
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

8-5-1981

Volume 18 (Part 3)

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

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C L E M E N T T. L O S H I N G

resumed the stand and testified further as follows:

THE COURT: You may proceed,

Mr. Norris.

CROSS-EXAMINATION OF CLEMENT T. LOSHING {Resumed}

BY MR. NORRIS:

Q Mr. Loshing, before we leave 2631, -- do you still have that in front of you?

A Yes, I do.

Q Address your attention to the second -- the first subobjective dealing with the matter of rates.

It's on page 2 of that exhibit.

{After an interval.}

A Yes, I see that.

Q The first sentence, "To persuade the administration and Council to increase MELP rates at least 8 percent."

Why would the --

{Mr. Lansdale rises from his chair.}

THE COURT: Sustain the objection.

Mr. Norris, this is the very thing that we have been discussing all morning.

CWRII I MW I IDP ADV

Loshing - cross

Please approach the bench.

- - - - -

{The following proceedings were had at the bench:}

THE COURT: State your objection.

MR. LANSDALE: My objection is, in

place of asking a substantive question of these witnesses, he is reading them the paper.

THE COURT: Why don't you ask him the question?

Let's proceed in the proper fashion, please.

{End of bench conference.}

- - - - -

BY MR. NORRIS:

Q Mr. Loshing, would persuading administration and Council to increase MELP rates by 8 percent contribute to the accomplishment of the overall MELP objective of acquiring and eliminating MELP?

A Yes.

Q In what way?

A It would narrow one of the advantages that they have, the differential in rates brought about by a subsidy.

Q Would you agree that if the Muny rates were increased to the CEI level, that that would result in a movement

CIVIL 11/11/1971

Loshing - cross

of customers away from Muny Light towards CEI?

A It could help, yes.

Q Mr. Loshing, would the opposition to a street light rate increase for Muny Light contribute to the accomplishment of the MELP objective?

A Which MELP objective?

Q The MELP objective that I referred to is what you testified to, sir, and it is reflected on page 2 of PTX-2631, to acquire and eliminate MELP?

MR. LANSDALE: Object, if your Honor please; that's not the statement.

THE COURT: Mr. Lansdale, if you have an objection, just say "I do have an objection," and come up here and tell me about it.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: My objection is that this witness said that if it is the proper distinction that the objective was to neutralize MELP activities, he has not adopted Mr. Norris's continuous suggestion of reading of the title of this document. That is the first objection.

The second objection is that this is clearly

COURT REPORTER

Loshing - cross

in the Noerr-Pennington area of appealing to the City Council.

MR. NORRIS: This is not a Noerr-Pennington subject if it ever got to City Council. Even at this point when it was -- and we argue it was not Noerr-Pennington; but assuming arguendo you got that in front of counsel, even assuming arguendo that that would be Noerr-Pennington within the internal confines of the company, talking about why they should oppose street light rate increase, and I direct your attention to page 3, your Honor, right here {indicating}.

THE COURT: Oh, yes; that clearly --
Read the question back.

MR. NORRIS: -- could not be.

{The question was read by the reporter as follows:

"Q The MELP objective that I referred to is what you testified to, sir, and it is reflected on page 2 of PTX-2631, to acquire and eliminate MELP?"

THE COURT: Read the previous question.

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Loshing - cross

{The record was read by the reporter as follows:

"Q Mr. Loshing, would the opposition to a street light rate increase for Munny Light contribute to the accomplishment of the MELP objective?"}

"A Which MELP objective?"

"Q The MELP objective that I referred to is what you testified to, sir, and it is reflected on page 2 of PTX-2631, to acquire and eliminate MELP?"}

THE COURT: It's a proper question.

You may proceed.

MR. LANSDALE: By the way, I'm informed that Mr. Dobler is in town.

THE COURT: Yes.

{End of bench conference.}

THE COURT: You may answer the question.

THE WITNESS: May I have the question read back, please?

THE COURT: Read the question back.

{The record was read by the reporter as

CWRII I AM I IDDDAV

1. Loshing - cross

2 follows:

3 "Q Mr. Loshing, would the opposition to a
4 street light rate increase for Muny Light
5 contribute to the accomplishment of the MELP
6 objective?

7 "A Which MELP objective?

8 "Q The MELP objective that I referred to
9 is what you testified to, sir, and it is reflected
10 on page 2 of PTX-2631, to acquire and eliminate
11 MELP?"

12 A I did not testify to that objective.

13 MR. NORRIS: I request that the
14 witness be asked to answer the question.

15 A I think I just did.

16 THE COURT: I think he said that
17 he didn't testify to that objective. You may ask
18 another question.

19 BY MR. NORRIS:

20 Q If Muny Light received fewer revenues from the street
21 light sources from the City's General Fund, would
22 that have a tendency to reduce Muny Light's cash flow?

23 A Yes.

24 Q Did CEI have an interest in increasing the financial
25 pressure on Muny Light?

CWRII I AM I IDNADV

1 Loshing - cross

2 A Yes, for not relieving the self-induced burden.

3 THE COURT: Read the question
4 and answer.

5 {Record read.}

6 THE COURT: He answered the
7 question.

8 Q What steps did CEI take to increase financial burdens
9 on Muny Light?

10 A By limiting the alacrity with which they would help
11 them out of their self-induced problems.

12 Q What problems are you referring to that would be
13 self-induced problems?

14 A Mismanagement, and there is a whole bevy of actions
15 and activities and inactivities.

16 Q Did the attempt by CEI to increase the financial pressure
17 on Muny Light have anything to do with creating what
18 you are calling mismanagement?

19 A We did not speed up to help them out of their own
20 problems.

21 Q Well, isn't it a fact that you would oppose anything
22 that would tend to relieve the financial crisis facing
23 Muny Light?

24 MR. LANSDALE: Objection, if your
25 Honor please.

CWRII I AM I IDIADV

Loshing - cross

THE COURT: Sustain the objection.
Come up to the bench and put it on the record.

- - - - -

{The following proceedings were had at the
bench:}

MR. LANSDALE: My objection is that
I submit that there has to be something more
particular than "oppose." After all, Muny Light
is into part of the City of Cleveland, and we have
a right to speak our piece.

"Oppose" is a word that requires more
information and more definition, and I think the
question is indefinite.

But if Mr. Norris would ask the question,
"Did you get down to City Hall and make opposition
in City Council," it would be clearly an
objectionable question, and if he says "oppose"
I don't know how in the world we would oppose
anything that Muny Light did other than by
exercising persuasion on the City of Cleveland;
and this is clearly a permitted activity.

THE COURT: Mr. Norris.

MR. NORRIS: First, may I have the
question back.

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1 Loshing - cross

2 {Pending question read.}

3 MR. LANSDALE: The only problem is
4 the witness says they are refrained from doing
5 something, and counsel keeps putting it in this
6 active sense.

7 THE COURT: It appears to me that
8 the question is merely a different form of a
9 previous question. Go back and read the record.

10 {Record read.}

11 THE COURT: He answered the
12 question, and the form of your last question,
13 did CEI do anything -- sustained as to form.

14 {End of bench conference.}

15 - - - - -

16 BY MR. NORRIS:

17 Q Mr. Loshing, addressing your attention to page 4 of
18 2631, do you see subobjective 2 there?

19 A Yes. I see the report on the page, yes, sir.

20 Q If Muny Light were to buy three gas turbines in the
21 1969 and 1970 period, the capital expenditures for
22 those turbines would become an obligation either of
23 the City or of Muny Light? Would you accept that as a
24 fair statement?

25 A Yes.

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1 Loshing -cross

2 objective was, and the MELP objective of CEI was to
3 neutralize the Municipal Light Plant as a competitor
4 and take the tax advantages that they had and
5 distribute them in some appropriate manner to all the
6 taxpayers of the City of Cleveland; and that is the
7 basis of what I considered the "propriety" of who
8 should be bearing the burden of capital cost to
9 supply electricity to a select segment of the City of
10 Cleveland.

11 Q So if City Council did say in an ordinance that the
12 debt service on three gas turbines should be borne by
13 the General Fund, you would simply say that they were
14 in error; is that correct?

15 A From my viewpoint, yes, with respect to economic burden.

16 Q Thank you.

17 Now, supposing the capital expenditure was
18 \$1,200,000 for three gas turbines --

19 A Yes.

20 Q -- and supposing the debt service had to come from
21 Muny Light's revenue, would that tend to increase the
22 financial burden on Muny Light?

