
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

7-27-1981

Volume 16 (Part 3)

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

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1 Engle - direct

2 Q Those are the blue and red lines on the large exhibit
3 no longer up there? On the big exhibit?

4 I guess you can't see it, Mr. Engle.

5 MR. WEINER: Maybe we can put it
6 back up there again for a second, Pat.

7 Thank you.

8 BY MR. WEINER:

9 Q That path is depicted on that chart by the blue and
10 red lines?

11 A Probably not. Many of Allegheny's systems are
12 located toward the central and eastern part of the
13 state which may not be shown on this map.

14 Q Thank you. Mr. Engle, I don't believe I have any
15 further questions.

16 -----
17
18 CROSS-EXAMINATION OF JOHN C. ENGLE, JR.

19
20 BY MR. LANSDALE:

21 Q Mr. Engle, this last bit of testimony about the
22 agreement with Allegheny, when did that meeting take
23 place where you said you worked out the agreement?

24 A I'm sorry, Mr. Lansdale, I didn't understand.

25 Q I'm sorry. When did the meeting take place with

1 Engle - cross

2 Allegheny when you worked out the agreement that you
3 just testified to?

4 A In February of 1974, sir.

5 Q Hadn't you had a tentative agreement to this same
6 effect with PASNY much earlier than that?

7 A It was discussed with PASNY. I don't -- there was no
8 agreement, sir.

9 MR. LANSDALE: Will you please hand
10 the witness CEI Exhibit 696?

11 My attention has been invited to the fact
12 that I got my agencies mixed up.

13 BY MR. LANSDALE:

14 Q Didn't you have an agreement to the same effect you
15 just testified to with Allegheny Power prior to your
16 meeting of 1974, earlier than the year that you just
17 related?

18 A No, sir.

19 Q Have you got CEI Exhibit 696 in front of you, a letter
20 dated August 2, 1973?

21 A Yes, sir.

22 Q To a Mr. Charno, signed by Mr. Duncan?

23 A Yes, sir.

24 Q And I note that you are on the distribution list. It
25 says "Carbon copy to John C. Engle, Jr."

Engle - cross

1
2 A Yes, sir.

3 Q That's you, is it not?

4 A Yes.

5 Q At the first full paragraph beginning on page 2, will
6 you read that to yourself, sir?

7 A Yes, sir.

8 Q Does not that indicate that an understanding had been
9 reached with Allegheny to let Allegheny have the
10 30 megawatts subject to transfer to AMP-Ohio sometime
11 prior to August 2, 1973?

12 A Mr. Duncan had been in conversations with Mr. William
13 Wise who was General Counsel for Allegheny Power
14 Cooperative, and the meeting that I had with Mr.
15 Matson was an outgrowth of those meetings that Mr.
16 Duncan had had with Mr. Wise.

17 Q Well, this letter says, "We have recently reached an
18 understanding with Allegheny Rural Electric
19 Cooperative."

20 What does that mean to you, Mr. Engle?

21 A Mr. Duncan may have done this with Mr. Wise, and I
22 was in almost daily contact on the phone with Mr.
23 Duncan.

24 But the meeting I had with Mr. Matson was in New
25 Orleans, Louisiana in February, 1974.

Engle - cross

1
2 Q Well, I don't know whether you are trying to make a
3 distinction between Mr. Wise and Allegheny Co-op or
4 not. Are you?

5 A Yes, sir. My meeting that I testified to was with
6 Mr. Wise at which we hammered out the details of the
7 agreement that had -- there had been conversations
8 between Mr. Duncan and Mr. Wise previous to that.
9 Mr. Duncan arranged the meeting between Mr. Matson
10 and myself.

11 Q Mr. Engle, all I'm trying to do is to find out from
12 you whether you are making a distinction between
13 Allegheny Rural Electric Cooperative as an institution
14 or a corporation or a cooperative and Mr. Wise as an
15 individual, because this letter from Mr. Duncan says,
16 "We have recently reached an understanding with
17 Allegheny Rural Electric Cooperative," and you tell
18 me that he has talked to Wise.

19 Is this one and the same thing? Are you trying
20 to make --

21 A Mr. Wise was General Counsel for Allegheny Power Co-op.

22 Q And as far as you understand, was authorized to speak
23 for Allegheny Co-op and make an agreement on their
24 behalf?

5 A As much so as general counsel is at any time, sir.

1 Engle - cross

2 Q Well, that doesn't tell me anything, Mr. Engle.

3 I'm inviting your attention to the fact that
4 Mr. Duncan's letter says, "We have recently reached
5 an understanding with Allegheny Electric Rural
6 Cooperative." He doesn't say, "We have talked to
7 their general counsel and maybe we can get something."
8 He says they have an understanding with the
9 cooperative.

10 Do you differ from that? Isn't that what the
11 letter says?

12 A That is what this letter says, and that is true.

13 It is a question of who the principals were who
14 were talking. My testimony had to do with my meeting
15 with Mr. Matson.

16 Q Mr. Engle, what difference does it make who they
17 talked to if the understanding was with the
18 cooperative as an agency?

19 A Conversations with the agency were taking place between
20 Mr. Duncan and Mr. Wise prior to my meeting with Mr.
21 Matson.

22 Q We seem to be passing in the night.

23 I want to know whether you agree that AMP-Ohio
24 reached an understanding with Allegheny with respect
25 to this 30 megawatts of power sometime prior to August 3,

1 Engle - cross

2 1973. Is this so or is it not so?

3 THE COURT: I'm sorry. My dates
4 are confused here.

5 What is August 3 --

6 MR. LANSDALE: August 2, 1973.
7 That is the date of the CEI Exhibit 696.

8 THE COURT: Read the question back.

9 {The last question was read by the reporter.}

10 THE COURT: August 3 of 1973.
11 August 2 of 1973.

12 ~~All right. Go ahead.~~

13 THE WITNESS: I'm sorry, your Honor.
14 I lost the question.

15 THE COURT: Read the question,
16 please.

17 {The last question was read by the reporter.}

18 A No, sir. We did not reach an agreement with or even
19 discuss this with Allegheny until after we received
20 the letter from Cleveland Electric Illuminating.

21 Q And that was subsequent to August 2, 1973?

22 A If that is the date on the CEI letter, yes, sir.

23 Q And it is your statement that the statement that Mr.
24 Duncan made to the Department of Justice of the United
25 States as contained in the letter dated August 2, 1973,

1 Engle - cross

2 carbon copy to you, is erroneous?

3 A What was that exhibit again, please, sir?

4 Q 1396.

5 A Mr. Lansdale, you will have to address that question
6 to Mr. Duncan because I don't know.

7 Q Well, you did receive a copy of this letter?

8 A Yes, sir, I did.

9 Q You did receive a copy of this letter and you agree
10 with me that it affirmatively states that an
11 understanding had been reached with Allegheny Co-op
12 whereby Allegheny and AMP-Ohio would combine their
13 respective applications for this 30 megawatts of power
14 and Allegheny would take delivery once it is made
15 available by PASNY and would have the use thereof
16 until AMP-Ohio has worked out its transmission
17 agreement with Penelec and CEI?

18 A That is what the letter states.

19 Q You just don't know whether this is so or not? Your
20 statement is you don't know whether it is so?

21 A That is correct.

22 Q All right. Now, Mr. Engle, you have shown us the
23 contract entered into in 1974, I believe, between
24 AMP-Ohio and Allegheny which is, I believe, Plaintiff's
25 Exhibit 1396?

1 Engle - cross

2 A Yes, sir.

3 Q Now, you entered into a subsequent agreement, did you
4 not, with Allegheny Electric Cooperative?

5 A Yes, we did.

6 Q Did this subsequent agreement supersede the earlier
7 one?

8 A Yes, sir.

9 MR. LANSDALE: Will you show the
10 witness Plaintiff's Exhibit 2209.

11 THE COURT: You are talking about
12 it superseded the agreement of October 8, 1974?

13 MR. LANSDALE: Yes. That is what
14 the witness said.

15 Q And this agreement, Plaintiff's Exhibit 2209, was made
16 October 21, 1977, was it not?

17 A Yes, sir. That is the date on it.

18 MR. LANSDALE: If your Honor please,
19 may I approach the bench?

20 THE COURT: Yes.

21 - - - - -
22 {The following proceedings were had at the
23 bench:}

24 MR. LANSDALE: May I have Stipulation
25 126 read?

1 Engle - cross

2 MR. WEINER: Can I see it?

3 {Pause.}

4 MR. WEINER: Yes. Okay. That's
5 fine.

6 {End of bench conference.}

7 - - - - -

8 THE COURT: Ladies and gentlemen
9 of the jury, Stipulation No. 126 reads as
10 follows:

11 "Muny Light was unable to obtain wheeling
12 service of preference power from CEI until
13 January, 1977, when the Nuclear Regulatory
14 Commission ordered CEI to furnish said service
15 to the City. 'Preference power' is power
16 supplied by governmental agencies not available
17 to privately-owned utility companies."

18 BY MR. LANSDALE:

19 Q Mr. Engle, that stipulation indicates that wheeling
20 would have been required of CEI early in 1977.

21 Did you make any application to Allegheny Co-op
22 and/or PASNY in order to take advantage of the
23 earlier agreement, the 1974 agreement that you talked
24 about, before it was superseded in October by
25 Plaintiff's Exhibit 2209?

I Engle - cross

2 Do you understand my question?

3 A No, sir, I don't.

4 MR. LANSDALE: May I have it read,
5 if your Honor please?

6 THE COURT: Please read the
7 question back.

8 [The last question was read by the reporter.]

9 A To the best of my knowledge, the answer is no.

10 Q All right, sir. Now, tell me how the agreement of
11 October 21, 1977, Plaintiff's Exhibit 2209, differed
12 from the agreement which it superseded, the 1974
13 agreement, if you can, in a nutshell.

14 A That is an extremely difficult thing to do in a
15 nutshell.

16 Between the time of these two agreements, there
17 had been a considerable change in the method of
18 allocation of power by the Power Authority. They
19 now from Niagara were allocating firm and peaking
20 power or non-firm power, and they had broken the
21 allocations down into a portion of firm power and a
22 portion of non-firm power.

23 Non-firm power is power that is not available at
24 all times.

25 Q And the effect of this new policy on the part of

1 Engle - cross.

2 PASNY was to reduce the quantity of power even to
3 Allegheny? I know it is more complicated than that,
4 but it was a less valuable allocation?

5 A No, I don't believe that it was in total. It was a
6 smaller allocation in that it was broken down into
7 firm and non-firm power.

8 Q Well, before that, Allegheny was assured of firm --
9 what was it, 30 megawatts? What was the amount?

10 A 30 megawatts.

11 Q It was assured of 30 megawatts around the clock, at
12 least on its load curve, was it not?

13 A That's correct.

14 Q And after the change in policy by PASNY, it was
15 assured of only 19 and a fraction firm in conformance
16 with its load curves, and the extra energy was only one
17 available, so to speak?

18 A It was non-firm or peaking power, the extra. I believe
19 your numbers are basically correct. I'm not certain
20 they are exactly correct.

21 Q I'm not trying to be precise about it, but that's
22 approximate, is it not so?

23 A That is correct.

24 Q And, in effect, this had the effect of delivering
25 less total energy to Allegheny or assuring it of

Engle - cross

less total energy to Allegheny than the previous agreement?

MR. WEINER: Objection, your Honor.

THE COURT: Overruled.

MR. WEINER: May I approach the bench?

THE COURT: Surely.

{The following proceedings were had at the bench:}

MR. WEINER: This agreement didn't have anything to do with the amount of energy going from PASNY to Allegheny. This is an agreement between Allegheny and AMP-0.

Now, you are confusing the witness by saying how much was going to Allegheny.

MR. LANSDALE: I am not confusing it. He said that it was drafted because PASNY made a different arrangement with respect to Allegheny, and that's what I am pursuing.

THE COURT: Overruled. Let's proceed.

{End of bench conference.}

1 Engle - cross

2 MR. LANSDALE: May I have the question
3 read again, your Honor?

4 THE COURT: Please read the
5 question back.

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

8 "Q And, in effect, this had the effect
9 of delivering less total energy to Allegheny or
10 assuring it of less total energy to Allegheny than
11 the previous agreement?"

12 A Yes, sir, that is correct.

13 Q All right, sir.

14 Now, -- and, therefore, this superseding
15 agreement, Plaintiff's Exhibit 2209, dated October
16 21st was to reduce Allegheny's obligation to AMP-Ohio
17 respecting this transfer should AMP-Ohio get the
18 allocation to correspond with the reduced power
19 supply pursuant to PASNY's new policies, is that
20 correct?

21 A It was intended to make the agreement conform with
22 PASNY's policies.

23 Q With PASNY's policies.

24 And it did so, so far as you know, did it not?

25 A I believe it did.

1 Engle - cross

2 Q You believe it did; all right.

3 Now, Mr. --

4 MR. LANSDALE: Will you hand the
5 witness Plaintiff's Exhibit 2184?

6 {After an interval.}

7 BY MR. LANSDALE:

8 Q While she's getting that out, Mr. Engle, let me pursue
9 this matter finally.

10 At the time these contracts were entered into
11 between you -- and these understandings between
12 AMP-Ohio and Allegheny, there was a contest basically
13 among -- initially, among the agencies of the
14 State of Vermont, which was entitled to receive
15 preference power, Allegheny Cooperative, which was
16 entitled to receive preference power, and the new
17 boy on the block, AMP-Ohio, all seeking the
18 available 30 megawatts of power.

19 Have I -- is that correct?

20 A That is basically correct.

21 Q Basically correct.

22 And I take it that your joining forces with
23 Allegheny was pursuant to the feeling on your part
24 and, I suppose, on Allegheny's part, that the two of
25 you together stood an excellent chance of winning the

1 Engle - cross

2 competition against Vermont or a better chance than if
3 you were competing with each other?

4 A Certainly, we stood a better chance than if we were
5 competing with each other.

6 We did appear before the Federal Power
7 Commission because the allotment to Allegheny was
8 challenged by Vermont before the Federal Power
9 Commission, and we appeared before them and
10 prevailed.

11 Q And prevailed jointly.

12 And the Federal Power Commission has the power to
13 decide whether PASNY is acting validly in making its
14 allocations, is that correct?

15 A I presume so.

16 Q You presume so. All right.

17 Now, I have asked Plaintiff's Exhibit 2184 be
18 placed before you.

19 Do you recognize that, Mr. Engle, as a letter by
20 you?

21 {The witness reading silently.}

22 Q Do you remember that letter?

23 {The witness continuing to read silently.}

24 A Yes, sir, I wrote this letter.

25 Q This letter is dated May 25, 1973, and is a letter

1 Engle - cross

2 from you to Mr. William Mattson, Pennsylvania
3 Rural Electric Association, is that correct?

4 A That's correct.

5 Q Is that the selfsame Mr. Mattson that you made the
6 1974 agreement with?

7 A That's correct.

8 Q You will note therein that you refer to some -- without
9 going into these details -- some tentative understandings
10 respecting agreements between AMP-Ohio and Allegheny,
11 and refer to a consensus among those attending our
12 recent conference in New Orleans?

13 A Yes, sir.

14 Q Is it not likely that you have telescoped events
15 happening so long ago, and that the meeting in New
16 Orleans was in early 1973 rather than early 1974?

17 A Yes, that is probably true; it would have been
18 February, 1973.

19 Q All right.

20 Now, Mr. Engle, your utility in Hamilton, in the
21 territory in which it supplies customers, is the
22 exclusive supplier of electric energy, is it not?

23 A Yes, it is.

24 MR. LANSDALE: Thank you very much.

25 I have no further questions.

1 THE COURT:

Mr. Weiner.

2 MR. WEINER:

Thank you.

3
4
5 REDIRECT EXAMINATION OF JOHN C. ENGLE, JR.
6

7 BY MR. WEINER:

8 Q The conversations you had with Mr. Mattson, Mr. Engle,
9 in New Orleans --

10 A Yes, sir.

11 Q -- the record is clear now that is February, '73?

12 A February, 1973.

13 Q That's in New Orleans?

14 A Yes, sir.

15 Q And the agreement that has been marked and has been
16 identified by you, that's the agreement that resulted
17 finally from those discussions, is that right, in
18 Plaintiff's Exhibit 1396?

19 {After an interval.}

20 A Yes, sir.

21 Q And the date of that is what, Mr. Engle?

22 A The 8th of October, '74.

23 Q And your letter, Plaintiff's Exhibit 2184, the date
24 of that letter?

25 MR. LANSDALE:

I object, your Honor.

1 Engle - redirect

2 THE COURT: I'm sorry. Read
3 the question back.

4 MR. WEINER: The date of
5 Plaintiff's Exhibit 2184?

6 MR. LANSDALE: He's testified to
7 that.

8 THE COURT: Overruled.

9 The date of it?

10 MR. WEINER: The date of it.

11 A May 25, 1973.

12 Q And the date of Mr. Duncan's letter, CEI Exhibit 696?

13 A August 2, 1973.

14 Q Thank you.

15 Mr. Engle, the question was asked to you whether
16 any application had been made to Allegheny subsequent
17 to January of 1977, and after the stipulation was read
18 to you, when the NRC ordered CEI to wheel, do you
19 recall that?

