4 is it not?

5 A No, sir.

6 Q It is not the fact?

7 A No, sir.

8 Q Well, it's adjournment time, Mr. Hincee, and I will ask
9 you the same question tomorrow morning and ask you to
10 indicate to me the source of the funds, and this will
11 give you all night to find out.

12 MR. LANSDALE: I have nothing
13 further for tonight.

14 THE COURT: Ladies and gentlemen
15 of the jury, we will now recess -- I should say --
16 adjourn for the day.

17 You may retire to the jury room and the Court
18 attache will present you with the exhibits of the
19 day for your consideration, and after you have had
20 an opportunity of examining the exhibits, you may
21 go on your way.

22 Please, during the adjournment, keep in mind
23 the Court's admonition, and it is important that
24 you adhere to this Court's admonition; any
25 departure could have serious consequences.

1 Please do not read any newspaper accounts of
2 this proceeding, listen to any radiobroadcasts
3 concerning this proceeding, view any television
4 broadcasts of this proceeding.

5 You have taken an oath to keep an open mind
6 until you have heard all of the evidence in this
7 case; you have also indicated that you would not
8 discuss this case either among yourselves or with
9 anyone else; you have also indicated that you
10 would listen to the instruction of the Court as it
11 relates to the law applicable to the case, and
12 you would keep this open mind until all of the
13 evidence is in and you have heard the instruction
14 of the Court and until such time as the matter is
15 given to you for your final deliberation and
16 judgment.

17 With that, ladies and gentlemen, good night,
18 and see you tomorrow morning at 8:30, at which
19 time you can again review those exhibits which you
20 are desirous of reviewing.

21 You're free to go.

22 {Thereupon the jury left the courtroom and
23 the following proceedings were had out of their
24 hearing and presence.}

1 {The Court and Law Clerk Schmitz conferred
2 off the record.}

3 THE COURT: The following exhibits
4 may be presented to the jury for their
5 examination:

6 Plaintiff's Exhibits 2384, 3234, 3233,
7 1544, 3216, 2840, 3048, 3235, 3217, 3218, 3219,
8 3220, 2951 and 2962, financial report, 1970.

9 3234 is the overlay.

10 MR. MURPHY: Your Honor, I think
11 that number was "2162" not "2962."

12 THE COURT: I stand corrected,
13 "2162."

14 Thank you, Mr. Murphy.

15 If there is nothing further, thank you,
16 gentlemen. See you tomorrow morning.

17 {Thereupon court was adjourned until Friday,
18 July 24, 1981, at 9:00 o'clock a.m.}

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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

Friday, July 24, 1981

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1980

1 FRIDAY, JULY 24, 1981, 9:15 O'CLOCK A.M.
2

3 LAW CLERK SCHMITZ: City of Cleveland,
4 Plaintiff, versus the Cleveland Electric
5 Illuminating Company, Defendant. This is Civil
6 Action No. C75-560.

7 THE COURT: Bring in the jury.

8 {Thereupon the jury entered the courtroom
9 and the following proceedings were had in their
10 hearing and presence.}

11 THE COURT: Good morning, ladies
12 and gentlemen.

13 Please be seated.
14 - - - - -
15

16 W A R R E N D. H I N C H E E
17 resumed the stand and testified further as
18 follows:
19

20 THE COURT: You may proceed,
21 Mr. Lansdale.
22

23 CROSS-EXAMINATION OF WARREN D. HINCHEE {Resumed}
24
25

1 Hinchee - cross

2 witness by Ms. Doyle, and a copy handed to Mr.
3 Lansdale by Mr. Murphy.}

4 BY MR. LANSDALE:

5 Q Okay, Mr. Hinchee, the floor is yours.

6 A Were you referring to a specific page or a specific part
7 of the statement here, Mr. Lansdale?

8 Q Well, Mr. Hinchee, yesterday we went through the 1970
9 report, did we not, and I thought that we covered the
10 various items of revenues and expenditures that had
11 to be made as disclosed by the 1970 fiscal report;
12 and we arrived, I believe, at the conclusion that after
13 paying -- that we had an excess of actual cash in the
14 accounts over expenses -- actual expenses recorded in
15 the account of \$261,000, and that we had \$570,000 worth
16 of non-operating income, interest on funds deposited in
17 sinking funds, and the like, do you recall that?

18 A Yes.

19 Q And so that we had total funds over and above the actual
20 cash costs of the operation in the amount of \$831,000;
21 do you remember that?