23 A Not necessarily.

24 Q And wherein might it not tend to create additional
25 burden on Muny Light?

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Loshing - cross

1
2 A If it were a prudent investment, it would have paid
3 for itself, so that savings either in reliability or
4 the ability to perform, would have been enough or
5 more than enough to pay the indebtedness that was
6 incurred to get the system back on track.

7 Q You made quite a study of Muny Light's financial
8 operation over the years, didn't you?

9 A "Quite a study" -- we constantly surveilled the
10 operation.

11 Q And this was your principal responsibility for many,
12 many years, was it not?

13 A One of a thousand, at least.

14 Q I know you are a busy man, but is that not a correct
15 statement, that that was one of your responsibilities?

16 A Yes.

17 Q And over the years you add somebody under you that
18 undertook that responsibility under your direction
19 and control; is that correct?

20 A From time to time, yes.

21 Q Let me ask you this question:

22 Would an interconnection between CEI and Muny Light
23 have tended to resolve or lessen any of the financial
24 problems of Muny Light?

25 A Yes, it would, but we had no obligation to rush into

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Loshing - cross

Q Do I understand that the accomplishment of subobjective 3 on page 5 would not contribute to the accomplishment of the overall objective set forth on page 2; is that what you are stating?

MR. LANSDALE: Objection.

THE COURT: Approach the bench.

{The following proceedings were had at the bench:}

MR. LANSDALE: The witness said it didn't make any difference to him, and now he is asking, and he said it didn't make any sense.

THE COURT: Go back and read that all.

{Record read.}

MR. NORRIS: The witness testified unequivocally this morning that the accomplishment of all five subobjectives set forth in the document would contribute to the accomplishment of the overall objective, and it sounds like he is changing his testimony with respect to No. 3.

MR. LANSDALE: He sure is. That is what he says.

MR. NORRIS: I am simply asking

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Loshing - cross

that question.

THE COURT: All right. I will sustain the objection, and the previous answer may stand. Let's proceed.

{End of bench conference.}

- - - -

BY MR. NORRIS:

Q Mr. Loshing, as of January of 1968, did you have a viewpoint as to how much time from a practical standpoint CEI had to acquire Muny Light?

A I have no recollection at this point.

Q In or about January of 1968, what is your view as to whether or not the construction of an interconnection between Muny Light and CEI would have on the possibility of CEI acquiring Muny Light?

A May I have the question read.

THE COURT: Read it.

{Question read.}

A I don't know.

Q Did you ever recommend to CEI management that CEI oppose any increases in rates to Muny Light?

A In street lighting, yes.

Q And why did you recommend that to your CEI management?

A Because it is consistent with our objective to

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Loshing - cross

distribute the tax advantages that Muny possessed for subsidy to the general constituents of the City of Cleveland.

Q Is it also a fact that the recommendation that you made was to increase the financial burdens on your competitors?

A Yes.

Q On page 6 of 2631 there is a reference to the rate structures, and as of January, 1968, were you still concerned with the matter of rates for CEI?

A I lost the reference. Would you read the question back.

{Pending question read.}

A Yes. I had trouble finding where the reference was. That is all.

Q In January of 1968, Mr. Loshing, was CEI giving attention to the possibility of acquiring Muny Light?

A That has always been a constant option.

Q Now, is it a fact that in January of 1968, CEI was giving consideration to keeping Muny Light in a separate subsidiary and to operate it separate from CEI in the event it were going to acquire it?

A This is really news to me. That is what this document describes it would be.

Q And you are telling me you have no personal

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Loshing - cross

recollection of the material set forth on page 5, page 6, and page 7 of PTX-2631; is that what you are telling me?

A Not in this form at all, no.

Q Well, what form? Tell me what is your recollection of the consideration given by CEI to how it would operate Munny Light after it acquired it?

A Three or four ways.

Q What are they?

A Putting it in a subsidiary, and a lease.

Q Are there any others?

A The Detroit plan.

Q And at that time -- the first one you mentioned, putting it in a subsidiary; is this one of the propositions discussed in the MELP Committee in 1968?

A No, not to my knowledge.

Q What is the option of leasing the plant, was that discussed in the MELP Committee in 1968?

A I don't recall the date in 1968, but that was one economical alternative and that was strictly looking at it from an economic standpoint.

Q How would the lease option work?

A We never got far into it. I don't know.

Q What did you have in your mind when you said leasing

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Loshing - cross

one of the ways that you could go?

could lease facilities to one another, to supply facilities for load.

mean the City could lease Muny Light's generating ion and transmission facilities for CEI to operate;

what what you are saying?

can you remember what period in time that that consideration was given to the possibility within CEI? could not get the time frame.

This was something I would do in any kind of investment, whatever the investment. We look at whether we lease or own the facilities; and this is what we look at.

in trying to find out what it was that was under consideration in CEI, and you say that you can't

all?

you recall what the other option is that you described at that time, the subsidiary option? Can you remember when that was under consideration in CEI?

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

THE COURT: Yes.

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Loshing - cross

I object to any further testimony along this line.

MR. NORRIS: It is the witness's own testimony. He told me there were three options.

MR. LANSDALE: He said three or four.

MR. NORRIS: -- that he identified as having been options that were considered, so I am asking him to describe what was the consideration.

THE COURT: I don't think that is the testimony. Go back -- number one, my recollection of the testimony is that there has been no time frame set when these considerations surface, if they did. My recollection of the testimony is that he is saying these are the various options.

Go back and read the testimony.

{Record read.}

THE COURT: Now, there is no time frame set.

If this stuff, if this material -- and I don't see -- maybe you can tell me, and then you can proceed, but it is purely a collateral issue, as I

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Loshing - cross

see it.

Where does it bear on the issues of this case?

Number one, it is pre-statute; and number two, it is conjecture, because they never acquired it; and number three, he wasn't privy to this; and number four, I don't know if these are his conjectures

at this point in time or if this was a policy of the company.

You see, it is completely fragmented.

MR. NORRIS: I will withdraw the question.

THE COURT: All right.

{End of bench conference.}

- - - - -

THE COURT: You may proceed.

MR. NORRIS: Mrs. Richards, please hand the witness PTX-538 and 539.

{After an interval.}

BY MR. NORRIS:

Q Can you identify PTX-538?

A Yes.

Q What is it?

A It is a copy of a memo from me to Lee Howley, dated June 17, 1969, entitled, "Progress Report on MELP

CHARLES H. ...

Loshing - cross

Interconnection."

In the second paragraph of your memorandum you made reference to Mr. Lester's memo, and I have asked that Mrs. Richards give you PTX-539, and that should be at your desk.

Is that the memo that you made reference to in the second paragraph?

Yes.

Now, did Mr. Lester's memorandum, PTX-539, point up the problem that CEI faced in avoiding a permanent parallel interconnection between CEI and Muny Light?

May I have the question?

{Question read.}

In part.

Please explain how Mr. Lester's memorandum pointed up that problem?

Mr. Lester's memo is a report of a meeting that he and Fred Sener met with the Municipal Light people on this morning of the 29th in trying to help them out in putting in precipitators to relieve their load.

That was the gist. That was the purpose of the memo and the meeting.

In Mr. Lester's memo he describes some additional talk and discussions of the people from Muny that were

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Loshing - cross

at that meeting, discussing what they thought their wishes were, which did not necessarily reflect the management of the Municipal Light Plant's objectives.

Q I don't yet understand how that memo points up the problem that you recite that CEI faces in avoiding a permanent parallel operation interconnection between MELP and CEI?

A You didn't read the first sentence of my memo. It says, "From H. A. Lester, it appears technically feasible that we could provide MELP with timely and sufficient load relief to enable them to install precipitators," and that was the thrust and use I put of his memo.

Q What is the next sentence?

A "We can accomplish this with a temporary interconnection without running the systems in parallel."

Q Go ahead.

A His memo describes how we could do it with a temporary interconnection, which was timely and needed, and suited their purposes.

Q But the sentence that we started our question and answer on is the next sentence that you haven't yet read, and I still do not understand why -- I don't understand what you meant. You say, "His memo also

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Loshing - cross

Q Mr. Loshing, is PTX-321 one of the documents that you make reference to in your second paragraph on the first page of your memo, 538?

A Yes.

Q Is PTX-337 similarly one of those documents?