20 MR. LANSDALE: I object. That's
21 erroneous.

22 THE COURT: Yes. I don't recall
23 that testimony and you've got about three questions
24 in there.

25 If you take them one at a time I think it

1 Engle - redirect

2 will be less confusing.

3 Sustain the objection as to form, not as to
4 substance.

5 BY MR. WEINER:

6 Q Do you know what is necessary to be filed before
7 wheeling can be obtained from a company?

8 A Generally, yes.

9 Q Is one of those things a wheeling tariff?

10 A Yes, it is.

11 Q Do you know when CEI filed its first wheeling tariff?

12 A No, sir, I do not.

13 Q Now, Mr. Engle, let me turn your attention, if you
14 would, to the second Allegheny, Amp-0 agreement.

15 I think you have that in front of you, do you not?

16 That's Plaintiff's Exhibit -- I'm not sure I have
17 it in front of me. Let's see.

18 Do you have it there, Mr. Engle?

19 A I have it before me. It is 2209.

20 Q 2209. Excuse me for one minute. I'll see if I have it.

21 I do.

22 Would you turn your attention, please, to Article II
23 of that agreement?

24 By the way, you signed this agreement, did you not,
25 Mr. Engle?

Engle - redirect

1
2 A Yes, I did.

3 Q Have you seen this agreement often since you've
4 signed it in 1977?

5 A No, sir. This was one of the last acts that I did as
6 President of AMP-Ohio and I have not been actively
7 engaged with the organization -- with the day-to-day
8 details of the organization since that time.

9 Q What does Article II reflect in terms of how much
10 power Allegheny was seeking from PASNY at that time?

11 A The allocation was 110,000 kilowatts. That's
12 110 megawatts of firm power and 20 megawatts of
13 peaking power.

14 Q I assume that totals 130 megawatts?

15 A Yes, sir, that's correct.

16 Q That is the amount of power Allegheny had been
17 receiving up to that time?

18 A That is correct.

19 Q And am I correct that this agreement provides that if
20 Allegheny is succesful in obtaining that 130 megawatts
21 and AMP-0 is then subsequently successful in getting
22 its wheeling, some part of that 130 megawatts would
23 be given over to AMP-0?

24 MR. LANSDALE:

I object.

25 THE COURT:

Approach the bench.

1 Engle - redirect

2
3 {The following proceedings were had out
4 of the hearing of the jury:}

5 MR. LANSDALE: You are just telling
6 this witness what to testify to.

7 I object. He hasn't seen it since 1977, he
8 says, and you are telling him what it says and he
9 says yes.

0 I object, and I object to him pursuing this
1 line of questioning because the witness says he
2 hasn't looked at it since --

3 MR. WEINER: You used this exhibit
4 to show that Allegheny was getting 30 megawatts.
5 The agreement is quite clear that it was getting
6 130 megawatts of power.

7 THE COURT: But you can't lead
8 the witness. We are getting into the same
9 posture that we got into with Mr. Norris and
0 with you at the previous trial. Stop leading the
1 witness.

2 MR. WEINER: Mr. Lansdale
3 purposely confused this witness.

4 THE COURT: Don't be making
5 conclusory statements like that, Mr. Weiner.

1 Engle - redirect

2 MR. WEINER: Well, it is very clear.

3 THE COURT: Sustain the objection.

4 Let's get back.

5 MR. LANSDALE: May I --

6 THE COURT: No. Let's get back.

7 {End of bench conference.}

8
9 THE COURT: Sustain the objection.

10 And Mr. Weiner, please do not lead the
11 witness.

12 BY MR. WEINER:

13 Q How much power was going to be re-allocated to AMP-0
14 in the event that AMP-0 was successful in obtaining
15 its wheeling after the 1977 agreement?

16 A Article IV of this agreement states that "Allegheny
17 will then relinquish PASNY power not to exceed 19.279
18 megawatts of firm power and energy and 3.05 megawatts
19 of peaking power and energy to AMP-Ohio."

20 Q That power was subsequently re-allocated to AMP-0?

21 Was that power --

22 THE COURT: Sustain the objection.

23 You are leading the witness again, Mr.

24 Weiner.

25 Q What happened to that power eventually, Mr. Engle?

Engle - redirect

A It was relinquished by Allegheny and allocated to
AMP-Ohio.

MR. WEINER: I have no further
questions.

MR. LANSDALE: No further questions.

THE COURT: Thank you. You may
step down.

{Witness excused.}

THE COURT: Ladies and gentlemen
of the jury, it is 10:30. Perhaps at this
interval it would be appropriate to take our
morning recess.

Please keep in mind the Court's admonition.

We will take a short recess.

{Recess taken.}

THE COURT: Please be seated.

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

THE COURT: Please be seated,
ladies and gentlemen.

You may proceed.

MR. WEINER: We would like to call

1 Wallace Duncan.

2 -----
3
4
5 WALLACE L. DUNCAN,
6 of lawful age, called as a witness on behalf
7 of the plaintiff, being first duly sworn, was
8 examined and testified as follows:
9

10 DIRECT EXAMINATION OF WALLACE L. DUNCAN
11

12 BY MR. WEINER:

13 Q Good morning.

14 Please state your name and home address.

15 A Wallace L. Duncan, 4732 Old Dominion Drive, Arlington,
16 Virginia.

17 Q Where do you work?

18 A I'm employed by Dunkin, Weinberg & Miller as a
19 practicing attorney in Washington, D.C.

20 Q Will you give us your education, please?

21 A I graduated with a B.A. degree from the American
22 University in Washington, D.C., and I took an LLB
23 at the Washington College of Law of the American
24 University; later took a Master's degree in the law,
25 an LLM at Georgetown University Law School.

1 Duncan - direct

2 Q What has been your post law school employment?

3 A For the two years after my graduation, I was a
4 teaching Fellow at the Georgetown Law Center.

5 I was then employed by the Department of the
6 Interior from 1961 to 1965 as a legal adviser to the
7 Secretary of the Interior; at which time I left to
8 join a Phoenix, Arizona law firm. I opened a
9 Washington office for that firm, later acquired the
10 assets of that firm and formed my own firm in 1971.

11 Q Have you been with that firm since?

12 A That firm or its predecessor firms, yes.

13 Q What type of legal work have you done in the last
14 10 years, in a general way?

15 A Our practice is largely devoted to public utility law,
16 antitrust law.

17 We do some Indian claims litigation and some
18 public land law matters also.

19 Q Could you give us a brief sampling of some of your
20 respective clients?

21 A On the utility side, we represent over 100 municipal
22 and cooperatively owned electric systems throughout
23 the United States.

24 A typical one would be, for example, the Municipal
25 Electric Utilities Association of the State of New York

1 Duncan - direct

2 which is comprised of all of the municipal systems of
3 the State of New York.

4 We also represent all of the municipalities in
5 Delaware, many in Indiana and California and some
6 cooperatives in Montana.

7 Q Mr. Duncan, what's been your connection with an
8 organization by the name of AMP-0?

9 A AMP-Ohio engaged an engineering firm by the name of
10 O'Brien & Gere -- that's G-e-r-e -- sometime in 1972
11 or early '73. We were the legal advisers to O'Brien &
12 Gere and were asked to assist O'Brien & Gere in
13 connection with some work they were doing for AMP-Ohio.

14 Subsequently, I believe it was in 1973, we were
15 employed directly by AMP-Ohio to assist that
16 organization in applying for some Niagara Project
17 power from the Power Authority of the State of New
18 York.

19 Q What was your particular assignment on behalf of
20 AMP-0?

21 A Initially, our assignment was to advise O'Brien & Gere
22 and AMP-Ohio as to what the legal requirements were
23 for obtaining an allocation of PASNY power from the
24 Niagara Project, and to advise them on the procedural
25 and legal aspects of obtaining that power from the

1 Duncan -- direct

2 Power Authority and getting it into the State of
3 Ohio over the lines of what are known as wheeling
4 agents.

5 Q What do you mean by wheeling agents?

6 A Wheeling agents are those systems that have
7 transmission systems in place.

8 In this particular instance, the New York
9 wheeling agent involved was Niagara Mohawk Power
10 Corporation. We ascertained that the power would come
11 over the Niagara Mohawk lines to Pennsylvania Electric
12 Company which was the next wheeling agent involved,
13 and that in order to introduce that power into Ohio,
14 specifically the City of Cleveland, we would also have
15 to have wheeling over the lines of CEI.

16 Q What did you do to arrange this necessary transmission
17 service?

18 MR. LANSDALE: Object.

19 May I approach the bench, if your Honor
20 please?

21 THE COURT: Yes.

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

25 MR. LANSDALE: I object on the grounds,

1 Duncan - direct

2 your Honor, that it is cumulative. Mr. Engle went
3 over this entire business exactly step by step
4 of the transmission pass, the applications to
5 Penelec and to CEI, the attendance at meetings
6 with CEI and so on. It is totally cumulative,
7 your Honor, and adds nothing to the case and I
8 object.

9 MR. WEINER: Well, I've asked him
10 what his involvement was, and if it becomes
11 cumulative it becomes cumulative. I don't know,
12 but I don't think it will. He had different
13 rules than Mr. Engle had.

14 MR. LANSDALE: I submit it is already
15 cumulative. He's testified to exactly the same
16 thing that Mr. Engle testified to.

17 MR. WEINER: No, he is testifying
18 as to what his job was on behalf of AMP-Ohio and
19 what role he had to play.

20 THE COURT: Well, we have to go
21 to the substance of his testimony.

22 I'm going to overrule your objection at this
23 time.

24 Now, let's not get into calling five witnesses
25 to testify to the same thing. It is just a waste

1 Duncan - direct

2 of time.

3 MR. WEINER: There certainly won't
4 be five. He's the only other PASNY witness on this
5 subject.

6 THE COURT: Let's proceed.

7 {End of bench conference.}

8
9 THE COURT: You may testify.

10 But please, let's not get into an area of
11 cumulative testimony.

12 MR. WEINER: I believe there was
13 a question pending. Could that be read/

14 THE COURT: Yes.

15 Read the question back. He may answer.

16 {The last question was read by the
17 reporter as follows:

18 "Q What did you do to arrange this
19 necessary transmission service?"}

20 A First, we approached the Power Authority of the State
21 of New York to ascertain whether they would entertain
22 an application by AMP-Ohio and, if so, whether
23 wheeling would be available over the transmission
24 lines of PASNY's New York wheeling agent, Niagara
25 Mohawk Power Corporation.

1 Duncan - direct

2 Next we approached Penelec through their
3 attorney Mr. Jim Lieberman, and asked whether or not
4 Penelec would be amenable to an arrangement for
5 wheeling PASNY power from the Niagara Mohawk system
6 to the CEI system.

7 Next we attempted to arrange wheeling through
8 CEI in a meeting in, I believe, June of 1973.

9 Q Mr. Duncan, Mrs. Richards is going to hand you some
10 documents. I would like you to identify the top one,
11 which is Plaintiff's Exhibit 835, if you would.

12 A I have it.

13 Q Could you identify that for the record, please?

14 A Exhibit 835 is a letter which I wrote to Mr. Gwinn
15 Dodson, who was President of Penelec, on May 1, 1973
16 on behalf of AMP-Ohio asking for wheeling over the
17 Penelec system.

18 Q And Plaintiff's Exhibit 836?

19 MR. LANSDALE: I would like to
20 interpose an objection, if your Honor please.

21 THE COURT: Approach the bench.

22 - - - - -

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

25 MR. LANSDALE: If your Honor please,

1 Duncan - direct

2 it is already in evidence that Penelec was
3 approached, that Penelec said they would wheel.

4 It is already in evidence that PASNY was
5 approached and they said that Niagara Mohawk
6 wheeling was available.

7 It has already been testified that an approach
8 was made to CEI and that eventually CEI refused to
9 wheel.

10 I submit this adds nothing whatsoever to the
11 case. It is a mere repetition. It is a precise
12 repetition.

13 MR. WEINER: All I have asked him
14 to do is to identify what the letter was, 835.

15 THE COURT: I mean, obviously this
16 is repetitions. I mean, we have in the testimony
17 from the previous witness that they approached
18 Penelec and Penelec said that they would wheel.

19 Let me check my notes here.

20 MR. WEINER: I don't deny that,
21 your Honor.

22 The problem is --

23 THE COURT: What is the sense of
24 putting it in?

25 MR. WEINER: The letter is important.

1 Duncan - direct

2 THE COURT: You can introduce
3 the letter.

4 MR. WEINER: All I asked him to do
5 was to identify it.

6 MR. LANSDALE: But what does the
7 letter add to the case?

8 They applied to Penelec. We admit it.

9 MR. WEINER: Where do you say you
10 admit it?

11 THE COURT: Are you objecting to
12 the introduction of the letter?

13 MR. LANSDALE: No, I don't object
14 to the introduction of the letter.

15 MR. WEINER: Well, all I have
16 asked him to do is identify it.

17 MR. LANSDALE: I don't object to it.

18 THE COURT: It may be admitted.
19 Let's go into something else.

20 MR. WEINER: Well, that's fine. I
21 didn't raise the objection.

22 THE COURT: Well, all right.

23 {End of bench conference.}

24 - - - - -

25 THE COURT: The letter is not

1 Duncan - direct

2 contested. It may be admitted.

3 And we already have in the record the fact
4 that AMP-0 approached Penelec for purposes of
5 wheeling and Penelec agreed that it would.

6 We also have in the record that PASNY was
7 approached and they permitted their wheeling
8 agent to transmit the power.

9 And we also have in the record the fact that
10 CEI was approached and they refused.

11 Now, that is already in the record. If there
12 is something, some new evidence that isn't in the
13 record, you are free to proceed.

14 But please, let's not be repetitious and
15 cumulative of the same testimony.

16 BY MR. WEINER:

17 Q Mr. Duncan, could you identify for us Plaintiff's
18 Exhibit 836? Do you have that in front of you?

19 A Yes, I do. Exhibit 836 is a letter dated May 1, 1973
20 which I wrote and addressed to Mr. Carl H. Rudolph,
21 President of Cleveland Electric Illuminating Company,
22 asking to wheel power for AMP-Ohio.

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

25 It is the same --

1 Duncan- direct

2 THE COURT: This is all cumulative.

3 MR. WEINER: All I'm asking him to
4 do is identify the letter. There is nothing wrong
5 with that.

6 THE COURT: Sustain the objection.
7 Let's proceed, please.

8 CEI was approached and they refused to wheel.

9 BY MR. WEINER:

10 Q Mr. Duncan, were you present in the courtroom this
11 morning when Mr. Engle testified as to a meeting that
12 was held among representatives of AMP-0 and representatives
13 of CEI in the summer of 1973?

14 A Yes, I was.

15 Q Were you present at that meeting?

16 A Yes, I was.

17 Q Was Mr. Engle's recollection of that meeting accurate
18 as far as you are concerned?

19 MR. LANSDALE: I object.

20 THE COURT: Overruled.

21 A With one exception. I don't believe that he mentioned
22 the name of Mr. Adam Kubik. At least I didn't hear it.
23 Mr. Kubik was also with O'Brien & Gere. He was in
24 attendance at the meeting.

25 THE COURT: He mentioned Mr. Kubik's

1 Duncan - direct

2 name.

3 THE WITNESS:

I'm sorry, your Honor.

4 BY MR. WEINER:

5 Q What did you think would be the outcome of that
6 meeting that you had with CEI in the summer of '73,
7 Mr. Duncan?

8 {Mr. Lansdale rises from his chair.}

9 THE COURT:

Approach the bench.

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

13 MR. LANSDALE:

14 I object to what did
15 he think would be the outcome, that's the question.
16 What's that got to do with --

17 THE COURT:

18 Read the question
19 back.

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

22 MR. LANSDALE:

I think --

23 THE COURT:

24 Was that the summer
25 of '73 or was it the summer of '72?

MR. WEINER:

'73.

Did I say "2" in the question?

THE COURT:

You said '73.

1 Duncan - direct

2 MR. WEINER: I'm sorry.

3 THE COURT: I had '72 in my
4 notes; and the previous testimony as to the state
5 of the meeting with Hinchee, Powers, Hauser,
6 Kubik and Duncan were present representing
7 AMP-0.

8 MR. WEINER: That was the meeting
9 with PASNY, your Honor.

10 This is the meeting with CEI.

11 THE COURT: Do you want to respond
12 to the objection as to the form of your question?

13 MR. WEINER: I don't think it's
14 objectionable as to form.

15 I'm asking what his recollection was as a
16 result of that meeting.

17 THE COURT: Read the question
18 back.

19 MR. WEINER: What did you think the
20 outcome of the meeting would be?

21 I know the question well.

22 THE COURT: Sustain the objection.

23 MR. WEINER: On what ground?

24 I'm sorry.

25 THE COURT: Sustain the objection.

Duncan - direct

MR. WEINER: I want this for future reference.