22 A Yes, sir.

23 Q And we also have ascertained that we had debt service
24 in the amount of \$861,000, at least, giving a deficiency
25 of \$37,000 in cash; do you recall?

Hinchee - cross

1
2 A Yes.

3 Q And you said to me, "Well, we had funds somewhere
4 else and we looked in the accounts and we saw that
5 there was on deposit in the so-called Revenue Fund of
6 Muny Light accounts the sum of \$661,000," and you
7 said, "Well, we could have used that."

8 Do you recall this?

9 A Yes, sir.

0 Q And I said to you, "All right, the accounts payable
1 are \$2,460,000."

2 Do you recall that?

3 A Yes, sir.

4 Q And we have after paying -- the \$661,000 is available.
5 Do you agree with me there?

6 A Yes.

7 Q And we haven't yet made any of the million dollars
8 -average annual required for routine capital expenditures,
9 have we?

0 A No; I think we have.

1 Q Where?

2 A Well, routine capital expenditures, if they are not
3 funded by bonds, are funded out of operating revenues
4 on a current basis.

5 Q If you have any, they are indeed, Mr. Hinchee; but we

1 Hinchee - cross

2 have taken away the cash operating expenses recorded
3 to the operating statement and find we only have
4 \$261,000 left.

5 Do you remember that?

6 A Yes.

7 Q Now, cash operating expenses do not represent money
8 paid for capital expenditures which are recorded as an
9 addition to investment, are they?

10 A They would be in this case.

11 Q They would be in this case?

12 A Yes, sir.

13 Q In the table of contents of Exhibit 2162, Mr.
14 Hinchee, you will find a line that says, "Investment
15 in plant and equipment."

16 It is on pages 11 and 12; and you and I both will
17 discover it, because I don't know what is contained
18 there.

19 And I think if you will look at that page, those
20 pages, you will see that we have a column headed,
21 "January 1, 1970."

22 Do you see that?

23 A Yes, sir.

24 Q And that records, does it not, the balance in the
25 investment account of property and plant as of the

1 Hinchee - cross

2 beginning of the year 1970; is that correct?

3 A Probably that is correct.

4 Q And then the next column says, "Net Additions, Stores
5 and Cash Funds."

6 Do you see that?

7 A Yes.

8 Q And then you see a column headed, "Balance, December 31,
9 1970."

10 Do you see that?

11 A Yes.

12 Q And you will find -- and the column, the right-hand
13 column is the sum of the first two columns, is it not?

14 A Yes, sir.

15 Q All right; and then we find that we had in the
16 production system \$177,173 worth of net additions, do
17 we not?

18 A Yes.

19 Q Now, Mr. Hinchee, to divert for a moment, the term
20 "net additions" applies to the difference between the
21 cost of new property added and the recorded cost of
22 any old property taken out as a consequence of the new
23 property being added; did it not?

24 A Yes.

25 Q So this figure, "net addition added," will probably be

1 Hincree - cross

2 less than the actual additional capital investment in
3 dollars which you had to make in the year 1970, will it
4 not?

5 A Could be.

6 Q And then the transmission system, we find four
7 substations that you added \$214,900 in that year; right;
8 is that correct -- right down at the bottom of the first
9 page, page 11?

10 A Yes.

11 Q And for the lines you added \$27,000 and a fraction?

12 A Yes.

13 Q And the distribution system you added \$634,000?

14 A Yes.

15 Q Now, the distribution system by the way is typically
16 the place where you find routine capital expenditures,
17 is it not -- a truck comes along and knocks a pole down,
18 and you have to take it down and put up a new one, and
19 that is a capital transaction, isn't it?

20 A Yes.

21 Q And that is recorded not as a cash operating expense
22 but as an addition to capital with the retirement of
23 the old pole and the addition of the new one; right?

24 A It is paid for as a cash operating expense.

25 How it is recorded is different than the way it is

1 Hinchee - cross

2 paid for, Mr. Lansdale.

3 Q It is paid out of your revenue fund, is it not?

4 A That is correct.

5 Q But it is recorded as a capital investment?

6 A Yes.

7 Q And it is not recorded as an operating expense on the
8 operating statement, is it?

9 A No, I believe that it is.

10 Q I beg your pardon?

11 A I believe that it is.

12 Q Mr. Hinchee --

13 A Well, we would have to look at the operating statement
14 to tell.

15 Q Well, please do, and tell me.

16 {After an interval.}

17 Q You will find that, by the way, at page 5, and you will
18 note that the operating expenses are divided into
19 operations and maintenance.

