
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

8-5-1981

Volume 18 (Part 2)

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

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Loshing - cross

and just added the migrations and imports and exports of customers and migrations between companies, and that was the basis of our numbers.

Q And this exhibit, 371, shows approximately the same breakdown that the earlier year chart showed as of 1973, just under 80 percent of the electric customers in the City of Cleveland were served by CEI, and the balance were served by Muny Light; is that a fair statement?

A That is right.

No matter how you cut it, it came out the same way.

Q Directing your attention to PTX-373; is that the 1971 study that you referred to earlier?

A Yes.

Q Let me, for the record, ask you to identify PTX-753.

A This is a copy of the memo from Bob Kemper, dated July 24, 1974, "Percent of MELP Customers to Total in City of Cleveland by Grid Areas."

Q Addressing your attention to the second page of PTX-753, am I correct that Mr. Kemper is showing you the breakdown by wards as to how many customers Muny Light has in each of the 33 wards; is that an accurate statement as of the date of this memo?

A Customers?

Loshing - cross

Q Yes.

A I can't read the heading. It is in pencil. It seems to me -- well, I am handicapped. I cannot read it.

Can you get me a cleaner copy, or ask a question?

Q Mr. Loshing, do you recognize the identification of the 33 wards on page 2 of this document? Do you see the column headed "Wards"?

A Yes, okay, "Wards."

MR. LANSDALE: May I approach the bench?

THE COURT: Yes.

{The following proceedings were had at the bench:}

MR. LANSDALE: He just can't tell what the darn thing says, if his copy is like mine.

MR. NORRIS: That is the best copy we could get from you, and this says "Estimated MELP Customers," and we used it in the last trial.

MR. LANSDALE: If you know what it says, tell us, and I will accept it if it is within reason, and give it to the witness. I can't read it.

MR. NORRIS: I represent to you that you represented to me that this is "Estimated MELP

1 Loshing - cross

2 Customers," and that is what the two columns say.

3 MR. LANSDALE: What does the top say?

4 MR. NORRIS: "Estimated MELP

5 Customers by Ward, 1974," and on the bottom it

6 says, "Based on the Estimated Number of MELP

7 Customers."

8 MR. LANSDALE: "To Estimated Total."

9 MR. NORRIS: -- "To Estimated

10 Total Number of Customers by Grid," so he took

11 the total customers that you had already identified,

12 and then he estimated the MELP customers related to

13 that.

14 MR. LANSDALE: I am going to object to

15 any detailed stuff on this thing on the grounds that

16 it is unfair to the witness, with a nine- or

17 ten-year-old memorandum, and he can't remember it.

18 MR. NORRIS: I am not going to ask

19 any questions about the third page. It is totally

20 unreadable.

21 {End of bench conference.}

22 - - - - -

23 BY MR. NORRIS:

24 Q May I put the question, and then I will hand him my copy.

25 Mr. Lansdale and I have deciphered from the heading

Loshing - cross

1
2 on page 2, if you will accept the proposition that
3 the heading on page 2 says:

4 "Estimated MELP customers by warrant, 1974,"
5 and the four columns left, it says, "Wards," and it
6 goes from 1 to 17, and then "Estimated MELP
7 Customers," and then the next third column again is
8 "Wards," which goes from 18 to 33, and actually it is
9 an estimated percent of MELP customers in each case.

0 Do we accept that?

1 A Now that you have corrected yourself, yes.

2 -Q Let me come back to the question that I put earlier:

3 In how many wards of the 33 wards in the 1974
4 study did Mr. Kemper find there were no MELP
5 customers in the City of Cleveland?

6 A Bear with me while I count -- one, two, three, four.

7 Q So if my arithmetic is correct, would you confirm that
8 Mr. Kemper's study, in that study he found there were
9 29 wards out of the 33 in the City of Cleveland where
0 Muny Light had at least a 1 percent share of the
1 electric customers?

2 A Based on his study.

3 Q And can you state that the information contained in
4 this memorandum is true and accurate to the best of
5 your knowledge and understanding?

1 Loshing - cross

2 MR. LANSDALE: Objection.

3 THE COURT: Approach the bench.

4 - - - - -

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

7 MR. LANSDALE: This is a study by
8 Mr. Kemper, and he reported to me, number one, and
9 number two, you have in evidence a map which
10 depicts the exact contours according to your
11 estimation of the MELP service area, and I object
12 to questioning this witness as to the area in which
13 MELP service goes.

14 The fact that they had one customer in a ward
15 is totally irrelevant.

16 MR. NORRIS: At transcript page --

17 THE COURT: Just a moment. Respond
18 to the objection.

19 It appears that my discussions concerning
20 proper forms of the question made immediately after
21 the recess was like speaking to the wall again.

22 You are asking this man to confirm the accuracy
23 of a document that he had nothing to do with, and
24 you are asking again his thought process of another
25 man.

Loshing - cross

I will sustain the objection. Let's go back.

MR. NORRIS: I haven't had a chance to make my statement.

THE COURT: Let's go back and start.

MR. NORRIS: That is the precise question he adopted at the first trial.

THE COURT: Maybe there was an objection to it the first time. Let's proceed. Let's go on. Ask a proper question.

{End of bench conference.}

THE COURT: Rephrase the question and lay a proper foundation, and then you are free to proceed.

BY MR. NORRIS:

Q Did you have confidence in the work done by your subordinate, Mr. Kemper?

A With respect to what? -- this study or -- you had an open question there.

THE COURT: Read the question.

{Question read.}

A With respect to this study, yes.

Loshing - cross

Q Do you have any reason to disbelieve the data set
forth here?

THE COURT: That is the same
question you asked before. It is an objectionable
question.

THE WITNESS: Mr. Kemper can give
you chapter and verse on it better than I can.

If you want my opinion for what it is worth,
I will be glad to express that, but I would be
giving you hearsay evidence.

MR. NORRIS: I will ask that the
witness respond to the question.

THE COURT: He is responding, and
if you are desirous of asking him, of laying a
foundation by asking him if he participated and
had personal knowledge as to the accuracy of the
figures, fine, but you can't ask him what somebody
else did.

Now, please proceed in the proper fashion.

BY MR. NORRIS:

Q Mr. Loshing, did you receive this document from your
subordinate in the ordinary course of business?

A I must have. I don't see my famous stamp on here, but
I must have.

1 Loshing - cross

2 Q Is this the kind of work, the sort of work that you
3 charged Mr. Kemper with doing from time to time within
4 the Treasury Department?

5 A Yes.

6 Q And when you received a report of this kind, within the
7 scope of Mr. Kemper's employment, would you have any
8 reason to disbelieve the results set forth therein?

9 MR. LANSDALE: Objection.

10 THE COURT: Approach the bench.

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

14 MR. LANSDALE: If your Honor please,
15 I object to interrogating the witness concerning
16 Mr. Kemper's work.

17 Mr. Kemper has been notified as a witness, and
18 Mr. Norris continually examines Witness A about
19 what Witness B did.

20 MR. NORRIS: When Witness B works
21 for Witness A, and Witness B is reporting to
22 someone within the scope of his own employment, it
23 is all right --

24 MR. LANSDALE: If that is a relevant
25 question, certainly.

Loshing - cross

THE COURT: I will sustain the
objection.

{End of bench conference.}

- - - - -

BY MR. NORRIS:

Q Is it a fact, Mr. Loshing, there was set up in the company in 1967 and early 1968, what was known as the MELP Committee?

A I don't exactly remember the name of it, but there was a MELP Committee around that time, yes.

Q Do you recall testifying in a case in this courtroom last September?

A Yes.

Q Let me ask you if you recall being asked these questions and giving these answers:

"Q Mr. Loshing, isn't it a fact that there was set up in the company in 1967 and early 1968 what was known as the MELP Committee; is that a term that you recall?

"A Yes, other than the date, that is correct, there was a committee.

"Q Are you saying I am off a little bit on my dates?

"A I have no knowledge. I am just saying I

Loshing - cross

could not substantiate, but it sounds right."

Do you recall those questions and answers?

A Yes.

Q And do you recall these questions and answers? --

MR. LANSDALE: I object.

THE COURT: Approach the bench.

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

MR. LANSDALE: I object to the
repetition. That is precisely what he said. There
is nothing that is impeaching.

MR. NORRIS: He was equivocating
in his answer.

THE COURT: Kindly follow, Mr.
Norris, the accepted practices and procedures.
It was a highly improper question designed to
indicate that there was a misstatement, and the
two statements are consistent. There is no
impeachment there.

Read the question and the answer.

{Record read.}

THE COURT: The testimony is no
different. Let's go on.

Loshing - cross

{End of bench conference.}

- - - - -

BY MR. NORRIS:

Q Was Mr. Howley on the MELP Committee?

A Yes.

Q And Mr. Perry was on the MELP Committee?

A Yes.

Q And what personnel of the company comprised the MELP Committee?

A To the best of my recollection, it was the managing directors of each of the areas in our company that would have a corresponding interest in the Municipal Light Plant; for instance, Mr. Perry was in charge of production, and we needed someone that was knowledgeable there to look at the production side, and it would be me on finance, or lawyers -- I can't even think of all of the people that were on it right now, but there were engineers, because there were engineering considerations.

Q How about marketing personnel?

A Marketing, yes, thank you.

Q How about the President of the company?

A Yes.

Q How about the Chairman of the Board?

Loshing - cross

1
2 A In 1967, yes, they were both still there.

3 Q And what was the function of that committee?

4 A Just keeping up to date, keeping abreast with the whole
5 Muny situation, so that if there was a need to call
6 on any type of discipline or knowledge within our
7 company, they would be on board and up to speed with
8 what the current knowledge of their operation was and
9 the current conditions.

0 Q And was the work of the MELP Committee part of the
1 surveillance that was carried on on a routine basis
2 of Muny Light?

3 A Yes; may I expand?

4 Q There is no question in front of you.

5 Isn't it a fact, Mr. Loshing, that in late 1967
6 the MELP Committee undertook an analysis of Muny
7 Light's operations, and that the different groups in
8 the company participated in a reanalysis of the CEI's
9 position vis-a-vis Muny Light?

0 A I do not remember that as being their function.

1 We would have analyzed -- let me hear the question
2 back.

3 {Pending question read.}

4 A The MELP Committee did not function as an operation.
5 It was an information forum.

Loshing - cross

They would have had in puts to a staff analysis that we in the Treasury would have made.

Q My precise question is whether or not the MELP Committee undertook an analysis in late 1967 of Muny Light's operation?

THE COURT: Did they, yes or no, if you know?

A I don't know. I don't recall.

Q Let me ask you if you remember this question put to you in September, 1980, and your giving this answer:

"Q Isn't it a fact, Mr. Loshing, that in late 1967, CEI undertook an analysis of Muny Light's operations and that different groups in the company participated in a reanalysis of the company's position vis-a-vis Muny Light; is that not correct?

"A Yes, there were constant surveillance of their operations."

Do you remember that question and that answer?

A That is identical to what you just said.

THE COURT: Approach the bench, gentlemen.

- - - - -

{The following proceedings wre had at the bench:}

Loshing - cross

THE COURT: Read the parent question and answer.

{Record read.}

MR. LANSDALE: The testimony I submit is not --

THE COURT: Read it back to him.

This witness must have taken lessons from Mr. Hinchee in answering questions.

MR. LANSDALE: But, your Honor, the alleged impeaching testimony does not ask him the question.

THE COURT: Let's proceed. I will overrule the objection. The answer may stand.

{End of bench conference.}

- - - - -

THE COURT: Mr. Norris, you just finished reading from the transcript, and I will let that testimony stand.

MR. NORRIS: I asked him whether he remembered the question being asked and the answer being given, and I don't remember whether he answered that question.

THE WITNESS: I believe I answered that it is identical to the last time that I

Loshing - cross

answered.

THE COURT: He is asking you, do you recall those questions being asked and giving those answers?

THE WITNESS: Yes.

THE COURT: Please go to another question.

BY MR. NORRIS:

Q Is it a fair statement that Mr. Howley was the supervising head of this municipal operation?

A Yes.

THE COURT: Mr. Norris, it is 3:00 o'clock. Supposing we take our afternoon recess. Please, ladies and gentlemen, during the recess, do not discuss this case, either among yourselves or with anyone else. You are free to go.

{Recess taken.}

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

THE COURT: Proceed.

MR. LANSDALE: I would like the record to show that we are handing Mr. Norris the document

Loshing - cross

entitled "Five-Year Construction Plan, 1977,"
and the date is September 12, 1969, which is the
best that we could do to find the report at or
about the date that Mr. Norris mentioned.

MR. NORRIS: Thank you.

MR. LANSDALE: And I have two other
brief items.

THE COURT: Very well.

MR. LANSDALE: Number one, I notice
that Mr. Norris is testing on the screen a document,
the origination of which, or the author of which is
a bit uncertain, but we believe it to be Mr.
Fitzgerald, and as to which he interrogated Mr.
Loshing at the last trial, and Mr. Loshing said that
he didn't recognize the document, although he
recognized some of the content, and I just want to
make sure that any interrogation concerning it is
made prior to the time it is flashed on the screen.

Secondly, I interpose an objection to the
general line of questions about the customer
ratios in the City of Cleveland on the ground
that there is no evidence in the case upon which
one can base a claim to date, the entire City of
Cleveland being the relevant market, and the

Loshing - cross

ratios of the City of Cleveland -- as well as the fact that there may have been records in the company in which this ratio determination was made, are not relevant; and I want to interpose an objection to any further interrogation of this witness or others along that line.

MR. NORRIS: Your Honor, Mr.

Loshing stated on the first matter in the transcript at page 1925, lines 13 to 16, that with respect to this exhibit, 2631 that Mr. Lansdale is referring to, the "outline of programs to take advantage of the MELP philosophy of independent operation," I asked Mr. Loshing whether or not he participated in the summaries, and his answer was:

"A Again, me or people under my direction did most of the work. The specific form and the writing of it is not my recognition, but the content, generally, is lifted from other studies we had done. The organization of these is new to me."

And because the witness has already adopted the content and generally lifted from other studies done in the Treasury Department, I believe

Loshing - cross

he is a confident witness to put questions to, using the material that is in this report.

MR. LANSDALE: May I respond?

THE COURT: Yes.

MR. LANSDALE: I certainly have no objection, whatsoever, providing the subject is relevant to asking Mr. Loshing about matters that he is concerned with.

What I object to is taking these memoranda out, that are not written by this witness, and flashing them on the screen and giving the content to the jury and then asking, "Is this true, or do you agree?"

I have no objection providing the substance is relevant to asking the witness directly the question concerning the information or the thing that the report deals with.

This is not my objection. My objection is that if you are taking a memorandum that counsel knows the witness did not author and displaying it to the jury, and then asking questions about "Did he believe this or that" --

THE COURT: I don't believe he intends to do that.

Loshing - cross

MR. LANSDALE: But he is flashing it on the screen. I wanted to get my objection in before it is displayed on the screen, before it is displayed to the jury.

THE COURT: I don't know. I thought you were just testing the machine.

MR. NORRIS: Well, if I find, your Honor, that the witness is familiar with the subject matter of the document, since it is a CEI document, one that has been admitted into evidence, I believe that your Honor has previously ruled that it is perfectly appropriate to ask an officer of the defendant whether or not, particularly when the defendant has already testified that the content of the document has been done by him or persons under him, that that witness can be asked whether or not he agrees with the information set forth or further questions with respect to the content.

THE COURT: I don't believe you understand the basis of the objection and the Court's previous ruling.

Would you like to restate your position and listen to it, please?

Loshing - cross

He is not objecting to asking the questions of the witness.

What he is objecting to is without any foundation, he is objecting to flashing the document on the screen and reading the document in effect to the jury, which is, as I have ruled before, improper, and I will sustain the objection if that is what you intend to do, and I take it that you do not.

In effect, you can use the document to impeach the witness if he makes statements inconsistent with the witness.

If he has made the statements, or if he is privy to the statements contained in the document, then that is elementary.

MR. NORRIS: With respect to the second point; we think, your Honor, that the evidence of relevant market, as we have articulated in the briefs that we have filed -- let me start over again.

We feel that the different kinds of evidence that the Court and the jury should look at with respect to what is relevant, geographic market in this case, includes a lot of different pieces of

Loshing - cross

evidence.

One of those pieces of evidence, your Honor, we believe, is what did the defendant itself perceive the relevant geographic market to be on the basis of commercial realities and on the basis of economic realities prior to the time that the lawsuit was filed; and one of the exhibits that has been shown to day and indeed was admitted in the prior trial, was an exhibit entitled, "Electric Customers in the City of Cleveland," where CEI was keeping track of the ratios by wards and also within the entire Muny's boundaries of the City, even recognizing the 150 customers that as of 1973 were located in Bratenahl and East Cleveland and other municipalities to the east.

And so I would strongly resist, and I certainly disagree with Mr. Lansdale's objection that this is not competent testimony.

MR. LANSDALE: Well, the fact that the defendant made an analyses of the ratios of customers on the one hand and on the other within the City of Cleveland, that had no significance whatsoever as to the relevant market as counsel well knows, and there is no way for

1 Loshing - cross

2 CEI, without a special study in the field, which
3 we have now conducted, to know how many customers
4 it has in the area served by Muny.

5 These were the only figures available to us,
6 and they proved nothing about the defendant's
7 perspective as to where the competition was,
8 number one, and number two, the defendant's
9 perspective on this ratio of customers is not the
0 important item.

1 The important item on relevant market in this
2 context is what the potentialities as a practical
3 matter of the plaintiff is, as to which the
4 evidence is very clear; if they have no plans to
5 expand beyond the territory that they occupied for
6 some 25 or 30 years, and I think for us to spend
7 repetitiously the time dragging these statistics
8 out of the files --

9 THE COURT: A geographic market is
0 still an issue in the case.

1 I think that the evidence is admissible as to
2 geographic market.

3 What the weight of it is is another question,
4 and I don't know what inferences the plaintiff
5 intends to draw, but I will overrule the objection

Loshing - cross

as to admissibility of this line of questions, and I will sustain your objection to the anticipated use of the document, unless of course the proper foundation is laid.