THE COURT: Sustain the objection.

It's obvious you're asking him to anticipate an event that didn't occur.

Let's proceed.

It's purely conjecture. Let's proceed.

{End of bench conference.}

- - - - -

THE COURT: Sustain the objection as to the form of the question.

BY MR. WEINER:

Q Mr. Duncan, what was your reaction to the receipt of Plaintiff's Exhibit 38, the letter from Mr. Hauser dated August 30, 1973 to you?

A I was shocked.

Q Why were you shocked?

{Mr. Lansdale rises from his chair.}

THE COURT: Sustain the objection.

You can ask him what he did or -- the word "shocked" is a conclusory statement, Mr. Weiner, and we're here to testify to facts.

Now, when he received the letter, he's free to testify as to what he did as a result of receiving

1 Duncan - direct

2 the letter, and maybe we can eliminate the
3 necessity for these objections if you put
4 proper questions.

5 Sustain the objection.

6 The jury will disregard the question and
7 the answer.

8 BY MR. WEINER:

9 Q What did you do upon receipt of that letter, Mr.
10 Duncan?

11 A I first advised Mr. Engle and the other parties
12 involved; I believe it was shortly thereafter that I
13 sent a letter to the Department of Justice Antitrust
14 Division calling their attention to it.

15 I also had a series of meetings with both
16 Allegheny Electric Cooperative, with PASNY, and with
17 representatives of AMP-Ohio.

18 Q Were you subsequently authorized to do anything on
19 behalf of AMP-Ohio with respect to CEI's refusal to
20 wheel?

21 A Yes.

22 We were authorized to intervene in a proceeding
23 which was then pending at the Nuclear Regulatory
24 Agency.

25 MR. LANSDALE:

I object.

1 Duncan - direct

2 THE COURT: Approach the bench.

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

6 MR. LANSDALE: I thought we had a
7 clear understanding since the beginning of this
8 case that NRC proceedings are not to be alluded to?

9 MR. WEINER: The results of the
10 NRC decision or any of the things were not to be
11 alluded to, but not the proceeding itself, the
12 fact it took place.

13 You raised the stipulation this morning.

14 MR. LANSDALE: I object to asking
15 him --

16 THE COURT: Sustain the objection.
17 Please proceed.

18 {End of bench conference.}

19 -----
20 THE COURT: You may proceed,
21 your Honor.

22 BY MR. WEINER:

23 Q Did you make any subsequent efforts, Mr. Duncan, to
24 resolve the difference between AMP-0 and CEI over
25 this wheeling question?

Duncan - direct

1
2 A There came a time, I believe it was in August of 1974,
3 that I once again addressed a letter to CEI. I believe
4 at that time it was a letter to Mr. -- Mr. Howley,
5 Lee Howley, again requesting that they change their
6 attitude towards wheeling and agree to the
7 arrangement that we had requested.

8 Q Would you look through the stack of exhibits you have
9 in front of you for Plaintiff's Exhibit 770?

10 A Yes, I have it.

11 Q What is that exhibit?

12 A That is the letter I just referred to. It is dated
13 August 2, 1974 and, again, to Mr. Lee C. Howley,
14 Vice-President and General Counsel of CEI.

15 Q What happened with respect to the 30 megawatts of
16 PASNY power that AMP-0 was seeking?

17 A It was eventually allocated to Allegheny Electric
18 Cooperative.

19 Q Do you recall the term of that?

20 A It was a five-year contract which expired in 1978.
21 I don't remember the date of the contract in 1973.

22 Q Do you recall when the service began?

23 A I believe it was in October -- September or October
24 of 1973.

25 Q If the records would indicate that that service began

I Duncan - direct

2 September 1 of 1974, you wouldn't have any reason to
3 doubt that, Mr. Duncan, this seven years later?

4 A No, I wouldn't. No.

5 Q What was AMP-0's relationship to this power at that
6 point?

7 A In early 1973 or late 1972 when the Power Authority
8 announced that it was going to allocate that 30
9 megawatts, AMP-Ohio decided to attempt to obtain it,
10 and since we did not have an interconnection with CEI
11 and it had no formal arrangements with either Penelec,
12 PASNY or CEI, we approached Allegheny Electric
13 Cooperative with the proposal that we would support
14 their application as opposed to the application of
15 the Vermont Public Service Board, and in return they
16 would agree to relinquish that 30 megawatts or a
17 portion of it to AMP-Ohio when AMP-Ohio was able to
18 introduce it into the State of Ohio over the
19 transmission lines of Penelec and CEI.

20 Q Was there a formal agreement entered into between
21 Allegheny and AMP-Ohio?

22 A Yes, the formal agreement was entered into in October
23 of 1974, although we had previously established
24 an understanding with the General Manager of Allegheny,
25 Mr. William Mattson, and their General Counsel, Mr.

1 Duncan - direct

2 William Wise, in June or May of 1973.

3 Q Mr. Duncan, did there come a time when AMP-0 entered
4 into a subsequent agreement with Allegheny?

5 A Yes. Subsequently as the Allegheny contract was about
6 to expire, the five-year contract, we did enter into
7 another arrangement with Allegheny sometime, I believe
8 it was, October or November of 1977.

9 Q What was the basic terms of that second agreement?

10 A Well, the basic terms were essentially the same as the
11 first; however, the basic difference was that we had to
12 change the allocation of power because the Power
13 Authority in reallocating that power in 1978 or in
14 late 1977 announced its intention not to market
15 30 megawatts of firm power, but to market some firm
16 and some peaking or non-firm power, so that the
17 numbers in the contract had to be changed to
18 reflect that marketing change by the Power
19 Authority.

20 Q Were there any other changes?

21 A Well, I don't believe it was -- we had to accommodate
22 Allegheny in one respect, and I think this occurred
23 in both contracts, but it did -- we did have to make
24 arrangements for Allegheny to retain some of the
25 30 megawatts since their wheeling rate went up when

1 Duncan - direct

2 they went to 130 megawatts as opposed to 100 megawatts.

3 So, we allowed in that contract for Allegheny to

4 retain 7.28 megawatts of the 30 megawatts and

5 AMP-Ohio was to get the balance.

6 Q What do you mean their wheeling rates went up? Would
7 you explain that?

8 A Allegheny had a contract with Penelec under which
9 Penelec had agreed to wheel 100 megawatts of PASNY
10 power and energy to the Allegheny system before 1973.

11 When Allegheny made its application for the
12 additional 30 megawatts, they had to go back to
13 Penelec and ask them to wheel that additional 30
14 megawatts. Penelec agreed to do that but only under
15 circumstances in which the wheeling rate would
16 increase.

17 When it increased, when Allegheny began getting
18 the 130 megawatts, Penelec was not willing to reduce
19 it back to the old rate when Allegheny relinquished
20 that 30 megawatts to AMP-Ohio.

1 Q What effect did all that have on AMP-0?

2 A AMP-0 got less than 30 megawatts as a result.

3 Q Was that second AMP-0, Allegheny agreement documented?

4 A Yes, it is.

5 Q And is Plaintiff's Exhibit 2209 a copy of that second

1 Duncan - direct

2 agreement?

3 A Yes, it is. It is dated October 21, 1977.

4 Q Did there come a time when AMP-0 submitted an
5 application to PASNY?

6 A There were several occasions that we submitted an
7 application to PASNY.

8 Q After the second AMP-0 - Allegheny agreement?

9 A Yes. It was sometime in 1978.

10 Q Why was an application filed at that time?

11 A Up until that time, CEI had not filed with the
12 Federal Power Commission, now the Federal Energy
13 Regulatory Commission, any wheeling tariff, and when
14 they did, AMP-Ohio promptly filed the application in
15 an attempt to take advantage of its contract with
16 Allegheny.

17 Q What was the purpose of the April, 1978 filing with
18 PASNY by AMP-0?

19 A Well, it is a requirement of the Power Authority law
20 in the Niagara Project Redevelopment Act that the
21 Power Authority and its trustees and subsequently the
22 Governor approve all contracts for the sale of
23 Niagara Project power, and there is a process for
24 applying for such power, and we were implementing an
25 application pursuant to those procedures.

1 Duncan - direct

2 Q What was Allegheny's position with respect to AMP-0's
3 application in 1978?

4 A Well, Allegheny, of course, was contractually bound
5 to honor our application and to support it under the
6 October 21, 1977 agreement, and they actively supported
7 our application to PASNY.

8 Q What was the result of AMP-0's application to PASNY?

9 A Eventually, some 19.279 megawatts of firm power and
10 some 3.05 megawatts of peaking power or non-firm
11 power were allocated to AMP-Ohio under a contract
12 which I believe was approved by Governor Carey in
13 January of 1980, and subsequently, on June 1 of 1980,
14 AMP-Ohio began receiving and delivering to the City
15 of Cleveland that allocation of power.

16 Q Mr. Duncan, assuming an interconnection had been in
17 place between CEI and Munny Light and CEI had agreed
18 to wheel back in 1973 when originally asked, what is
19 your opinion as to whether Cleveland would have been
20 obtaining the 30 megawatts of PASNY power since 1974?

21 MR. LANSDALE: I object.

22 THE COURT: Approach the bench.

23 - - - - -

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

1 Duncan - direct

2 MR. LANSDALE: I object.

3 I don't think there has been foundation laid
4 for him to have such an opinion, number one, and
5 number two, I think it is totally irrelevant
6 because the record shows that AMP-Ohio and
7 Allegheny joined in order to make sure that the
8 allocation was not made to Vermont.

9 MR. WEINER: I'm not sure what the
10 second part has to do with the first part.

11 But there is plenty in the record for him to
12 base this opinion upon as to what he thinks would
13 have happened in 1974 if CEI had wheeled.

14 THE COURT: Read the question back.

15 {The last question was read by the reporter.}

16 THE COURT: He may answer it.

17 Overruled.

18 {End of bench conference.}

19 - - - - -

20 THE COURT: You may answer the
21 question.

22 A In my opinion, had those been the facts, PASNY would
23 have allocated the power to AMP-Ohio and AMP-Ohio would
24 have been able to sell that power or deliver it to the
25 City of Cleveland as of late 1973.

1 Duncan - direct

2 Q How long would that continue, in your opinion?

3 A The contract that the Power Authority was --

4 MR. LANSDALE: I object. I object.

5 THE COURT: Sustained.

6 Q How long is the present contract between the City of
7 Cleveland and AMP-0 and PASNY; do you know?

8 A I believe it is five years.

9 Q Do you know when that expires?

10 A I'm not sure of the exact dates, no.

11 MR. WEINER: May I approach the
12 bench, your Honor?

13 THE COURT: Yes.

14 -----
15 [The following proceedings were had at the
16 bench:]

17 MR. WEINER: A couple things.

18 I was going to ask him to identify a few
19 other --

20 MR. LANSDALE: I can't understand
21 you.

22 MR. WEINER: You can't understand
23 me? I'm sorry.

24 I was going to ask him to identify a few other
25 letters that go to the question of CEI's refusal

1 Duncan - direct

2 to wheel. I just want to make sure beforehand
3 that there is no objection to having these in
4 evidence. We are going to establish a foundation
5 for these documents.

6 I will show them to you, counselor.
7 That is one of them, Plaintiff's Exhibit 770.

8 MR. LANSDALE: This is a letter
9 threatening CEI with continued litigation and
10 why don't we just give up.

11 I think, however, this was in evidence last
12 time.

13 I would like to object to it.

14 But in view of it being already in evidence,
15 under our ground rules -- it expresses the view
16 that there is a violation of the antitrust laws.
17 I think it is objectionable. But I let it go in
18 last time.

19 {Pause.}

20 THE COURT: Well, the letter may
21 go in with the exception of -- Section 3 certainly
22 must go out. It is not material in this case.

23 Consequently, the first sentence -- well,
24 really, if we take Paragraph 3 out, the first
25 sentence of the first paragraph of page 3, i.e.,

1 Duncan - direct

2 "In light of AMP-Ohio's singular objection in these
3 proceedings," that could refer to the proceedings
4 before the PASNY Service Board of the State of
5 New York -- well, then you are going to have to
6 strike from the last paragraph, page 3, "we are
7 fully cognizant of the fact that the company will
8 undoubtedly insist that AMP-Ohio withdraw as a
9 party in Docket Nos. 50-440A and 50-441A,"
10 which are the Atomic Board proceedings.

11 And the rest of it may stay.

12 You will conform the document to --

13 MR. WEINER: Your Honor, we had
14 one other. Mr. Lansdale says he has no objection
15 to it.

16 MR. LANSDALE: Yes, I have no
17 objection to it.

18 MR. WEINER: Plaintiff's Exhibit
19 1658.

20 One other thing while I'm here. I would
21 like to request the Court to read Stipulation 211.

22 MR. LANSDALE: Will you tell me what
23 that is?

24 MR. WEINER: Yes. It is the NRC.
25

1 Duncan - direct

2 THE COURT: He has got it.

3 MR. LANSDALE: I can't think of any
4 really valid objection to that, although I would
5 like to.

6 THE COURT: Which one?

7 MR. WEINER: 211.

8 THE COURT: All right.

9 That is Exhibit 770 that is to go in?

10 MR. WEINER: 770.

11 THE COURT: What was the other
12 one?

13 MR. WEINER: 1568.

14 {End of bench conference.}

15
16 THE COURT: Plaintiff's Exhibit
17 No- 770 may be admitted in its refined state
18 without further identification.

19 Plaintiff's Exhibit 1568 may be admitted.

20 And, ladies and gentlemen of the jury,
21 Stipulation 211 reads as follows:

22 "On January 6, 1977, the Atomic Safety and
23 Licensing Board of the NRC issued its order and
24 opinion providing that licenses issued to the
25 CAPCO companies to construct Davis-Besse Units

Duncan - direct

1, 2 and 3 and Perry Units 1 and 2 were conditional upon compliance with various license conditions which included the following license condition dealing with wheeling {the term 'CCCT' used in this license condition refers to the combined service areas of the CAPCO companies and the term 'Applicants' refers to CEI and the other CAPCO companies.}:

"Applicants shall engage in wheeling for and at the request of other entities in the CCCT:

"{a} of electric energy from delivery points of Applicants to the entities; and

"{b} of power generated by or available to the other entity as a result of its ownership or entitlements in generating facilities to delivery points of Applicants designated by the other entity.

"Such wheeling services shall be available with respect to any unused capacity on the transmission lines of Applicants, the use of which will not jeopardize Applicants' system. In the event Applicants must reduce wheeling services to other entities due to lack of capacity, such reduction shall not be effected

1 Duncan - direct

2 until reductions of at least 5 percent have
3 been made in transmission capacity allocations
4 to other Applicants in these proceedings and
5 thereafter shall be made in proportion to
6 reductions imposed upon other applicants to this
7 proceeding.

8 "Applicants shall make reasonable provisions
9 for disclosed transmission requirements of other
10 entities in the CCCT in planning future
11 transmission either individually or within the
12 CAPCO grouping. By "disclosed" is meant the
13 giving or reasonable advance notification of
14 future requirements by entities utilizing
15 wheeling services to be made available by
16 Applicants.

17 "Entitlement includes but is not limited to
18 power made available to an entity pursuant to an
19 exchange agreement.

20 "The objective of this requirement is to
21 prevent the pre-emption of unused capacity on
22 the lines of one applicant by other applicants
23 or by entities the transmitting Applicant deems
24 non-competitive. Competitive entities are
25 to be allowed opportunity to develop bulk power

1 Duncan - direct

2 services options even if this results in
3 reallocation of CAPCO transmission channels.
4 This relief is required in order to avoid
5 prolongation of the effects of Applicants'
6 illegally sustained dominance."

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

9 No further questions of Mr. Duncan.

10 THE COURT: You may proceed.

11 MR. LANSDALE: Yes.

12
13
14 CROSS-EXAMINATION OF WALLACE L. DUNCAN

15
16 BY MR. LANSDALE:

17 Q Mr. Duncan, do you have before you by any chance
18 Plaintiff's Exhibit 2184, letter dated May 25, 1973?

19 THE COURT: I'm sorry.

20 Would you repeat that?

21 MR. LANSDALE: 2184, Plaintiff's
22 Exhibit 2184.

23 Q You do not have it?

24 A I do not have it.

25 Q Here it comes.

Duncan - cross

{Exhibit handed to the witness by Ms. Doyle.}

A Yes.

Q That's a letter from Mr. Engle, the gentleman who was just recently on the witness stand, to Mr. William Mattson, dated May 25, 1973, and I notice that you received a copy of it or, at least, it is so indicated at the bottom of the letter, is it not?

A I did receive a copy.

Q You did receive a copy.

Have you seen this letter recently by any chance?

Is this one of the things you reviewed?

A I did not review this letter.

I knew it existed; I haven't seen it probably in three or four years.

Q If you need to read the letter to answer the questions I'm going to ask you, please don't hesitate to do so, Mr. Duncan.