A Yes.

Q Now, both of these exhibits, 321 and 337, are altered by Mr. Moore; is that correct?

A That is correct.

Q And can you tell me what -- well, Mr. Moore would have been reporting officially information to you and to Mr. Bingham; is that correct?

A That is correct.

Q And I notice in your sentence you say, "Mr. Moore and Mr. Beck just completed comprehensive financial and engineering studies."

Would Mr. Moore have been the author of an engineering study or Mr. Beck?

A Mr. Beck.

Q And do you know what that study was that you make reference to that Mr. Beck had just completed?

A Yes.

As I recall, it was to evaluate the total savings available, however split between the Municipal Light

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1 Loshing - cross

2 Plant and us, if there were an interconnection.

3 Q Would you do me a favor and at the recess inquire
4 whether or not a copy of Mr. Beck's comprehensive
5 engineering study is still in the file?

6 A Yes.

7 Q And then if it is in the file, I would make a request
8 that it be produced.

9 Mr. Loshing, in that same paragraph you make
10 reference to the studies on MELP's answering the
11 questions posed by Mr. Besse and Mr. Rudolph, "At
12 our last Muny meeting."

13 Would you kindly tell us what were the questions
14 posed by Mr. Besse and Mr. Rudolph at your last Muny
15 meeting?

16 A I believe it was the one I just stated, "What are the
17 total economies available jointly to having an
18 interconnection between CEI and the Municipal Light
19 Plant.

20 Q When you say "joint economies" you mean benefits to
21 both parties?

22 A The total available to share, yes.

23 Q Were Mr. Besse and Mr. Rudolph concerned about
24 conferring benefits on Muny Light at that point?

25 MR. LANSDALE:

Objection.

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Loshing - cross

Q I will withdraw the question.

THE COURT: All right. Proceed.

Q Mr. Loshing, turn to page 5 of PTX-538.

As I see it, there are 15 people that got copies of your memorandum.

Were all of those 15 on the MELP Committee?

A Yes, at least formally. Some may have been staff people that were on this, on the informational committee.

Q I would like to have you identify the capacity of each of the persons on this list of addressees for a carbon copy. First there is Mr. Besse. Was he the Chairman?

A Yes.

Q And Mr. Rudolph, a President?

A Yes.

Q And what office did R. M. Ginn hold?

A Probably Executive Vice-President, although I am not sure.

Q He was a Vice-President?

A He was a Vice-President.

Q What capacity did Mr. R. A. Miller have at that time? Was he also a Vice-President?

A He was a Vice-President, yes.

Q What about Mr. Sealy?

CONFIDENTIAL

Loshing - cross

A He was Vice-President of Operations.

Q And Mr. Williams is a Vice-President?

A Vice-President of Engineering.

Q And Mr. Wyman?

A He was the Vice-President of Marketing.

Q Now, Mr. Beck got a copy. What was his capacity?

A He was not a Vice-President. He was not -- he was an individual that was in the mechanical engineering department that made the study.

Q And Mr. Bingham, was he a Vice-President at that time?

A Not at that point.

Q And Mr. Bostic, was he a Vice-President?

A No.

Q All right. What function did Mr. Bingham and Mr. Bostic have at that time?

A As I described so many times, they were staff to this communications group called the Munny Task Force, whatever it was called, and they were there, and they either had input, or primarily to have input.

Q Mr. Bingham worked for you?

A Yes.

Q And his particular area was rates?

A And cost studies.

Loshing - cross

Q Whom did Mr. Bostic work for?

A He probably reported at that time to Dick Shuerger, our Chief Mechanical Engineer.

Q You say Mr. Bostic worked for Mr. Shuerger?

A Yes.

Q Now, Mr. Davidson is on the list. What was his capacity?

A He probably was head of System Planning.

Q How about Mr. Lester?

A Mr. Lester worked for Mr. Bingham, and was a Senior Rate Engineer.

Q And Mr. Moore is on the list, and he worked for you, didn't he?

A No. He worked for Mr. Bingham in the Rates area.

Q All right; and you already identified Mr. Shuerger, and then the last is Mr. Sener. What was his capacity at that point?

A He was in System Planning, I presume, at that time. He worked for Mr. Davidson.

THE COURT: It is time for our recess.

Ladies and gentlemen, please keep in mind the Court's admonitions. We will take a short recess.

Loshing - cross

{Recess taken.}

THE COURT:

Please be seated.

Bring in the jury.

- - - - -

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

THE COURT:

Please be seated,

ladies and gentlemen.

BY MR. NORRIS:

Q Mr. Loshing, the only person we didn't identify in connection with your memorandum of June 17th, 1969, was the person to whom it was addressed, and that was Mr. Howley, was it not?

A Yes.

Q And he was the head of the Legal Department, is that right?

A That is correct.

Q And I believe you referred to him as the spearhead of the Munny operation, is that accurate?

A Yes.

Q Now, then, --

A I seem to -- I do not have a copy of mine.

Q I want you to have a copy of that exhibit.

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Loshing - cross

{Exhibit handed to the witness by Mrs. Richards.}

THE COURT: What exhibit are we talking about?

MR. NORRIS: 538, your Honor.

BY MR. NORRIS:

Q Now, you identified Muny Light as being caught in an economic squeeze, and what were the factors that contributed to that economic squeeze for Muny Light?

A Primarily mismanagement.

Q Where does "mismanagement" appear in your memorandum of June 17th, 1969 as a reason for that, Mr. Loshing?

A Only the consequences of the fact that they were in poor operating shape that was the result of continued pursuits of --

Q Would you kindly turn to the first page --

A I wasn't finished.

Q Continue with your answer.

A -- pursuits of mismanagement and some bad decisions that were finally coming home to roost.

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

THE COURT: Yes.

11/11/69

Loshing - cross

"A Yes.

"Q Now then, --

"A I seem to -- I do not have a copy of mine.

"Q I want you to have a copy of that exhibit.

"Now, you identified Munny Light as being caught in an economic squeeze, and what were the factors that contributed to that economic squeeze for Munny Light?

"A Primarily mismanagement.

"Q Where does 'mismanagement' appear in your memorandum of June 17th, 1969 as a reason for that, Mr. Loshing?

"A Only the consequences of the fact that they were in poor operating shape that was the result of continued pursuits of --

"Q Would you kindly turn to the first page --

"A I wasn't finished.

"Q Continue with your answer.

"A -- pursuits of mismanagement and some bad decisions that were finally coming home to roost."

MR. NORRIS:

The witness's testimony

Loshing - cross

does not conform with what the man wrote in 1969, and I want to ask him questions about what he wrote, and I would like the jury to be able to see the first page on the screen as I question him.

THE COURT: No.

Sustain the objection.

Not unless you lay the proper foundation. There is nothing in your questions and his answers, you never asked him the question whether or not that exact statement appeared in that diagram -- or in that memorandum.

If you want to lay the proper foundation, you are free to do so.

His answers are consistent with the questions.

Let's proceed, please.

{End of bench conference.}

BY MR. NORRIS:

Q On page 1 of your Exhibit 538, you identify "an antiquated system with little prospect of volume economies" as one of the factors in the economic squeeze, is that a fair statement?

A That is correct.

Q Now, let me ask you this:

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Loshing - cross

Is it -- is it necessarily true that an antiquated system with little prospect of volume economies means that the operator of such an antiquated system was guilty of mismanagement?

A Not in and of itself, no.

Q Now, the next element that you identify for the economic squeeze is "rising price levels and rapidly rising debt service".

Now, in your view as a financial forecaster, does that necessarily point to mismanagement on Muny Light's part?

A You didn't finish the rest of that sentence, sir.

Q All right, let's do that:

"Rising price levels and rapidly rising debt service caused by the need to raise the existing system's reliability and install pollution controls to meet minimum acceptable standards."

Now, my question is:

Given those factors that you have pointed to, do those necessarily point, in your opinion, to Muny Light having been mismanaged?

A Yes.

Q And is it the rising price levels that you derive your conclusion from that a company that has rising price

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Loshing - cross

levels would be a mismanaged company?

A No; but the lack of recognition of them in reflecting your rates surely is a prime cause of mismanagement.

Q Now, did you make referende to that, the lack of recognition of the rapidly rising price levels, did you make reference to that in this memorandum?

A That is such an implicit -- given here --

Q May I have -- did you?

A No.