Bring in the jury.

- - - - -

{The jury was reseated in the jury box and the trial continued as follows:}

THE COURT: You may proceed, Mr. Norris.

BY MR. NORRIS:

Q Mr. Loshing, do you have at your place up there PTX-2631?

A Yes, I do.

Q Would you look at that, please.

Are you able to identify that exhibit?

A I saw it once before, the last time that I testified.

Q Well, is it a fair statement that the exhibit contains, that is, the substance -- strike that.

It is not an agreement.

Let me start over.

A Okay.

Q Is it a fair statement that PTX-2631 is a summary of some of the work done in 1967 and 1968 by the MELP

Loshing - cross

1
2 Committed?

3 A It contains portions of work that I recognize.

4 Q And is it not a fact, Mr. Loshing, that either you or
5 people under you did most of the work that is set
6 forth in that document?

7 A No, sir. We are responsible for the table on page 3,
8 the statistics on the wards on page 2, but the bulk of
9 the verbiage is really foreign to me.

10 Q Were you through answering?

11 A Yes.

12 Q Let me ask you if you were not asked this question and
13 gave this answer last September in this courtroom --
14 and this is with reference, Mr. Loshing, to this
15 exhibit.

16 "Q Did you participate in the summaries that
17 are summarized or set forth in that exhibit?

18 "A Again, me or people under my direction did
19 most of the work. The specific form and the writing
20 of it is not my recognition, but the content,
21 generally, is lifted from other studies we had done.
22 The organization of these is new to me."

23 Did you give that answer to that question?

24 A Right.

25 Q Okay.

Loshing - cross

MR. NORRIS: Would you give Mr.

Loshing PTX-526, please.

{After an interval.}

BY MR. NORRIS:

Q Mr. Loshing, can you identify PTX-526?

A Yes.

Q Is it a fact that -- well, excuse me. Would you kindly identify it for the record.

A It is a copy of a memo from Messrs. Lester and Chopp to me, February 1st, 1968, entitled, "Muny Incremental to 1965."

Q And in fact you asked Mr. Lester and Mr. Chopp to do an analysis and report back to you on the basis of their conclusions as to what the operation would be like if CEI were to add Muny Light to the CEI system?

A That is correct.

Q And this memorandum sets forth the conclusions of Mr. Lester and Mr. Chopp?

A That is correct.

Q And isn't it a fact, Mr. Loshing, that the information in this memorandum, PTX-526, was desired by you to be used in conjunction with the work of the MELP Committee in reanalyzing the CEI position with respect to Muny Light in late 1967 and early 1968?

Loshing - cross

A Whether it was the committee or not, I cannot recall, but it was with respect to studying the whole Muny problem and the impact it would have on us with a combined operation.

Q Is it not a fair statement that this really represented a reanalysis by the company of its attitude and judgments with respect to Muny?

A A reanalysis? --

THE COURT: Read the question.

{Question read.}

A No. It is one of a continuing analysis of alternatives that we would pursue, and the impact on us with various courses of action.

Q Just so I get it clear, Mr. Loshing, you are saying that the MELP Committee did not, as a committee, do this reanalysis, but different elements in the company -- strike that.

Am I correct that you are saying that the MELP Committee did not as a committee do these analyses or the continuing analysis, but rather different elements in the company did this continuing analysis in late 1967 and early 1968; is that a fair statement?

A Yes.

Q And would I also be correct in saying that the MELP

Loshing - cross

Committee played a coordinating function as between all the different elements doing this continuing analysis?

A Coordinating, yes, in one sense of the word, although it was, as I said before, it was a communications committee more than an operating committee.

Q Well, I understand, and did the MELP Committee have regular meetings?

A Yes, for a period of time, yes.

Q How frequently were the MELP Committee meetings?

A Sometimes every week, and sometimes once a month.

Q And during what period, Mr. Loshing, were meetings taking place, either every week or once a month?

A In the late '60's.

Q Can you be any more precise than that?

A No. I don't remember the length of the Committee's activities, but it is over a period of several years.

Q Would you be willing to accept the date of approximately January, 1968, that the PTX-2631 was written?

THE COURT: What number?

MR. NORRIS: 2631, your Honor.

A I do know that it is on PTX-2631.

MR. NORRIS: May I have a conference with Mr. Lansdale for a moment?

Loshing - cross

{Short conference between Mr. Norris and
Mr. Lansdale.}

MR. NORRIS: May I approach the
bench, or shall I report on the conference?

THE COURT: Approach the bench.

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

MR. NORRIS: It is my understanding
that this was published in January of 1968, but
Mr. Lansdale doesn't want to be that precise.

He is willing to say that it was published in
early 1968.

MR. LANSDALE: I want the record to
show that I have made a thorough investigation about
the authorship and the timing, and that is the best
we can do, and that is early 1968. I can't be more
precise than that.

THE COURT: All right.

MR. NORRIS: Just one other question:

I would ask Mr. Lansdale in the second
paragraph, the second sentence, it says, although
their report will not be out until -- but we have
some general idea, and so forth.

Loshing - cross

I would submit --

MR. LANSDALE: This is what Burns & Roe -- let's look up when Burns & Roe made their report.

MR. NORRIS: I deduced that it had to be the month of January, and I wonder if you would accept that?

MR. LANSDALE: Do we know when Burns & Roe published their report?

MR. NORRIS: I think my information is accurate that it did come out in February of 1968. We have that report.

MR. LANSDALE: Let's look. Have you looked at the Burns & Roe Report when it came out?

MR. NORRIS: Yes, and I can't remember precisely.

MR. LANSDALE: If you tell me it came out early in 1968, I will accept that logic.

MR. NORRIS: Yes, I can. It is my belief that it came out in February of 1968, and I am sure of those facts.

MR. LANSDALE: Then your logic is inescapable.

Loshing - cross

MR. NORRIS: I thought it was.

Then, can we stipulate that has a January, 1968 date?

MR. LANSDALE: I will stipulate that to the best of our belief that this is the approximate date.

MR. NORRIS: I will go along with that.

{End of bench conference.}

THE COURT: Ladies and gentlemen of the jury, the parties have agreed that since the document, Plaintiff's Exhibit 2631, bears no date, that to the best of the lawyers' estimation, the document was generated or originated during January of 1968.

MR. NORRIS: Thank you, your Honor.

BY MR. NORRIS:

Q Mr. Loshing, before we leave PTX-526, I would ask you a couple of other questions about it.

A 526?

Q Yes, the Lester-Chopp memo to you.

A Yes.

Q Is it a fair statement there were other similar memos from other elements in the company with respect to the

Loshing - cross

continuing analysis going on in late 1967 and early 1968, similar to the PTX-526?

A There would be other memos from other parts of the company that would address their specific interest with respect to the Muny problem here.

Q And was Mr. Howley the Chairman of the MELP Committee?

A I would say no. There was no Chairman.

It was an informational meeting, and I think the Chairman of our Board who sat on that committee would have chaired it if there were such a chair.

Again, it was an informational meeting.

Q But the kind of information that would be shared at these meetings of the MELP Committee were the results of the memoranda from different elements in the company similar to PTX-526 that was addressed to you?

A That is right, and they end up in the Fact Book.

Q Now, I notice that this particular memorandum to you sets forth a table showing the results of what a first-year analysis would be like of a combined operation if MELP were at it to CEI; is that a fair statement?

A That is correct, yes.

Q Now then, I notice that Mr. Lester and Mr. Chopp had made assumptions that were set forth, and there are

Loshing - cross

eight assumptions in all on the first page, and I address your attention to the third one, and it indicates a particular amount of money for an interconnection.

Now, do you recall discussing this with either Mr. Lester or Mr. Chopp?

A The amount of the interconnection?

Q Yes, discussing their assumptions and what that particular amount of money would be related to?

A They would have gotten that from Engineering, and I would have told them to go to the best source in the company, and these are some of the other studies, and I would have told them to go to other areas in the company to evaluate how this would be accomplished.

Q What I am really asking you is, I am asking you whether or not the third assumption setting forth an amount of \$900,000 would be a sufficient amount for an underground interconnection or not?

A I have no knowledge.

From the amount, it would not be.

Q Did you have any occasion from the MELP Committee meetings to discuss the matter of interconnection between CEI and Muny Light?

A This was a topic of discussion at some of the meetings,

Loshing - cross

yes.

Q And was the type of interconnection discussed; that is, either underground or overhead?

A Yes.

Q And was there any consensus that had been established as to whether or not this interconnection should be underground or overhead?

A No.

Q Wouldn't it be a fair statement that for \$900,000, if you were going to have an interconnection, it would have to be overhead? That is true, is it not? That is not enough money for underground?

A That is my assumption. It would not be sufficient to be under ground.

Q Now, what was the nature of these discussions in late 1967 and early '68 with respect to the subject of an interconnection between the two power companies?

MR. NORRIS: Objection.

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: My objection is that the question assumes that there is a discussion of an

Loshing - cross

interconnection, and the memorandum deals with incrementally adding to the system, and one element of which is an interconnection, and to suggest, to assume in your question that there was a discussion of an interconnection without finding whether there was or not is objectionable. I object.

THE COURT: My note says, "Interconnection discussed."

MR. LANSDALE: I believe so.

THE COURT: It was about four questions back.

MR. LANSDALE: Then I stand corrected.

THE COURT: It may be that I am just writing things here.

MR. LANSDALE: No, I am not prepared to suggest that.

THE COURT: All right. Let's go back and read it --

MR. LANSDALE: I will withdraw my objection.

{End of bench conference.}

- - - - -

Loshing - cross

THE COURT: Read the question.

{Question read by the reporter as follows:

"Q Now, what was the nature of these discussions in late 1967 and early '68 with respect to the subject of an interconnection between the two power companies?"}

A The discussions of interconnection were studies like, how could you accomplish an interconnection if it were requested or needed, and in this analysis, PTX-526, all this is doing is hypothesizing what if -- what the additional impact would be under some reasonable assumptions of running Muny and CEI as a single entity.

Q Isn't it a fair statement, Mr. Loshing, that the senior executives of CEI in early 1968 were well aware of the fact that Muny Light wanted a permanent interconnection between its plant and CEI's Lake Shore Plant?

A In 1968?

Q Yes.

A I believe so, yes.

Q Now, apart from PTX-526, Mr. Loshing, would you kindly tell us what discussions there were in the MELP Committee with respect to Muny Light's desire for a

Loshing - cross

1
2 permanent interconnection with CEI?

3 A Discussions of the pros and cons of various ways to
4 serve them and the ramifications thereof would be to
5 those alternative choices of serving.

6 Q And can you recall who the senior executives were
7 that participated in those discussions?

8 A The discussions -- "discussions" is a heavy word. It
9 was one of many subjects. It was part of the general
10 topic.

11 Q What words would you use?

12 A "Conversations."

13 Q All right. Can you recall who the senior executives
14 were that had conversations about Muny's desire for a
15 permanent interconnection in early 1968?

16 A The year 1968 bothers me; but Lee Howley and Harold
17 Williams, and those would be the ones.
18
19
20
21
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Loshing - cross

Q Were these conversations during MELP Committee meetings?

A Yes, it was mentioned.

Q Well then, wouldn't all of the persons attending the MELP Committee meetings have heard the conversations that you're referring to?

A Yes.

Q You're aware, are you not, of the letters that Mr. Lindseth wrote to Mayor Locher in 1962 and 1963 offering a permanent interconnection to Muny Light on condition that Muny Light would raise its rates for private customers to the CEI level?

A Yes, I'm well aware of those.

Q And are you similarly aware of the letter in 1965 from Mr. Besse to Mayor Locher dealing with the same subject?

A Yes.

Q Now, isn't it a fair statement, Mr. Loshing, that by 1968, CEI's senior management had decided that rather than offering an interconnection to Muny Light based upon getting Muny to raise its rates, that the consensus that was achieved within the company was that CEI's policy should be to have no interconnection between Muny Light and CEI at all, isn't that a fair

Loshing - cross

statement?

A No.

We were exploring all alternatives; we still are.

Q When did a concensus occur on this subject?

THE COURT: On what -- I'm not following you, what subject?

MR. NORRIS: On the -- I will withdraw that, your Honor.

BY MR. NORRIS:

Q I think we have established, Mr. Loshing, that from 1962 to at least 1965, CEI's attitude toward the interconnection with Muny Light was that CEI would be willing to give Muny Light a permanent interconnection that would permit the full range of power options on condition that Muny Light would raise its rates to the CEI level, is that a fair statement?

A Yes.

{Mr. Lansdale rises from his chair.}

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: He's established that we wrote letters to that effect.

1 Loshing - cross

2 That's something different from whether or
3 not that was our attitude or not.

4 MR. NORRIS: Well, I think that
5 I'm permitted to ask more than just, "Did you
6 send letters?" And I'm trying to identify for the
7 witness what the purpose of my question is:

8 I want to find out if there was any change
9 in this attitude.

10 THE COURT: Go ahead.

11 MR. LANSDALE: You're making the
12 assumption that this was the attitude embodied in
13 the letters, and I object to that.

14 I submit that you must ask the witness --

15 THE COURT: I think the way we get
16 into this, in the absence of a foundation question,
17 namely, "Was there an attitude?" You have to
18 establish what the attitude was, if there was one
19 that he was aware of.

20 {End of bench conference.}

21
22 BY MR. NORRIS:

23 Q Mr. Loshing, is it a fair statement that the letters
24 from Mr. Lindseth in '62 and '63, and Mr. Besse in
25 1965 to Mayor Locher that we have already alluded to

Loshing - cross

represented CEI company policy during those years with respect to interconnection with Muny Light?

A Those were letters that made an offer which was unresponded to.

Q Well, I'm sorry, I didn't ask that question.

THE COURT: Read the question back.

{The last question was read by the reporter.}

A We made a bona fide offer to interconnect under those conditions; that it was our policy.

MR. NORRIS: I request a direct answer to the question, your Honor.

THE COURT: He's responded. He said they made a proposal; that was their policy.

THE WITNESS: Yes.

BY MR. NORRIS:

Q That was your company policy?

A Yes.

Q All right. I just didn't understand your question.

Now, --

A Answer.

Q I didn't understand your answer; I'm sorry.

Now, did there come a time when that company policy changed?

A No; that's always been one of our options, to my

1 Loshing - cross

2 knowledge, because I kept making studies that included
3 that option.

4 Q Is it not a fact that CEI has on more than one
5 occasion refused Muny Light's request for permanent
6 interconnection?

7 A Yes.

8 Q Well, would that --

9 A You're past '68 now.

10 Q Yes.

11 But my question is: Would not a refusal to grant
12 Muny Light a permanent interconnection represent a
13 change in the company policy from what you have just
14 identified during the 1962 to 1965 period?

15 A Yes.

16 Q When did that change of policy first come about?

17 A As I said before, I cannot recall there being any
18 abrupt change in policy occur any date in the period
19 up to, say, 1975, when the interconnection was made
20 operational.

21 Q Can you recall any date prior to 1975 by at least
22 which time the policy had changed?

23 A No; because I remember in '71 discussing -- or some of
24 our people discussing various forms of interconnection
25 with the City of Cleveland.

Loshing - cross

1
2 Q Yes.

3 And is it not a fair statement that in 1971
4 CEI refused an interconnection on a -- permanent
5 interconnection with Muny Light, is that not a fact?

6 A I'm not aware of that refusal.

7 Q Well, your testimony that CEI did refuse a permanent
8 interconnection with Muny Light, what are you thinking
9 of?

10 A Thinking of a permanent interconnection, 138 synchronous --

11 Q I know. But I want to know, if you please, what --
12 at what time are you thinking of when you tell me that
13 CEI did refuse a permanent interconnection with Muny
14 Light?

15 A {After an interval.}

16 Q When did that happen?

17 A In the -- '70, '71.

18 Q And would it not be a fair statement that it happened
19 in July of 1971?

20 A But the refusal was only on the basis of Muny not
21 picking up their end of the --

22 Q Well, we can get to that.

23 But I just want to tie it down.

24 Am I not correct that in July, 1971, CEI refused
25 a permanent interconnection with Muny Light?

Loshing - cross

A I do not recall such a --

Q I'm sorry?

A I do not recall such a refusal.

We refused to continue working on it until they paid a bill.

Q All right.

Now, you tell me when it was that CEI refused a permanent interconnection with Muny Light?

{After an interval.}

A We refused to proceed with a permanent interconnection in 1971 until they paid the bill they owed us for load transfer service.

MR. NORRIS: Your Honor, may I have the question read?

THE COURT: Yes, read the question back.

{The last question was read by the reporter.}

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

THE COURT: Read the rest of that, too, and then approach the bench.

In the meantime, we'll let the jury retire.

Read the answer back, please.

{The last answer was read by the reporter.}

Loshing - cross

THE COURT: All right.

Now, gentlemen, you can stay. We'll let the jury go, and you can argue your motions.

Ladies and gentlemen, I cannot stress overly the importance of my admonition, even though I don't give it to you in full at each recess and at each adjournment.

It is, by the way, important to the progress of the case, the outcome of the case, that you not discuss this case either among yourselves or with anyone else; listen to any radiobroadcast, read any newspaper article, or view any videobroadcast of these proceedings.

You are, ladies and gentlemen, hearing this evidence firsthand. You are the ones that are going to have to judge that evidence; and please keep an open mind until you've heard all of the evidence in this case and my instructions on the law and the application of the law to the facts, and the matter is given to you for your judgment.

So with that, ladies and gentlemen, you are free to retire to the jury room.

Hopefully they have brought the temperature down so that you may view the day's evidence in

1 comfort and leave when you have concluded your
2 examination of the evidence.

3 With that, thank you, ladies and gentlemen,
4 good night, see you tomorrow morning at 8:30.

5 {The jury left the courtroom and the
6 following proceedings were had out of their
7 hearing and presence.}

8 - - - - -

9 THE COURT: Will you get me the
10 exhibits of the day, please {addressing Law Clerk
11 Kurdziel}?

12 {Law Clerk Kurdziel complies.}

13 THE COURT: Plaintiff's Exhibits
14 539, 628, 2059, 345, 371, 753, 2631, and 526, all
15 of which had been admitted at the previous trial,
16 may be permitted to go to the jury.