This letter deals generally, does it not, with understandings reached in discussions between Mr. Mattson, who Mr. Engle identified as an official of the Allegheny Co-op, and Mr. Engle speaking on behalf of AMP-Ohio, respecting the arrangements which were later embodied in the agreement reduced to writing in 1974, I believe, respecting the fact that Allegheny

1 Duncan - cross

2 and AMP-Ohio would jointly apply for the allocation
3 of 30 megawatts or, at least, AMP-Ohio would support
4 Allegheny, with the consequent arrangements to share
5 it or give it up, is that so?

6 A Yes; except that the arrangements with Mr. Mattson
7 which are alluded to in this letter were negotiated
8 by myself and Mr. Engle, not only Mr. Engle; we were
9 together with Mr. Mattson in New Orleans in May of
10 1973 and reached these agreements.

1 Q Well, would you say that this letter rather
2 accurately portrays the events that took place or
3 the discussion that was had?

4 A Yes, I'd say so.

5 Q Initially, Allegheny Power and AMP-Ohio and Vermont
6 all separately applied for the allocation from
7 PASNY, isn't that so?

8 A For the additional 30 megawatts?

9 Q Yes, for the additional 30 megawatts.

10 A That's correct.

11 Q And I invite your attention to the last paragraph of
12 Mr. Engle's letter where he says that in his view or
13 "in our view --" perhaps he's expressing including
14 you within the plural sense there -- "neither AMP-Ohio
15 nor Allegheny can afford an open disagreement over

1 Duncan - cross

2 the allocation subject 30 megawatts, and this would
3 be counterproductive," he says, "and would probably
4 result in the allocation of this power to the
5 Vermont applicant."

6 Did that accurately express the fear of the
7 people involved at the time?

8 A Yes.

9 Q Fear --

10 A Yes, I think.

11 Q Thank you.

12 MR. LANSDALE: I have no further
13 questions.

14 THE COURT: Anything further, Mr.
15 Weiner?

16 MR. WEINER: No, your Honor.

17 THE COURT: Thank you. You may
18 step down and watch your tie.

19 THE WITNESS: Thank you, your Honor.

20 THE COURT: Call your next witness,
21 please.

22 MR. WEINER: Mr. George Ingalls,
23 your Honor.

24 - - - - -
25

1 G E O R G E L. I N G A L L S

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

5
6 DIRECT EXAMINATION OF GEORGE L. INGALLS

7
8 BY MR. WEINER:

9 Q Please state your name and home address.

10 A George L. Ingalls, 38 Beethoven Street, Binghamton,
11 New York.

12 Q And your business address, Mr. Ingalls?

13 A 1 Marine Midland Plaza, also Binghamton.

14 Q Your occupation?

15 A I am engaged in the general practice of law since
16 admission to the New York Bar in 1939.

17 Q Your present employer?

18 A Coughlin & Gerhart and at that business address, a
19 law firm.

20 Q And how long have you been with Coughlin & Gerhart?

21 A Well, the firm was formed in 1973, but I was with
22 predecessor firms before that.

23 Q Have you practiced in Binghamton --

24 A Yes.

25 Q -- all your adult career?

1 Ingalls - direct

2 A Sometime in that framework. -- I don't remember exactly.

3 Q 1972-73 period?

4 A Somewhere in that area, yes.

5 Q Do you recall who applied for that 30 megawatts of
6 power?

7 A Yes. The application was made both by the State of
8 Vermont and by Pennsylvania and by AMP-Ohio.

9 Q What was your position as a Trustee with respect to
0 those applications?

1 MR. LANSDALE: I object.

2 A Well, legislatively --

3 THE COURT: Approach the bench,
4 gentlemen.

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

8 MR. LANSDALE: I object on two
9 grounds.

0 Number one, what his individual position as
1 a Trustee was seems to me is irrelevant. This is
2 apparently a Board that acts as a Board.

3 Number two, as to the facts we have
4 developed so far, it is completely repetitive.
5 This is the third witness who has testified to the

1 Ingalls - direct

2 same thing.

3 MR. WEINER: I will go backwards.

4 The question is not repetitive of anything
5 that has been done in the past.

6 As to the first point, if it acts as a Board
7 and that is something you think the jury should
8 know, you can bring it out on cross-examination.

9 All I asked him for is what his position was
10 in --

11 THE COURT: Sustain the objection.

12 Please proceed.

13 {End of bench conference.}

14 -----
15 THE COURT: Sustain the objection.

16 You may testify as to what the Board did.

17 BY MR. WEINER:

18 Q What action was taken by the PASNY Board of Trustees
19 with respect to the AMP-0 application?

20 A At what time?

21 Q In 1973.

22 A Well, we were informed -- or at least the staff informed
23 me as one of the Trustees that AMP-Ohio had not been
24 able to arrange wheeling of the power from the Ohio
25 border to Cleveland, and because of that inability to

1 Ingalls - direct

2 for the public hearing on that contract at April 23,
3 1974 in New York City.

4 Q Is this the type of report that was generally kept
5 by PASNY and formed the basis of Trustees' actions?

6 A Yes.

7 Q Could you then turn to Plaintiff's Exhibit 2196.

8 A Yes.

9 Q Could you identify that document, please?

10 A This is the Niagara contract for the sale, transmission,
11 and distribution of power by the Power Authority to
12 Allegheny Electric Cooperative, including an amendment
13 dated August 23, 1974.

14 Q How much power was allocated pursuant to that
15 amendment?

16 A 130 megawatts.

17 Q And that --

18 A Well, 30,000 of which was an amendment to the
19 existing contract.

20 Q How much in total was then allocated to Allegheny?

21 A 130 megawatts.

22 Q Once AMP-0 secured wheeling, what procedures had to
23 be followed in order for the power to be allocated to
24 AMP-0 for Cleveland?

25 A Well, it would have to file an application with the

1 Ingalls - direct

2 ~~Power Authority and the Trustees would then have to~~
3 consider it.

4 If we reached an agreement, we would then set a
5 public hearing, have the hearing, make a decision on
6 the contract, and forward it to the Governor of
7 New York for his action.

8 Q Mr. Ingalls, would you turn your attention to
9 Plaintiff's Exhibit 2226. Do you have that in front of
10 you?

11 A Yes.

12 Q Could you identify that document, please.

13 A This is excerpts from the official meeting minutes of
14 the Power Authority of the State of New York dated
15 July 26, 1979.

16 Q What do they provide, in essence?

17 A Well, the resolution which was unanimously adopted by
18 the Trustees authorizes the advertising of a proposed
19 contract with AMP-0 for resale to the City of
20 Cleveland and fixed the date of a public hearing on
21 that contract at August 30, 1979.

22 Q What happened subsequent to the public hearing that
23 was advertised pursuant to that document?

24 A A contract was executed, I believe, with AMP-0.

25 Q Would you turn your attention, please, to Plaintiff's

1 Ingalls - direct

2 THE COURT: Cross-examination.

3 MR. LANSDALE: I have no questions.

4 THE COURT: You may step down.

5 {Witness excused.}

6 THE COURT: It is 12:00 o'clock,
7 ladies and gentlemen of the jury. We will recess
8 for the lunch hour.

9 Please, during the lunch hour, adhere to the
10 Court's admonition and do not discuss the case
11 either among yourselves or with anyone else.
12 Keep an open mind until you have heard all of the
13 evidence, the Court's instructions on the law
14 and the application of the law to the facts,
15 and until you have received the case for your
16 final deliberation and judgment.

17 With that, we will recess for lunch.

18 {Luncheon recess taken at 12:00 p.m.}

19 -----

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21
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25

1 WEDNESDAY, JULY 29, 1981, 1:40 O'CLOCK P.M.

2
3 THE COURT: Please be seated.

4 {The following proceedings were had out of
5 the hearing and presence of the jury.}

6 MR. WEINER: Your Honor, I had
7 one thing to raise before the jury came back, if
8 you would.

9 THE COURT: All right.

10 MR. WEINER: Despite the largest
11 note I have written myself, I had failed to put
12 on the record before Mr. Ingalls left the stand --
13 although he's still available -- the proffer of
14 the testimony that was set forth in the motion
15 of the City filed June 25, 1981 with respect to
16 the portion of the Court's May 18, 1981 order
17 about eliminating the post 1985 damages for
18 refusal to wheel PASNY power; and that proffer
19 is set forth on page 3 --

20 THE COURT: That's in the
21 argument, isn't it?

22 MR. WEINER: Yes, it is.

23 I just wanted to make sure it was here in the
24 record.

25 THE COURT: It's all in your

1 motion.

2 MR. LANSDALE: Fine.

3 Thank you.

4 THE COURT: All right.

5 MS. COLEMAN: Your Honor, I'm
6 giving Mr. Lansdale the documents I told him I
7 would give him.

8 THE COURT: Very well.

9 - - - - -

10 {The jury entered the courtroom and the
11 following proceedings were had in their hearing
12 and presence.}

13 THE COURT: Please be seated,
14 ladies and gentlemen.

15 MR. WEINER: Call Mr. Rudolph.

16 - - - - -

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25

1 K A R L H. R U D O L P H,

2 of lawful age, called as a witness as if
3 on cross-examination by the plaintiff, being
4 first duly sworn, was examined and testified
5 as follows:
6

7 CROSS-EXAMINATION OF KARL H. RUDOLPH.
8

9 BY MR. WEINER:

10 Q Please state your name and address for the record.

11 A Karl H. Rudolph, 3033 Lander Road, Pepper Pike, Ohio.

12 Q And your present employment, Mr. Rudolph?

13 A I'm working as a consultant for The Cleveland Electric
14 Illuminating Company.

15 Q How long have you been a consultant?

16 A About two years.

17 Q What kind of consulting do you know?

18 A I'm working on financial matters and primarily pension
19 plan matters.

20 Q Who did you work for before becoming a consultant
21 for CEI?

22 A I worked for CEI.

23 Q Starting when?

24 A 1942.

25 Q Did you stay with CEI until you became a consultant with

1 Rudolph - cross

2 them?

3 A Yes, I did.

4 Q Could you trace your employment history with CEI for
5 us, please?

6 A I went to work for CEI in the Financial and Accounting
7 Departments in 1942. I spent six or seven years in
8 various accounting and financial jobs, spent approximately
9 three years in an assignment that was designated at that
10 time as Administrative Assistant to the President,
11 became Manager of another of the Financial Departments,
12 ultimately served as Controller, and in 1959 became
13 Vice-President of Marketing. I served in that
14 capacity until about 1963 or '4 when I became
15 Executive Vice-President.

16 I became President in 1967, served in that
17 capacity until about 1975 or '6 when I became
18 Chairman.

19 Q And you retired --

20 A Retired.

21 Q -- your position when?

22 A I retired in June of 1979.

23 Q Now, briefly, Mr. Rudolph, what were your duties when
24 you were Controller?

25 A Generally the broad oversight of the accounting and

1 Rudolph - cross

2 financial activities of the company, including such
3 things as the cost accounting, the general accounting,
4 at that time some of the activity included rate
5 activities, some financial planning.

6 Q How about when you were Vice-President of Marketing
7 between 1959 and 1963? What were your duties then,
8 generally?

9 A Again, a general oversight of the company's marketing
10 and sales activities, a job that encompassed
11 supervision of some six or seven different marketing
12 departments, such departments as Residential
13 Marketing, Commercial Marketing, Industrial Marketing,
14 and in addition serving as a member of the
15 company's top management organization.

16 Q Is it fair to say that the Marketing Department could
17 be called the Sales Department?

18 A Yes.

19 Q And the idea behind that department was to increase
20 the revenues of CEI?

21 A Yes.

22 Q Who took over the Marketing Department after you became
23 Executive Vice-President in 1963?

24 A Mr. Wyman, R. W. Wyman.

25 Q And did Mr. Wyman at that time report to you?

1 Rudolph - cross

2 A Yes, he did.

3 Q Did you continue to monitor the activities of the
4 Marketing Department while you were Executive Vice --
5 President?

6 A Yes.

7 Q Did you, in connection with other people in the
8 company, approve the budgets of the Marketing
9 Department?

10 A Yes.

11 Q And those other people would be people such as Mr.
12 Besse and Mr. Lindseth?

13 A Yes.

14 Q While you were Executive Vice-President from 1963
15 to 1967, as I understand the marketing group, what
16 other group in the company reported to you?

17 A Well, my recollection, Mr. Weiner, is that there were
18 some changes during that period, and I can't recall
19 specifically all of the elements that reported to me.

20 What I do recall is marketing, most if not all of
21 the financial operations, and I think probably some
22 of the general administrative activities as we
23 designated them, including personnel and office
24 services, things of that sort at least.

25 Q Did those same groups report to you while you were

Rudolph - cross

1 President of the company from 1967 on?

2
3 A Yes, along with other groups. Our organization at that
4 time consisted in broad terms of the chief executive,
5 who in the period to which we are now referring was
6 Mr. Besse, and I reported to Mr. Besse, and all of
7 the vice-presidential groups with the possible
8 exception of the legal and public relations groups
9 reported to me.

10 Q That is in the period of 1960 to 1967?

11 A No. From 1967 to 1970.

12 Q 1967 to 1970. Thank you.

13 How about after Mr. Besse retired in 1970?

14 A I continued as President and Chief Executive Officer.

15 Q You were then the top man?

16 A Yes.

17 Q Did all the groups then report to you?

18 A Yes, they did, from Mr. Besse's retirement until Mr.
19 Ginn was designated as President and I became
20 Chairman, and that would have been '75 or '76.

21 Q As a top officer or near the top for all these number
22 of years, how were you generally advised as to what
23 was going on in the company? What was the practice
24 of the company?

25 A Well, we had a well-developed system of communications

1 Rudolph - cross

2 and reporting that included, among other things,
3 regularly-scheduled meetings of the top people at
4 which we discussed matters of pertinence and interest
5 to the company. We had a series of monthly reports.
6 We had a system of annual reports that included such
7 things as review of activities during the year past
8 and a series of statements on the objectives to be
9 pursued in the year ahead.

10 Q How many employees when you became Chief Executive
11 Officer did CEI have, approximately; do you recall?

12 A Oh, 5,000, plus or minus.

13 Q Am I correct, Mr. Rudolph, that at that time as in the
14 past, the company had had a policy of trying to have
15 the decisions made at the lowest level of competency
16 possible?

17 A Yes.

18 Q And that is also true, am I not correct, with respect
19 to planning decisions and policies for the future?

20 A Well, I think as a generalization, yes. But planning
21 programs were generally reviewed up the line. Our
22 management philosophy was built around the idea, as
23 you said, that day-to-day decisions in particular
24 should be made at the lowest level of competence.
25 When it comes to planning, those decisions were usually

1 Rudolph - cross

2 reviewed before the plans were put into effect.

3 Q When you say "usually reviewed," that means by top
4 management such as yourself?

5 A Well, at least up the line. You see, this planning
6 process started at the lowest supervisory levels and
7 moved up. So the plans at the lowest levels would have
8 been approved at the next level. The broad policy
9 plans moved to the top of the organization, and they
10 would have been reviewed by the senior officers of the
11 company.

12 Q Would it be fair, then, to say that it was planned, at
13 least, at CEI that things of broad policy consequence
14 wouldn't happen without top management such as yourself
15 knowing that they were going to happen?

16 A I think that is fair enough.

17 Q I assume sometimes, though, things did happen that were
18 not planned and you would find out about it later?

19 A Yes, that's true.

20 Q And if you didn't approve of them, you would either
21 initiate some action to change them or, at least,
22 change the policy for future action?

23 A That's right.

24 Q Are you familiar with the term "President's Council"?

25 A Yes, I am.

1 Rudolph - cross

2 Q What is that?

3 A That's one of these -- that was a designation that we
4 put on one of these regular meetings that we held.

5 The President's Council consisted of the top ten
6 people in the organization, that would include the
7 Chairman and the President, and the six or seven
8 Vice-Presidents -- the number varied from time to
9 time -- and the President's Council met regularly on
10 Mondays.

11 Our purpose, as I said, was to sit around the
12 table and, in turn, bring out activities of the
13 preceding week, suggestion of things to be done, just
14 a general communication effort to keep everybody up
15 to date.

16 Q Were the people in attendance at those functions
17 provided with source materials prior to the meetings?

18 A I'm sorry, I didn't get your question, Mr. Weiner.

19 Q Were people who were in attendance at the Council,
20 were they provided with written materials ahead of time?

21 A No.

22 Q How about after the meeting, were decisions ever made
23 at the President's Council?

24 A Yes, I'm sure some decisions were made there, but this
25 was not a decision-making body.

1 Rudolph - cross

2 The purpose of the President's Council was to
3 inform the top management organization about things
4 that were going on outside their immediate sphere
5 of activity.

6 Q How were decisions generally made at CEI when you were
7 in charge?

8 A Well, I think that depends on the level of decision.

9 As you said earlier, decisions were made as far
10 down the line as we felt that there was competence
11 to have them made.