Q And let's take the next:

What about the rapidly-rising debt service, does a co-mpany that has a rapidly-rising debt service necessarily constitute a mismanaged company?

A No; but, as I pointed out, again, with the rest of that sentence, the rising debt service to pick up for past inadequacies or system reliability, which is the key --

Q Is there any place in this paragraph where you talk about past inadequacies of Muny Light?

{The witness reading silently.}

A Not directly, but implicitly throughout.

Q All right.

Now, you mentioned the "existing system's" reliability," and you told us this morning that Muny

1 Loshing - cross

2 Light's major problem was reliability.

3 Now, does that necessarily point to Muny Light
4 having been mismanaged just because their major
5 problem is reliability?

6 A It sure is a strong system.

7 Q What about the difference between an isolated
8 utility and an interconnected utility, is it not a
9 fact that an interconnected utility, other things
10 being equal, is going to have greater reliability
11 than an isolated utility?

12 A All things being equal?

13 Q Yes.

14 A Yes.

15 Q If CEI, for example, were to lose all of its
16 interconnections today that it's presently got, would
17 that not cause CEI's reliability to possibly be in
18 some jeopardy?

19 A It would deteriorate its reliability.

20 Q What about this last point, Mr. Loshing:

21 "---install pollution controls to meet minimum
22 acceptable standards," am I correct that along about
23 the late '60's and early '70's, the entire electric
24 power industry was faced with new air pollution
25 control requirements that they had not been faced

Loshing - cross

before?

question then is:

Does the need to install pollution control
 measures necessarily point to Munny Light having been
 managed?

because they were laggard -- lagging in installing
 pollution controls.

Is there any place in this memorandum where you
 point out that Munny Light was lagging in installing
 pollution controls?

MR. LANSDALE: I object, your

Honor.

THE COURT: Approach the bench --

Sustain the objection.

Let's approach the bench, please.

- - - - -

{The following proceedings were had at the
 bench:}

MR. LANSDALE: If your Honor please, --

THE COURT: Now, Mr. Norris, --

just a minute -- I want to tell you one more time:

Loshing - cross

Will you stop this manner of questioning?

I'm ordering you to do that right now. I'm tired of having you come up here and just going back and defying what the Court has ruled.

Now, please, let's go back and proceed in the proper manner. If you don't know how to proceed in the proper manner, get somebody up here that does.

Let's proceed, please.

{End of bench conference.}

--- --

THE COURT: Please ask proper questions, Mr. Norris.

There is no indication in the form of your questioning that those things were contained in that memorandum.

Let's proceed in the proper manner.

MR. NORRIS: I didn't hear your comment, sir.

THE COURT: Read my comment back.

If you are desirous of asking the type of questions you're asking, preface the question by asking whether or not a certain situation was referred to in the memorandum.

UP

Loshing - cross

MR. NORRIS: Your Honor, I thought I did.

THE COURT: I'm sorry, you didn't. Please, let's proceed in the proper manner.

BY MR. NORRIS:

Q Mr. Loshing, my question wasn't clear enough.

Is there -- did you point to the matter of Muny Light lagging in its air pollution controls installation any place in this memorandum?

A No, I did not.

Q Thank you.

At the time you wrote this memorandum, Muny Light had a positive cash flow, is that correct?

{After an interval.}

A From our statement, just barely, yes.

Q It was your estimate, however, that the normal construction expenditures came very close to equalling the positive cash flow, is that a fair statement?

A Yes; choking it out.

Q And it was your conclusion, was it not, that if Muny Light were to go into any kind of capital program, that it would need to resort to external financing?

A That's correct.

Q And what kinds of external financing did you speculate

Loshing - cross

in this memorandum that Muni Light would resort to?

A I presumed that they would go to their cash-free mortgage bond route --

Q Councilmanic bonds?

A No.

Q Well, just addressing your attention to page 3:

Isn't it a fact that just above the heading "Impact of New Gas Turbines on MELP Operation", I think you do suggest that, do you not?

A I suggested that's what they might do.

Q Yes.

You said, "It also seems probable that they will continue going the route of Councilmanic bonds"?

A Yes.

On another free lunch.

Q I'm sorry. Would you repeat that?

A They found another free lunch.

Q What do you mean by that?

A They were able to again continue burdening the rate payers -- scratch that -- taxpayers of the City of Cleveland for the inadequacies of the revenues of the electric operation -- Municipal Light Plant's operation to cover the cost of its operation.

Q You're not suggesting that they were doing anything

Loshing - cross

illegal; are you?

MR. LANSDALE,

Oh, come on.

A No, sir.

THE COURT:

Sustain the objection.

Q Now, a permanent interconnection between Muny Light and CEI you've already testified would have been beneficial to Muny Light; that is correct; isn't it?

A That is correct, solely.

Q And one of the benefits would have been fuel savings, is that right?

A Yes, sir.

Q And how much did you estimate an interconnection would be worth to Muny Light, just in fuel savings alone?

A We're on page 3 now?

Q That's one place.

A 500 to 600 thousand dollars per year is the total fuel savings if Muny had an 80-megawatt interconnection and it used it only for backup purposes, which is not how you use an interconnection.

Well now, you referred to this as a tremendous economic benefit, did you not?

Yes; I said that in this memo.

And you, of course, meant a tremendous economic benefit to Muny Light?

Loshing - cross

{After an interval.}

A Yes.

Q And your reference to a 500 to 600 thousand dollar fuel savings per year was with regard to an interconnection used only for capacity backup and not for power exchange or maintenance power or economy power, is that what your meaning was?

A That's right; that's the result of one of these studies.

Q Now, also on page 3 I see a referenc to "transfer of energy."

You say, "These fuel savings to MELP do not include any transfer of energy."

Do I properly understand what you meant by "transfer of energy"? I don't want to put words in your mouth, but --

Strike that.

What did you mean by "transfer of energy" when you said "These fuel savings do not include any transfer of energy"?

A They do not contemplate any displacement of energy but, rather, the savings to Municipal Light Plant in returning their otherwise required spinning reserve on their own system, their own units, as opposed

Loshing - cross

to placing the burden on the interconnection and, ergo, the CEI system.

Is that a typical benefit from a permanent interconnection that is customary in the industry? It's a two-way street.

This was a one-way street where there was, is, has not been any mutuality of this benefit.

I understand. But my question is:

Whether or not the fuel savings from not having to continue to have spinning reserve operating all the time, is that not a typical benefit that any power company could achieve from a permanent interconnection with a neighbor?

Yes.

Now, would the fuel savings to Muny Light have been greater had Muny Light been able to receive transfers of energy over the interconnection rather than just fuel savings to avoid spinning reserves?

On page 4 of this -- my memo, I say:

"It may seem surprising, but if we were to enter into an economy interchange agreement where we split the savings, this would only result in annual savings of \$6,000 to Municipal Light Plant."

If you want me to interpret that, I will be glad

Loshing - cross

to.

Q Well, let me ask you to direct your attention to the next paragraph. You say:

"No measure of value is put on the corresponding increase in service reliability".

When you say "no measure of value", am I correct that you put a measure of value on the fuel savings that came from the elimination of the spinning reserve?

A That's right.

Q And that was the 500 to 600 thousand dollars a year, right?

A Right.

Q Now then, if you were to put a measure of value on the increase in service reliability that would come to Muny Light from an interconnection, how would you have gone about that?

A Would have made a study of the potential growth, the customers' load as a function of the enhanced reliability or improvement in the poor reliability.

Q Might this -- I'm sorry, I didn't mean to interrupt.

A And, as I point out here, on the ability to take on new customers, you could evaluate the after cost value of adding new customers relative to the cost of

Loshing - cross

serving.

So that the increased service reliability could have been translated, at least in part, into the ability to take on new customers, is that a fair summary?

Yes.

And, of course, those new customers would have -- if they hadn't -- strike that.

Those new customers, assuming that they were already existing users of electric power in the City of Cleveland, would have had to have come from CEI, is that correct?

Yes; or competition for new customers, including public load.

I'm speaking of those that were already here, those customers, your assumption here is that, of course, they would already have been served by CEI, is that right?

My memo says I made no analysis of that.

I understand.

You're hypothecating what I would have done.

But if you had made an analysis of it, you would have come up with some kind of a measure of value for that factor, is that not correct?

That could have been ascertained, right, under several

Loshing - cross

parameters, like we do all of our studies.