17 There have been objections to Plaintiff's
18 Exhibit 2400 on the basis that there is something
19 objectionable on the cover page.

20 Please be seated, ladies and gentlemen
21 {addressing the people in the back of the
22 courtroom.}

23 Let me see the cover page.

24 {Exhibit handed to the Court by the Law Clerk.}

25 THE COURT: All right.

1 Will somebody tell me why you are objecting
2 to the cover page?

3 MR. MURPHY: Your Honor, we are
4 objecting to the cover memorandum because it refers
5 to the fact that the information was requested
6 for meetings Mr. Lansdale was having with the
7 Department of Justice.

8 THE COURT: Well, I'm sure that
9 there is not going to be any objection to removing
10 that.

11 MR. WEINER: We can just wipe out
12 the "Department of Justice" because, otherwise,
13 the jury would not know how this got into the
14 possession of Mr. Loshing without the cover
15 memorandum on, and without it, it just looks like
16 a --

17 THE COURT: Well, --

18 MR. MURPHY: That's fine with us.

19 THE COURT: "Jack Lansdale
20 requested the attached customer tabulation for
21 possible use."

22 Strike out the rest.

23 MR. WEINER: Okay.

24 Thank you, your Honor.

25 MR. NORRIS: Fine.

1 MR. NORRIS: Fine.

2 MR. LANSDALE: May I comment on that,
3 your Honor?

4 This memorandum to me is dated August 15th,
5 1973, the data are dated 1971. They were not
6 compiled in response to a question by me, I merely
7 obtained them. And to use the memo to suggest
8 that that's so conveys an erroneous impression.

9 MR. WEINER: It says that you
10 requested the attached customer tabulation.

11 MR. LANSDALE: I sure did request
12 the tabulation, but they didn't make the study for
13 me, it's dated two years before.

14 THE COURT: Here's what it says:

15 "Jack Lansdale requested the attached
16 customer tabulation for possible use."

17 MR. LANSDALE: Mr. Murphy says I
18 shouldn't care.

19 {Laughter.}

20 MR. LANSDALE: I withdraw my comment.

21 THE COURT: And you're out of
22 order. You're infringin upon Mr. Murphy's
23 territory, and he will make the necessary arguments.

24 MR. MURPHY: You tell him, your
25 Honor.

{Laughter.}

THE COURT: What's the other objection?

There is an objection to Plaintiff's Exhibit 2081 as not having been utilized by --

MR. NORRIS: We agreed -- we agreed to hold that.

I'm agreeable to holding that.

THE COURT: All right.

Take the rest of them into the jury --

MR. WEINER: Did you wipe that out, Pat {addressing Mrs. Richards}?

THE COURT: {Continuing} -- while I listen to -- read the last question back to put me back in context.

{The last question and answer were read by the reporter as follows:

"Q Now, you tell me when it was that CEI refused a permanent interconnection with Muny Light?

"A We refused to proceed with a permanent interconnection in 1971 until they paid the bill they owed us for load transfer service."

THE COURT: All right. Give me your objection.

1 MR. LANSDALE: My objection is that
2 the answer is responsive, and Mr. Norris is
3 requesting that the question be reread on the
4 presumed ground that the witness is not being
5 responsive.

6 He was asked if CEI ever refused a permanent
7 interconnection. He said, "Yes."

8 The question is when? We wouldn't go forward
9 unless they paid it.

0 That's the answer that the witness has given,
1 and I submit that it's a responsive answer.

2 MR. NORRIS: I have nothing to say,
3 your Honor.

4 THE COURT: It would seem that
5 it's responsive, perhaps with the exception of
6 having some time frame.

7 MR. LANSDALE: '71 I think was the
8 question.

9 THE COURT: Read the question back.

0 MR. NORRIS: Wasn't there a
1 subsequent question?

2 THE REPORTER: No; that was the last
3 question.

4 MR. NORRIS: I'll start there
5 tomorrow, and I'll establish the time frame if

didn't do it.

THE COURT: It may be there, I think it is.

{After an interval.}

THE COURT: Because I have here in my notes -- I'm sorry, I didn't have my glasses when I was listening to you -- the question, in substance, was: In 1971 did CEI refuse an interconnection with Muny Light?

Then, '70, '71, and he said "Yes".

And then you rephrased -- on your next question picked it up, July, '71.

So it was in the context.

That's all. Thank you, gentlemen.

MR. NORRIS: I'll start there tomorrow morning.

THE COURT: All right.

MR. NORRIS: Oh, your Honor, could we -- I'm sorry -- could we hold you just for one more thing?

THE COURT: Well, yes, you can.

But keep in mind that I have --

MR. NORRIS: Very briefly.

THE COURT: -- a temporary restraining order hearing waiting out here; and I

1 understand that I was fortunate to draw the
2 controllers' strike case.

3 {Laughter.}

4 MR. NORRIS: Ms. Coleman has a
5 comment.

6 MS. COLEMAN: Yes.

7 Your Honor, I just wanted to say we're going
8 to file correspondence on the experts' reports ,
9 that we had mentioned before.

0 THE COURT: All right, fine.
1 Very good.

2 MS. COLEMAN: We won't hold you.

3 {Documents handed to Mr. Lansdale by Ms.
4 Coleman.}

5 THE COURT: Thank you.

6 MR. NORRIS: Thank you, your Honor.

7 {Court adjourned.}

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

Transcript

Thursday, August 6, 1981

KF
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1980

1 THURSDAY, AUGUST 6, 1981; 9:20 O'CLOCK A.M.

2
3 THE CLERK: This is the case of
4 the City of Cleveland versus the Cleveland
5 Electric Illuminating Company, Civil Action
6 C75-560.

7 THE COURT: Call in the jury.

8 {The jury was seated in the jury box and the
9 trial continued as follows:}

0 THE COURT: Good morning. Please
1 be seated, ladies and gentlemen.

2 You may proceed, Mr. Norris.

3 - - - - -

4
5 CROSS-EXAMINATION OF CLEMENT T. LOSHING {Resumed}

6
7 BY MR. NORRIS:

8 Q Good morning, Mr. Loshing.

9 A Good morning.

0 Q Yesterday we agreed that CEI's company policy toward the
1 interconnection with Muny Light during the 1962-1965
2 period was to offer Muny a permanent synchronous
3 interconnection which would allow the full range of
4 power options; but on condition that Muny Light would
5 increase its prices to the level of CEI's prices; is that

Loshing - cross

correct?

A That is correct.

Q And by the way, for the purposes of these questions, can we agree that the term "permanent synchronous interconnection" is the same thing as a "permanent parallel interconnection"?

A Yes.

Q And you confirmed to me that Mr. Lindseth had offered Muny Light an interconnection on those terms in both 1962 and 1963?

A Correct.

Q And Mr. Besse had offered Muny Light an interconnection on those same terms in 1965?

A Yes.

Q Now, are you aware of an offer made by Mr. Besse and Mr. Howley to Muny Light for an interconnection on those same terms on July 19, 1966?

A No, I am not.

Q And, to your knowledge, Mr. Loshing, did CEI ever make the same interconnection offer to Muny Light after the Besse offer of 1965 that you have confirmed?

A No; I'm not aware.

Q Now, I put to you the proposition that by 1968 CEI's company policy towards an interconnection with Muny Light

1 Loshing - cross

2 was to avoid an interconnection so that Muny Light
3 would continue to operate as an isolated system; do
4 you agree with that?

5 A Yes.

6 Q And am I correct that that same policy of avoiding
7 an interconnection between -- and I'm talking about
8 a permanent interconnection --

9 A Yes.

10 Q -- am I correct that CEI's company policy of avoiding
11 a permanent interconnection between Muny Light and CEI
12 continued through 1969, 1970, 1971, 1972, 1973?

13 A Yes.

14 THE COURT: What was that last
15 year?

16 MR. NORRIS: '73.

17 {After an interval.}

18 BY MR. NORRIS:

19 Q Do you want to change your answer?

20 A Yes.

21 Our policy was to avoid an interconnection through
22 all those years for commercial reasons --

23 Q Excuse me.

24 Did you want to change your answer about through
25 1973?

Loshing - cross

1
2 A No.

3 Q Did that policy continue through 1974, Mr. Loshing?

4 A Yes.

5 Q Now, in 1975, there was an interconnection agreement
6 reached between Muny Light and CEI, is that correct?

7 A That is correct.

8 Q And the interconnection became operational, is that
9 correct?

10 A That is correct.

11 Q And that was as a result of an order of the FPC, is
12 that correct?

13 A Not exactly; partially, yes.

14 We could not suffer the public relations aspect
15 of not having an interconnection, and we internally in
16 the company had decided that in the best interests of
17 the citizens of the City of Cleveland we had to proceed
18 with an interconnection; and, again, the proceedings
19 were in the Federal Power Commission.

20 Q But were not the proceedings -- well, am I not correct,
21 that the proceedings were both in the Federal Power
22 Commission and then there were also negotiations?

23 A Negotiations, you're absolutely correct.

24 Q So that the determination that the company made to allow
25 an interconnection in the best interests of the people

1 Loshing - cross

2 of this area was in 1975 when the agreement was
3 reached, is that a fair statement?

4 MR. LANSDALE: I object to that,
5 if your Honor please.

6 THE COURT: Approach the bench.

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

10 MR. LANSDALE: I object to this
11 1975; that's when the interconnection was
12 energized.

13 Mr. Norris knows from the record that in
14 1972, I believe it was, or '73, down at the
15 Federal Power Commission, there was a meeting of
16 the minds about going ahead with a 138 KV
17 synchronous interconnection.

18 For him to suggest to this witness -- to this
19 witness that there was no agreement about this
20 thing until the thing had already been constructed
21 and energized in 1975 I think goes beyond
22 permissible suggestion of an answer.

23 MR. NORRIS: It's my understanding,
24 your Honor, that the negotiations of the
25 interconnection agreement were continuing on into

1 Loshing - cross

2 1975 and that the parties were simply unable to
3 agree on all the terms until that year, and that
4 was the intent of my question.

5 MR. LANSDALE: May I respond to that,
6 your Honor?

7 THE COURT: Yes.

8 MR. LANSDALE: The final agreement
9 on the exact terms of the interconnection is quite
10 a different thing.

11 Agreeing to go ahead with the interconnection,
12 which Mr. Norris knows full well that Mr. Williams
13 agreed to, I believe it was in 1974 before the
14 Federal Power Commission.

15 And, moreover, the evidence -- the record
16 shows that the original suggestion of a draft of
17 an interconnection agreement was sent to Mr.
18 Goldberg in January or February of 1974, and he
19 didn't bother to respond to it until December of
20 1974.

21 Now, for you to suggest to this witness
22 something different I think is going too far, and
23 I object.

24 MR. NORRIS: May I respond to that,
25 your Honor?

Loshing - cross

1
2 THE COURT: Yes.

3 MR. NORRIS: I recall Mr. Goldberg
4 testifying that --

5 THE REPORTER: I can't hear you.

6 MR. NORRIS: I recall Mr. Goldberg
7 testifying that the parties were really very far
8 apart in the year 1974 and on into 1975, until
9 such time as they were able to reach an agreement
0 on some of the major elements of the interconnection
1 agreement.

2 And I don't think you would disagree with me,
3 I don't think, that the terms and conditions were
4 agreed to the interconnection until 1975, is that
5 not correct?

6 THE COURT: Well now, just a
7 minute.

8 That was not your question.

9 The implication that you have left with the
0 jury at this juncture of the case, which you have
1 limited the answers to "yes" or "no," is nothing
2 was done on the interconnection until 1975.

3 MR. NORRIS: If I may respond to
4 that, your Honor?

Loshing - cross

THE COURT: Yes.

MR. NORRIS: The agreement -- I was picking up on an answer that the witness gave me, and I think that if we want to put this into context, if you go back and read the answer back that I had in mind that Mr. Loshing gave me that precipitated the question that we're now discussing, because he said that in the best interests of the people of this area they made a decision to go ahead with the interconnection, and the implication that I got from that was that it was in 1975, and that was the question --

MR. LANSDALE: That's not so.

THE COURT: Wait just a minute.

We have to pick it up before that.

{After an interval.}

THE COURT: Yes. Your question -- your foundation question was:

After 1968 did CEI have a policy to avoid an interconnection?

And his answer was "Yes."

Then you said: Did they follow that policy in 1969, 1970, 1971, 1972, and 1973?

And then he initially said "Yes," then he

1 Loshing - cross

2 hesitated, and you asked him, "Do you want to
3 change your answer?"

4 And then he says -- he started to say --
5 when you cut him off -- "for commercial reasons"
6 I don't know what he was going to say, but you
7 cut him off.

8 And then you asked him again:

9 "Do you want to change your answer?"

10 And he said, "No."

11 Then you asked him: Did it continue through
12 1974?

13 His answer was "Yes."

14 Then you asked him: Did it continue -- no --
15 did the interconnection become operational in 1975
16 as a result of an FPC order?

17 Then he answered -- he gave that long answer.

18 So that's the sequence.

19 MR. NORRIS: There is one other
20 thing, there was another question that you didn't
21 write down: The operational nature of the
22 interconnection came in from the FPC and --

23 THE COURT: I've got it here.

24 MR. NORRIS: And then it was at
25 that point that he gave me the answer, something

1 Loshing - cross

2 about the welfare of the people of the area; and
3 I wanted to have him be specific about when that
4 decision was made.

5 That's really the springboard to the question
6 that I asked.

7 MR. LANSDALE: I would like to
8 respond to that.

9 That all of this complication following, to
0 get a definition of words now of what we know for
1 a fact was; and I would stipulate to the following
2 if you want: . . .

3 That the CEI desired to avoid an interconnection
4 until -- permanent synchronous interconnection
5 throughout.

6 The fact of the matter is -- and you know it's
7 the fact because it's on the record, that in 1972,
8 whether you consider it was under pressure from
9 public opinion or pressure from the Federal
0 Power Commission, or whatnot, that down at the
1 FPC we agreed to go forward with a synchronous 138
2 KV interconnection; and there were later proceedings
3 with the Federal Power Commission in which the
4 FPC finally issued an order that there would be one,
5 and it was a mixed question of our agreement and

1 Loshing - cross

2 the FPC.

3 Now, for you to try to get this witness to
4 say -- and to suggest to him as an answer -- that
5 this is something different from that I think is
6 beyond the point.

7 THE COURT: Of course, your
8 witness shouldn't testify to anything beyond his
9 personal knowledge.

10 Obviously, it was not within his personal
11 knowledge.

12 MR. LANSDALE: It wasn't fair.

13 THE COURT: But that's your
14 witness's fault, that's not his fault.

15 MR. LANSDALE: I know it is; but I
16 submit, your Honor, that he's asking him about
17 company policy, he's asking him about the
18 company's attitude, and for him to suggest an
19 answer that he knows is erroneous --

20 THE COURT: Fine.

21 The matter can be corrected either by Mr.
22 Norris, he may clarify it, or you can clarify it
23 on redirect right after he finishes.

24 MR. LANSDALE: I certainly intend to
25 do so; but I submit that it's objectionable for

1 Loshing - cross

2 counsel to suggest an answer to the witness that
3 he knows is wrong.

4 MR. NORRIS: I really resent that,
5 because --

6 THE COURT: Come on, fellows,
7 I don't want to get into your personal differences.

8 Commenting upon what Mr. Goldberg has said,
9 I went back through my notes here, and his testimony
10 is that these negotiations began in 1973 in
11 August -- before August of '73, went back -- and
12 they continued all the way through that year.

13 February meeting in -- on February 4, 1974,
14 additional negotiations and agreements, and the
15 final terms were negotiated, that was after the
16 interconnection had been built in 1975.

17 But let's proceed, gentlemen, I have ruled.

18 MR. NORRIS: Your Honor, if there
19 is any further question about this, at the break
20 I will ask Nick to go back to the question that
21 Mr. Loshing answered that I say was in my mind when
22 I asked the question, but I don't want to take
23 the time to do that now.

24 THE COURT: Proceed.

25 {End of bench conference.

1 Loshing - cross

2 - - - - -

3 THE COURT: You may answer as to
4 his personal knowledge.

5 MR. NORRIS: May we have the
6 question read back.

7 THE COURT: If you know, as
8 opposed to conjecture.

9 You will be permitted to go into that in
10 redirect examination. You may proceed.

11 MR. NORRIS: I'm just waiting for
12 the court reporter to read the question -- your
13 Honor, could the Court reporter read two questions
14 back, so I get the context?

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

17 "Q Now, in 1975, there was an
18 interconnection agreement reached between Muny
19 Light and CEI, is that correct?

20 "A That is correct.

21 "Q And the interconnection became
22 operational, is that correct?

23 "A That is correct.

24 "Q And that was as a result of an order
25 of the FPC, is that correct?

1 Loshing - cross

2 "A Not exactly; partially, yes.

3 "We could not suffer the public relations
4 aspect of not having an interconnection, and we
5 internally in the company had decided that in the
6 best interests of the citizens of the City of
7 Cleveland we had to proceed with an
8 interconnection; and, again, the proceedings were
9 in the Federal Power Commission.

10 "Q But were not the proceedings --
11 well, am I not correct, that the proceedings were
12 both in the Federal Power Commission and then
13 there were also negotiations?

14 "A Negotiations, you're absolutely
15 correct.

16 "Q So that the determination that the
17 company made to allow an interconnection in the
18 best interests of the people of this area was in
19 1975 when the agreement was reached, is that a
20 fair statement?" }

21 THE COURT REPORTER: And that is where
22 Mr. Lansdale objected.

23 THE COURT: I will sustain the
24 objection.

25 MR. NORRIS: You are sustaining

Loshing - cross

the objection?

THE COURT: Yes, I am.

BY MR. NORRIS:

Q Mr. Loshing, you mentioned that the company, namely, CEI, could not suffer the public relations problem of there being no interconnection, and your language was, "in the best interests of the people of Cleveland there was an agreement to go forward."

My question is, when did the company make that determination that you have told us about?