12 Policy decisions, almost invariably would have
13 been made after discussion between the
14 Vice-Presidents that were involved and the Chief
15 Executive.

16 Q When you made a decision as Chief Executive, how was
17 that communicated to the people who were affected by
18 your decision?

19 A Well, that depends on how widely the decision would
20 impact the organization.

21 If it were a decision involving the activity of
22 one particular segment, for example, a decision
23 involving a financial matter, there might very well
24 have been no need to communicate it beyond the
25 financial Vice-President and, if we had two top people,

Rudolph - cross

1
2 the other top man in the organization.

3 On the other hand, if there were a policy decision
4 that had broad ramifications, we probably would have
5 put out some kind of a written statement announcing
6 it so that everybody knew it and the story got to
7 everybody on a consistent basis.

8 Q Was the Treasurer of CEI often in the President's
9 Council meetings?

10 A I don't remember whether he was or not. I don't think
11 so.

12 Q At the President's Council, was the subject of
13 competition discussed from time to time?

14 A Yes.

15 Q Was the subject of Muny Light also discussed?

16 A Yes.

17 Q And were policies of the CEI company with respect to
18 Muny Light discussed at those Council sessions?

19 A Oh, I'm sure they came out during the course of the
20 discussion, not necessarily by design, but just as a
21 part of the interchange of information.

22 Q Were decisions with respect to Muny Light and CEI's
23 relationship reached at those Council sessions?

24 A No. As I said, that wouldn't have been likely.

25 Q Such decisions, then, would have been made at other

1 Rudolph - cross

2 types of meetings rather than the President's Council
3 meeting?

4 A Yes, because the President's -- the objective of the
5 President's Council was communication, not decision
6 making.

7 Q What was the budget process while you were the Chief
8 Executive Officer at CEI, Mr. Rudolph?

9 A This is an intricate detailed process.

10 In its briefest form, I guess it could be
11 described by saying that the lowest organization
12 elements reduced to writing their budget requirements
13 for the ensuing year and those reports were moved
14 progressively through higher and higher levels of
15 supervision, and at each level they were
16 consolidated so that we ended up with, at the upper
17 level of the organization, a budget report for each one
18 of these vice-presidential groups to which we've
19 referred.

20 Then, all of those reports after review were put
21 together by our staff people and we ended up with a
22 company-wide budget.

23 Q So, when you were President or Vice-President, rather,
24 of the Marketing Division, you had the job of
25 preparing that budget and submitting it to Mr. Besse,

1 Rudolph - cross

2 would that be correct? First Mr. Lindseth, I guess,
3 and then when Mr. Besse became the President?

4 A Yes, that's right.

5 Q Then you had the obligation at that point to know the
6 line items in those budgets?

7 A Yes.

8 Q And then after you left the Marketing Department, as I
9 understand it, Mr. Wyman would have had that obligation?

10 A Yes.

11 Q And that would have come from Mr. Wyman to you for your
12 subsequent review and approval?

13 A Yes, sir.

14 Q Is it fair to say, Mr. Rudolph, that if a program needed
15 money to have accomplished, in other words, something
16 that needed some money to be done, without money in the
17 budget the project couldn't have been accomplished at
18 CEI?

19 A No, I wouldn't say that's fair.

20 I'd say that it is probable because a budget --
21 if it is any good -- it ought to contemplate almost
22 everything that could come up, but certainly we looked
23 at the budget as a broad guideline. I can think of
24 many things that might have come up that hadn't been
25 budgeted and it certainly would have been unwise, at

Rudolph - cross

least, not to have spent the money just because it weren't in the budget.

Q How about ongoing programs, things that lasted over a period of years that cost money. Would those likely find their way in the budget process?

A Well, that was the idea. We tried to make a budget as complete as we could.

Q You are familiar, are you not, Mr. Rudolph, with the term Munny Competition Program?

A Yes.

Q And Munny Conversion Program?

A Right.

Q And the Munny Allowance Program?

Munny Allowance Program. I'm sorry if I drop my words.

A I think those terms are all more or less synonymous, Mr. Weiner, as far as their objectives is concerned.

Q Basically, different names for the same type program?

A Very much so, yes.

Q And am I correct that that program existed from the early '60's into 1973?

A Yes.

Q Now, if that program by its various names was budgeted during that period, those budgets would have

1 Rudolph - cross

2 found their way to you for your ultimate review and
3 attention?

4 A Yes.

5 Q Just turning your attention, Mr. Rudolph, if I could,
6 to 1963, 1965 period, you were aware of the long-range
7 planning process that the company was engaged in at
8 that period of time, the process they were using?

9 A Yes.

10 Q Am I correct that that process started out having the
11 company set forth some certain basic premises and
12 assumptions?

13 A Yes, that's right.

14 Q And some of those assumptions, I presume, were
15 statistical assumptions?

16 A Yes.

17 Q And I would gather that someone in the company was
18 responsible for selecting and reviewing data with
19 respect to such things as population trends and
20 highway construction, urban development and things
21 like that?

22 A Yes, sir.

23 Q And then those assumptions would lead, then, from
24 assumption stage to long-term objectives of the
25 company?

1 Rudolph - cross

2 A --That's a good generalization of it, yes.

3 Q And then the same process would come out and set forth
4 in one document for each of the various groups the
5 program and the plans that had been achieved with
6 respect to those objectives?

7 A That's right.

8 Q Now, Mr. Rudolph, were you aware and do you recall that
9 in 1964 there was a planning report and objective which
10 called for the reduction and ultimate elimination of
11 Muny Light?

12 A Mr. Weiner, I'd have no specific recollection of that
13 as such, but I suppose it was in there. I don't
14 contest that.

15 Q Mr. Rudolph, just so we are clear on that --

16 MR. WEINER: Pat, could you hand

17 Mr. Rudolph the exhibits. There are a few of them.

18 Q Mr. Rudolph, if I could, I would ask you to turn your
19 attention to Plaintiff's Exhibit 2387, which should be
20 on top. Is it?

21 A Well, let's see.

22 All right. I have it.

23 Q All right. Can you identify that document for us?

24 A Yes. This is entitled "Excerpts from the CEI Five-Year
25 General Planning Report," and the excerpts are

1 Rudolph - cross

2 addressed, I believe, to the public relations and
3 legal group solely.

4 Q That was one of the six groups in the company at that
5 time?

6 A Yes.

7 Q Would you turn your attention to page 9.

8 A All right.

9 Q For your convenience, that same page is up on the
10 easel, although I think you will be able to see it
11 easier by looking at the document.

12 A All right.

13 Q Am I correct that the objective which I have just
14 referred to is set forth on page 9? It is down under
15 the heading "Cleveland Municipal Electric System,
16 Objective," I think.

17 A No. We are looking at two different documents.

18 MR. LANSDALE: May I approach the
19 bench, if your Honor please?

20 THE COURT: Yes.

21 A Here it is on page 3.

22 Q Thank you. You are correct, Mr. Rudolph.

23 THE COURT: Approach the bench.
24
25

1 Rudolph - cross

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

4 MR. LANSDALE: My understanding is
5 that in response to your question, this witness
6 testified that this group did not report to him
7 at this time. This is way back in 1964.

8 MR. WEINER: He said it might not,
9 actually.

10 THE COURT: 1967 forward, legal
11 and public relations didn't report to him.

12 MR. WEINER: 1967, that's right.
13 This is 1964.

14 He said it may not have reported to him, by
15 the way.

16 MR. LANSDALE: I object to
17 interrogating this witness about 1964.

18 THE COURT: Let's find out. Let's
19 clarify it.

20 If they did report to him, fine. If they
21 didn't, fine.

22 MR. WEINER: Could we read back
23 the first question I asked him and the answer to
24 the question?

25 THE COURT: Sure.

1 Rudolph - cross

2 --MR. LANSDALE: It is clear this
3 gentleman didn't have responsibility.

4 MR. WEINER: It is not clear.

5 THE COURT: Let's not have this
6 reparte. I told all counsel that if there is an
7 objection, both sides will be given an opportunity
8 to come up and state their objection. Once having
9 stated their objections and the responses, the
10 Court will rule and that is the end of it.

11 Now, the instruction of the Court is that if
12 you are desirous of clarifying, number one, in
13 1964 did legal and public relations report to him,
14 and number two, was he aware of this report, if
15 you can lay the proper foundation, then you can
16 go forward. If not, then that is the end of it.

17 MR. WEINER: That's fine. I have
18 no objection to that.

19 THE COURT: All right. Very good.

20 {End of bench conference.}

21 - - - - -
22 THE COURT: You may proceed,
23 Mr. Weiner.

24 MR. WEINER: Thank you.

25 THE COURT: And qualify the

1 Rudolph - cross

2 witness, and, if he can be qualified, then the
3 proper foundation laid, you may proceed with
4 this line of inquiry.

5 MR. WEINER: Okay.

6 BY MR. WEINER:

7 Q Mr. Rudolph, in the specific year of 1964, you were
8 Executive Vice-President, were you not?

9 A Yes.

10 Q And am I not correct that one of the groups of the
11 reports that you would have received was from the
12 Public Legal Information Group in 1964?

13 A Would have seen?

14 Q Yes.

15 A Yes, I think so.

16 Q Now, I have directed your attention to page 3 of that
17 report rather than page 9 -- I appreciate you
18 corrected me.

19 You now recall seeing that page at this time --
20 at that time? Excuse me.

21 A No. I don't recall having seen it because we
22 circulated documents such as this to our top
23 people, but I didn't have direct responsibility for
24 this.

25 I would have seen it, I was aware of it also, and

1 Rudolph - cross

2 that's about the extent of it.

3 Q As far as you're concerned, am I not correct, Mr.
4 Rudolph, that the Muny Conversion Program and the
5 other name, eliminate the competition, was designed to
6 aid CEI in its efforts to reduce competition with
7 Muny Light?

8 A To reduce and eliminate the competition, yes.

9 Q And, in fact, is it not true, Mr. Rudolph, Muny's
10 Conversion Program caused Muny Light customers to
11 switch to CEI?

12 A I would like to qualify that, Mr. Weiner, --

13 Q Can you answer it yes or no first?

14 A All right.

15 The answer is yes.

16 Q Thank you.

17 Now, would you like -- I'm sure if you have some
18 qualification, your counsel will ask you --

19 THE COURT: Counsel, please ask
20 him questions.

21 MR. WEINER: Okay.

22 THE COURT: I'll instruct the
23 witness as to any legal consequences.

24 MR. WEINER: Thank you, your Honor.
25

1 Rudolph - cross

2 BY MR. WEINER:

3 Q Mr. Rudolph, the type of customers that switched from
4 Muny Light -- excuse me -- from CEI to Muny Light as a
5 result of Muny's Conversion Program, those were
6 customers which were beneficial -- at least, some of
7 the customers were beneficial to CEI to have as new
8 customers, is that not correct?

9 A Some of them, yes.

10 Q Do you have any possible way of quantifying how many
11 you felt were beneficial to CEI?

12 A No.

13 Q I assume that some of them that were not beneficial
14 were the ones that might not be paying their bills?

15 A That would have been some of them, certainly.

16 Q Were there other categories of customers that were not
17 beneficial to CEI?

18 A Oh, yes.

19 I think that if we wanted to get into it in
20 great detail, it would be possible to find some such
21 customers:

22 Customers whose requirements facility-wise, for
23 example, were extensive and whose use, on the other
24 hand, would have been very minimal, so that our cost
25 and investment would be pretty modest -- I mean, pretty

1 Rudolph - cross

2 great -- compared to the revenues we got.

3 Q Do you have any way of quantifying that?

4 A No.

5 Q Who would have that kind of information in the company?

6 Someone would, wouldn't they?

7 A I suppose someone would have it.

8 You're talking about -- now about 1964, right?

9 Q I'll take the whole period from '64 to '75.

10 A Sure, I'm sure someone would have it; and the figures
11 they would have would be representative of broad
12 categories of customers.

13 Q Well, what department would we look to to find that
14 type of information?

15 A I think probably the Rates Department.

16 Q Who would be in charge of the Rates Department in the
17 start of '65?

18 A In '65, I don't know.

19 I think the best way to determine that is to look
20 it up. I don't remember.

21 Q Well, I'm trying to find out who to ask that question
22 to.

23 Would Mr. Wyman be in charge of the Rates
24 Department?

25 A No, he would not have been.

Rudolph - cross

1
2 The rates activity would have been in a different
3 group, as we called it, it would have been part of
4 the Financial Group.

5 Q They would have reported to the Vice-President of
6 Finance?

7 A Yes.

8 Q How about the quantification of the customers that CEI
9 obtained that were not paying their bills, do you have
10 any quantity for that?

11 A Would you repeat that, please?

12 Q Sure. Let me try to rephrase it, I'm confusing you.

13 Some of the customers that CEI obtained from
14 Muny Light as a result of the Muny Conversion Program
15 were not beneficial to CEI because they didn't pay
16 their bills either regularly or promptly, or whatever.

17 Do you have a quantity for that number?

18 A No, I don't.

19 Q Would you think it is less than 1 percent?

20 A It would be a guess; but if you want me to give an
21 answer, I'd say it's a lot higher than 1 percent.

22 Q Where would we find the answer to that question back
23 then when you were Executive Vice-President?

24 A To find out how many of these customers we were getting
25 from Muny Light who were not paying their bills, I would

1 Rudolph - cross

2 have asked Mr. Wyman.

3 Q And who would you have asked back then with respect to
4 these people you were getting from Muny Light that
5 were requiring extensive facilities?

6 MR. LANSDALE: I object.

7 THE COURT: Approach the bench.

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

11 MR. LANSDALE: I object to this whole
12 series of questions as being totally irrelevant.

13 One cannot escape the impression that you are
14 not interested in information, but you're trying
15 to bring out whether this witness knows who these
16 various people were.

17 What difference does it make?

18 I object.

19 MR. WEINER: I have no interest in
20 knowing who they are, just the quantity of them.

21 He indicated some of the people that were
22 being taken by CEI from Muny Light were not good
23 customers, were not beneficial to CEI.

24 I want to know how many.

25 THE COURT: Sustained.

1 Rudolph - cross

2 Let's proceed.

3 {End of bench conference.}

4 - - - - -

5 BY MR. WEINER:

6 Q Mr. Rudolph, I am correct, am I not, that there was
7 competition between Munny Light and CEI into 1973?

8 A Yes.

9 Q Am I not also correct, Mr. Rudolph, that the Munny
10 Conversion Program or this other named was stopped
11 sometime in '73 or early '74?

12 A Somewhere in that period, yes.

13 Q Am I also not correct, Mr. Rudolph, it was stopped
14 because of an order of the PUCO?

15 A I can't answer that. I don't remember.

16 Q Who would we ask that question to, Mr. Rudolph?

17 A Well, I suppose the place to go would be to our
18 lawyers. It is basically a legal question.

19 Q Mr. Rudolph, am I correct that while you were
20 President of CEI during the years of 1971 to '79 --
21 actually, Chief Executive Officer, I guess, is the
22 correct title -- CEI has had a policy to eliminate
23 the remaining competition within CEI's entire
24 service area?

25 A Yes.

1 Rudolph - cross

2 Q And that included both the area outside the City of
3 Cleveland and the area inside the City of Cleveland,
4 is that not correct?

5 A This would have been our continuing objective, to
6 reduce or eliminate competition wherever it existed.

7 Q Where is the CEI service area, generally, Mr.
8 Rudolph?

9 A Oh, roughly from Avon to the Pennsylvania border,
10 along the lake. It is 1,700 square miles. It
11 includes a part or all of five counties, Ashtabula,
12 Geauga, Lake, Cuyahoga and one other one.

13 Q As of 1971, what was the remaining competition that
14 existed in CEI's service area?

15 A In 1971?

16 Q Yes, sir.

17 A It would have consisted of the Cleveland Muny System,
18 the Painesville Sytem and various scattered
19 independent generating installations of, basically,
20 big industrial companies, and I can't -- I'd like to
21 pursue that a little further.

22 Over the period to which we're referring to here,
23 we successively negotiated agreements with, I suppose,
24 6 or 8 different large manufacturers who had their
25 own generating facilities. Whether or not there were

1 Rudolph - cross

2 very many left in 1971, I just don't remember.

3 Q There had been other municipal systems in the service
4 area prior to that time?

5 A Yes.

6 Q You were familiar at that time with the Painesville
7 Municipal System?

8 A Yes.

9 Q And you were familiar with the goal of the CEI company
10 for some time to purchase that system, were you not?

11 A Yes.

12 Q Do you recall the size of the Painesville Municipal
13 System?

14 A No, I don't recall that. It wasn't and isn't very big.
15 I don't know what the population of Painesville is,
16 7 or 8 thousand, I suppose.

17 Q Do you recall the service area that Painesville served
18 at that time?

19 A Generally, yes.

20 Q What was that?

21 A It consisted primarily of the City of Painesville, but
22 they had some customers particularly east of Painesville
23 going towards the Pennsylvania line. They had
24 transmission facilities out in that direction.