20 A What page?

21 Q Page 5. Page 5 of the same series that you have been
22 looking at at page 11; and if it would be helpful to
23 you, on page 21 there is a breakdown into further
24 details of the operating expense.

25 And if you will look just, for example, Mr.

1 Hinchee - cross

2 Hinchee, look at page 22, which gives the breakdown of
3 the cash operating expenses assigned to the
4 distribution system.

5 Do you see that?

6 A Yes.

7 Q How much is the total expense, operating expense, for
8 the distribution system reflected on that page for
9 1970?

10 A It's \$505,430.

11 Q And how much have we just determined was added to the
12 assets to the investment account in that selfsame
13 distribution system?

14 A I'm sorry, I lost the page.

15 Q That's page 12.

16 A 634,000.

17 Q Now, Mr. Hinchee, you have been in the utility
18 business a long time, have you not?

19 A Yes.

20 Q And you have been in management positions responsible
21 for the finances of the City of Columbus, the City of
22 Cleveland, and the City of Burbank, have you not?

23 A Yes.

24 Q And you know, do you not, Mr. Hinchee, that in the
25 accounting of utility -- for utility purposes, whether

1 Hinchee - cross

2 they're municipals or whether they're private
3 companies, you record capital expenditures in the
4 capital account and operating expenditures in the
5 operating account; this is true, is it not?

6 A Yes, sir.

7 Q And the same thing is true in Cleveland, and was in
8 1970, was it not?

9 A Mr. Lansdale, I think you're confusing the figures, and
10 you certainly are confusing me with your questioning.

11 THE COURT: Read the question
12 back to the witness.

13 Listen to the question; it's a simple
14 question, Mr. Hinchee.

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

17 A I'm sorry, I don't know what the "same thing" was.

18 THE COURT: The same thing that
19 you testified to in the previous question.

20 Read the question and the answer back.

21 {The record was read by the reporter as
22 follows:

23 "Q And you know, do you not, Mr.
24 Hinchee, that in the accounting of utility -- for
25 utility purposes, whether they're municipals or

1 Hinchee - cross

2 whether they're private companies, you record capital
3 expenditures in the capital account and operating
4 expenditures in the operating account; this is true,
5 is it not?

6 "A Yes, sir."}

7 THE COURT: Now read the next
8 question.

9 {The next question was read by the reporter
10 as follows:

11 "Q And the same thing is true in
12 Cleveland, and was in 1970, was it not?"}

13 A The best way I can answer that, Mr. Lansdale, is that
14 on the comparative income statement --

15 THE COURT: Please answer the
16 question, Mr. Hinchee.

17 THE WITNESS: Well, I think that's
18 what I was trying to determine; I think it's part
19 of the answer to the question, sir.

20 THE COURT: Can you answer the
21 question "Yes" or "No"?

22 THE WITNESS: No, I can't.

23 BY MR. LANSDALE:

24 Q Mr. Hinchee, is it your statement that in the year
25 1970 in the accounting for capital expenditures and

1 Hinchee - cross

2 operating expenses in the City of Cleveland Municipal
3 Light Plant in the year 1970, that the capital
4 expenditures were reflected in the operating statement
5 reflecting operating expenses, is that your statement?

6 A Yes.

7 Q Will you explain then, Mr. Hinchee, how it is that the --
8 at page 19 -- it reflects net additions to the
9 distribution system in the investment account of
10 \$634,000; do you see that?

11 {After an interval.}

12 Q Page 12 -- pardon me -- I gave you the wrong page.

13 {After an interval.}

14 A Yes, that's what it shows.

15 Q And the detail of the operating expense Schedule B-1,
16 the portion of it at page 22, shows for distribution
17 \$505,430?

18 A Yes, sir.

19 Q If the cost of these capital expenditures listed as
20 \$634,000 are run through the expense accounts, tell me
21 why there is only \$505,000 in the expense account,
22 whereas, it reflects net additions which we have agreed
23 is probably less than the gross additions of six
24 hundred and some odd thousand dollars to the operating
25 statement -- I mean, to the investment account?

1 Hinchee - cross

2 Can you explain that?

3 A I would like to have the question read back.

4 THE COURT: Read the question
5 back, please.

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

8 A I think the best way to explain it is this, Mr.
9 Lansdale:

10 That material is purchased and labor is paid for
11 out of operating expense monies initially.

12 And so the figure that shows as expended for
13 distribution or transmission and operating expense is
14 an all-inclusive figure except for special funds such
15 as bond funds.