A It was not an interconnection. It was the blackouts we could not suffer.

Q I'm sorry. All right.

Tell me when you made that determination?

A I didn't make them. This started welling up in 1969 and 1970 and 1971 during the emergency that Muny was suffering, so the policy was an evolutionary policy.

Q So am I correct what you are saying is that in 1970 when the load transfer service was commenced that one of the contributing factors to that was the company's determination that there should not be further blackouts in this area; is that a fair statement?

A That is correct.

Q Now, let me ask you another question:

1 Loshing - cross

2 Ever since you have been with this company, Muny
3 Light and CEI have been in head-to-head competition in
4 Cleveland; is that correct?

5 A Over the years.

6 Q Is that true from 1948 forward?

7 A YES.

8 Q That is when you came to the company?

9 A Yes.

10 Q Would you agree that from time to time the level of
11 that competition could be characterized as vigorous?

12 A Yes.

13 Q Would you agree that Muny Light's lower rates represented
14 a significant competitive advantage in favor of Muny
15 Light?

16 A Yes.

17 Q In terms of Muny Light's service, Mr. Loshing, what
18 would you consider to have been the greatest problem
19 that Muny Light had in rendering service?

20 A Continuity of service, reliability.

21 Q So that Muny Light had lower rates going for it, and
22 one of the things going against it was poor reliability;
23 is that correct?

24 A That is right, self-induced.

25 Q I am sorry?

1 Loshing - cross

2 A Self-induced.

3 Q Thank you.

4 Now, the interconnection offers made by Mr.
5 Lindseth and Mr. Besse in the 1960's were made in the
6 hopes of eliminating Muny's competitive advantage from
7 the rates; is that right?

8 A That is part of the objective, yes.

9 Q And with regard to CEI's attempt to get Muny Light's
10 rates up to the CEI level, CEI made its own decision,
11 based upon its own self-interest; is that a fair
12 statement?

13 A It was a business decision, yes.

14 Q And CEI felt that it was a legitimate business
15 decision so as not to permit Muny Light to have a
16 competitive advantage; is that a fair statement?

17 A Yes.

18 Q And would the opposite of that be true, similarly,
19 CEI felt it was legitimate to make its business
20 decision to gain whatever competitive advantage it could
21 over Muny Light?

22 A May I have the question?

23 {Question read.}

24 A Yes.

25 Q Pardon me?

1 Loshing - cross

2 A Yes.

3 Q And the business decision that CEI made on the matter
4 at hand; that is, on the matter of the permanent
5 interconnection between CEI and Munny Light, was made
6 on the same basis so as to gain whatever competitive
7 advantage CEI could; is that a fair summary?

8 A Yes.

9 MR. NORRIS: Mrs. Richards, would
10 you give Mr. Loshing PTX-603, please.

11 THE COURT: What is the number?

12 MR. NORRIS: 603.

13 {After an interval.}

14 Q Do you have that, Mr. Loshing?

15 A Yes, I do.

16 Q And you are aware this letter is from Mayor Locher to
17 Mr. Besse, dated February 17, 1977?

18 A It has been a long time. Let me glance through it.

19 {After an interval.}

20 A Yes; this is the letter.

21 Q And you are aware that Mayor Locher stated that the
22 City had long desired an interconnection between Munny
23 Light and CEI?

24 MR. LANSDALE: Objection.

25 THE COURT: Approach the bench.

1 Loshing - cross

2 - - - - -

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

5 MR. LANSDALE: We are going again
6 into the process of reading Mayor Locher's letter
7 to Mr. Besse.

8 We have Mayor Locher here and Mr. Besse,
9 and you haven't even established that this witness
10 saw it at the time.

11 MR. NORRIS: It is preliminary
12 only.

13 THE COURT: Wait a minute. If it
14 is preliminary, you have to lay a foundation.
15 Before he is able to testify to this, you have to
16 establish that he knew of it at the time the
17 letter was written and not now and sometime
18 subsequent.

19 MR. NORRIS: I will ask him
20 directly. I am not doing what you are concerned
21 I am going to do.

22 THE COURT: He already testified
23 that he knows of the policy, knew of the Besse
24 letter to Locher, and this is Locher's response,
25 I would assume. All right. Go ahead.

Loshing - cross

MR. LANSDALE: I object.

{End of bench conference.}

- - - - -

THE COURT: You may proceed if
you fix the time.

BY MR. NORRIS:

Q Let's do it this way, Mr. Loshing:

When did you first become aware that the City of Cleveland desired a permanent interconnection between Muny Light and CEI, just roughly. I don't care to be precise.

A My first direct recollection of a request -- my first recollection of a request was in the 1969 period, other than this letter, which is a response to our offer for another interconnection.

Q The 1969 offer that you are referring to, if I am not mistaken, was when Mr. Lester and Mr. Sener met with the Muny Light executives in May of 1969; is that what you are referring to?

A It was not this meeting, but yes.

Q It was not that meeting?

A It was that time frame, yes.

Q Isn't it true that those gentlemen reported to you what went on at the May 29th meeting?

Loshing - cross

A Yes.

Q Isn't it true that those gentlemen reported to you what went on at the May 29th meeting with the Muny Light executives?

A Yes.

Q And would that report have been rendered fairly soon after the meeting took place?

A Yes.

Q So at least as of the end of May of 1969, you were aware that the City wanted a permanent interconnection between Muny Light and CEI?

A Yes. That is consistent with what I said.

Q Yes; and is it your testimony that prior to that time you were not aware that the City wanted a permanent interconnection between Muny Light and CEI?

A Yes.

Q Would it be a fair statement, Mr. Loshing, that any electric power company that has reliability as its major problem -- and I don't care how big or how many generating units -- but any electric power company that has been totally isolated could improve its reliability situation by interconnecting with one or more of the neighboring power companies?

Loshing - cross

MR. LANSDALE: Objection.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: This witness is the Treasurer of the company. He testified that he relies on the engineering people for this sort of thing.

Now, to separate himself because of some impression in the record that he may have had from technical people, I think that should not be permitted in cross-examination, and I object.

MR. NORRIS: May I respond to your objection?

I would respond that it doesn't take a great deal of engineering expertise to be able to respond to the question that I had put.

It is a very general question.

THE COURT: I will sustain the question. It is obviously objectionable.

If you qualify him as a technical expert, you may proceed.

{End of bench conference.}

- - - - -

1 Loshing - cross

2 THE COURT: You may proceed if
3 you can qualify the witness as a technical expert.

4 BY MR. NORRIS:

5 Q Mr. Loshing, you mentioned yesterday from time to
6 time there were discussions in the MELP Committee
7 about the subject of interconnection between Muny Light
8 and CEI, and in those discussions -- I would like to
9 know whether you participated in those discussions or
0 whether you just were a listener?

1 A I was just a listener.

2 I was the money man in those proceedings.

3 Q And can you place -- strike that:

4 You told us yesterday that the MELP Committee
5 was operational as a communicating and coordinating
6 body in late 1967 and early 1968, and that is at least
7 a full year prior to the May, 1979 period that you have
8 just referred to.

9 My question is, in any of those MELP Committee
10 discussions that you were a listener at, did you hear
11 the discussion about the subject of interconnection
12 between Muny Light and CEI?

13 MR. LANSDALE: Objection.

14 THE COURT: Sustained. This is
15 the very same thing that we just discussed up

1 Loshing - cross

2 here, Mr. Norris.

3 You are talking about the President of the
4 company, and you are trying to elicit technical
5 questions.

6 MR. NORRIS: I'm just asking
7 whether he heard a discussion about interconnections
8 prior to the May 29th, 1969 date, that he is
9 giving us, and I want to know when he heard the
10 first discussions.

11 MR. LANSDALE: I object.

12 THE COURT: Sustained.

13 Please proceed in a proper manner.

14 BY MR. NORRIS:

15 Q Mr. Loshing, after you became aware that the City was
16 entering into a permanent interconnection with CEI,
17 what were the City's options insofar as you were aware?

18 I will withdraw that. That is not a clear
19 question.

20 A That is right.

21 Q We agree on that.

22 After you became aware of the City's desire for an
23 interconnection with CEI, is it a fair statement that
24 you related that interest in an interconnection to the
25 City's reliability problem?

1 Loshing - cross

2 A Yes.

3 Q In your view, what were Muny Light's options for
4 dealing with the reliability problem?

5 MR. LANSDALE: I object.

6 THE COURT: Sustain the objection.

7 We are right back in the technical area again...

8 MR. NORRIS: If he has an opinion,
9 your Honor.

10 THE COURT: Approach the bench.

11 We have gone through this before.

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

15 THE COURT: He cannot express
16 an opinion unless he is qualified as an expert in
17 the field, and you have not attempted to qualify him
18 as an expert in the field.

19 He is qualified now as the Treasurer of the
20 Company.

21 You are trying to place to him questions
22 which involve operational and engineering
23 decisions.

24 I don't know how I can make that any more
25 explicit.

1 Loshing - cross

2 MR. NORRIS: It seems to me that
3 one of the top officers of the company that was
4 responsible for most of the contents of this
5 1968 MELP study, PTX-2631, that includes
6 comment after comment with respect to the
7 options that are available, and it seems to me
8 that that is not such a precisely technical
9 question that this top executive of CEI should
10 not be able to be asked if he has an opinion.

11 MR. LANSDALE: May I respond?

12 THE COURT: Yes.

13 MR. LANSDALE: This man testified
14 that his is a staff operation, that he responds
15 to requests or studies within his field from
16 others, and that he was a collecting agent.

17 Now, I submit that he is not in a position
18 to be interrogated about these decisions.

19 You have got in your witness list of
20 actors in this thing, you have got the technical
21 people, and I submit that questions of this
22 nature have to be confined to the people that
23 know about it.

24 THE COURT: Very well. I will
25 sustain the objection.

1 Loshing - cross

2 MR. NORRIS: All right. I will go

3 on.

4 {End of bench conference.}

5 - - - - -

6 THE COURT: You may proceed.

7 MR. NORRIS: Mrs. Richards, would

8 you give Mr. Loshing PTX-539 and -538, please.

9 {After an interval.}

10 BY MR. NORRIS:

11 Q Now, I address your attention to PTX-539, please.

12 A Yes.

13 Q Is that the memorandum that you referred to earlier
14 that gave you information about the meeting between
15 Mr. Lester and Mr. Sener and Munny Light executives in
16 May of 1969?

17 A Yes.

18 Q And are you --

19 THE COURT: Are we talking about
20 539?

21 MR. NORRIS: Yes, your Honor.

22 THE COURT: Now, what is the
23 question again, please.

24 {Last question and answer were read by the
25 reporter.}

Loshing - cross

BY MR. NORRIS:

Q Do you have any reason to disbelieve the statements made in PTX-539?

A I have no reason to disbelieve it.

Q Now, in the MELP Committee was there any discussion of the May 29th, 1969, meeting between Mr. Lester and Mr. Sener and the MELP executives?

A I cannot recall specifically. It was part of the bevy of information that we received.

Q All right.

Apart from the MELP Committee then, do you recall any discussions of the contents of PTX-539 in CEI, whether in the MELP Committee or elsewhere?

A Yes.

Q All right.

If you would tell us about those discussions; can you recall when they took place?

A Subsequent to this, to this May 29 period.

Q And who was involved in the discussions?

A Mr. Bingham, Mr. Sener, and Mr. Lester.

Q -- and yourself?

A Yes, or through notification by memo.

Q Well, I am interested in discussions that you have knowledge of, and let me ask you about discussions

Loshing. - cross

that you participated in.

How many discussions did you participate in about this subject matter, as you recall?

A I can't recall specifically how many, but my participation would have been from the financial and not the rate-making side.

Q Let me ask you this, Mr. Loshing.

Without pinning you down to how many discussions or over what period of time, what was the essence of the discussions that you participated in with respect to the subject matter of PTX-539?

A I got a call specifically on any of these -- this is on "load relief," and I was not, to my recollection, in any of those engineering meetings which were very technical.

We were trying to meet an emergency need of the City of Cleveland, and those were technical discussions beyond my knowledge.

MR. NORRIS:

May I have the

question read again?

{Record read.}

THE COURT:

That is responsive

to the question. Proceed.

Q Mr. Loshing, I thought you told me that you had

1 Loshing - cross

2 participated in some discussions with respect to the
3 subject matter of this memo. Did I not hear that
4 correctly?

5 A I believe not. I said it was with respect to the rate
6 side.

7 Q Well, whatever it was with respect to, I wanted you to
8 kindly give me the concensus of any other discussions
9 about the subject matter of this memo that you yourself
10 participated in?

11 A I cannot recall being in any meetings on load transfer.

12 Q Is it your testimony that you participated in no
13 discussions, Mr. Loshing, with respect to the content
14 and the subject matter of PTX-539; is that your
15 testimony?

16 A No, sir.

17 Q Well, please tell me.

18 A I was not at any meetings.

19 THE COURT: Just a moment. One
20 at a time, please, gentlemen.

21 Now, go back and read the last question.

22 {Record read.}

23 THE COURT: Had you finished your
24 answer?

25 A I was not at any meetings with outside people on this

Loshing - cross

subject; and my only function was the financial rate aspect of the meetings, that load pickup requirement that was the subject of this memo.

Q: I am not asking you, sir.

THE COURT: Wait a minute.

Read the record.

{Record read.}

MR. LOSHING: I am not asking you about meetings with outside people, Mr. Loshing.

You have told me that you did participate in discussions with respect to the subject matter of this memorandum, and I would like you to kindly tell me what the nature of those discussions was.

A Were.

Q No; what the nature was.

A Determining how to price out the activities that we were undertaking, that of picking up load transfer at the various stations, and the facilities involved, and how we would price out compensation, fair compensation for that function.

Q Who did you have these discussions with?

A Messrs. Beingham and Lester.

Q And Mr. Sener?

A Not on the rate side, other than he was supplying us

Loshing - cross

with the engineering facts and the facilities involved.

Q So you had discussions with Mr. Sener about this same subject matter?

A In a joint meeting with Messrs. Bingham and Lester, who were the experts.

Q And Mr. Sener was supplying the engineering input?

A That is correct.

Q And did Mr. Sener describe to you the nature of the meeting with the Muny Light's executives on May 29, 1969?

A I don't recall.

Q Was there any engineering report made in or about May, 1969, by the engineering element of the company with respect to the subject of interconnection between Muny Light and CEI?

A There may have been. I have no direct knowledge of it at this point.

Q Were there any financial studies made in the May to June period, 1969 time frame with respect to the subject of interconnections between Muny Light and CEI?

A Yes.

Q And who made those financial studies?

A It would have been in my area, either George Moore or

Loshing - cross

Charlie Chopp.

Q Who is Mr. L. O. Beck?

A Larry Beck was a mechanical engineer. In the production element at that time.

Q Now, would Mr. Beck have made any financial studies?

A No. He would have made a cost study.

We have a word nuance here.

He would be the one that would price out the energy costs, hour by hour.

Q Would Mr. Beck have been a civil engineer, if you know?

A I do not know, but he is an engineer.

Q But the function that he was performing in the company had to do with pricing out rates?

A Pricing out costs of energy, hour by hour.

It was an adjunct to his normal responsibility.

Q Mr. Beck would not have produced a civil engineer's report or study on the subject of the interconnection between Munny Light and CEI?

MR. LANSDALE: Objection.

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: Objection. I don't

1 Loshing - cross

2 know what "civil engineering" means.

3 Can't we make some kind of a distinction
4 between civil engineer and mechanical engineer?

5 THE COURT: If he knows, he may
6 answer.

7 {End of bench conference.}

8
9 THE COURT: You may answer if you
10 know. Read the question.

11 {The pending question was read by the court
12 reporter as follows:}

13 "Q Mr. Beck would not have produced a
14 civil engineer's report or study on the subject
15 of the interconnection between Munny Light and
16 CEI?"}

17 A I would not know at this time.

18 Q Did Mr. Beck work in the Treasury Department?

19 A No.

20 Q What element did he work in?

21 A I believe it was the Mechanical Engineering Department
22 at that time or the Power Production. He is one of
23 our 5,000 employees.

24 Q And was Mr. Williams in charge of the engineering
25 element that Mr. Beck worked in in 1969?

Loshing - cross

A Probably, yes.

Q Now, you are aware -- well, excuse me.

Have you told us everything that you can recall about the discussions which you yourself participated in with respect to the City's interest on May 29th, 1969, in having a permanent interconnection with CEI?

A Yes.

Q Are you aware of Muni Light's request for a permanent interconnection with CEI in January of 1970?

A I am trying to get my time frame straight here.

I cannot recall.

MR. NORRIS: Mrs. Richards, would you give Mr. Loshing PTX-1488.

{After an interval.}

Q Mr. Loshing, I call your attention to PTX-1488, which is already in evidence.

Have you seen that letter before?

A Yes. This is the letter for a temporary tie-in, not an interconnection at load transfer.

Q Addressing your attention to the second page of that letter, is it not something a little bit more than you have just described?

A It is a wish or a hope. May I quote?

Q You may.

Loshing - cross

1
2 A "In addition the City wishes" -- this is the first
3 page, where it talks about the business:

4 "Let's bail them out and get load to them to keep
5 the City from being blacked out," and then the
6 second-last sentence it says:

7 "In addition the City wishes to memorialize its
8 understanding with CEI in this temporary tie-in
9 arrangement by the first of a three-phase project
10 which when completed will provide a permanent tie-in."

11 And that is an expression of the desire, yes.

12 Q And does not the Mayor continue with one more
13 sentence?

14 A "The City understands further to this and CEI
15 pledges good faith and commits itself to continuing
16 negotiations with the City of Cleveland in order to
17 effect such a permanent tie-in between our
18 respective facilities," and that is a correct
19 statement.

20 Q That is correct?

21 A Yes.

22 Q Now, my question is, the date of that letter is
23 January 15, 1970?

24 A Yes.

25 Q Now, I would like to know whether or not there were any

Loshing - cross

discussions in the MELP Committee with respect to the subject matter of the January 15, 1970, letter that you just read to the jury?

A There must have been. I cannot recall specifically.