25 Q Mr. Rudolph, do you recall the Painesville System at

1 Rudolph - cross

2 that time was an isolated utility?

3 A Yes.

4 Q And that the Painesville System competed with the
5 CEI System for some certain customers outside the
6 City of Painesville?

7 A Well, yes. There was some competition. But this was
8 not intensive or extensive.

9 Q Do you recall in 1971 when Painesville asked the CEI
10 company for an interconnection?

11 A In '71?

12 Q Yes, sir.

13 A No, I don't.

14 Q Do you recall at any time when the Painesville System
15 asked CEI for an interconnection?

16 A No, Mr. Weiner. My recollection of the Painesville
17 situation is this: we had, as we have already
18 indicated, an objective to acquire the Painesville
19 System. In the early '60's, there were a series of
20 meetings, was a series of meetings with Painesville
21 representatives. We had a series of internal meetings.
22 We discussed it back and forth. There were a half a
23 dozen at least different arrangements that we could
24 have made with Painesville. But this never came to
25 fruition.

Rudolph - cross

1
2 Along about 1962 or '63, I guess, we just
3 concluded that there wasn't any real possibility of
4 any kind of a reasonable deal with Painesville, and
5 for the moment, the whole thing just became dormant.

6 Then in 1964, I think we offered to provide
7 standby power to the City of Painesville, and I don't
8 recall anything beyond that other than the fact that
9 Painesville declined.

10 Q You don't recall --

11 A And that is about the whole story of Painesville.

12 Q You don't recall any request by Painesville in the
13 early '70's; '71, '72?

14 A I don't recall, no.

15 Q Mr. Rudolph, I think you have before you Plaintiff's
16 Exhibit 1030. Do you?

17 A Yes.

18 Q Would you take a look at that and identify it?

19 A Yes, sir. It is a memorandum from Mr. Williams, who --

20 Q Who is he?

21 A -- would have been our Engineering Vice-President, I
22 think, in 1972, addressed to me.

23 Q At that time, you were Chief Executive Officer?

24 A Yes.

25 Q Would you refer to the second page, the second paragraph.

1 Rudolph - cross

2 I assume you received that memorandum, by the way,
3 Mr. Rudolph, in the ordinary course?

4 A Well, I assume so, too, because it is addressed to me.
5 I don't recall anything beyond that.

6 Q All right. Reading through page 2 of that, which
7 starts out, "Background," does that refresh your
8 memory at all with respect to the activity between
9 the CEI company and Painesville Muny in 1971?

10 A Well, I suppose it refreshes my memory. But I don't
11 think it adds anything to what I have said.

12 Q Does not the memo indicate at the second paragraph
13 that "Painesville Municipal currently appears to want
14 to tie in with CEI?"

15 A That is what it says, yes.

16 Q You don't recall that instance?

17 A Well, I not only don't recall it, but this is only some
18 kind of a surmise or assumption by the author of this.
19 He says it appears that they do. I have no recollection
20 of any formal approach by Painesville, as I said.

21 Q Do you think Mr. Williams just made that up?

22 A No. No. He didn't make it up. I'm sure that he felt
23 that there probably were some conditions that indicated
24 that they would be interested.

25 Q Am I not correct, Mr. Rudolph, that CEI was aware of

1 Rudolph - cross

2 Painesville Muny's ability to go to the Federal Power
3 Commission to seek such an interconnection?

4 A Oh, yes. We knew that, sure.

5 Q Am I not also correct that it was at least recommended
6 that an interconnection with Painesville should be
7 conditioned on such things as customer trading?

8 A I don't recall that. But that would have been one of
9 the many alternatives that we would have discussed with
10 regard to our relationships with Painesville.

11 Q What does the phrase "customer trading" mean to you?

12 A Well, in this particular context, it referred to those
13 customers primarily that Painesville had on this long
14 extension that ran east of the city limits of
15 Painesville. We served all of the area outside of
16 the city with a few minor exceptions, of which this long
17 string to the east was the most significant, and the
18 term "customer trade" would have had to do with our
19 taking those customers, the customers on that long
20 line, in exchange for some customers that we had that
21 were in, broadly speaking, the southwest section of
22 the Painesville Municipal area.

23 Q Does that mean, then, that some customers that at that
24 time were served by Painesville then would become
25 served by CEI?

1 Rudolph - cross

2 A Yes, and vice-versa.

3 Q And the document also speaks in terms of territorial
4 allocation. Is that another word for the same thing?

5 A No, not necessarily.

6 Q The document also speaks in terms of conditioning the
7 interconnection upon limiting the Painesville service
8 area.

9 What did that mean?

10 A What it means is that the quid pro quo for a tie, for
11 us putting a line into the Painesville System, would
12 have been an agreement on their part to restrict their
13 service territory to some predetermined geography,
14 geographical area.

15 Q That would mean that some customer who is outside this
16 predetermined area set by negotiation or whatever who
17 called on Painesville Muny and asked for service could
18 not get Painesville service at that point; is that
19 correct?

20 A That is what it would have meant, yes.

21 Q Am I not correct, Mr. Rudolph, that in terms of the
22 ultimate consumer, the person who uses the electricity,
23 all these various conditions were anti-competitive
24 measures?

25 MR. LANSDALE: Oh, for goodness'

1 Rudolph - cross

2 sakes.

3 THE COURT: Just a minute.

4 Let's not have comments, just objections.

5 Approach the bench.

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

9 MR. LANSDALE: Your Honor, I object
10 in fury to these kinds of questions.

11 THE COURT: Read the question back,
12 please.

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

14 MR. WEINER: Your Honor, I don't
15 know what the objection is, but he just says he
16 objects like heck, and I assume he's afraid of the
17 answer.

18 Whether they were anti-competitive or
19 pro-competitive activities with respect to the
20 interconnection with Painesville, in order to give
21 them interconnection, I can't think of a more
22 appropriate question.

23 MR. LANSDALE: This is the question
24 for the jury if it is relevant.

25 THE COURT: That's what it would

1 Rudolph - cross

2 appear to me.

3 Sustain the objection.

4 Let's go.

5 MR. LANSDALE: You know better than
6 that.

7 THE COURT: Sustain the objection.

8 Please place a proper question.

9 {End of bench conference.}

10 - - - - -

11 BY MR. WEINER:

12 Q Let me ask you, Mr. Rudolph, do you recall that one of
13 the conditions sought by CEI with Painesville was a
14 rate equalization of the rates between the Painesville
15 Municipal System and the CEI Municipal System for
16 private customers?

17 A No, but again that would have been -- I can understand
18 this would have been one of the series of alternatives
19 that would have been considered.

20 Q Now, I am correct, though, am I not, that the company
21 recognized, CEI recognized negotiations with
22 Painesville with respect to the interconnection would
23 affect the negotiations CEI was having with Muny Light
24 with respect to an interconnection?

25

1 Rudolph - cross

2 MR. LANSDALE: I object, if your
3 Honor please, and I'd like to approach the bench.

4 THE COURT: Approach the bench.

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

8 MR. LANSDALE: If your Honor please,
9 I have two objections to this.

10 In the first place, I have a continuing
11 objection to the relevance of any inquiry regarding
12 Painesville, and number two, this is an internal
13 document discussing options available and for
14 counsel to keep stating and suggesting to the
15 witness that CEI is seeking this or that or the
16 other thing is going beyond the document. It is
17 not a proper question and I object to counsel's
18 whole approach to this question.

19 MR. WEINER: I will address one at
20 a time.

21 MR. LANSDALE: And --

22 MR. WEINER: First of all,
23 Painesville is certainly relevant and the Court
24 will recognize that in the impact order. I can cite
25 you the chapter. I have it back at the lectern.

1 Rudolph - cross

2 THE COURT: What?

3 MR. WEINER: The testimony about
4 Painesville is clearly relevant. The Court said
5 that in the impact order.

6 Do you want me to get it?

7 THE COURT: Yes.

8 MR. LANSDALE: May I make -- I'll
9 address the second point.

10 THE COURT: Just a minute. Let's
11 take one at a time.

12 MR. LANSDALE: Okay.

13 Yes, sir, this is correct, but this is a
14 different question, if I could. The Court is
15 ordering that we go -- that you may go into
16 Painesville bearing on the intent with which
17 things are done here.

18 Now, I submit to your Honor, he's taken this
19 memorandum which recites options --

20 THE COURT: Let's take one thing
21 at a time.

22 First of all, you are permitted -- I permitted
23 you all along to go into factual matters concerning
24 Painesville as it reflects upon intent.

25 Now, your last question -- read it back --

1 Rudolph - cross

2 and it seems to be negotiations with Painesville
3 would affect the negotiations with CEI. I don't
4 know how that is relevant here.

5 MR. WEINER: Well, the purpose of
6 it was to show that the company at the time it
7 was negotiating with Painesville, a competitor,
8 took into consideration what they would do and
9 what they would not do with Painesville because
10 they knew it would affect what they would do with
11 Muny Light, because they would say this is what
12 you did with Painesville, do this with us, or
13 vice-versa.

14 MR. LANSDALE: Or --

15 THE COURT: No, wait.

16 Now, I would say you got some inferences
17 upon inferences upon inferences in here, in your
18 statement, Mr. Weiner.

19 I'm going to sustain the objection as to the
20 last question, as to its form, and as I indicated
21 in the impact order and as I have done thus far,
22 I will permit you to make inquiry concerning the
23 Painesville situation as it may impact or reflect
24 upon, I should say, intent.

25 What's your next objection?

1 Rudolph - cross

2 MR. LANSDALE: My next objection is
3 the manner, improper suggestions. These questions,
4 whole series of questions is that you were seeking
5 to do this with Painesville or you tried to do
6 this.

7 The document says, "Some of the options we
8 should consider," and here is a whole list of them.
9 Nine of them, of which 2 and 9 appear to be the
10 most feasible and he hasn't asked him about 2 and 9,
11 he has asked him the stuff that were considered
12 and discarded and to suggest to the witness by
13 repetitious questioning that the document says
14 that they were seeking these things from
15 Painesville is simply erroneous.

16 MR. WEINER: Well, the response to
17 the question, as the Court's notes indicate,
18 doesn't have anything to do with the document.
19 I asked whether CEI recognized negotiations with
20 Painesville and their negotiations with Munny
21 Light would be --

22 THE COURT: Yes. In the last
23 series his questions would not have specifically
24 incorporated the memorandum.

25 Now, and again, you can use this memorandum

1 Rudolph - cross

2 to impeach the witness or discredit the witness
3 provided you ask -- have to ask him the question.

4 MR. WEINER: I haven't attempted
5 to impeach him. He's answered and I assume he's
6 answering truthfully.

7 THE COURT: Let's proceed.

8 MR. WEINER: Just -- Mr. Lansdale,
9 before you walk away --

10 THE COURT: Mr. Lansdale.

11 MR. WEINER: Am I foreclosed from
12 getting an answer to that question?

13 THE COURT: Yes, I sustained the
14 objection to the form of that last question.

15 MR. WEINER: Okay.

16 THE COURT: The last question
17 dealt with the negotiations with Painesville
18 would have affected the negotiations with CEI.
19 I mean, how is that material?

20 MR. WEINER: I just wanted to know
21 where we stood.

22 {End of bench conference.}

23 - - - - -
24 THE COURT: You may proceed.
25

1 Rudolph - cross

2 BY MR. WEINER:

3 Q Mr. Rudolph, do you recall approving a tax report of
4 the company dated April 13, 1967, a planning report
5 from the marketing group which was entitled
6 "Elimination of Electric Power Generating Facilities
7 in the Eastern District"?

8 A No, I don't recall approving it, but I certainly have
9 a recollection, as I said earlier, that we had this as
10 one of our continuing company objectives.

11 Q Mr. Rudolph, I'm going to ask you if you will look at
12 Plaintiff's Exhibit 105, which I believe you have in
13 front of you. Do you?

14 A Yes, sir.

15 Q Is that such report as I have just referred to?

16 A Yes, it is.

17 Q And it does indicate that you approved that on April
18 13, 1967?

19 A Right.

20 Q And it is a planning project of the Marketing Group?

21 A Right.

22 Q I presume you haven't seen this document for a while?

23 A That is right.

24 Q Would you take a minute just to review it. I know it
25 is rather long. I don't want you to read it word for

Rudolph - cross

1 word. But just so you can get a general feel for its
2 contents.
3

4 {Pause.}

5 A All right.

6 Q I presume you would have read it with some care at the
7 time you approved it back in 1967?

8 A Yes, I would have.

9 Q Now, who was doing this private generation in that
10 period of time? Who were the actual companies?

11 A Well, this document refers to Union Carbide,
12 Industrial Rayon, and Diamond Alkali.

13 Q Am I correct that the document refers to the size of
14 this various generation?

15 A That is included in here, yes.

16 Q At the time this report would have been sent to you for
17 approval, what did the phrase "isolated electric
18 power generating facilities" mean?

19 A Well, that was the objective of this planning effort.
20 "isolated power generation" referred to the fact that
21 these three companies, namely, Union Carbide, Industrial
22 Rayon, and Diamond Alkali, had their own generating
23 plants to generate their electrical needs in whole and
24 in part independent of any provision from CEI.

25 Q Now, did you consider these companies to be competitors

Rudolph - cross

of CEI?

A. Well, "competitors" is kind of a tough -- a difficult word, Mr. Weiner, for this reason. If my neighbor grows tomatoes and I grow tomatoes and I open a stand on the street and sell tomatoes but he grows and consumes all his own tomatoes, I'm not sure he is a competitor of mine.

So in that sense, no, they weren't competitors. They were meeting their own needs in whole or in part.

Q Wasn't the idea of this planning project to come out with a plan to eliminate that generation?

A Right. Sure.

Q That was in order for CEI to sell all that generation to them, was it not?

A Right.

Q And I believe this planning report indicates that because of this private generation, CEI was being deprived of some 12 to \$17 million of annual revenue?

A Probably so. Just like I was being deprived of the sale of tomatoes to my neighbor because he grew his own.

Q What you were trying to achieve, then, as I understand it, by this project was to get this potential revenue into the company as opposed to having them do it?

1 Rudolph - cross

2 A Well, sure. This is just a normal business function,
3 and we thought that we had something to offer these
4 three companies in exchange for providing them with
5 electrical service, and apparently they agreed.

6 Q When did they agree?

7 A I don't know.

8 Q Now, am I not correct that if CEI had been successful
9 in this effort, these companies would no longer generate
10 their own electricity and they would buy it all from
11 CEI?

12 A That is right.

13 Q At the time this planning project was put in, was this
14 generation by the private companies economical or
15 uneconomical for themselves?

16 A Oh, I can't answer that. This was their decision, not
17 mine.

18 Q No. Maybe I confused you, Mr. Rudolph.

19 Do you recall, in terms of the company's
20 generation for themselves, were they generating power
21 at a cheaper price than CEI could sell it to them?

22 A I don't know that. That might or might not have been
23 a consideration from their point of view.

24 Q Let's see if we can figure that out, Mr. Rudolph. If
25 you will turn to page 14 of that document.

1 Rudolph - cross

2 A All right.

3 Q Which is identified at the top "Techniques for
4 Determining the Economic Purchase Price of Isolated
5 Generation Facilities."

6 A Wait a minute. I have only got 12 pages in the
7 document.

8 THE COURT: I do, too.

9 MR. LANSDALE: I don't find a 14.

10 Page 12 is the last page.

11 Q There are two appendices. Actually, there is a table
12 of exhibits, a table of appendices, and two appendices
13 attached to that document which are --

14 MR. WEINER: You don't have them
15 either, your Honor?

16 THE COURT: I don't have them.

17 MR. WEINER: We need those, I guess.
18 Let me see if my extra copy has one.

19 Pat, do we have any more?

20 THE COURT: Supposing we take an
21 afternoon recess and you can look for them then,
22 Mr. Weiner.

23 MR. WEINER: Thank you, your Honor.
24 I will make some copies.

25 THE COURT: Yes.

1 Rudolph - cross

2 It is 2:40.

3 Please, during the recess, do not discuss the
4 case, ladies and gentlemen, as I have so often
5 reminded you. Keep an open mind until you have
6 heard all of the evidence and the matter is given
7 to you for your deliberation and judgment upon
8 the evidence and the instructions of the Court
9 as to the law.

10 With that, we will take a short recess.

11 {Recess taken.}

12 THE COURT: Please be seated.

13 - - - - -
14 {The following proceedings were had at the
15 bench:}

16 THE COURT: Gentlemen, I have
17 received a motion that was filed by the
18 defendant, Motion of CEI for Judicial Notice
19 and Jury Instruction that the legitimacy of CEI's
20 load transfer rates has been conclusively
21 established by the Ohio Court of Appeals for
22 Cuyahoga County in Cleveland Electric Illuminating
23 Company v. City of Cleveland, 50 Ohio Appellate
24 2d 275 {1976}, motion to certify overruled on
25 April 8, 1977, and cert. denied by the United

1 Rudolph - cross

2 States Supreme Court, 434 U.S. 856 in 1977; and
3 by the Federal Energy Regulatory Commission,
4 City of Cleveland, Ohio v. Cleveland Electric
5 Illuminating Company, docket Nos. E-7631,
6 E-7633, E-7713, Opinion No. 644-C {1980}.