16 And so if you're making expenditures for capital
17 outlay items out of cash operations, out of revenues,
18 instead of out of bond funds, it would all be
19 included in this first statement we talked about.

20 Now, as a matter of accounting, the accountants
21 would extract those charges to capital outlay and
22 show that in addition to the plant.

23 Q Exactly so, Mr. Hinchee.

24 Let me see if we can agree together this way:

25 You have -- you place in an account in Muny Light,

1 Hincbee - cross

2 in the City of Cleveland, which was called 104,
3 was it not? That was the operating fund account?

4 A Yes.

5 Q Do you remember that number?

6 A Yes.

7 Q 204 was one of the bond funds, and 203 was another one.

8 Do you remember those numbers?

9 A I believe that's correct.

10 Q And in Account 104, you placed all revenues of the
11 Municipal Light System from operations, that is, all
12 the payments you got from customers, right?

13 A Yes.

14 Q You placed in it all of the non-operating income that
15 you got from investment on bonds, and whatnot?

16 A Yes.

17 Q Except those that were returned on investments in bonds
18 in the bond account?

19 Are you with me so far?

20 A Well, I think I know those went into 104.

21 Q I assure you that they did, and let's not spend time
22 trying to go through that detail.

23 A All right.

24 Q And those are the monies that went into Account 104,
25 right?

1 Hinchee - cross

2 A Yes.

3 Q Now, what came out of 104 was everything that was paid
4 from revenues, right?

5 A Yes.

6 Q And what was paid from revenues, if you had enough,
7 were cash operating expenses, interest on debt, debt
8 service, and routine capital expense, all of those
9 were paid out of the Revenue Fund if you had enough
10 money there, right?

11 A Yes, sir.

12 Q All right.

13 Now, as you have stated, when the accountants got
14 ahold of these figures, they segregated those
15 expenditures, those cash expenditures, among other
16 things, as between the operating expenses which are
17 used to determine whether you made a profit or not
18 and capital expenditures which you added to your
19 capital account, is this not so?

20 A I'm not certain about that.

21 Q You're not certain about that.

22 And your experience in operating utilities as
23 manager all these years does not tell you -- give you
24 that information, is that what you're telling me?

25 A Mr. Lansdale, it's done differently at different

1 Hincree - cross

2 places; and I had accountants and I had people in
3 fiscal control to monitor that and handle that
4 activity for me, and I'm not at all certain what
5 you're saying at this time is correct.

6 Q Mr. Hincree, are you telling me that that you have
7 been working for or associated with either as
8 consultant or as manager any public utility that
9 records capital investment in operating expenses on
10 their books?

11 A No, I'm not telling you that.

12 Q You're not telling me that.

13 And you know for a fact that there is no utility
14 you have ever been connected with that did that, don't
15 you, at least, intentionally?

16 A No, I'm not certain of that.

17 Q You're not certain of that.

18 Is it your belief that in the City of Cleveland
19 in the year 1970 that capital expenditures were
20 recorded as cash operating expenditures on the books
21 of account?

22 A No; in the final account they were not recorded that
23 way.

24 Q And the final account is what we have been looking at,
25 2162, is it not?

Hinchee :- cross

1 A Yes, that would be the final statement.

2 Q Now, I come back again to my question which I asked
3 you yesterday, -- by the way, have you spent any time
4 trying to figure out the answer to the question that
5 I put to you at the close of business yesterday?

6 A Yes, I have.

7 Q You have?

8 A Uh-huh.

9 Q Well, based upon that study, will you explain to me
10 how it is that you testified yesterday that there
11 was money in the Revenue Fund sufficient to pay all
12 of these four items: cash operating expenses,
13 interest on debt, debt service, and routine capital
14 expense, if you also paid the \$2,400,000 of accounts
15 payable?
16

17 A Yes, I think I can explain it to you, Mr. Lansdale.

18 Q All right. Please do so.

19 A I believe that your assumption is that the utility --
20 any utility -- should draw down to point zero as far
21 as accounts payable are concerned, and your utility
22 doesn't do it, and mine doesn't do it.

23 In fact, this is a roll-over situation, much
24 like if you have a credit card, you owe so much debt,
25 you make a charge, you pay it one month. You go back