Q Well, how do you know that there must have been?

A Because as part of our recognition of needing to help the citizens of Cleveland out, as opposed to the Municipal Light Plant, we had to look down the line to a longer-range solution.

Q Did CEI make a response to the request for permanent interconnection set forth in the January 15, 1970 letter, to your knowledge?

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

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

THE COURT: We are right back where we were. Can't you anticipate the objections?

MR. NORRIS: If your Honor please, counsel knows that in January, January the 20th, 1970, the response was made, and they entered into a contract, and counsel knows that this witness

Loshing - cross

did not participate in these negotiations, and I object to this continuing effort --

MR. NORRIS: But Mr. Lansdale --

MR. LANSDALE: Just a minute. I am entitled to make my statement.

THE COURT: Finish your statement.

MR. LANSDALE: Counsel knows exactly what the facts are as they are on the record and in evidence, and the attempt to interrogate this witness and test his recollection about these things is beyond the pale, and I object to it.

This witness has not participated in these things. In fact, it has been established that he did not, and I object to this interrogation.

MR. NORRIS: At this time of this letter, the MELP Committee had been in operation at least two years, and this gentleman said at one of the weekly meetings, and sometimes monthly, he participated in the discussions about the subject matter, and I have no intention of asking him about the negotiations that he did not participate in, but to ask a senior executive officer of this company a simple question, "Did CEI respond," and I think there is nothing wrong

1 Loshing - cross

2 with that.

3 THE COURT: Mr. Norris, this letter
4 is Mr. Howley's letter to Stefanski -- or rather,
5 Mr. Stefanski's letter to Mr. Howley?

6 MR. NORRIS: Yes.

7 THE COURT: He didn't participate
8 in that letter. You can ask him if he responded
9 to it.

0 I will sustain the objection. Let's proceed.

1 {End of bench conference.}

2
3 THE COURT: Sustain the objection.

4 Let's proceed in the proper manner.

5 BY MR. NORRIS:

6 Q Do you recall participating in any discussions at any
7 time within CEI with respect to the subject matter
8 contained in Mr. Stefanski's letter to Mr. Howley of
9 January 15, 1970?

0 A This letter, no.

1 Q What do you mean to convey by that? Was there something
2 in your answer --

3 A Your loose question was the subject matter in the letter.

4 There may have been a response which I was not a
5 party to, and this was Mr. Howley to Mr. Stefanski, and

1 Loshing - cross

2 it was a legal question, and I was not privy to any
3 of the correspondence.

4 Q I am sorry if I misspoke. I did not ask for you to
5 respond.

6 THE COURT:

Mr. Norris and Mr.

7 Loshing, please -- let's go back and read the

8 pivotal question, which is about three questions
9 back.

10 We are going into this dialogue, and
11 gentlemen, you cannot do that.

12 {Record read by the court reporter.}

13 THE COURT:

All right. Place

14 another question. Listen to the question, Mr.

15 Loshing, and if you don't understand, I am

16 sure Mr. Norris will rephrase it, and be

17 responsive to the question. Let's proceed.

18 BY MR. NORRIS:

19 Q Did you participate in any discussions within CEI
20 dealing with the subject matter of a three-phased
21 project between CEI and the City which, when
22 completed, would provide a permanent tie-in?

23 A Yes.

24 Q What was the nature of those discussions?

25 THE COURT:

Let's get the

Loshing - cross

approximate time first.

Q All right. Tell me when those discussions took place?

A The period 1970 through 1973.

Q Well, what was the first discussion that you remembered?

A In this latter time frame, February of 1970, and my participation was in getting the rates established for this service.

Q Mr. Loshing, do you remember a discussion that you had in December of 1969 with Mr. Bingham on this same subject matter?

A Yes.

Q All right.

We'll come back to this later.

I'm asking you for your discussion on the subject matter of a three-phase project that, when completed, would lead to a permanent interconnection between CEI and Myny Light. I would like to know, did you have discussions in the company after January, 1970 that you can remember?

A Yes.

Q Were there many discussions?

A We were making constant studies, they were not necessarily discussions.

Q I want discussions:

1 Loshing - cross

2 Were there many discussions?

3 A Yes.

4 Q Did you ever discuss them with the Chairman of the
5 Board?

6 A Yes.

7 Q And who was that at that time?

8 A 1970, that was just about the time of the change, it
9 was either Mr. Rudolph or Mr. Besse.

0 Q Did you discuss this subject matter with the President
1 of the company?

2 A Yes; but only in a staff position, not --

3 Q What was the circumstance that caused this discussion
4 to take place: Was it in a meeting of some kind?

5 A Yes.

6 Q What kind of a meeting was it?

7 A A Munny Light meeting, how to proceed --

8 Q A MELP Committee meeting?

9 A Could have been.

0 Q And these were weekly meetings, is that correct?

1 A Not necessarily, no.

2 Q All right.

3 Tell us the essence of the discussion that you had
4 on the subject of the three-phase project that, when
5 completed, would lead to a permanent interconnection

1 Loshing - cross

2 that you participated in subsequent to this letter of
3 January 15, 1970?

4 A My function was always to price out the service and to
5 evaluate the alternatives.

6 Q Mr. Loshing, I'm sorry, I'm asking you, what was the
7 essence of the discussions that you participated in,
8 and you tell me what your function was.

9 I'd like to know what the essence of the
10 discussions was?

11 A I cannot recall. It was --

12 Q You can't recall? . . .

13 A No.

14 Q Okay.

15 MR. NORRIS: Would you hand the
16 witness PTX-2631, please.

17 {Exhibit handed to the witness by Mrs.

18 Richards.}

19 BY MR. NORRIS:

20 Q Now, Mr. Loshing, this is the exhibit that you testified
21 yesterday either you or persons under you had supplied
22 most of the contents for; do you recall that?

23 A I did not say that. I said we supplied several of
24 the exhibits, but the bulk of the facts were picked up
25 from our Fact Book.

1 Loshing - cross

2 I have a recollection of this exhibit.

3 MR. NORRIS: Your Honor, I would
4 like a moment, please.

5 THE COURT: Yes.

6 MR. NORRIS: Would this be a good
7 time to take a break? Because I would like to find
8 a record of yesterday's discussion.

9 THE COURT: Very well.

10 Ladies and gentlemen, please, during the
11 recess, adhere to the Court's admonitions not to
12 discuss the case either among yourselves or with
13 anyone else; keep an open mind until you have heard
14 all of the evidence and the Court's instructions
15 on the law, and until such time as the matter is
16 submitted to you for your judgment.

17 With that, we'll take a short recess.

18 {Recess taken.}

19 THE COURT: Please be seated.

20 MR. LANSDALE: Your Honor, may I
21 discuss a brief matter with you?

22 THE COURT: Approach the bench.

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

Loshing - cross

1
2 MR. LANSDALE: I have concluded that
3 I should make objection to the line of questioning
4 that we are embarking on, that is to say,
5 probing this witness as to discussions he heard
6 in meetings among company personnel respecting
7 this matter in the year 1970 on the ground that
8 this is prior to the damage period.

9 The most that this could be admissible for
0 is the question of intent, which we have been
1 through this 1970 episode and numerous documents
2 on.

3 There are witnesses on the witness list who
4 have already testified who were in decision-making
5 positions at the time, and I submit that probing
6 this witness as to discussions among staff
7 personnel concerning this thing is not relevant
8 nor probative to establishing -- it's repetitious.

9 As to the ground of intent, it's before the
0 statutory period and no liability can be
1 predicated on it; and I submit that this whole
2 line of inquiry as to the discussions that were
3 taking place is not -- is irrelevant and should
4 be --

5 THE COURT:

Mr. Norris?

1 Loshing - cross

2 MR. NORRIS: Mr. Loshing has
3 testified to things that I am hearing for the
4 first time, --

5 THE COURT: He certainly isn't
6 testifying to anything that I haven't heard more
7 than once before, --

8 MR. LANSDALE: I --

9 THE COURT: Wait a minute.
10 Finish your statement.

11 MR. NORRIS: Yes, I would like to.

12 THE COURT: All right.

13 MR. NORRIS: I don't want to rile
14 the Court, --

15 THE COURT: You aren't riling
16 me at all.

17 MR. NORRIS: But I must put on the
18 record the fact that Mr. Loshing is talking about
19 discussions at the MELP Committee.

20 If we had taken Mr. Loshing's deposition,
21 this is the sort of thing that would have come
22 out and I wouldn't have to be doing it for the
23 first time in front of the jury.

24 And it does seem to me that the information
25 that he is testifying about, discussions within

1 Loshing - cross

2 the company with respect to the subject of
3 interconnection, those discussions are highly
4 relevant, and I have every intention -- unless
5 the Court prohibits me from doing it -- of
6 asking him what those discussions were, who
7 was involved; because if there are admissions
8 that have been made that I don't know anything
9 about, I am entitled to elicit that testimony,
10 and that is the purpose of this line of
11 questioning, your Honor, and I just do not
12 understand Mr. Lansdale's suggestion that this is
13 objectionable.

14 THE COURT: I don't understand
15 the significance of your statement concerning the
16 City's failure to take Loshing's deposition. I
17 mean, that is not my concern, that's your
18 concern.

19 MR. NORRIS: I'm renewing my
20 concern that we were not permitted to take --

21 THE COURT: That's what I thought
22 you were doing; and we have had the Court's
23 ruling on that, let's not get into that aspect
24 at this trial again, when you had every opportunity
25 to take depositions if you had petitioned the

1 Loshing - cross

2 Court to do so.

3 The City instead took to set up a condition
4 for taking further discovery without consulting the
5 Court; but apart from that, Mr. Norris, we have
6 been here since -- we started at 9:15; I have
7 gone over my notes concerning this man's
8 testimony this morning, and everything that you
9 have gotten into or attempted to get into has
10 been in the record not once, but at least a
11 couple of times. It's repetitious, it's
12 cumulative, and it was testified to by the
13 principals involved.

14 I don't know where you're going. Certainly
15 you are entitled to cross-examine this man if you
16 do it in a proper manner; and certainly you are
17 entitled to cross-examine him concerning any
18 discussions of the MELP Committees if it goes to
19 intent. But it appears to me that all you're doing
20 is trying to elicit from him those matters which
21 already are in evidence.

22 MR. NORRIS: Your Honor --

23 THE COURT: Now, let's proceed.

24 I'm finished; I'm not going to engage in
25 further dialogue, gentlemen.

1 Loshing - cross

2 Bring in the jury.

3 MR. NORRIS: Your Honor, I'm going
4 to request that the reporter read the last question
5 and answer --

6 THE COURT: Read the last question --

7 MR. NORRIS: I mean, when the jury
8 comes back, I'm going to request that that be
9 read for continuity purposes.

0 THE COURT: Read it now, let's
1 hear it.

2 Read the question back, let's not waste any
3 time.

4 Read the question for Mr. Norris, why wait
5 till the jury comes in?

6 We don't have to wait for them. Read the
7 question and read the answer.

8 {The last question and answer were read by
9 the reporter while the jury was entering the
10 courtroom as follows:

11 "Q Now, Mr. Loshing, this is the exhibit
12 that you testified yesterday either you or persons
13 under you had supplied most of the contents for;
14 do you recall that?

15 "A I did not say that. I said we

1 Loshing - cross

2 supplied several of the exhibits, but the bulk
3 of the facts were picked up from our Fact Book."}

4 THE COURT: Proceed.

5 BY MR. NORRIS:

6 Q Mr. Loshing, let me ask you whether or not you recall
7 going over this with me yesterday, and whether or not
8 you recall these questions and these answers.

9 MR. NORRIS: I'm reading at
10 Transcript 13,033, starting at line 13:

11 "Q Mr. Loshing, do you have at your
12 place up there PTX-2631?

13 "A Yes, I do.

14 "Q Would you look at that, please.

15 "Are you able to identify that exhibit?

16 "A I saw it once before, the last time
17 that I testified.

18 "Q Well, is it a fair statement that
19 the exhibit contains, that is, the substance --
20 strike that.

21 "It is not an agreement.

22 "Let me start over.

23 "A Okay.

24 "Q Is it a fair statement that PTX-2631
25 is a summary of some of the work done in 1967 and

Loshing - cross

1968 by the MELP Committee?

"A It contains portions of work that I recognize.

"Q And is it not a fact, Mr. Loshing, that either you or people under you did most of the work that is set forth in that document?

"A No, sir. We are responsible for the table on page 3, the statistics on the wards on page 2, but the bulk of the verbiage is really foreign to me.

"Q Were you through answering?

"A Yes.

"Q Let me ask you if you were not asked this question and gave this answer last September in this courtroom -- and this is with reference, Mr. Loshing, to this exhibit.

"Did you participate in the summaries that are summarized or set forth in that exhibit?

"A Again, me or people under my direction did most of the work. The specific form and the writing of it is not my recognition, but the content, generally, is lifted from other studies we had done. The organization of these is new to me.'

1 Loshing - cross

2 "Did you give that answer to that question?

3 "A Right."

4 Do you recall those questions and those
5 answers being given?

6 {Mr. Lansdale rises from his chair.}

7 THE COURT: Approach the -- let
8 the witness answer.

9 Mr. Norris, there is nothing inconsistent
10 with what you have just read back and what he has
11 answered before.

12 You may answer the question.

13 THE WITNESS: May I have the
14 question?

15 THE COURT: Read the question
16 back -- did you give those answers -- were you
17 asked those questions and did you give those
18 answers?

19 THE WITNESS: Yes, I did.

20 THE COURT: Thank you.

21 Let's proceed.

22 MR. NORRIS: Thank you.

23 BY MR. NORRIS:

24 Q You see in the second paragraph on the first page of
25 this exhibit the reference to "Burns & Roe"?

1 Loshing - cross

2 A Yes.

3 Q Who were Burns & Roe?

4 A They are a consulting outfit, to my knowledge, that
5 has been hired from time to time by the Municipal --
6 by the City of Cleveland.

7 Q And it's your opinion that Burns & Roe was a
8 competent consulting firm, is that correct?

9 A I have no knowledge.

10 Q Mr. Loshing, do you recall your deposition having
11 been taken on June 13, 1975 in the related proceeding?

12 A Yes.

13 Q Let me ask you if you recall these questions and
14 these answers at that deposition?

15 MR. NORRIS: Mr. Lansdale, I'm

16 reading at page 53, starting at line 18.

17 BY MR. NORRIS:

18 Q "Q Who were Burns & Roe?

19 "A Burns & Roe are a consulting firm, quite competent,
20 who were hired by the City and, if I'm not confused on
21 the time frame here, they were brought in at the
22 behest of the City of Cleveland to look at the
23 future of Munny Light's program as to whether it
24 should expand, and in what way to expand their
25 general capacity. That is what I'm talking about

1 Loshing - cross

2 with respect to the engineering report."

3 Do you recall that question and that answer?

4 A Now that you recall it for me, yes.

5 Q I'm sorry?

6 A Yes, I do now recall it.

7 Q Thank you.

8 Did CEI have a hard time getting ahold of the
9 Burns & Roe report that is mentioned in the second
0 paragraph?

1 MR. LANSDALE: I object, if the
2 Court please.

3 THE COURT: Approach the bench.
4 - - - - -

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

7 MR. LANSDALE: In spite of our
8 frequent objections, I object to this witness
9 being interrogated about this memorandum.

0 It is not his memorandum, and it is perfectly
1 clear that he doesn't recognize the verbiage that
2 he didn't write, he says he recognizes portions
3 of it, and to ask him about various things
4 stated in the memorandum as such is objectionable,
5 and I object to it.

1 Loshing - cross

2 MR. NORRIS: Your Honor, if I may:

3 The Court has already ruled on this, Mr.
4 Lansdale, you raised this last night, --

5 MR. LANSDALE: I sure did.

6 MR. NORRIS: -- and I'm not departing
7 from the Court's ruling.

8 I object to your constant interruptions of
9 the cross-examination. I didn't do it during your
10 cross-examination of Hinchee --

11 THE COURT: Now, just a minute.

12 Both sides have a right to object.

13 MR. NORRIS: Yes, your Honor, I
14 know that.

15 THE COURT: And many of your
16 questions, Mr. Norris, are obviously objectionable,
17 and I have tried to convey to you the proper way
18 of proceeding but you insist on ignoring what I
19 tell you.

20 Now, let's not get into any recriminations
21 between the parties here concerning objections
22 and failures to object. You both are entitled to
23 object to anything that the other counsel asks
24 or does; and let's try to keep this at a
25 professional level.

1 Loshing - cross

2 Now, are you desirous of responding to the
3 objection?

4 MR. NORRIS: I am, your Honor.

5 As I have responded last night on the
6 record, this witness has already acknowledged that
7 most of the content of this document was done
8 either by him or people under him, and I am going
9 to put the questions specifically to him, I'm
10 not going to put the thing up on the screen unless
11 it is necessary for impeachment purposes, but I
12 want to have this witness answer questions with
13 respect to information that is set forth in here,
14 and if he does not testify truthfully, then I
15 am going to ask him to explain any difference
16 that he may have of what is set forth herein.

17 THE COURT: And I have told you
18 last night, Mr. Norris, you're free to do so,
19 with the proviso that you do it in a proper
20 fashion, by laying a proper foundation.

21 If you fail to lay that foundation, I'm going
22 to sustain the objection.

23 Now, let's proceed.

24 You have laid no foundation for this
25 question. If you are desirous of laying a foundation,

1 Loshing - cross

2 you are free to proceed.

3 Let's proceed, gentlemen.

4 Read the last question.

5 {The last question was read by the reporter
6 as follows:

7 "Q Did CEI have a hard time getting
8 ahold of the Burns & Roe report that is mentioned
9 in the second paragraph?"}

10 THE COURT: Mr. Norris, you may
11 proceed along this line of questioning if you
12 lay a proper foundation.

13 BY MR. NORRIS:

14 Q Mr. Loshing, to your knowledge, did CEI at some point
15 in time see the Burns & Roe report that is made
16 reference to in this exhibit?