7 I am in the process of reading this, I
8 haven't fully reviewed it, and I don't know if
9 the plaintiffs are desirous of responding.

10 MR. NORRIS: I just received that.

11 I would like to have a chance, if I may, to
12 look at it, and maybe by the end of the week to
13 notify the Court of whether we are going to file
14 anything in response.

15 THE COURT: Yes.

16 Well, I have -- what is today, Wednesday?
17 Yes, perhaps by Friday, -- I don't know when you
18 want an instruction on this.

19 MR. LANSDALE: I had wanted probably
20 to have an instruction tomorrow.

21 We had submitted a stipulation to the plaintiff
22 yesterday based upon the decision of the Court of
23 Appeals of Cuyahoga County in the common pleas
24 case; and counsel stated they wanted to get the
25 file out and see what the Common Pleas Court said.

1 Rudolph - cross

2 and because of the delays involved, we went
3 ahead and filed the motion.

4 THE COURT: Well, I can see that
5 this is -- I don't think until Friday is an
6 excessively long period of time within which to
7 reply, albeit that I can also, on the other hand,
8 represent the request to instruct the jury during
9 the testimony of Hinchee, I have not fully
10 oriented myself with the context within which
11 the motion is made as it relates to Hinchee's
12 testimony.

13 I would like to go over his testimony. I
14 assume that it goes to two things:

15 It goes to a substantive issue as well as a
16 credibility issue; I don't know.

17 MR. LANSDALE: Yes.

18 THE COURT: I am just trying to
19 reconstruct the testimony.

20 But, you know, I'm here at 8:30 beginning
21 with the case every day, and we go until 4:00,
22 and, generally, at 4:15 I have other hearings in
23 Erie-Lackawanna; and I have -- in addition to that,
24 I am miscellaneous judge, I might say, so I have to
25 handle all the restraining orders that come through,

1 Rudolph - cross

2 and I have one set -- I had one yesterday, I have
3 one today, and one Friday, so I have some time
4 problems.

5 So why don't we -- Mr. Norris, are you
6 desirous of responding by, say, noon on Friday?

7 Hopefully I will have completed my review
8 by that time.

9 MR. NORRIS: That's fine, your
10 Honor.

11 THE COURT: And we can proceed
12 accordingly.

13 MR. LANSDALE: That will be fine.

14 {End of bench conference.}

15 -----
16 THE COURT: Bring in the jury,
17 please.

18 {The members of the jury entered the
19 courtroom.}

20 THE COURT: I'd like to have the
21 transcript of that testimony.

22 MR. NORRIS: Pardon me?

23 THE COURT: The transcript of the
24 testimony as it relates to the matter that I was
25 just discussing.

1 Rudolph - cross

2 You may proceed.

3 MR. WEINER:

Thank you, your Honor.

4 BY MR. WEINER:

5 Q Mr. Rudolph, before we turn your attention back to
6 the exhibit which you now have those extra pages of,
7 let me just ask you if I'm correct that the program
8 we were talking about earlier in this testimony, the
9 Muny Allowance Program, the Muny Conversion Program,
10 and one of the other names for that program was the
11 Muny Displacement Program. Am I correct?

12 A Yes.

13 Q Thank you.

14 Mr. Rudolph, now let's turn back to page 15
15 which just has a little pencil-mark 15 to make it easier
16 for you to find, but is actually page 2 of Appendix 1,
17 is that correct?

18 A Yes, sir.

19 Q During the break, Mr. Rudolph, with the assistance of
20 people who know more about these rate matters than
21 maybe either you or I do, we calculated on the basis
22 of the CEI memorandum that with respect to Diamond
23 Alkalai, the company that was in mention in this
24 memorandum, one of the private generators that were
25 in existence in 1967, that the rates they were charging

Rudolph - cross

1
2 their own generation for was 3 mills, is that correct,
3 the operating cost?

4 A That's what has been assumed in this document, yes.

5 Q Okay. And on the basis of the assumption made by
6 somebody, the person who prepared this document on
7 behalf of the company, we calculated that the rate the
8 company could have charged for such electricity was
9 7.39 mills or 7.4 mills roughly, is that correct?

10 A Yes.

11 Q Now, that indicates to you, does it not, Mr. Rudolph,
12 that as far as Diamond Alkali was concerned at that
13 point in time, they could do better generating their
14 own electricity than they could by buying it from CEI
15 on a dollar-for-dollar basis?

16 A Well, if you stop right there, obviously, 7.4 is more
17 than 3.8 or whatever, but that doesn't tell the whole
18 story.

19 Q That is just the amount they were going to pay for the
20 electricity?

21 A Sure.

22 Q But am I not correct, Mr. Rudolph, that this report
23 came to the conclusion, and you approved that
24 conclusion, that it was not an opportune time for the
25 company to try to take over this or buy out this

1 Rudolph - cross

2 private generation because it was economical for these
3 people?

4 A No, I don't think so.

5 Q All right. Now, I know you have had some time to look
6 at this document and I know you haven't read it in any
7 great detail since 1967. But if you will give me a
8 minute.

9 Let's turn to page 4. Am I correct that the
10 conclusions of this report are set forth on page 4?

11 A Well, you are talking about what I got as 17?

12 Q I'm sorry. No. Actual page 4. Back from the very
13 beginning.

14 A Oh, the fourth sheet?

15 Q Fourth sheet down. Typed No. 4.

16 A All right. I have got it.

17 Q That is titled "Conclusions, Final Report and
18 Recommended Plan"; is that right?

19 A No.

20 Q That isn't?

21 A No.

22 Q Darn it.

23 Let's see here. Mine certainly is.

24 A Well, part of mine may be cut off.

25 Does it start "The Economic Value to Diamond"?

1 Rudolph - cross

2 Is that the sheet you are talking about as the first
3 sentence?

4 THE COURT: Are you looking at
5 page 4, Mr. Rudolph?

6 THE WITNESS: Well, I'm --

7 THE COURT: Of the marketing group
8 planning report?

9 THE WITNESS: No. I'm looking at
10 the exhibits.

11 Q You are looking at the appendix. Good.

12 Let's go back to the Planning Report.

13 MR. WEINER: Thank you, your Honor.

14 Q The Marketing Group. That was Plaintiff's Exhibit
15 105 to which these other reports were attached as
16 appendices.

17 A All right. Fine.

18 "Conclusions," right.

19 Q All right. "Conclusions, Final Report and Recommended
20 Plan."

21 Now, if I can direct your attention down to
22 Paragraphs 2 and 3, am I not correct in summarizing
23 those this way, that it was the recommendation and final
24 conclusion of the person preparing this report for the
25 company that neither Diamond Alkalai nor IRC Fibers at

1 Rudolph - cross

2 that time would benefit from the company purchasing?

3 A That is what this says, yes.

4 Q So am I correct, in other words, in saying that it
5 wouldn't have been a good time to try to go after
6 those companies to acquire their private generation?

7 A Yes. That is right.

8 Q Now, this report talks in terms of uneconomic isolated
9 generating facilities, does it not?

10 A Well, I don't want to quibble with you about words. I
11 don't see "uneconomic" in here. But I suppose that is
12 what it is.

13 Q All right. Let me direct your attention to page 1
14 of 105. It is not numbered but it is the top page.
15 Under "Objective."

16 A Yes. Right.

17 Q It uses the phrase "uneconomic isolated generating
18 facilities"; is that right?

19 A Right.

20 Q Would that then mean to you that what they were meaning
21 was it was uneconomic for CEI to operate those generating
22 facilities at that time?

23 A No, that is not what this "objective" means. What this
24 "Objective" means is -- let me read part of it.

25 "Develop and put into effect a program," and I will

Rudolph - cross

1
2 paraphrase the rest, which will eliminate the
3 generation of those companies that can't do it
4 economically. It doesn't refer to CEI's generating
5 economically.

6 Q "Those companies." Am I correct that there are only
7 three and they are referred to on the very first page,
8 Union Carbide, Diamond Alkalai, and IRC Fibers?

9 A Yes.

10 Q We have just looked at page 4 where it is indicated by
11 the author of this report in his conclusion that those
12 were, in fact, economical facilities for those companies
13 at that point?

14 A All right.

15 Q Isn't that right?

16 A I think so.

17 Q All right. So the use of the phrase "uneconomic" in
18 terms of those facilities wouldn't have been correct,
19 would it?

20 A You are right. It would not have been correct.

21 Q Mr. Rudolph, do you know or do you recall how those
22 companies were generating their electricity?

23 A How they were generating?

24 Q Yes.

25 A You mean their fuel?

1 Rudolph - cross

2 Q Well, actually, how did it come that they were producing
3 electricity? Weren't they using the steam as a
4 byproduct of their other processes?

5 A Several of them were at least, yes.

6 Q And are you familiar with the phrase "heat balance"?

7 A Yes, but I don't want to explain it to you.

8 Q Well, that is not a bad deal, because I'm not going to
9 try to explain it to you.

10 But heat balance, in a rough sort of way, has
11 something to do with how much steam is being produced
12 and how much that steam is turning out into electricity;
13 is that right?

14 A I think so.

15 Q All right. Am I not correct that the people who prepared
16 this report for your approval back in 1967 indicated
17 that disrupting the heat balance may result in an
18 uneconomic isolated generation plan? Do you recall that?

19 A No, but I will agree with that.

20 Q All right. That appears on page 8 of Plaintiff's
21 Exhibit 105.

22 A All right.

23 Q Do you recall whether or not CEI sales people in the
24 field were making suggestions to these companies in an
25 effort to disrupt this favorable heat balance?

1 Rudolph - cross

2 A Well, I would be sure that our salesmen were in
3 communication with these companies all the time, that
4 is, on a regular basis, and with the customer they
5 would have been seeking out any kind of a
6 relationship, exchange of power that would have been
7 mutually advantageous.

8 MR. WEINER: I wonder if you could
9 play that question back, if you would.

10 {The last question was read by the reporter.}

11 A No, I don't recall that.

12 Q Would you turn your attention to that same page 8,
13 paragraph 2.

14 Do you have that in front of you? The second full
15 paragraph and the last sentence of that paragraph.

16 A Yes.

17 Q Would that not indicate to you that, in fact, salesmen
18 or CEI representatives were, in fact, making efforts
19 to have a couple of these, Diamond Alkalai and IRC
20 Fibers, do things that would disrupt their favorable
21 heat balance?

22 A Not at all.

23 Q You don't understand that to mean that?

24 A Not at all. No. Entirely the contrary.

25 Q Let me read the sentence, then, and ask you to

1 Rudolph - cross

2 interpret it for me.

3 "These companies --" referring to Diamond
4 Alkalai and IRC Fibers -- "however, are alert to
5 keeping their present and future heat balances
6 economic and generally resist sales efforts bent on
7 disrupting their heat balances."

8 A Sure.

9 Q Whose sales efforts would those be?

10 A Ours.

11 Q And the disrupting the heat balances would mean it
12 would be disruptive to the heat balances, is that
13 right?

14 A Yes.

15 Q And the heat balances are something that they needed
16 to produce their electricity at favorable rates, is
17 that not correct?

18 A Probably, yes.

19 Q And if you disrupted those heat balances, they
20 wouldn't be able to produce their electricity at
21 favorable rates?

22 A That's right, absolutely, but this doesn't cover the
23 whole thing.

24 These people are as smart as we are, maybe smarter,
25 and when we go out there to deal with them we discuss

Rudolph - cross

1
2 heat balance and these other opportunities. Now, this
3 is a mutually -- a mutual decision. If we can find
4 some arrangement which is mutually advantageous, then
5 broadly speaking we've got a deal.

6 But, if you are reading into this the idea that we
7 can go out and talk Diamond Alkalai or Union
8 Carbide into doing something that's economic just
9 because some salesman gives them the word, I think you
10 are not right.

11 Q You think they were too smart for your sales people?

12 A Well, we got smart salesmen, but after all, you don't
13 do business that way. And, secondly, these are
14 sophisticated people and in order to have an
15 arrangement it has got to be mutually advantageous.

16 Q I assume, though, the disruption of the heat balances
17 would have been advantageous for CEI, is that not
18 correct?

19 A Oh, sure.

20 Q Now, let's go back to Appendix 1, the one we were
21 missing there temporarily.

22 That's entitled, "Techniques for Determining the
23 Economic Purchase Price of Isolated Generation
24 Facilities," is that correct?

25 A Yes.

1 Rudolph - cross

2 Q And this was in reference -- in order to do this
3 document, they used the Diamond Alkalai situation as
4 an example?

5 A Yes.

6 Q Is that right?

7 A Yes.

8 Q And that was providing guidance to the people in the
9 Marketing Department and others at CEI as to how CEI
10 should go about determining how much to pay for these
11 private generation units?

12 A Yes.

13 Q Is that correct?

14 A Yes.

15 Q Do you recall what the largest units of Union Carbide
16 were? Do you recall the size of those units?

17 A My recollection is it was of the order of 200 megawatts.

18 Q I think the records would show that it had 160
19 megawatt -- well, let's turn back there just so we're
20 right, page 1 of PTX-105, Mr. Rudolph.

21 I'm not trying to test your memory, I just want
22 to make sure we are all together here.

23 160 megawatts of nameplate. Is that what it
24 reflects?

25 A It also says 209 megawatt B.

Rudolph - cross

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2 Q Right, and do you recall the nameplate capacity was
3 made up of 4 megawatt -- excuse me -- four 40-megawatt
4 units?

5 A All right.

6 Q And those, I believe the records would indicate, were
7 some 10 years or more old in age at that time and you
8 would assume that if I tell you that that's fairly
9 accurate?

10 A Right.

11 Q Mr. Rudolph, if CEI were going to add new generation
12 on their own in 1967, would it have put in units of the
13 size of 40 megawatts?

14 A No.

15 Q Why not?

16 A Because they are too small.

17 Q And isn't it a fact that the Diamond Alkalai units
18 and the IRC units, the generating units, those two
19 private generators had were even smaller than the 40
20 megawatt units of the Union Carbide Company?

21 You can look back to page 1 of 105 if you'd like.

22 A That's right, but we should keep in mind here that
23 what is too small for one activity may very well be
24 too large or identical for another.

25 Q That's right. It might have been identical for Diamond

1 Rudolph - cross

2 Alkalai and too small for CEI?

3 A Could have been.

4 Q Am I correct, then -- you were interested, am I right,
5 in purchasing both the generating units of Diamond
6 Alkalai and IRC Fibers, is that right?

7 MR. LANSDALE: I want to object.

8 This is about the third time.

9 THE COURT: Overruled. It is
10 repetitious but he may answer it.

11 A The answer is yes.

12 THE COURT: He's answered that
13 question about three or four times.

14 MR. WEINER: Thank you. I'm sorry
15 if I was repetitious.

16 BY MR. WEINER:

17 Q Mr. Rudolph, am I correct in stating, then, that the
18 company CEI would not have been interested in purchasing
19 those size of generating units but for the fact that
20 these units were depriving the company of some revenue
21 source that they were looking to obtain?

22 A Yes, I think that's a good generalization of it, sure.

23 Q And you were --

24 A We were trying to increase our load.

25 Q And you had indicated that the capacity -- excuse me --

1 Rudolph - cross

2 you indicated that the Union Carbide plant was an
3 isolated plant, is that correct?

4 A Yes.

5 Q Do you not now recall that Union Carbide had an
6 interconnection with CEI?

7 A May have had, and I'm afraid my recollection isn't
8 sufficiently accurate to be sure of what I'm giving
9 you, but they had an isolated -- they had their own
10 generation. Whether they operated it parallel with us
11 or whether they had a piece of their own load and we
12 had a piece separately, I don't remember.

13 Q Do you now recall at all what type of interconnection
14 Union Carbide had with CEI?

15 MR. LANSDALE: Your Honor, I think --

16 THE COURT: Read the last question
17 back. He answered that.

18 MR. WEINER: Well, I won't take the
19 time to do that. I'll go on to another question
20 if it is all right.

21 THE COURT: All right.

22 Q Who would know the type of detail as to the type of
23 interconnection that CEI had with Union Carbide, if
24 you don't recall?

25 MR. LANSDALE: I object.

Rudolph - cross

THE COURT: Approach the bench,
gentlemen.

{The following proceedings were had at the
bench:}

MR. LANSDALE: We just go over and
over the same thing.

I object to it; it's repetitious.

THE COURT: He indicated he
doesn't know.

MR. WEINER: I apologize for asking
the second time.

If he doesn't know, I would like to know who
does know the details of that because it's important.

I think I'm entitled to ask him: Do you know
what the fact is?

MR. LANSDALE: We'll be glad to tell
you.

I'll find out and let you know.

MR. WEINER: I don't want it from
counsel; I want it from a witness that I can
inquire about it.