Now, another factor here that you indicate that you do not take into consideration:

No measure of value was put on the corresponding relief of future investments needed to strengthen their system.

What do you mean by that?

I'm trying to -- would you point me to it?

Yes.

It's on page 4, the second paragraph.

Oh.

{The witness reading silently.}

With us supplying the back up as spinning reserve, that obviated the necessity for them to get rid of their antiquated equipment and replace them with usable facilities, because that is the measure of the value of the spinning reserve.

Is this not also a typical benefit that exists in the electric power industry, whether you're a Municipal System or a privately-owned system, that if you do have interconnections with neighboring utility companies, that you don't have to build such plant in place for your own backup, is that not a fair summary?

Loshing - cross

To some degree, yes.

And the relief of future investments needed to strengthen the system here at the time you wrote this memo, Muny's biggest unit was 75 megawatts -- 85 megawatts; do you recall that?

Yes.

And if Muny were to create its own backup without an interconnection, is it a fair statement that to be consistent with normal industry practice, that they would have to have backup at least equal to the largest unit?

That is correct.

So that am I correct in assuming that when you say you put no measure of value on the relief of future investments needed to strengthen their system, would that -- would I be correct in assuming that you did not try to put a value on how much they would be relieved from having to build another 85-megawatt unit?

That is correct, yes.

Have you got any notion in 1969 what it would have cost to build an 85-megawatt unit?

No.

Loshing - cross

I could -- then I would have known.

Q May I ask you this way, please, Mr. Loshing:

Assume that the 85-megawatt unit that Muny Light put on line in 1967 cost in the neighborhood of \$12 to \$13 million.

Now, two to three years later, have you got any opinion at all as to whether that would have gone up by 10 percent?

A Yes; \$16 to \$18 million as a haphazard guess.

Q \$16 to \$18 million? ...

A Yes.

Q Now, what kind of debt service do you think an \$18 million investment would have amounted to on an annual basis?

A For a Municipal Light Plant?

Q Yes.

A With their tax-free bonds?

Q Exactly.

A Not Councilmanic?

Q Let's take it the way you suggested it, with their tax-free bonds.

A You're going back a long way, and I don't want to put any more speculation on this record; but I would think

that the tax-free market -- which we're not into it at this time -- was 5, 7 -- 6 percent, thereabouts, 5, 6 percent.

Q Well, subject to check, if I'm not mistaken, the annual debt service on the bonds for the gas turbines and the precipitators issued in the late '60's were somewhere in the order of \$500, 600 thousand a year, does that sound about right to you?

A I have no recollection.

It's ascertainable. If it's reasonable, I'll accept it.

Q Just one more question on this, if you have an opinion:

Would you think that if you had made a study and if you had put a measure of value on the relief of future investments that would flow to Muny from this interconnection, would it be fair to say that that measure of value could be roughly comparable to the fuel saving measure of value that you have already estimated?

{After an interval.}

A Will you read the question back?

{The pending question was read by the reporter.}

A I made no such study.

I couldn't really comment at this time on the

Loshing - cross

relative comparability.

Q Now, on page 3, in the next-to-the-last paragraph, Mr. Loshing, you make reference to another assumption that you made, and that was an assumption with respect to the charging of a standby charge.

Now, what do you mean by "standby charge"?

A A standby charge is a function that you provide -- as this interconnection would to Municipal Light Plant -- where you stand by for their need for capacity; and the traditional at that time going rate for providing standby service was 30 cents a kilowatt week.

Q That would have translated into a million two hundred thousand dollars a year?

A Right.

Q And that if you had charged Muny Light that amount of money, as you point out here, that would have left Muny Light with an increased deficit, is that correct?

A That is correct.

Q Now, then, you make reference to the charge for emergency standby service as being a most vital point and one that may be difficult to obtain.

Why?

Well, first of all, -- I have got two questions,

Loshing - cross

I'm sorry.

Why did you say that the charge for emergency standby service was a most vital point?

A Because of the potential transfer of burden from the inadequacies of the Municipal Light Plant System to the facilities of CEI provided by CEI's rate payers. That would be a difficult number to quantify as we're just going through here.

Q Now then, I noticed that on the fourth page, you make reference again to the standby charge, and I call your attention to the fourth paragraph of the page.

You use the term "a proper standby charge"?

A Yes.

Q And does "proper standby charge" mean a sufficiently high standby charge?

A No.

A sufficiently adequate one which, in the context of my memo here, really under the standards of the industry would be a million to a year, would --

Q That would --

A -- properly compensatory.

Q That would be -- in other words, the million two a year would be a proper standby charge?

A That is correct.

1 Loshing - cross

2 Q And that also is the charge that would have left an
3 increased deficit for Muny Light?

4 A That is correct.

5 Q Now then, you concluded that:

6 "A strong permanent interconnection would give
7 MELP the system reliability it so sorely needs."

8 Q Did you feel, when you wrote that, that that
9 would be beneficial to Muny Light even though they had
10 to pay a million two for a standby charge every year?

11 A Yes.

12 Q But with the proper "standby" charge, am I not correct
13 that Muny Light would not get any financial relief
14 from the interconnection?

15 A That's right.

16 Q And, yet, rather they would incur higher expenses?

17 A Yes; their system was so mismatched that the
18 prevailing rates in industry would not have bailed out
19 their mistakes of their system configuration.

20 Q Mr. Loshing, did you think that charging that kind of
21 a standby charge would have put pressure on Muny Light
22 to increase their rates?

23 A Yes.

24 Q And if that had occurred, that, of course, would have
25 represented a competitive advantage that CEI would have

1 Loshing - cross

2 been able to realize from the standby charge, is that
3 a fair statement?

4 A Or the lessening of the disadvantage we had to their
5 tax exemption.

6 Q Well, that would depend upon the quantity of the
7 charge, would it not?

8 A Yes; but that was -- yes.

9 Q And that would, of course, then be also dependent upon
10 how high the rates ultimately did get raised in
11 relation to the CEI rates?

12 A Yes.

13 THE COURT: Ladies and gentlemen,
14 it's now 4:00 o'clock.

15 So that you may have an opportunity to review
16 the exhibits, which I'm sure you have seen before,
17 we will permit you to return to the jury room so
18 that you may peruse these exhibits, and at
19 4:30 you will be free to go.

20 Again, keep in mind the Court's admonition
21 that you are not to discuss the case either among
22 yourselves or with anyone else; you are to keep
23 an open mind until such time as you have heard
24 all of the evidence in the case and the Court's
25 instruction as to the law and the application of

1 Loshing - cross

2 the law to the facts as you find them to be, and
3 until such time as the matter is submitted to you
4 for your ultimate deliberation and judgment.

5 With that, you're free to go, return tomorrow
6 morning at 8:30.

7 Good night.

8 {The jury left the courtroom and the
9 following proceedings were had out of their
10 hearing and presence.}

11
12 THE COURT: Plaintiff's Exhibits
13 603, 538, 539, 1488, 2631, 2081, 321, 337, all of
14 which have been admitted and may be submitted to
15 the jury.

16 You may step down.

17 THE WITNESS: Thank you.

18 THE COURT: Mr. Norris, may I
19 make an inquiry here at this juncture?

20 I was attempting to follow the testimony
21 from the afternoon recess on.

22 I am unable to understand the purpose of the
23 testimony. It appears to me that this is testimony
24 that is directed to the substantive issues before
25 the Court during the statutory period.

1 Loshing - cross

2 Maybe you can enlighten me.

3 MR. NORRIS: The purpose of the
4 testimony, your Honor, is to demonstrate that in
5 1969 CEI recognized that its utilization of the
6 market power that it had either to grant an
7 interconnection or withhold the interconnection
8 could have devastating consequences on Muny
9 Light. And, as this memorandum demonstrates,
0 Mr. Loshing made a very careful study -- actually
1 two comprehensive financial studies made by Mr.
2 Moore, he had a comprehensive engineering study
3 made by Beck -- and he then summarized the
4 comprehensive financial and engineering studies
5 in this memorandum, which was sent to the top
6 management -- virtually everyone in the top
7 management of the company.

8 A thorough understanding of what this
9 memorandum states makes it very clear that the
0 testimony that we have not quite reached, your
1 Honor, has -- Mr. Loshing sets forth three
2 conclusions of three different courses of
3 action that the company could take, and one
4 of them was to initiate an interconnection
5 and impose a sufficiently high standby charge

1 to increase the financial pressure on Muny Light.