17 A Yes.

18 Q And do you recall -- well, strike that.

19 Subject to your right to check the accuracy of the
20 date, I represent to you that it is my belief that the
21 Burns & Roe report was issued in February, 1968; and I
22 would ask you, can you place approximately the date
23 that CEI first obtained the Burns & Roe report?

24 A No, I cannot.

25 Q Do you have any recollection as to whether CEI made

Loshing - cross

efforts to obtain a copy of the Burns & Roe report, which efforts were successful?

A Yes.

Q And what efforts did CEI make to obtain the Burns & Roe report?

A Our legal people tried to get a copy of it.

Q And is it a fair statement that CEI had a hard time getting ahold of the Burns & Roe report?

{Mr. Lansdale rises from his chair.}

THE COURT: Sustained as to form.

Q Do you know when the Burns & Roe report finally came into the possession of CEI?

A No, I do not.

Q Do you recall that there were hearings in City Council with respect to the Burns & Roe report?

A Yes, I believe there were; yes.

Q And can you recall whether or not CEI had obtained a copy of the Burns & Roe report by the time those hearings took place?

A I cannot unequivocally say we got reports by that time or not.

Q Would it be a fair statement that CEI did not get a copy of the Burns & Roe report prior to its issue?

A I have no knowledge.

1 Loshing - cross

2 Q All right.

3 Addressing your attention to the exhibit in
4 front of you, is it a fact that before the Burns &
5 Roe report was issued, CEI knew generally what it would
6 contain?

7 A Not to my knowledge.

8 Q Addressing your attention to the second paragraph,
9 second sentence, would you read that silently to
10 yourself?

11 A Second --

12 Q Second paragraph, second sentence.

13 {The witness reading silently.}

14 A Yes.

15 Q Do you disagree with the statements made in that
16 sentence?

17 MR. LANSDALE: I object.

18 THE COURT: Approach the bench.

19 - - - - -
20 {The following proceedings were had at the
21 bench:}

22 THE COURT: I submit --

23 Read the question back to me, please.

24 {The question was read by the reporter.}

25 MR. LANSDALE: I object.

Loshing - cross

It's technically irrelevant whether he questions Mr. -- or whether he asks a question when this is a report written by somebody else.

If you want to ask him if he knew the contents of it beforehand, fine and dandy; but I just submit that this persistent giving to him of statements made by somebody else, which were not written by him, and asking him whether he agrees with or not is improper cross-examination.

MR. NORRIS: I submit that the question asking whether or not the witness agrees with a statement set forth in a CEI report of this character is proper cross-examination.

THE COURT: Sustain the objection.

{End of bench conference.}

- - - - -

BY MR. NORRIS:

Q Mr. Loshing, regardless of when CEI learned what the recommendations would be of the Burns & Roe report, at least CEI did at some point learn what those recommendations were going to be, is that correct?

A Were going to be?

Q Yes.

A I cannot recall.

1 Loshing - cross

2 Q And is it a fair statement that one of the recommendations
3 in the Burns & Roe report is that: "the present
4 peaking capacity provided by the topping unit and
5 the old generator on the outside of the road is
6 obsolete, inadequate, expensive to maintain, and does
7 not provide emergency backup to their 85 megawatt unit?"

8 Q Is that one of the recommendations that was in
9 the Burns & Roe report?

10 A That is 12, 13 years ago, I cannot recall at this
11 point; may have been.

12 Q I ask you whether the Burns & Roe report contained the
13 recommendation that those units south of the Freeway
14 would be retired?

15 MR. LANSDALE: I object, if your
16 Honor please.

17 THE COURT: Approach the bench.

18 - - - - -
19 {The following proceedings were had at the
20 bench:}

21 MR. LANSDALE: I would be happy, if
22 your Honor please, to have the Burns & Roe report
23 go in evidence, I will stipulate what it says,
24 but I'm going to object like the dickens to have
25 you interrogate this witness as to what the

1 Loshing - cross

2 Burns & Roe report says.

3 THE COURT: Just a minute; just a
4 minute.

5 If he has read the Burns & Roe report, if
6 he recalls, he can interrogate him on it in the
7 areas of his expertise, but you haven't qualified
8 him again.

9 No. 1. There is nothing in the evidence
10 thus far to show that he ever saw, let alone
11 read the Burns & Roe report thus far, to my
12 recollection.

13 Secondly, I don't know if he's got the
14 necessary background to agree or to disagree with
15 any of the conclusions in the Burns & Roe report
16 if he read it.

17 Now, if you want to qualify him, Mr. Norris,
18 you are free to do so.

19 Let's proceed; let's proceed.

20 {End of bench conference.}

21 - - - - -
22 THE COURT: The witness will be
23 permitted to answer the questions if you lay a
24 proper foundation, both as to whether or not he
25 ever saw or read the Burns & Roe report, and if

1 Loshing - cross

2 he's got the necessary expertise in the area which
3 you seek to interrogate him.

4 BY MR. NORRIS:

5 Q Mr. Loshing, at some point in your service for CEI, did
6 the Burns & Roe report come to your attention?

7 A Yes.

8 Q Are you aware of the fact that the Burns & Roe report
9 contained recommendations?

10 A Yes.

11 Q Do you recall today what those recommendations were?

12 A Just vaguely.

13 If you show me the report, I'll be glad to read
14 those recommendations.

15 Q I would ask you to look at PTX-2631 which is in front of
16 you, and I ask you to look at the paragraph starting
17 Roman II, and I ask you whether or not that refreshes
18 your recollection as to what the recommendations were
19 in the Burns & Roe report?

20 {Mr. Lansdale rises from his chair.}

21 THE COURT: Approach the bench,
22 gentlemen.

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

Loshing - cross

1
2 MR. LANSDALE: We're going to a
3 secondary document to ask this witness, who didn't
4 write the secondary document, what the Burns &
5 Roe recommendations were.

6 Are you trying to show CEI misunderstood them,
7 or are you trying to show that they wrote something
8 down that is different from what Burns & Roe said?

9 Let's get the Burns & Roe report, let's put
10 it in evidence and see what the recommendations
11 are, if you want to do it.

12 But I submit, your Honor please, this
13 continual effort to cross-examine the witness out
14 of a secondary source as to what the
15 recommendations were -- is it the objective to
16 get the recommendations before the jury? Is it
17 the objective to find out what this witness
18 knows about them, or is it the objective as to
19 what some third party wrote in the memorandum?

20 Any of these except the first one, I submit,
21 are irrelevant.

22 MR. NORRIS: My objective is to put
23 on my case within the Rules of Civil Procedure
24 and the Rules of Evidence.

25 Now, as I understand it, if the witness has a

1 Loshing - cross

2 need to refresh his recollection, you don't have
3 to go back to any particular piece of paper, if
4 this doesn't refresh his recollection, he says
5 "No." But he doesn't have to look at the Burns
6 & Roe report to refresh his recollection, he
7 supplied information for this material, the
8 MELP Committee on which he sat was a
9 coordinating body that considered this material.

10 There is no reason why I can't ask him,
11 "Does that refresh your recollection?" And I
12 submit, your Honor, that it's a proper question.

13 THE COURT: First of all, you
14 haven't qualified him as an expert in the field.

15 I don't know what the recommendations are;
16 are they engineering recommendations or are
17 they financial --

18 MR. NORRIS: They're set forth --
19 this is so preliminary, your Honor, -- they're
20 clearly set forth --

21 THE COURT: It doesn't make any
22 difference.

23 MR. NORRIS: If you just look at
24 that, you'll see what I'm talking about. ''

25 THE COURT: How can you interrogate

1 Loshing - cross

2 somebody that is a Treasurer of the company on
3 engineering matters that he has no expertise in?

4 MR. NORRIS: He doesn't need
5 expertise, your Honor.

6 THE COURT: Well, let me see
7 what --

8 MR. NORRIS: He said that he
9 remembered that it had recommendations.

10 THE COURT: Did he remember the
11 recommendations?

12 MR. NORRIS: No; so I'm giving him
13 a document that describes the recommendations,
14 CEI's memorandum, and I'm going to ask him:
15 Does that refresh your recollection?

16 THE COURT: Well, assuming that
17 it does, then what were you going to do?

18 MR. NORRIS: Then I can ask him
19 what the recommendations were that were contained
20 in it.

21 THE COURT: No, you can't.

22 MR. LANSDALE: May I make a suggestion?

23 MR. NORRIS: Why? That is testimony,
24 your Honor, --

25 THE COURT: Just a minute.

1 Loshing - cross

2 Let me see what the recommendations are.

3 MR. NORRIS: I'll show you, your
4 Honor.

5 On the first page, right there {indicating}.
6 It's a very preliminary question.

7 I want to cross-examine this witness in my
8 own way, subject to the Court's rulings on --

9 THE COURT: Now, wait a minute,
10 here are the recommendations: "MELP's major
11 problem is that of reliability. The engineering
12 report will point out that the present peaking
13 capacity provided by the topping unit and the
14 old generators on the south side of the road is
15 obsolete, inadequate, expensive to maintain, and
16 does not provide emergency backup to their
17 85-megawatt unit. It will recommend that these
18 units be retired."

19 This is the second one:

20 "To provide peaking capacity and reliability,
21 the report will recommend that gas turbine
22 generators be purchased. Two units in the 25-30
23 megawatt range will be recommended for immediate
24 purchase to be located at the Collinwood and
25 West 41st Street Substations, and a third unit to

1 Loshing - cross

2 be purchased later, probably installed at the
3 Lake Road station. Locating these units in the
4 substations will improve transmission reliability."

5 The third recommendation:

6 "In order to pay the approximate \$8 million
7 capital cost of these three units, MELP must have
8 funds of \$750,000 to \$1,200,000 annually, since
9 the operating and maintenance costs of the gas
10 turbine generators will be about the same as the
11 O & M savings in disposing of the East 53rd
12 Street station, there will be no relief from
13 reduced costs. MELP can borrow only \$7,900,000
14 at a maximum of 5 percent interest rate under
15 the bonding formula and debt schedule. Rates
16 of MELP should be raised at least eight percent
17 across the board."

18 Now, certainly -- are you telling me that
19 these are not substantive engineering areas?

20 MR. NORRIS: I'm telling you, your
21 Honor, that this witness does not have to be an
22 expert in engineering to be able to come up with
23 those recommendations; a lot of those are in the
24 financial area.

25 THE COURT: Maybe the last one.

Loshing - cross

MR. NORRIS: I'm saying that --

THE COURT: You are free to ask him anything in the finance area.

MR. NORRIS: Well, your Honor, I think it's improper to try to restrict that kind of a question to this kind of a witness; and I submit that Mr. Lansdale is harrassing me in the way I try to put on my case --

THE COURT: Mr. Norris, you just don't know how to ask proper questions, that's your problem; and I try to give you direction on how to do it.

I'm not going to permit this witness to testify to substantive engineering questions. Those are for the Engineering Department; and, as I understand it, subpoena the proper people.

MR. NORRIS: Your Honor, --

THE COURT: Secondly, -- secondly, you have not qualified this witness as to the last question that you have asked.

I sustain the objection; let us proceed.

MR. NORRIS: I move to put one more request on the record.

THE COURT: Very well.

1 Loshing - cross

2 MR. NORRIS: I filed a subpoena
3 on CEI to produce the employee, agent, officer,
4 who can testify with respect to this CEI
5 document, and I have got nothing but a runaround.

6 Mr. Lansdale has reported the following to
7 me:

8 He didn't even tell me that Mr. Loshing had
9 supplied most of the content for this report; he
10 told me that he found Mr. Fitzgerald may have
11 written it; that Mr. Hauser may have supplied
12 some input into it; and I submit that this is a
13 studious attempt by CEI to hide evidence, to
14 prevent the plaintiff from having access to
15 evidence, and that they have not responded as they
16 should under the rules with respect to that
17 subpoena, and if he would respond to that, we
18 could avoid a lot of this business.

19 MR. LANSDALE: I can make no further
20 response than I have already made.

21 That our belief is that Harry Fitzgerald,
22 who retired nine or ten -- eight or nine years
23 ago, however long ago it was, is 74, 75 years old.

24 Now, he wrote the report; that's our belief.
25 We told him -- we told Mr. Norris that Mr.

1 Loshing - cross

2 Häuser remembers having specific input into this.

3 I told him we cannot find anybody else that
4 would take responsibility for the document.

5 Mr. Loshing has said that he recognizes
6 much of the content as having come from the
7 MELP Fact Book.

8 The MELP Fact Book is a voluminous document,
9 and I don't know who put the stuff in there,
10 in the memorandum, a lot of people; and to
11 suggest that we are trying to conceal things is --
12 I won't respond to that, but I will say this:

13 In this case -- or this trial, I'm not
14 going to permit, if I can possibly prevent it,
15 your practice of engaging in trying to examine
16 Witness A about stuff that should be examined
17 of Witness B.

18 THE COURT: Sure.

19 MR. LANSDALE: That's highly
20 improper.

21 MR. NORRIS: May I just respond
22 to that?

23 That I don't think that you can have it both
24 ways.

25 If either you tell me who can take responsibility

1 Loshing - cross

2 for 2361 and let me put questions to that person,
3 -- the best you have done is this witness. And
4 now I'm trying to put questions to this witness,
5 and I'm being prevented.

6 THE COURT: Mr. Norris, please,
7 let's face the realities of life.

8 They have made the necessary efforts to
9 determine who it is, and counsel gave you his
10 professional word that they can't determine who
11 it is beyond the fact that it may have been
12 Fitzgerald, and Hauser may have had some input
13 into it.

14 I don't know what else they can do.

15 Are they going to fabricate some
16 fictitious person that made it? I don't know.

17 This is -- until it's brought to my attention
18 that there was evidence to the fact that they
19 are maliciously withholding evidence that has
20 been properly subpoenaed, if that comes to my
21 attention, then it is a serious problem and I
22 will take appropriate sanction actions.

23 Now, the fact that you cannot find a person
24 who did it to properly cross-examine him, that's
25 one of the unfortunate parts of certain trials

1 Loshing - cross

2 because you can't find the originator of the
3 document or the person that can testify to it,
4 you can't improperly attempt to examine an
5 individual who has had no work in putting --
6 wasn't the originator of the document under the
7 argument that you're doing it because you can't
8 find the originator of the document.

9 MR. NORRIS: But this witness has
10 said that he has -- he was the originator of most
11 of the content or either people under him.

12 THE COURT: Mr. Norris, you still
13 haven't -- do you want me to tell you how to ask
14 a proper question?

15 MR. NORRIS: I thought that the
16 defendant had some responsibility for producing --
17 just from the reading of the document, it's a
18 basic policy statement, all elements of the
19 company participated in this analysis that took
20 place, and that this document would appear to be
21 a summary of the culmination of the plan that
22 they put into practice; and this is such a
23 basic document, that the City is requesting an
24 opportunity to put questions to the defendant
25

1 Loshing - cross

2 with respect to the substance of this document.

3 Now, it's my understanding --

4 THE COURT: I'm not precluding
5 you from doing that if you do it in the proper
6 manner, but you may not be able to do that through
7 this witness; I don't know.

8 MR. NORRIS: But if the defendant
9 had responded like it should to the subpoena,
10 -- they certainly, in that company there, can
11 identify people that can take responsibility for
12 this; and all I have gotten is conversation, your
13 Honor.

14 THE COURT: Well, I don't know
15 what else you want them to do beyond what they
16 have said.

17 They said that, "We have conducted an
18 investigation and can't find who the originator
19 of the document is."

20 Actually what you have got here, from what
21 I gather from both of you gentlemen is a document
22 that has been contributed to by a number of staff
23 sections, and a great deal of the information
24 came from -- what is it -- the CEI Fact Book?

25 MR. LANSDALE: The Muny Fact Book.

1 Loshing - cross

2 THE COURT: -- Munny Fact Book,
3 whatever that is, and that -- and this document
4 resulted from that source, and it was put together
5 by somebody. I don't know who put it together --
6 he has testified that he didn't put it together,
7 they say they think that Fitzgerald may be the
8 author, --

9 MR. NORRIS: Your Honor, I don't
10 think it's important to find out who put it
11 together.

12 The thing that is important is that there
13 are substantive judgments and propositions that
14 are contained in the document that are relevant
15 to the Section 2 cause of action; and in trying
16 to identify -- trying to carry the burden of
17 proof that the City has, your Honor has already
18 ruled that it is proper cross-examination to
19 put to a CEI executive a question, "Do you agree
20 with the opinion set forth -- proposition set
21 forth in CEI memoranda?"

22 MR. LANSDALE: May I respond to that?

23 THE COURT: I don't think I have --

24 MR. LANSDALE: The Court has never
25 said any such a thing; that is the whole objection.

1 Loshing - cross

2 MR. NORRIS: Let me get the record.

3 MR. LANSDALE: You have been talking
4 a long time, now give me a chance.

5 MR. NORRIS: You can have a chance.

6 MR. LANSDALE: And this is the basic
7 objection:

8 The Court has never ruled that it is proper
9 for you to read an anonymous memorandum to him and
10 say does he agree with it?

11 You can ask him the direct question: Does
12 he have that opinion; does he know this fact?

13 You can ask anybody --

14 THE COURT: Now, I'm going to tell
15 you: If you can establish the fact that he is
16 responsible for this paragraph and it was his
17 input, then you can interrogate him on it.

18 MR. NORRIS: I know what I'm going
19 to get.

20 THE COURT: I can't help what
21 you're going to get.

22 What do you want me to do about that?

23 MR. NORRIS: If the defendant will
24 not produce a responsible person who can take
25 responsibility for this document, then I think

1 Loshing - cross

2 the only alternative is to permit us to take
3 depositions because we have a responsibility
4 here, your Honor.

5 Not only that, let me answer his -- let me
6 get the record to the other trial, if I may, because
7 I think your Honor was correct in the ruling that
8 you made.

9 THE COURT: Get it.

10 {Mr. Norris leaves the bench momentarily
11 and returns.}

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Loshing - cross

MR. NORRIS: In the first trial I was cross-examining Mr. Lindseth at page 1717, and I put questions to Mr. Lindseth with respect to the general planning report, PTX-3054, and the Court stated to me at Transcript 1717, that he was at a loss to know where I was going.