THE COURT: He will give you the
name of the person.

1 Rudolph - cross

2 Why do you ask him this?

3 MR. LANSDALE: We'll give you the
4 name.

5 THE COURT: Let's proceed.

6 We're wasting so much time, gentlemen.

7 Please, let's go on.

8 {End of bench conference.}

9
10 THE COURT: Counsel have agreed --
11 defendant's counsel has agreed to submit the name
12 of the individual that could supply the information,
13 if those names are available.

14 Let's proceed.

15 BY MR. WEINER:

16 Q Mr. Rudolph, I'd like to turn your attention to page 7
17 of the same agreement -- I mean, the same document,
18 Plaintiff's Exhibit 105.

19 {After an interval.}

20 Q Do you have it in front of you?

21 A Yes, sir.

22 Q Turn your attention to Paragraph C of that document
23 under the label of "Union Carbide Corporation".

24 Do you have that in front of you?

25 A Yes.

Rudolph - cross

1
2 Q Does not -- does that not indicate that there was an
3 exchange agreement as early as November of 1949
4 between the CEI Company and Union Carbide?

5 A Yes, that's what it says.

6 Q And that exchange agreement was to provide for the
7 exchange of maintenance power between those two
8 concerns?

9 A Right.

10 Q And it also indicates that in 1972, in fact,
11 September, 1972, another amendment to the agreement
12 provided start-up power for Union Carbide, is that
13 correct?

14 A Well, except that it's "'62," not "'72."

15 Q Thank you, I appreciate it; I misspoke.

16 It also provided for optional power for CEI and
17 a continued exchange of maintenance power; is that not
18 correct?

19 A That's right.

20 Q And in August of 1964, the company -- CEI agreed to
21 supply 25 kilowatts of power during off-peak period?

22 MR. LANSDALE: I object.

23 THE COURT: Approach the bench.
24
25

1 Rudolph - cross

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

4 MR. LANSDALE: This is the same old
5 stuff.

6 If your Honor please, we are just simply
7 reading memoranda.

8 The witness has said he doesn't know anything
9 about it, and you're sitting there reading the
10 damn stuff.

11 I object.

12 THE COURT: Sustained.

13 You're reverting to those same tactics, Mr.
14 Weiner, and I would request that you desist, please.

15 MR. WEINER: Well, he approved this
16 document --

17 THE COURT: Sustain the objection.

18 {End of bench conference.}

19
20 THE COURT: You may proceed.

21 BY MR. WEINER:

22 Q Am I not correct that the kind of interchange agreement
23 which existed between Union Carbide and CEI company was
24 the same type of interchange agreement that Cleveland
25 Munny requested from CEI?

Rudolph - cross

A I don't know that; I can't answer that.

Q Is that because you don't know what Cleveland Muny requested of CEI?

A Because I'm not familiar with the details, number one.

Q I am correct, am I not, Mr. Rudolph, that in 1967, on the basis of this planning report, the people at the company -- which you approved -- indicated it was not a ripe time to try to purchase Union Carbide because of the recent exchange -- recent agreement for interchange power, is that not correct?

A If that's what this says, yes.

I don't see it here; but, sure, we'll stand behind whatever it says.

Q And, Mr. Rudolph, do you recall that in 1972, CEI did purchase the Union Carbide generating equipment?

A Yes, I do recall that.

Q Do you know what price CEI paid for that plant?

A No.

Q Did you at the time?

A Sure.

Q Do you know whether the company paid depreciated book value for the plant or more than that?

A I have no recollection at all.

I'm sure that I knew all the details at the time.

1 Rudolph - cross

2 Q Where would such information be available if we were
3 interested in knowing how much CEI paid for that
4 plant?

5 A Again, I'd go to the financial people.

6 This is a money matter, and I'm sure there would
7 be some record there of the whole contractual
8 relationship.

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Rudolph - cross

Q Do you know whether that report as to how much they paid for that was made to the shareholders of CEI as part of the annual statement to shareholders?

A I don't recall that either.

Q Do you know if it was made to the FCC?

A I can only say that if there is a requirement to report it to the FCC, it would have been reported.

Q Am I correct that whatever price that CEI would have paid for Union Carbide would have gone into the rate base of CEI?

MR. LANSDALE: Oh, I object.

A You are not correct.

THE COURT: Just a minute.

Approach the bench.

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{The following proceedings were had out of the hearing of the jury.}

MR. LANSDALE: I submit that whether it goes into the rate base or whether it is reported to the FCC, whoever has track of the information is totally irrelevant to this case.

I object to it.

MR. WEINER: It is a foundation question. The next step is to --

THE COURT: Sustain the objection.

Please keep these questions material. You have been questioning this man -- you haven't been objecting. We have been going all afternoon here and there is nothing probative as to the material issues of this case. Everything has been repetitious and unsubstantive.

MR. WEINER: It can't be repetitious. We never brought this subject up before and he doesn't know some of the answers.

THE COURT: Sustained.

Let's proceed.

{End of bench conference.}

- - - - -

Q Mr. Rudolph, would you have considered it prudent for CEI to purchase the generating equipment of Union Carbide, this 440-megawatt unit, if it had not been a person who was generating their own electricity?

MR. LANSDALE: I object.

THE COURT: Sustained.

Let's keep it material to the issues of this case, Mr. Weiner.

Q Mr. Rudolph, do you recall in 1972 the number of interruptable customers CEI served?

A No.

Rudolph - cross

Q You have no knowledge on that subject?

A Interruptible customers? No, I don't. It wouldn't have been very many.

Q Am I correct, Mr. Rudolph, that there also was private generation in the Cleveland District of CEI as opposed to the Eastern District that we have been discussing here?

A I think we talked about this a little earlier. Let me try to again repeat what I think I said.

Going back to the early '60's, there may have been eight or ten of these isolated generating facilities. Some of them I think probably were in Cleveland. Some of them, obviously from what we have been discussing, were not.

So if it is relevant here, I guess I would have to say that I'm not sure whether they are in Cleveland or not.

Q Were the goals of the company the same with respect to the private generation that may have existed in the Cleveland area?

A No different.

Q Who in the company would know the details of the relationships between CEI and the interruptible customers?

1 Rudolph - cross

2 A The rate relationships?

3 Q Yes.

4 A Our rates people.

5 Q And in 1972, who would that have been, Mr. Rudolph?

6 A Well, it would have again been the people that
7 reported to our Financial Vice-President.

8 Q Can you think of any specific name?

9 A Well, Warren Brooks I think was probably -- this is '72?

0 Q Yes, sir.

1 A Well, I can only think of Mr. Bingham and Mr. Lashing
2 offhand.

3 Q Mr. Rudolph, do you understand the term "wheeling"?

4 A Yes, I do.

5 Q Do you recall analogizing the term "wheeling" to a
6 railroad delivery of coal?

7 A Yes, I do.

8 Q What is that analogy?

9 A Well, wheeling, as this analogy goes, is likened to a
0 railroad that hauls coal from a coal mine to a
1 consumer. The only interest that the railroad has is
2 in the tariff or fee that it gets for picking the coal
3 up at the mine and delivering it to the consumer.

4 Q Am I not correct -- I'm sorry. Did I cut you off?

5 A Well, wheeling is the same thing. "Wheeling" is the

Rudolph - cross

1
2 term applied to that activity by a utility that is
3 between two other utilities and whose only function in
4 this case is to take the power from one and deliver it
5 to the other.

6 Q Am I correct that you have indicated that the wheeling
7 of electricity by utilities is a common practice in
8 the industry?

9 A Yes.

10 Q And you have indicated that without wheeling, often
11 you can't get power from one source to another; is that
12 correct?

13 A Again, I don't want to quibble with you. That is
14 probably right. If you want to get power from California
15 to Ohio, I know of no way you can do it if it were
16 practical except by wheeling.

17 The only reason I'm taking any reservation at all
18 to your observation is that there are some incidental
19 flows of power back and forth that result in power
20 going from one company to another.

21 Q That is something different than wheeling?

22 A That is right.

23 Q When you were Chief Executive Officer in the period of
24 1970 to 1974, CEI wheeled power to other utilities
25 across its lines, did it not?

Rudolph - cross

1
2 A Yes.

3 Q And this was a fairly normal occurrence?

4 A I think so.

5 Q Now, on the basis of your knowledge of the industry,
6 was it a fairly normal occurrence for other utilities
7 as well?

8 A Yes.

9 Q And you recall, do you not, receiving the request from
10 AMP-0 to have CEI wheel power for AMP-0?

11 A Yes, I do.

12 Q You are generally familiar with what AMP-0 is?

13 A Yes.

14 Q And you were then?

15 A Yes, sir.

16 Q What kind of power did AMP-0 want transmitted?

17 A They wanted power from PASNY, if that is what you mean
18 by the kind of power.

19 Q Yes, sir.

20 A They wanted power from the New York Power Authority.

21 Q And they wanted that power transmitted from the
22 Pennsylvania-Ohio border into Cleveland Municipal
23 Light?

24 A Yes, sir.

25 Q Do you recall receiving a letter to that effect?

Rudolph - cross

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A Yes.

Q Do you recall after a passage of time there was a conference held among the chief officers of CEI to discuss this request?

A Oh, I'm sure we discussed it, yes.

Q Well, do you recall such a conference?

A Mr. Weiner, we had conferences every day and we must have talked about this a dozen times. So I can't identify any particular, specific conference.

Q Do you recall, though, that there was a decision made by the company not to wheel PASNY power?

A Yes, I recall that distinctly.

Q And you also recall that it was a decision made not to wheel any other third-party power; is that not correct?

A I think here we have got some time differentials.

Q Well, let me see if I can clarify it.

Do you have in front of you Plaintiff's Exhibit 581?

A Yes, I do.

Q Would you identify that for us, please.

A Well, this is entitled "Perry Antitrust Review," and it talks about a meeting in the company held on August 8, 1973, and it names the participants and it

1 Rudolph - cross

2 says it was decided that the company should refuse the
3 request of AMP-Ohio to wheel PASNY power or wheel
4 power from any other third party.

5 Q And that would have been at this time that the
6 question of AMP-0 was pending before the company,
7 is that not correct?

8 A Yes.

9 Q Am I not correct, Mr. Rudolph, that the company's
10 refusal to wheel PASNY power was one of the means
11 CEI used to eliminate the competition with Muny Light?

12 A No, I don't think I can quite agree with that. I
13 don't quite see how a passive position on our part
14 results in that.

15 What we did by not wheeling power from PASNY to
16 Cleveland was avoid enhancing Muny's position, and we
17 felt we had no obligation to do that. After all, we
18 were competitors and they owed us a lot of money.

19 Q Well, am I not correct, Mr. Rudolph, that the wheeling
20 of PASNY would have been beneficial to Muny Light?

21 A Oh, I'm sure it would have.

22 Q And it would have reduced its cost, would it not?

23 A Yes.

24 Q And, in fact, if it had reduced its costs like you
25 acknowledged, wouldn't that have made Muny Light a

Rudolph - cross

stronger entity than it was before?

A Right.

Q And wouldn't that then make it harder for CEI to reduce and eliminate the competition it had with Muny Light?

A I'm sure it would have been.

Q So that's the reason you did not wheel the PASNY power for it, is that not correct?

A It would have made it harder. It didn't necessarily as such result in the reduction of or elimination --

MR. WEINER: I have no further questions.

THE COURT: Mr. Weiner.

Do you have anything to add?

THE WITNESS: No, this may be a fine extension, but I think it is a valid one, that our failure to wheel PASNY power resulted in not giving Muny an advantage that we felt we had no obligation to provide.

BY MR. WEINER:

Q I understand that because PASNY power to you would have made Muny Light a more competitive company?

A Yes.

Q And that would have made it harder for the company to

Rudolph - cross

achieve its objective of eliminating the competition with Muny Light, is that not correct?

A It would have gone far beyond that or could have.

Q But that was one of the end results of that, is that not correct?

A Yes.

Q Thank you, Mr. Rudolph.

THE COURT: Are you desirous of asking Mr. Rudolph any questions at this juncture?

MR. LANSDALE: Yes, if I may, your Honor.

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CROSS-EXAMINATION OF KARL H. RUDOLPH

BY MR. LANSDALE:

Q Mr. Rudolph, what do you mean by saying that last comment of yours, it may have gone far beyond that?

A Well, here we were in a position competing with the Muny System at a time when they owed us money, and we were asked to provide them access to power that they could have used to undersell us. The result could have been -- if you carry this to extremes -- it just could have gone to great lengths to drive us out of

Rudolph - cross

town.

Q Now, Mr. Rudolph, referring to wheeling -- and you made an allusion to a similarity with the railroad carrying coal -- what is the fact as to whether CEI as an electric utility with its transmission lines is in the business of wheeling? What is the factors of that?

A I'm afraid I don't understand your question.

Q Well, my question is, what is the fact as to whether or not you recognize any obligation to wheel upon request, or anybody?

A No, I don't think it is an obligation. It is a business judgment.

Q Thank you. I have no further questions.

THE COURT: Mr. Weiner.

Please limit your examination to the --

MR. WEINER: I will, your Honor.

THE COURT: Yes.

MR. WEINER: Thank you.

REDIRECT EXAMINATION OF KARL H. RUDOLPH

1
2
3 BY MR. WEINER:

4 Q In terms of this business judgment you say would have
5 been necessary in order to make a determination to
6 wheel for Muny Light or anyone else, am I not correct,
7 Mr. Rudolph, that providing wheeling for an entity
8 also provides revenue for the company, for CEI?

9 A Yes.

10 Q And the second point, Mr. Rudolph, you indicated in
11 response to Mr. Lansdale's question, you were afraid
12 that getting the PASNY power might cause Muny Light
13 to drive CEI out of business?

14 A I said it would move in this direction, yes.

15 Q Now, CEI is in business in a 1,700 square mile area, is
16 it not?

17 MR. LANSDALE: Oh, I object to that.

18 He didn't say --

19 THE COURT: Sustain the objection
20 as to the form of the question. The direct
21 examination was confined to the geographic market
22 of Muny Light and CEI.

23 MR. WEINER: I heard it, your Honor.

24 If I heard it wrong, I apologize.

25 THE COURT: Then if you would like

1 Rudolph - redirect

2 to pursue it, if you want to clarify the question,
3 you may.

4 BY MR. WEINER:

5 Q You didn't have any information that they were going to
6 drive you out of business, did you, Mr. Rudolph?

7 A Well, I think in the context of the question and the
8 response, we're talking about the area, geographic
9 area of Cleveland.

10 I certainly didn't have any idea of indicating
11 they were going to take our customers in Painesville or
12 Ashtabula.

13 Q I wanted to make sure that was clear.

14 Thank you, Mr. Rudolph.

15 A All right.

16 THE COURT: Do you have anything
17 further?

18 MR. LANSDALE: No, sir.

19 THE COURT: Thank you, Mr.

20 Rudolph. You may step down.

21 I think it is 4:00 o'clock, ladies and
22 gentlemen.

23 Please, during the adjournment of Court, keep
24 in mind the Court's admonition and please abide by
25 it, namely, do not read any newspaper accounts of

1 Rudolph - redirect

2 this trial, listen to any radiobroadcasts, view
3 any television broadcasts, discuss the matter
4 with anyone, including among yourselves or members
5 of your family. Keep an open mind until you've
6 heard all of the evidence and my instructions on
7 the law and the matter is submitted to you for your
8 final judgment.

9 With that, thank you, good night. We will
10 see you tomorrow morning at 8:30 and you may
11 leave immediately upon concluding a review of the
12 exhibits of the day.

13 Thank you.

14 May I have the exhibits, please?

15 You are free to go.

16 PTX-1654, 2494, 38, 1396, 2209, 2184, 836,
17 2189, 2196, 2226, 2231, 1030 and 105 and
18 Defendant's Exhibit 696 may go to the jury.

19 Also, Plaintiff's Exhibits 835, 707 as
20 conformed and 1658.

21 THE CLERK: 770.

22 THE COURT: I'm sorry, 770 as
23 conformed.

24 581 was the CEI memo --

25 MS. COLEMAN: Right.

1 MR. MURPHY: Your Honor, we would
2 object to 581 going to the jury in that form.

3 THE COURT: Well, obviously, you
4 have to take that Perry antitrust review out of
5 there.

6 MR. MURPHY: Well, I think most of
7 it --

8 THE COURT: I haven't read it, but
9 you have to conform to my previous order.

0 MR. WEINER: That's how it was
1 conformed at the end of the last trial, your
2 Honor.

3 MR. NORRIS: That is it, your
4 Honor.

5 MR. MURPHY: I think the issues at
6 the end of the trial last time were much broader
7 at this point than they are here.

8 THE COURT: Well, why don't you
9 discuss it tonight. We'll see what happens. You
0 can present it to me in the morning and the rest of
1 the exhibits may go to the jury.

2 If there is nothing further, gentlemen, thank
3 you and I would appreciate your clearing the
4 courtroom as expeditiously as possible. I have a
5 restraining order that I must address.

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