2 Another alternative that Mr. Loshing
3 identifies is to initiate an all-out effort to
4 purchase Muny Light.

5 And then the third alternative, which is
6 one that they followed, was to avoid an
7 interconnection, running the risk of an FPC
8 dictated interconnection hoping that, in the
9 meantime, the operating and financial
10 difficulties of Muny Light would result in an
11 elimination of Muny Light as a competitive threat.

12 And the reason this is important to the
13 issues in this case is that it demonstrates an
14 intent on CEI's part to make use of its
15 enormous market power with respect to what the
16 consequences are going to be on its competitor.
17 And this attitude, this intent on the part of
18 CEI has got to be considered to the attitudes
19 that are implicit in the 1962, 1963, 1965 offers
20 of an interconnection based upon the condition
21 that Muny Light should raise its rates to the
22 CEI level.

23 And, as we have seen, the CEI studies have
24 already indicated that they determined that if
25

1 Muny Light's rates were raised to the CEI
2 level, that this would go a long way towards
3 their being able to knock Muny Light out of the
4 box, either to eliminate it or to acquire it,
5 and thereby accomplish their MELP objective.

6 Now, what this means, your Honor, is that if
7 you take a look at all the CEI conduct up to the
8 July, 1971 inception of the damage period, it
9 is apparent that CEI was aware of what it could
10 do towards accomplishing its MELP objective
11 with respect to what it did on either withholding
12 or offering an interconnection.

13 And this intent evidence helps characterize
14 what happened in July, 1971 within the damage
15 period, and the CEI executives have one version
16 of what happened in July, 1971, and the City's
17 witnesses have a different version of what
18 happened in July, 1971 with respect to this
19 matter of refusing an interconnection.

20 And the jury must resolve that question of
21 fact as to what actually occurred, whom do they
22 believe. And the City submits that this
23 evidence of the 1960's and the recognition by
24 CEI that if they could keep Muny Light isolated,
25 that Muny would ultimately be eliminated as a

1 competitive threat.

2 That intent evidence helps illuminate what
3 happened in July, 1971, and that's why the
4 evidence is relevant.

5 THE COURT: I appreciate what
6 you're saying to me, Mr. Norris.

7 But I think that we must begin at a point
8 of departure. That point of departure in this
9 case is an admission, which I have had my law
10 clerk get for me since I have been getting
11 increasingly concerned about where we're going.

12 The admission in this case is:

13 CEI has in the past intended and attempted
14 to reduce or eliminate competition between it
15 and Muny Light by one or more of the following
16 means:

17 Number one. Acquisition by purchase.

18 Number two. Agreement with Muny Light,
19 express or implied, to reduce or eliminate
20 competition by one or a combination of means
21 such as:

22 {a} Equalization of rates to private
23 customers;

24 {b} a mutual policy of refraining from
25

1 soliciting or expanding to serving the other
2 customers, a mutual "live-or-let-live"
3 situation; and

4 {c} When competition could not be
5 peacefully removed or eliminated, CEI competed
6 as vigorously as it could in the area in which
7 there is a duplication of service with Muny
8 Light and still intends to do so.

9 In furtherance of this effort, CEI sometimes
10 sought to avoid doing and, in any event, did not
11 wish to do things which would help Muny Light
12 to compete more effectively.

13 Now, with that point of departure, and
14 recognizing that the substantive issues in
15 this case are confined to a damage period
16 commencing with July 1, 1971 --

17 MR. NORRIS: That is correct.

18 THE COURT: -- to a limitation
19 period July 1, 1975, the great weight of the
20 testimony -- I should say, the great amount of
21 the testimony that has been introduced during
22 these 18 days of trial has addressed the period
23 that goes back as early as 1948 through and up
24 to 1970.

There has been a very limited amount of testimony addressed to the period '71 through '75.

I might say, within the context of the number of days that the trial has progressed, that amount of testimony to date has been miniscule.

1 Much of the testimony elicited as it reflects
2 through this period of time has been cumulative and
3 repetitious.

4 We have witnesses saying the same thing in a
5 different form; recognizing also that the admission
6 of such testimony is discretionary with the
7 Court; and recognizing that I had permitted, as I
8 say, during this 18 days of trial, this wide
9 latitude of permitting this pre-damage period
10 testimony in for the purposes of establishing
11 some color of intent, which really, under the
12 facts of the stipulation, is redundant.

13 My next question is, how many more witnesses
14 are we going to go over the same material with,
15 because there has got to be at some point in time
16 an end to this type of testimony, and we must
17 direct our attention to the testimony, the
18 substantive testimony as it bears upon the ultimate
19 issues in this case; namely, the period July 1,
20 1971, through 1975, and the damage period that
21 the Court has permitted testimony in thereafter.

22 We just have to put a stop to it, especially
23 in view of the fact that it is repetitious.

24 MR. NORRIS: Your Honor, one thing
25 I would like to observe before I go to your question

1 about is this testimony redundant with the
2 admission, I am sure that the number of trial
3 dates taken on direct versus cross-examination is
4 something that the Court will take into
5 consideration. We have tried to be expeditious.

6 THE COURT: Mr. Norris, a great
7 deal of what has transpired during this 18-day
8 period now doesn't take into account the three or
9 four weeks that we were getting ready on the voir
10 dire on the selecting of the jury. I grant you
11 that, but one situation aggravates the other,
12 and a great deal of our time here has been spent
13 on collateral issues.

14 MR. NORRIS: Well, on the
15 substantive point, I can share with the Court the
16 lineup of the witnesses that we have, but could I
17 come back --

18 THE COURT: I really don't want
19 to argue that point with you, Mr. Norris.

20 My question to you is, how many more
21 witnesses do you intend to put on to go over the
22 same type of testimony that we have been through?

23 MR. NORRIS: I don't think I am
24 putting on testimony, your Honor, that is'
25 redundant.

1 THE COURT: Mr. Norris, I
2 certainly wouldn't expect you to say anything
3 else, but I am giving you what analysis of the
4 testimony, what my analysis of the testimony is,
5 and I am confident that the record will speak for
6 itself, and it will either support your contention
7 or support my contention, and if my contention
8 should be wrong, that is why we have the Court
9 of Appeals.

10 MR. NORRIS: May I just make one
11 comment, please:

12 The reason the intent evidence that we are
13 adducing is not redundant with the CEI admission --

14 THE COURT: I am not saying
15 redundant with the CEI admission. You misconstrue
16 what I am saying. It is redundant in light of the
17 CEI admission, taken together with the testimony
18 of the witnesses.

19 We have had four or five witnesses testify to
20 the identical same material.

21 MR. NORRIS: We haven't had anybody
22 testify to the MELP Committee until today.

23 THE COURT: They didn't call it
24 the MELP Committee.

25 MR. NORRIS: We didn't have any

1 testimony from anybody prior to Mr. Loshing with
2 respect to the intent evidence that his memorandum
3 reflects.

4 THE COURT: Well, I am not going
5 to take the time to go back over my notes.

6 I wish you would address my question, because
7 we have reached that point where the Court is
8 seriously considering restricting further testimony
9 to the statutory period, 1971 through 1975, and
10 the remainder of the damage period which I have
11 allowed during the course of the last trial.

12 Now, unless you can show me some compelling
13 reason where you are going to go into new
14 evidence, I think that we must face this reality,
15 because I am interested in moving into that area
16 which is the material part of this case from which
17 action or inaction damages may or may not accrue.

18 MR. NORRIS: Well, to the extent
19 that the intent evidence doesn't illuminate the
20 character of the actions within the damage period,
21 that of course is relevant.

22 THE COURT: What I said to you is,
23 I am certainly considering at this juncture to
24 eliminating the testimony to the period 1971 through
25 1975, unless you can show me some compelling reason

why I should not, and you need not argue the issue of intent, and the testimony concerning intent. I am well aware of that. And I was aware of it in the first trial and in this trial.

My point is, unless you can show me some witness that is going to testify to some new matter, we are going to eliminate the testimony to the period here in issue, 1971 through 1975.

MR. NORRIS: Your Honor, after Mr. Loshing is off the stand --

THE COURT: Yes.

MR. NORRIS: -- I am aware of two other witnesses, both of whom will be very short.