Your Honor stated:

"I do not know if this man was privy to it. If he was, that's one thing. If he was not privy to it, you certainly are permitted to cross-examine him as to any conclusion set forth in the report, and you are permitted to ask the opinion as to whether or not the conclusion, in his mind, are correct.

"But the form of your questions and the form of his answers have been not probative of what we are seeking, I think, to establish, because each one of his responses, as I recollect, says, 'That's what this report says,' and 'I agree that that is what this report says.'

MR. NORRIS: Well, except that I had a whole series of questions where I asked him, 'Do you have any reason to disagree?' And he said no on almost every one of those.

Loshing - cross

"Is that what your Honor is referring to?"

"THE COURT: No, I am not. I am referring to something more basic than that.

"What I am saying to you is the form of your questioning is improper.

"MR. NORRIS: Well, when I asked him, 'Do you have any reason to disagree,' he was Chairman of the Board and Chief Executive Officer at the time this high level planning project was completed, and if he says no, he had no reason to disagree with it.

"THE COURT: But you can't use the document to, in effect, impeach him when he is not made a statement to the contrary is what I am saying to you. You are permitted to ask him the contents of any conclusion set forth in this report."

THE COURT: Now, you are going into a different area.

MR. NORRIS: This is similar.

THE COURT: I know that that is me talking, and I haven't said anything inconsistent.

MR. NORRIS: You are permitted to ask --

Loshing - cross

1
2 THE COURT: All right.

3 MR. NORRIS: And the specific thing
4 that I am referring to that I think the Court is
5 correct in, you said that "Even if he was not
6 privy to the document, you are certainly permitted
7 to cross-examine him as to any conclusions set
8 forth in the report, and you are permitted to ask
9 an opinion whether the conclusion is correct."

10 Now, we are here. We have a witness that is
11 very much privy to the document.

12 THE COURT: Mr. Norris, that is
13 just a demonstration that you have no concept of
14 what we have been talking about.

15 I said nothing inconsistent in my review in
16 the previous trial that I am saying here today.

17 MR. NORRIS: I agree, but Mr.
18 Lansdale had said there is something inconsistent
19 in that, and that is why I am responding.

20 THE COURT: No, no, no.

21 I don't know how I can explain it to you,
22 the circumstances under which you are entitled to
23 utilize this, and you have done it not once, but
24 many times, and I am not going to allow you to do
25 it here again, you can't use the document initially.

1 Loshing - cross

2 You have to first lay a foundation, and then
3 ask a probative question, and depending on the
4 answer, what the answer is, if it is to be
5 probative. Then you proceed thereafter.

6 Now, I can't be directing you as to each
7 question that you are asking. That is all I am
8 telling you. If there is an objection, I will
9 sustain the objection as a matter of law.

10 MR. NORRIS: Mr. Lansdale stated
11 a moment ago that I had no right to ask this
12 question.

13 THE COURT: -- with respect to
14 this document, and I sustained the objection.

15 MR. NORRIS: I am saying to him
16 that if there are propositions that are set
17 forth in the CEI policy memorandum that are
18 relevant to the issues in the case, I see no
19 reason why I can't ask him what his opinion is
20 with respect to the subject matter without
21 mentioning the document.

22 THE COURT: If he is qualified to
23 answer.

24 MR. NORRIS: Then I do think,
25 under the Court's ruling, and under the rules of

Loshing - cross

1
2 evidence, I think that I can ask the witness,
3 "Here is a CEI document and on Subject A it says
4 so and so, and do you agree with that, Mr.
5 Witness," and I am just suggesting --

6 MR. LANSDALE: I want to make two
7 comments:

8 Number one comment, Mr. Norris persists in
9 characterizing this as a basic CEI policy document.

10 It appears to me to be a staff study provided
11 for passing it on to higher authorities, the
12 outline of a program.

13 It is a staff work, and to characterize this
14 as a policy document is intrinsically incorrect.

15 I come back to this proposition:

16 I am not going to object to asking this
17 witness if he has an opinion or knowledge about
18 specific facts, but to hang it on this document
19 and say, "Do you agree with this document," I
20 think it is objectionable, and I continue to
21 object.

22 Secondly, to try to use this document to
23 impeach this witness is totally objectionable in
24 my opinion because he did not author the document,
25 irrespective of whether he made input into it or

Loshing - cross

not, and just like this Burns & Roe report, as far as I am concerned, you can put the whole Burns & Roe report into evidence and look into the document and get out one of their recommendations and say, "Do you agree or don't you," and ask him about the Burns & Roe recommendation, but trying to go through a secondary document to get the contents of those recommendations seems to be crazy, not only objectionable.

MR. NORRIS: I would like to make another representation to the Court:

In this gentleman's deposition he stated that he had a hard time getting ahold of the Burns & Roe document.

In the document itself, in the second paragraph, it states that the Burns & Roe report hasn't been issued, but "We have a pretty good idea what the recommendations are going to be."

That shows good staff work. He claimed they couldn't get ahold of the document, but they had the recommendations as to what that report was going to contain before it came out.

MR. LANSDALE: What does that prove?

THE COURT: Gentlemen, we have

Loshing - cross

gone far afield.

MR. NORRIS: The question I put was, did he agree with one of the recommendations that was read in this paragraph.

Now, if your Honor is going to rule against me, that I can't ask him, "Do you agree with the statement made in that document, that the recommendation was going to be so and so," then just tell me, and I will leave that.

THE COURT: Here is my ruling, unless you can qualify him with the necessary expertise to testify on the subjective engineering conclusions or recommendations of the Burns & Roe report appearing in Document 2631:

"I will not permit it in. Conversely, if you can, he may testify to those conclusions, and he may express any opinion that he is desirous of expressing concerning the validity of those opinions.

"As to the third recommendation here, properly conducted, you can make inquiry of this witness concerning whether or not in his mind an approximate \$8 million capital cost for three units, namely, two 25-30 megawatt units," and

1 Loshing - cross

2 whatever else is in there, "as a fair evaluation,
3 and you may make further inquiry as to what his
4 conclusions are as to the financial evaluation
5 incorporated in No. 3, and you are free to do
6 that."

7 MR. NORRIS: I hope that the
8 record is clear that this gentleman has had a
9 broad background through the technical studies
0 under him, and he has a much broader experience
1 in the company than simply financial, but as the
2 Treasurer of the Company, he has 100 plus
3 people under him.

4 THE COURT: That proves that he
5 might be a good administrator and a good
6 financial man. It doesn't prove he is a good
7 engineer.

8 MR. NORRIS: I am also suggesting
9 he doesn't have to be an engineer to know the
0 impact of an interconnection.

1 THE COURT: Well, if I am in
2 business, I am not going to take the opinion of a
3 guy that is not an engineer.

4 MR. NORRIS: This goes to intent.

5 THE COURT: All right, fine.

1 Loshing - cross

2 Gentlemen, everyone has had their say, and I
3 have ruled, and you are free to proceed in the
4 proper manner in which I ruled. Let's proceed.

5 {End of bench conference.}

6 - - - - -

7 THE COURT: You may proceed,

8 Mr. Norris.

9 BY MR. NORRIS:

10 Q Mr. Loshing, from time to time the term "MELP
11 objective" has been used. What was CEI's MELP
12 objective?

13 A As I say, the MELP objective, as I viewed it, was to
14 neutralize the Municipal Light Plant as a competitor
15 of CEI and take their tax subsidy and distribute it in
16 an equitable manner to all of the taxpaying citizens of
17 the City of Cleveland.

18 Q Do you know whether or not the company had advance
19 knowledge of the content of the Burns & Roe report
20 before it was issued?

21 A I do not recall, no, sir.

22 I did finally see the Burns & Roe report.

23 Q Have you got any way of explaining the fact that the
24 recommendations that are described in this report are
25 in the Burns & Roe report before it was issued and

1 Loshing - cross

2 nevertheless described in this memorandum?

3 A No, I do not..

4 Q Turn to the second page of PTX-2631, please, and
5 under "CEI Program," am I correct that the MELP
6 objective is there referred to as the objective to
7 acquire and eliminate MELP?

8 MR. LANSDALE: Objection.

9 THE COURT: Sustained. This is
10 the very reason that we had this discussion up
11 here, Mr. Norris.

12 Q How many officers are there of CEI?

13 A A dozen.

14 Q Is the Chairman of the Board an officer?

15 A Yes.

16 Q Is the President?

17 A Yes.

18 Q I want you now -- and this is 1969 -- and I am asking
19 you to recall --

20 A Oh, gee --

21 Q Now, in 1969 you were an officer; is that correct?

22 A I was Treasurer of the company, yes.

23 Q That is an officer?

24 A Right, yes, sir.

25 Q Now, am I correct that in 1969 there were Vice-Presidents

1 Loshing - cross

2 who were not officers?

3 A I believe all officers, all Vice-Presidents are
4 officers. I would have to have legal advice on that.

5 Q And they were in 1969, to your knowledge?

6 A Yes.

7 Q In 1969 how many Vice-Presidents were there, if you
8 recall?

9 A I don't recall.

10 Q Would there have been a Vice-President in charge of
11 Marketing?

12 A Yes.

13 Q Would there have been a Vice-President in charge of
14 Operations?

15 A Yes.

16 Q Would there have been a Vice-President in charge of
17 Engineering?

18 A Yes.

19 Q And one in charge of Finance, which was you?

20 A I was not --

21 Q Was there a Financial Vice-President in addition to
22 yourself?

23 A Yes.

24 Q Was there any Executive Vice-President at that time?

25 A I cannot recall right now.

Loshing - cross

1
2 Q Now, Mr. Howley was also a Vice-President, and we have
3 got six, and the President and Chairman of the Board
4 were also officers?

5 A That is right.

6 Q Now, there are eight.

7 Were there more officers than that, as you recall?

8 A There was an Administrative Service Vice-President.

9 Q That makes nine.

0 Would it be a fair statement that there would be
1 less than a dozen people in the company that would be
2 officers?

3 A About that number, and that is ascertainable. We
4 could determine it quickly by going to the annual
5 report.

6 Q Did officers from time to time attend Boards of
7 Directors meetings?

8 A Very rarely.

9 Q Did officers from time to time attend meetings of
0 the President's Council?

1 A Yes.

2 Q Did officers from time to time discuss the subject
3 of the interconnection between Muni Light and CEI?

4 A Yes.

5 Q Did officers from time to time discuss policy matters

1 Loshing - cross

2 that went beyond their own particular area of
3 expertise?

4 A Discuss them, yes.

5 Q I take it that they would not have decision-making
6 responsibility about something that was not in their
7 area of expertise?

8 A Yes.

9 Q But there were times when you as a financial officer
10 and Treasurer would be at a meeting, and you would be
11 discussing with Mr. Williams an engineering matter; is
12 that a fair statement?

13 A I would be discussing the financial aspects of it.

14 Q I understand, but isn't it fair that subjects on
15 engineering would come up, and the Marketing man and
16 the Financial man would just go along with the
17 Engineer; he is the expert?

18 A Yes, absolutely. That is good management.

19 Q Now, the MELP objective of acquiring and eliminating
20 Muny Light, that was discussed by all officers from
21 time to time; is that a fair statement?

22 MR. LANSDALE: Objection.

23 THE COURT: I will sustain the
24 objection.

25 THE COURT: Approach the bench.

1 Loshing - cross

2 - - - - -

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

5 MR. LANSDALE: The objection is
6 that you are asking about what other people
7 discussed.

8 MR. NORRIS: I am not. I am
9 asking the subject of a discussion.

10 MR. LANSDALE: And No. 2, the thing
11 is irrelevant and redundant, and we admit the
12 objectives put in the form of formal admissions,
13 and I object to asking this witness.

14 THE COURT: Read the question.

15 {The pending question was read by the
16 reporter.}

17 THE COURT: It is the form of
18 your question. He is permitted to testify to
19 any discussion concerning the policy that you
20 incorporated that he participated in.

21 MR. NORRIS: That is what I had
22 been asking him.

23 THE COURT: Read it.

24 {The pending question was reread by the
25 reporter.}

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1 Loshing - cross

2 THE COURT: You said there are
3 some 12 officers. How does he know whether or
4 not some of the officers had discussions?

5 If you want to ask him the question, "Were
6 you present when all officers discussed it," or
7 the other question would be, "Limit it to his
8 participation," so I will sustain the objection
9 as to the form of the question.

10 {End of bench conference.}

11 - - - - -
12 THE COURT: I will sustain the
13 objection as to the form of the question.

14 BY MR. NORRIS:

15 Q Mr. Loshing, am I correct that from time to time you
16 had discussions yourself with one or more other
17 officers of CEI with respect to the MELP objective of
18 acquiring and eliminating Munny Light?

19 A Yes.

20 Q Let's go down the list of officers.

21 Is it a fair statement that from time to time you
22 had discussions about that objective with the Marketing
23 Vice-President?

24 A Yes.

25 Q With the Engineering Vice-President?

Loshing - cross

1
2 A Yes.

3 Q With the Legal Vice-President?

4 A Yes.

5 Q The Operations Vice-President?

6 A Yes.

7 Q The Chairman of the Board?

8 A Yes.

9 Q The President?

10 A Yes.

11 Q Even the Administrative Vice-President?

12 A Even him, yes.

13 Q Now, does that complete the list of all of the
14 officers in 1969?

15 A No; there was a Secretary of the company, and the
16 controller.

17 Q Mr. Vogelsang?

18 Did you have discussions with the Secretary of
19 the company?

20 A Not to my recollection, no.

21 Q Were some of these discussions in group meetings of all
22 of the officers?

23 A There may have been, but not so structured.

24 Q Well, what kind of regular meetings did the company have
25 in 1969 where all of the officers were invited to

1 Loshing - cross

2 participate?

3 A Regular meetings?

4 Q Yes.

5 A On anything -- there was the Group Council which met
6 every Monday.

7 Q And were all of the officers invited to participate
8 in the Group Council?

9 A I was never there, only on invitation.

10 Q And you were there from time to time?

11 A Yes.

12 Q And on any of the occasions that you were with the
13 Group Council, was the subject of the MELP objective
14 discussed?

15 A Yes.

16 Q And did that happen more than once?

17 A Probably, yes.

18 Q And these are weekly meetings?

19 A It was a weekly meetings for communications purposes of
20 all of the activities of the company.

21 Q Now, were there any other regular meetings that all
22 of the officers of the company were invited to
23 participate in on a regular basis?

24 A There is a Friday morning breakfast which I also did
25 not go to.

1 Loshing - cross

2 Q And did you ever go to it?

3 A No, sir.

4 Q Now, at the meetings of the Group Council that you
5 attended, were the MELP objectives discussed, and I
6 would like to know whether those discussions were
7 taking place during the same time that the MELP
8 Committee was in operation?

9 A I would think that there would be, because it would have
10 been a current topic, one of many that was discussed
11 at the President's Council on the Monday morning
12 meeting.

13 Q You said "President's Council." Did you mean the
14 "Group Council"?

15 A The President's Council is a meeting of all of the
16 groups. That is the more proper term.

17 Q It is not a Group Council. It is a President's
18 Council?

19 A Yes.

20 Q And that would be on a regular basis?

21 A Every Monday morning a communications meeting of all
22 of the many, many items that are opportunities facing
23 the Illuminating Company.

24 Q And when did the President's Council -- when was that
25 created? Was that something Mr. Besse created?

1 Loshing - cross

2 A I would believe so, yes. It has been in existence
3 since the early '60's.

4 Q So that there was a President's Council in existence
5 during the period of time that we are talking about,
6 the '60's and the '70's?

7 A Yes.

8 Q Now then, can you recall whether the subject of the
9 MELP objective was discussed at a meeting of the
10 President's Council at about the time of Mr.
11 Stefanski's letter to Mr. Howley of January 15, 1970,
12 wherein he requested that a Phase 3 project should be
13 undertaken, and when completed, to result in a
14 permanent interconnection.

15 Was that subject discussed during that time frame?

16 A I do not recall being at a President's Council where
17 it was discussed.

18 There may have been -- as I said before, I was not
19 at the President's Council on a routine basis.

20 Q Let's do it this way:

21 Could you please search your recollection and tell
22 me of any meetings of the President's Council that you
23 remember attending where the MELP objective to acquire
24 and eliminate Muny Light was the subject of discussion?

25 A I cannot recall any such meetings. There may have been.

1 Loshing - cross

2 Q You know there were, but you cannot recall when?

3 MR. LANSDALE: Objection.

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

6 Q Well, Mr. Loshing, you testified a moment ago that there
7 were meetings of the President's Council that you
8 attended.

9 MR. LANSDALE: Objection.

10 THE COURT: Overruled.

11 Q -- when the MELP objective was the substance of the
12 discussion; am I correct?

13 A One of the subjects of discussion.

14 Q Yes?

15 A Yes; one of 35 items.

16 Q Well, make it 50, but at least that was one of the
17 items discussed; right?

18 A Yes.

19 Q And that happened on more than one occasion; is that
20 correct?

21 A Yes.

22 Q And what you are telling me is that you can't fix the
23 date of any one of those occasions, but you know that
24 they occurred?

25 A That is right.

1 Loshing - cross

2 Q Now, that is fine.

3 Now, let's get down to a year's frame of reference.

4 Now, in 1969, when the matter of the load relief
5 to Muny Light was being discussed between Muny and
6 CEI, did the MELP objective ever get discussed at a
7 President's Council meeting that you attended?

8 A I cannot recall in that time frame.

9 Q Do you recall writing a memorandum dated June 17,
10 1969 that went into a fair amount of detail on the
11 matter of an interconnection between Muny Light and
12 CEI?

13 A Yes, I do.

14 Q Was that memorandum discussed at a President's
15 Council meeting?

16 A I do not know. It more likely was discussed at the
17 Muny Committee.

18 Q You mean the MELP Committee?

19 A Yes.

20 THE COURT: What was the date?

21 MR. NORRIS: June 17, 1969.

22 Q Now, I just want to be sure I understand.

23 Are you saying that the matter of your memorandum
24 of June 17, 1969, was not discussed at a President's
25 Council meeting, or you are not sure?

Loshing - cross

1
2 A I am not sure of it. It seems unlikely. That is not
3 the form to discuss a memo.

4 Q Well, what about -- bringing your attention to Mr.
5 Stefanski's request for a permanent interconnection
6 in January of 1970, that was a matter of current
7 events, was it not?

8 A Yes.

9 Q Would a President's Council meeting, in which you
10 were in attendance, of January of 1970, is that
11 something that may have been discussed?

12 A It may have been, and if I were there, and you have
13 got two happenstances -- whether I was at a meeting
14 and whether it was discussed, and I have no recollection
15 whatsoever of that form being used to discuss it.

16 Q Do you remember attending a meeting with other CEI
17 executives and Muny Light executives on July 8, 1971?

18 A Yes.

19 Q Do you remember the subject matter of that meeting?

20 A Yes.

21 Q You do remember the subject matter?

22 A Yes.

23 Q Did you attend a President's Council meeting during
24 July of 1971, when that subject matter was discussed?

25 A I have no recollection. I don't even have a diary going

Loshing - cross

1
2 that far back.

3 Q All right.

4 Do you know in what year you attended any
5 meetings of the President's Council when the MELP
6 objective to acquire and eliminate Muny Light was
7 discussed?

8 A No, I don't.

9 Q Thank you.

10 Have you had a chance to look over the balance of
11 PTX-2631, Mr. Loshing?

12 A I have been scanning this exhibit, yes.

13 Q And have you gotten through it far enough to find there
14 were five subobjectives that were set forth under
15 the basic objective to acquire and eliminate MELP?

16 A I wasn't looking at the -- the answer is, no, I wasn't
17 looking at it in that respect.

18 Q Would you kindly do that for me.

19 A Yes.

20 Yes, I have read it.

21 Q Would it be a fair statement that the accomplishment of
22 each of the subobjectives would contribute toward the
23 accomplishment of the overall objective?

24 A It would be one course of action that would achieve
25 that, yes.

1 Loshing - cross

2 Q I just don't want to fence with you. Is that a yes
3 answer to my question?

4 A Yes.

5 Q Now then, subobjective No. 1 is set forth on pages
6 2, 3 and the top of page 4, and am I correct this is
7 one of the subobjectives for which your department
8 supplied information, and I direct your attention
9 particularly to page 3?

10 A That table specifically did come out of the Muny
11 Fact Book, and these particular tables were developed
12 in the Treasury Department.

13 MR. NORRIS: Mrs. Richards, would
14 you give Mr. Loshing PTX-2081 -- unless it is
15 already up there. Do you have it, Mr. Loshing?

16 THE COURT: What is the number
17 again?

18 MR. NORRIS: 2081.

19 THE WITNESS: No; I don't have it.

20 MR. NORRIS: If we can save time,
21 your Honor, Mr. Loshing has already agreed that
22 PTX-2081, well, do you have it -- okay, thanks.

23 {Above-referred-to exhibit handed to the
24 witness.}

25 Q Do you recall that yesterday you indicated that 2081

1 Loshing - cross

2 was part of the MELP Fact Book, and my question is, is
3 it not a fact that the table set forth at the top of
4 page 3 of 2631 under the subobjective No. 1 is the
5 data from the PTX-2081?

6 A Yes.

7 Q Immediately below the table on page 3 -- well, just
8 for the record, the table deals with rate comparisons,
9 using 1965 data; is that correct?

10 A That is correct.

11 Q And the rate comparison shows one column, Muny Light's
12 rates for the different categories of customers, and
13 next to that is another column, showing CEI's rates
14 for the same types of customers; is that correct?

15 A That is correct.

16 Q And just in summary form, to the total private customers,
17 as of 1965, the rate differential was about 13.3 percent,
18 and streetlights, a 55 percent differential, making an
19 overall total sales differential of 18.7 percent
20 higher than CEI's?

21 A Yes.

22 Q And MELP on that table, am I correct, that the subject
23 matter of Comment C is the same subject matter as is
24 set forth on Exhibit 2617, which is on your left,
25 sitting on the easel, which is a blow-up of page 2

Loshing - cross

1
2 from PTX-628, the memorandum written from Mr.
3 Horning back in 1960, with respect to the importance
4 of getting rate equalized in order for the private
5 systems to take over municipal systems; is that a
6 fair summary?

7 A This is an unknown author who has paraphrased the
8 contents of Mr. Horning's letter.

9 Q What unknown author are you talking about?

10 A Whoever wrote this language, you are asking me to
11 identify.

12 Q And whoever took your table and put it at the top of
13 page 3?

14 A Yes.

15 Q Do you know who that person is?

16 A No.

17 Q In this period of time the MELP Committee was quite
18 active, was it not?

19 A I don't know.

20 Q This is January of 1968, and the MELP Committee was
21 quite active in January of 1968, wasn't it?

22 A Yes.

23 Q Are you telling me you have no recollection of who put
24 this document together?

25 A Absolutely not, honest engine.

Loshing - cross

Q Addressing your attention to Comment C, "In the takeover of public systems that we have knowledge of, the rates of public systems were higher. The financial condition of the public systems was critical and the facilities and service of the public systems was inferior."

A That is an accurate reading.

Q Now, the reference to --

MR. LANSDALE: May we approach the bench?

THE COURT: Ladies and gentlemen, it is now the noon hour, and this is a good opportunity for you to go to lunch. Please keep in mind the admonitions heretofore given. You are free to go and come back at 1:30.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: If your Honor please, I well understand Mr. Norris's desire to read as many documents as he can which says things he believes creates an invidious impression with the jury, but I submit the documents speak for themselves, and to separate the witness and using

CWRI 1 MW 1 IDP ADV

1 Loshing - cross

2 him as a vehicle for reading Mr. Horner's
3 memorandum is improper, and I made this objection
4 at least 100 times, and you have ruled the same
5 way each time, and Mr. Norris persists in doing
6 it, and I object strongly to it.

7 Mr. Norris not only refuses to comply with
8 your Honor's directions, but he puts me in a
9 position of having to continually object, and I
10 think it is time it stopped.

11 MR. NORRIS: The witness
12 indicated familiarity with the subject matter,
13 and it is my understanding that proper cross -
14 examination permits me to put a question, whether
15 or not the witness agrees with the opinion set
16 forth, and that is what I am doing.

17 THE COURT: Sustain the objection.
18 I am not even going to go over it again. Sustain
19 it as to the form.

20 See you after lunch.

21 {Luncheon recess had.}

22 - - - - -
23
24
25

1 THURSDAY, AUGUST 6, 1981, 1:50 O'CLOCK P.M.

2
3 THE COURT: Please be seated.

4 Bring in the jury.

5 MR. NORRIS: Your Honor, before you
6 bring in the jury, I would like to just raise
7 two matters preliminarily.

8 THE COURT: Yes.

9 MR. NORRIS: In view of the
10 Court's ruling on the questioning of Mr.
11 Loshing on PTX-550, the matter of the three-year
12 deferral of the \$5 million capital improvement
13 project, we have looked at the material that
14 Mr. Lansdale has supplied, and without further
15 interrogation, we are unable to support the point
16 that we were trying to make.

17 We would request the right to take Mr.
18 Dobler's deposition at some convenient time over
19 the weekend and explore with him his memorandum,
20 and then if we can become satisfied that we
21 don't need to call him to the stand, we would try
22 to avoid calling him, but we would in any event
23 like the opportunity to recall Mr. Loshing
24 following the deposition.

25 The companion request, your Honor, is that we

CWRI / AM / ID / ADV

1 would request that the Court enforce the subpoena
2 that was served upon CEI with respect to the
3 production of the employee or agent or officer
4 or other person that has knowledge about the
5 contents of PTX-2631 that we have been dealing
6 with this morning.

7 THE COURT: Well, how do you
8 propose I rule, in view of the statements,
9 namely, that they made a search of their
10 employees, and they are unable to find anyone
11 that originated that document, and they feel that
12 it may have been Mr. Fitzgerald who has retired.
13 Is he within the jurisdiction of the Court?

14 MR. LANSDALE: No, he is in
15 Florida.

16 THE COURT: What do you propose
17 I do?

18 MR. NORRIS: The only thing I can
19 think of is to permit us to take the deposition
20 of such other persons as the defendant can
21 identify as having had any contact with the
22 exhibit.

23 Now, Mr. Hauser was identified as someone
24 who might have contributed to it, and it just
25 boggles my mind to think there is no person within

1 the jurisdiction that can speak authoritatively
2 on a document such as this.

3 THE COURT: Mr. Norris, this case
4 has been in litigation in one facet or another
5 since 1970.

6 MR. NORRIS: 1975, I think.

7 THE COURT: I said, these
8 issues have been before the Federal Power
9 Commission and before the Nuclear Regulatory
10 Commission, and before this Court, since at least
11 1970.

12 There have been discovery proceedings on these
13 issues going on since that time.

14 There have been over 2,800,000 documents that
15 have been discovered. I don't know how many
16 depositions have been taken, in excess of a couple
17 of hundred as I recall.

18 Now, the case is now in trial, and I am not
19 going to interrupt this case for the purposes
20 of discovery proceedings that could have been
21 accomplished during that -- what is it -- ten-year
22 period.

23 Now, if there is a single deposition of an
24 individual that you are desirous of taking, Mr.
25 Dobler --

1 MR. NORRIS: The only two that have
2 been identified are Mr. Dobler and Mr. Hauser.

3 THE COURT: Now, we are not going
4 to go beyond Dobler.

5 If you want to take Mr. Dobler's deposition,
6 the defendants will produce him over the weekend,
7 if you can.

8 MR. LANSDALE: I don't know.

9 THE COURT: Mr. Hauser is, I
10 understand, a subpoenaed witness?

11 MR. NORRIS: He is.

12 THE COURT: He will be available
13 here, but we are not going to get into parallel
14 discovery proceedings, and we have been through
15 this discovery problem, not once, but many, many
16 times.

17 MR. NORRIS: One other question.

18 THE COURT: Okay.

19 MR. NORRIS: We filed a subpoena
20 duces tecum on Mr. Hauser to bring with him
21 certain identified documents if they exist.

22 I have asked Mr. Lansdale for the production
23 of those documents, and he has stated to me that
24 I would only get those documents that are named
25 in the Hauser subpoena on the day that Mr. Hauser

CWRI I AM I IDP ADV

1 is supposed to testify.

2 Mr. Hauser has been in the courtroom for much
3 of this case, and I submit that the Court could
4 request the defendant to be more cooperative with
5 respect to the production of those documents if they
6 exist, and not require me to wait until the day
7 that Mr. Hauser goes on the witness stand.

8 THE COURT: Mr. Norris, I can make
9 a request, and if they don't want to do it, I can't
10 force people to do something they don't want to do
11 unless it is a violation of one of the rules of
12 evidence or an order of this Court, and if that
13 is the situation, then you can be assured that the
14 Court will take the necessary action, including
15 any sanctions, to enforce such an order.

16 Now, the rule is that when you issue a
17 subpoena duces tecum, as I understand it, and I
18 may be wrong, a subpoena duces tecum says, "Bring
19 with you at the time you arrive to testify."

20 Now, if they want to give it to you, fine.
21 I don't know where you come up with these theories.

22 MR. NORRIS: I believe --

23 THE COURT: I don't know where
24 you come up with these theories.

25 MR. NORRIS: It isn't a theory, sir.

1 it's a subpoena that required attendance of this
2 witness at the beginning of this trial.

3 Now, the law is, your Honor, that the witness
4 is to stay in attendance, subject to the
5 discretion of the Court to permit the witness to
6 go hence and then return when that witness's
7 presence is going to be needed on the witness
8 stand.

9 THE COURT: Mr. Norris, your
10 interpretation of the law and my interpretation
11 of the law is completely different.

12 My understanding is that a witness is ordered
13 to appear to testify on a given date.

14 MR. NORRIS: That's right.

15 THE COURT: Now, if he should not --
16 if he should be called to testify on that date and
17 he is not available to testify, then he is in
18 violation of the subpoena, which the Court will
19 enforce.

20 But there is no law or no rule that I am
21 aware of that requires a witness to sit idly by
22 for one week, ten weeks, five weeks, three days,
23 two hours, waiting to be called.

24 His only responsibility is to be available
25 at the time that he is called. And if he is not

CWRII I AM I IDPNDV

1 available, then, of course, he is in violation.
2 And if you will check the law, you will probably
3 find that that is an accurate interpretation of
4 the law.

5 MR. NORRIS: I have checked the
6 law, your Honor, and the subpoena commands the
7 attendance of that witness in this particular
8 case on a given day in July.

9 That witness was here, and it's in the
10 discretion of the Court to say to the witness,
11 or through agreement of counsel, that there is no
12 point in that witness sitting idly by, as you say.
13 But that witness was here on the subpoena date,
14 and he had -- he should have had the document with
15 him, and we haven't gotten it.

16 THE COURT: Very well, Mr. Norris.
17 That's your interpretation, and I have given
18 you mine, and my interpretation must prevail.

19 Let's proceed.

20 Can you make this material available?

21 MR. LANSDALE: If your Honor please,
22 I have forgotten what it was that they subpoenaed,
23 but let me tell you what the problem was:

24 We agreed to produce a whole bunch of
25 witnesses.

1 There has been some interchange between us
2 because the vacation period was coming up.

3 All of a sudden all of our witnesses get
4 served with a long subpoena, included in them
5 are certain subpoenas duces tecum.

6 Mr. Norris or Ms. Coleman, somebody called us
7 later and said they didn't get the documents.

8 I said, "You're the guys that chose to do
9 that by subpoena in place of calling us for the
10 documents, you knew we have them, but you
11 subpoenaed them," and I said, "By golly, that's
12 when we'll bring them in, and I'll stick to that.
13 I won't do it in a different manner." But we
14 will cooperate with them.

15 I want to -- perhaps a little late, interpose
16 an objection to depositions over this weekend since
17 I have got other things with respect to this case
18 to do.

19 I don't know what it is that these people want
20 with respect to either the \$3 million business, or
21 whatnot.

22 All of my objections have been to asking
23 people that don't have the information about it.
24 If I have some rational explanation of what they
25 want to show with these blankety-blank feeder

cables, construction reports were possibly put off from year 8 to year 11, perhaps we can agree on it.

But counsel -- I guess I have said too much already -- I simply object to this manner of proceeding; in this manner after attempting to ask Witness A what he ought to ask Witness B.

THE COURT: Well, we have been through that at bench conference after bench conference, and it's the same thing over and over again.

MR. LANSDALE: Yes.

THE COURT: But that is not the issue that is confronting the Court at this juncture.

The issue is the depositions.

I will order that Mr. -- what's his name -- Dobler be presented for a deposition, if he is in town, at 8:30 on Saturday morning.

MR. NORRIS: And I will be willing to waive that if counsel can enter into an appropriate stipulation with respect to the information --

MR. LANSDALE: I haven't the faintest idea what you want.

MR. NORRIS: And on the matter of

1 correcting the record, the only reason the City
2 issued the subpoenas, your Honor, is that we got
3 inconsistencies from the counsel for the defendant --

4 THE COURT: Gentlemen, I am not
5 going to get involved in your personal bickering.

6 Now, if you want to proceed in accordance with
7 the Federal Rules, and if there is a violation
8 of any order of this Court or any subpoena, you
9 bring it to my attention; and if I find that there
10 is a violation, I will take the necessary action
11 to remedy the situation.

12 But, please, gentlemen, I don't want to get
13 involved in your personal affairs here.

14 If you can resolve these matters, I would
15 prefer that you resolve them. That's the
16 simplest way of proceeding.

17 If you can't resolve them, the Federal Rules
18 are specific as to what you should do, the manner
19 in which you should do it, and it directs the Court
20 as to its authority in bringing about a resolution
21 of the issues before it.

22 That's the orderly way of doing it. I don't
23 know why you always have to depart here and get into
24 personality clashes; it's beyond me.

25 MR. LANSDALE: If your Honor please,

1 may we have it understood that the Dobler
2 deposition -- I'm advised that he is here -- going
3 to be here -- is limited to the fifth paragraph of
4 Plaintiff's Exhibit 550?

5 MR. NORRIS: I don't see any reason
6 for such a limitation.

7 The matter of the Dobler deposition came up
8 during the testimony of this witness; and if there
9 is anything with respect to Dobler's knowledge,
0 whether it's in that fifth paragraph, or whether
1 it's in some other part of that exhibit or some
2 other related exhibit that this man has written
3 that touches on these issues, I think that it is
4 necessary that we not limit it to that extent.

5 MR. LANSDALE: I object.

6 THE COURT: Just a moment.

7 Mr. Norris, I told you earlier, we are not
8 going to depart from this case and undertake
9 parallel discovery proceedings.

0 Your cross-examination here has raised an
1 issue as to whether or not Dobler has certain
2 information concerning -- I forget, what is that
3 paragraph?

4 MR. MURPHY: The fifth paragraph,
5 your Honor, of Plaintiff's Exhibit 550.

THE COURT: Where is 550?

{Exhibit handed to the Court by Mrs.
Richards.}

THE COURT: What paragraph?

LAW CLERK KURDZIEL: Five.

{The Court reading silently.}

THE COURT: Yes, Paragraph 5,
and the information contained therein.

Now, as I indicated, you are free to pursue
that deposition to determine whether or not such a
report exists.

I don't know what more I can do.

Let's proceed, gentlemen.

MR. MURPHY: Your Honor, there is
only one thing: With respect to Mr. Dobler, I
think Mr. Lansdale misspoke a couple of minutes
ago. Mr. Dobler is an employee of CEI still, but
the people at the table don't know for sure whether
he is in Cleveland at the present time -- we are
checking on that now and we'll know in a minute.

THE COURT: Where would he be?

MR. MURPHY: Conceivably he might
be on vacation, that's the only --

THE COURT: If he's available --
if you can contact him, make him available.

1 Let me know.

2 MR. MURPHY: Yes, your Honor.

3 THE COURT: Let's proceed.

4 Bring in the jury.

5 -----

6 {The jury entered the courtroom and the
7 trial proceeded as follows:}

8 -----

12 -----

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