THE COURT: That is what everybody tells me, but Mr. Hinchee was going to be short, and he was on the stand for nine and a half days, and Mr. Loshing was going to be short, and he was here three days.

MR. NORRIS: I just started with him yesterday. It may seem like three days.

THE COURT: Well --

MR. NORRIS: Anyway, what I was going to say, after Mr. Loshing is off the stand, then I have Mr. Garafoli who can't be here until Monday.

1 THE COURT: Tell me what he is
2 going to testify to, and I will tell you whether it
3 is new matter or repetitious of old matter.

4 MR. NORRIS: His testimony goes to
5 this point:

6 Mr. Lansdale has, I think, attempted -- well,
7 he hasn't attempted to -- he has actually charged
8 Mr. Hinchee with misrepresenting to City Council
9 with respect to the use to which the \$5 million
0 issue would be put.

1 THE COURT: I think Mr. Hinchee's
2 testimony will speak for itself.

3 Nobody has to characterize that, and I am sure
4 the jury is well aware of his testimony.

5 MR. NORRIS: Well, I think there
6 may be a difference of opinion.

7 THE COURT: That is true, but I
8 hope you are not saying that Mr. Garofoli is
9 going to come in and --

10 MR. NORRIS: Mr. Garofoli is going
11 to testify as to what representations were made to
12 the City Council with respect to the use to which
13 the \$5 million would be put.

14 Mr. Lansdale was critical of Mr. Hinchee and
15 telling him he was actually misrepresenting to

1 City Council, and that is totally inaccurate, and
2 there are two other witnesses that will clarify
3 whether or not the Bednar Report was the sole
4 basis upon which City Council passed the ordinance,
5 1187-71, following Mr. Hinchee's arrival in
6 Cleveland.

7 THE COURT: Well, I hear what you
8 are saying, but I don't fully appreciate how you
9 are going to evolve that in testimony by following
10 the rules of evidence. That is what concerns me.

11 MR. NORRIS: Very easily.

12 THE COURT: Maybe it is easy for
13 you, but I am having difficulty with it.

14 MR. NORRIS: I am trying to answer
15 your question.

16 There are a couple of witnesses after Mr.
17 Loshing that will testify marginally before the
18 damage period, and this is June 28, 1971, testimony.

19 THE COURT: As I said, I will
20 consider that.

21 What I am asking you is, what is the substance
22 of the testimony that you are desirous of developing
23 that occurred prior to the statutory period.

24 That is what I am asking you; so that I can
25 evaluate whether or not it should be permitted, or

1 whether we should go on into the real issues in
2 the case.

3 MR. NORRIS: These are the real
4 issues in the case.

5 THE COURT: Will you kindly answer
6 my question?

7 MR. NORRIS: I am confused as to
8 what question you want me to answer.

9 THE COURT: The question I would
10 like you to answer is, who are the witnesses, and
11 what do you intend to develop by their testimony?

12 MR. NORRIS: Mr. Garofoli is going
13 to testify as to the representations made by the
14 administration to City Council on June 28, 1971.

15 Mr. Garofoli was the President of City
16 Council, and Mr. Garofoli has relevant testimony
17 as to whether or not the Bednar Report was the
18 sole representation made by the administration,
19 or whether or not other representations were made.

20 The other witnesses --

21 THE COURT: This is a witness,
22 I take it, that is introduced to rehabilitate the
23 testimony of Mr. Hinchee?

24 MR. NORRIS: No, sir, to give
25 additional evidence as to what the representations

1 were that the City Council was given as to the use
2 to which the bond money would be put.

3 The suggestion that Mr. Lansdale has left
4 in the jury's mind is that no plant renovation was
5 communicated to City Council as a reason for the
6 \$5 million of bonds.

7 The facts are, your Honor, that the plant
8 renovations and permanent interconnection, those
9 factors were thoroughly debated on the floor of
0 City Council, and Mr. Garofoli who was a
1 representative of City Council can state what the
2 representations were.

3 THE COURT: And the City Council
4 passed an ordinance?

5 MR. NORRIS: Yes.

6 THE COURT: And that incorporated
7 the commitment of the money?

8 MR. NORRIS: But the issue that has
9 been raised is whether or not that ordinance was
0 passed on the basis of misrepresentations, and the
1 facts are that there was no misrepresentations.

2 Mr. Lansdale is suggesting that City Council
3 was not told that the money would be used for
4 plant renovation, and the fact is that City Council
5 was told that.

1 THE COURT: I don't recall the
2 ordinance. Did the ordinance incorporate plant
3 renovation?

4 MR. NORRIS: The ordinance made
5 reference to the Bednar Report having been lodged
6 with the Director of Finance, and the way the
7 testimony stands at the present time there is an
8 inference that Mr. Lansdale has invited the jury
9 to make that there were no representations made
10 to City Council as to the use of those funds other
11 than the Bednar Report.

12 THE COURT: Well, what is the
13 purpose of the witness? What is the next witness
14 that is going -- that you are going to have, and
15 what is he or she going to testify to?

16 MR. NORRIS: Mr. Gaskill, who was
17 the Director of Utilities from late 1970 or early
18 1971, for I guess, I think 14 to 16 months, and he
19 was also one of the Directors that appeared in
20 City Council on that night and made his own
21 representations with respect to the plant
22 renovations that the fund would be used for.

23 THE COURT: What ordinance?

24 MR. NORRIS: 1187-71.

25 THE COURT: All right, go ahead.

1 Mr. Gaskill and who else?

2 MR. NORRIS: Then we are planning to
3 call Mr. Salko and Mr. Titus who are Muny Light
4 employees, and their testimony will be with
5 respect to the way in which Muny Light was required
6 to operate during the continuance of the load
7 transfer service from an operating standpoint.

8 THE COURT: I thought we went into
9 that with Mr. Meehan and Mr. Daniels?

10 MR. NORRIS: Those were plant
11 people, and these are distribution and transmission
12 people.

13 THE COURT: You can use one of
14 those people.

15 What number was that ordinance again? Was it
16 1187-71?

17 MR. NORRIS: Your Honor, they have
18 different testimony to give.

19 THE COURT: What number is the
20 ordinance?

21 MR. NORRIS: 1187-71.

22 Your Honor, will the defendant --

23 THE COURT: Just a minute.

24 I am sorry. My copy of this ordinance is
25 blurred in one portion. It says:

1 "Council of the City of Cleveland hereby
2 find and determine that as set forth in the
3 section in order to meet the demand for electric
4 light and power in the City of Cleveland, it is
5 necessary and advisable and desirable that the
6 Municipal Electric Light and Power Plant and
7 transmission and distribution systems to the
8 City of Cleveland, a product and service of which
9 are now and will be supplied to the City of
10 Cleveland" -- and then I can't read it.

11 I think it is -- I don't know what the remainder
12 of that paragraph says.

13 {Copy of ordinance handed to the Court.}

14 THE COURT: And it says, "and
15 its inhabitants be entered by the acquisition
16 and construction of the capital improvements set
17 forth on the second page of the preliminary report,
18 financing requirements prepared by C. M. Bednar,
19 Staff Consulting Engineer, copy of which has been
20 filed with the Director of Finance."

21 Okay. Get me the Bednar Report, please, so
22 I can see what they are referring to there.

23 MR. NORRIS: It is 29 -- it would
24 be in the CEI Exhibits, 2124, I think. It is your
25 two compendium exhibits -- maybe not.

1 MR. WEINER: 2312.

2 MR. LANSDALE: What did you say?

3 MR. WEINER: 2312.

4 MR. LANSDALE: 2312 is correct, your
5 Honor.

6 THE COURT: All right.

7 As I read this then, Mr. Garofoli's testimony
8 will be directed to the issue as to what beyond
9 the Bednar Report Council relied upon in enacting
10 the ordinance.

11 That is of course -- that does not go to the
12 substantive issues of the case.

13 Now, as to these other two gentlemen that you
14 said, instead of one, you say you need two -- why?

15 MR. NORRIS: Your Honor, we have
16 21 witnesses, and by my count only 8 have been
17 pre-damage period.

18 THE COURT: Pardon?

19 MR. NORRIS: Only eight of them
20 have had exclusive testimony pre-damage.

21 THE COURT: We have 21 witnesses --
22 my goodness. It doesn't seem that long.

23 MR. NORRIS: I do not believe that
24 there has been an overburdening of the
25 pre-damage period testimony.

1 THE COURT: There certainly has.
2 If you can go back to the record, you will see the
3 great weight of the testimony introduced to this
4 juncture, both on direct and cross of the
5 defendant's witnesses deals primarily with the
6 pre-damage period, and goes to the issue of intent,
7 and I have permitted this testimony in to
8 characterize any intent, but what I am saying to
9 you is that there is going to have to be a stop
10 to it, and my question to you is, what are these
11 other two gentlemen going to testify to, and how
12 is their testimony different from each other, and
13 would you kindly tell me that.

14 MR. NORRIS: Mr. Hjelmfelt will
15 respond.

16 THE COURT: Why can't we use one
17 gentleman?

18 MR. NORRIS: Mr. Hjelmfelt is
19 going to handle the two witnesses.

20 THE COURT: Approach the bench.

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

24 MR. NORRIS: Your Honor, it seems
25 to me that if this is something that your Honor

1 wants to inquire into, it ought to be done in
2 camera.

3 This is still an adversary presentation, and
4 for me to stand up and lay out my case to Mr.
5 Lansdale, it doesn't seem to be appropriate.

6 THE COURT: I am not asking for
7 you to lay out your case.

8 MR. NORRIS: You are asking me
9 what are the people going to testify to.

10 THE COURT: Did they testify
11 during the last case? If you want to put them
12 on, one is enough. We have had so much
13 repetitious testimony.

14 We have been going over this last night, and
15 going back over the record, and just between you
16 and me today was a complete wasted day. You got
17 absolutely no probative evidence.

18 We spent more time walking back and forth
19 between the bench. You are wearing out my rug.

20 MR. NORRIS: It is my judgment that
21 PTX-538 is a critical document in the intent
22 evidence, and therefore I respectfully disagree,
23 but if you want Mr. Hjelmfelt to respond --

24 MR. HJELMFELT: Mr. Salko and Mr. Titus
25 will testify as to the operation of the load

1 transfer service from the period 1971 to 1975.

2 Mr. Titus was in charge of it from 1971 to
3 '73.

4 THE COURT: Certainly the fellow
5 is going to testify from 1971 and 1975. He is
6 permitted to testify to that. No problem.

7 MR. HJELMFELT: Both are within the
8 damage period.

9 THE COURT: Okay. I have got no
10 problem.

11 MR. NORRIS: I told you there is
12 only two. I told you there is only two that I
13 am aware of that are still left outside the
14 damage period.

15 THE COURT: I asked you who they
16 were.

17 MR. MURPHY: Does that include
18 CEI employees also?

19 MR. LANSDALE: Our impression is
20 that the number of these witnesses that you
21 called from CEI are devoted to this same sort of
22 stuff.

23 THE COURT: Just so we understand
24 each other, I am talking about limiting the
25 testimony as to the pre-damage period, and I want

1 to know how many witnesses you intend to utilize
2 or are thinking about utilizing.

3 I don't care whose witnesses they are. All
4 I am saying is that we have just been over it so
5 many times.

6 MR. NORRIS: Well, the additional
7 witnesses that we have, there are half a dozen
8 CEI witnesses, and I would have to review each
9 of those to be able to answer your Honor's
10 precise question as to whether or not it is
11 pre- or post-, but there may be some incidentally --
12 like Mr. Dobler, and I don't know what we will
13 find with respect to the benefits to CEI of an
14 interconnection or the aggravation of Muny Light.

15 That I thought we could get out of Mr.
16 Loshing, but we were not able to. But we are
17 not rehashing the pre-damage period.

18 THE COURT: You certainly are.

19 We can list, Mr. Norris, and I don't have my
20 notes, the activities that you rely upon as
21 undertaken by CEI to reflect their intent as it
22 may or may not bear upon the antitrust issues.

23 Now, my question to you is, we have already
24 had about four or five witnesses that have
25 testified to those areas that they undertook, and

1 what I am saying to you is, we are not going to
2 have any more witnesses testify to those same
3 areas to reflect that same intent.

4 That is what I am saying to you.

5 Now, if there is some new activity that we
6 have not gone into that reflects upon intent during
7 this period, I will be happy to entertain it and
8 listen to what it is without committing myself
9 to permitting it at this juncture.

0 MR. NORRIS: One of the other
1 events that has not been gone into, but I intend to
2 go into it with Mr. Loshing, was in the period of
3 the Christmas outage, December, 1969, and
4 January, 1970, and the exhibit that I just asked --

5 THE COURT: I am going to permit
6 you to conclude with Mr. Loshing. You will be
7 permitted to conclude your examination as it
8 concerns him.

9 I am asking about other witnesses that you
0 will have.

1 Now, if you can't answer my question now, I
2 am not pressing you. You can look through your
3 notes and find out.

4 All I am telling you is that you better be
5 selective in your witnesses, and they better

1 contribute something new, otherwise I am going to
2 permit, I am not going to permit any more cumulative
3 testimony as to intent.

4 We are going to get into the meat and potatoes
5 of this case.

6 MR. NORRIS: If I may put this on
7 the record?

8 THE COURT: Sure, absolutely.

9 MR. NORRIS: I think that the
10 intent issue is one of the most difficult issues
11 that lawyers are required to prove in the trial
12 of lawsuits, because when you are talking about
13 this kind of an issue, it is just common knowledge
14 that defendants don't go around admitting that
15 they have damaged in illegal activities, and
16 therefore you have got to be able to prove
17 intent through circumstantial evidence and
18 inferences.

19 THE COURT: They haven't had any
20 illegal activities at this juncture.

21 MR. WEINER: Yes, there have been.

22 THE COURT: Mr. Weiner, please,
23 please don't tell me there is any evidence of
24 illegal activities.

25 MR. NORRIS: The violation of

1 Section 2.

2 THE COURT: That is not what
3 you said.

4 MR. NORRIS: That is what I
5 intended to say.

6 THE COURT: You see, here is
7 where we constantly have a parting of the ways,
8 Mr. Norris.

9 The activities which you are attempting to
10 develop may or may not be a violation of the
11 Sherman Antitrust Act.

12 If they were such flagrant violations of the
13 Antitrust Act, the Court would have to rule as a
14 matter of law that there was a violation of the
15 Antitrust Act.

16 Now, if the evidence in this case parallels
17 the evidence in the other case, certainly this
18 Court and no Court would rule that as a matter of
19 law these are violations of the Antitrust Act.

20 So these acts that you characterize as
21 violations of the Antitrust Act are your
22 characterization of the violations of the
23 Antitrust Act, and the jury will determine whether
24 or not they are.

25 The purpose of previewing the testimony is to

1 permit you to develop within the parameters
2 certain activities which may bear upon predatory
3 conduct or conduct that is unreasonable and
4 unfair, and what I am saying to you is, we have
5 these outlined definitions of conduct that you
6 characterize as illegal.

7 Now, what I am saying is, you have already
8 had four or five witnesses testifying to those
9 same illegally characterized activities, and I
10 am saying that is cumulative, and I am not going
11 to permit it any more; that if you have new
12 areas of conduct that you are going to characterize
13 as a violation of the antitrust act, I will
14 consider whether or not it should be permitted in
15 to reflect upon intent, and I don't care whether
16 they are your witnesses or theirs.

17 I don't care whose witnesses they are.

18 That is what I am saying, and I don't think
19 that I am being unreasonably restrictive. I don't
20 think I am being restrictive at all.

21 So, all I am telling you is that tonight I
22 would like to have you reevaluate your witness
23 list, and I don't want any cumulative testimony as
24 to the issues that we already had.

25 If you want to introduce through any witness

1 a new area of claimed Sherman Antitrust
2 violation, I will consider it within that limited
3 parameter.

4 Do you have anything to say, Mr. Lansdale?

5 MR. LANSDALE: No, sir.

6 I intended to make a motion along this same
7 line.

8 THE COURT: Along what line?

9 MR. LANSDALE: The same line of
10 trying to stop what I consider the redundant
11 testimony.

12 THE COURT: Well, it has gotten
13 to the point --

14 MR. WEINER: Your Honor, we have
15 been here -- you are right -- 18 days, and over
16 11 days we have had testimony exclusively in the
17 damage period, of those 18 days, exclusively, and
18 that doesn't take into account some of the
19 testimony of the witnesses that go half and half.

20 THE COURT: I am not going to
21 argue the point with you, Mr. Weiner.

22 You are telling me your impression.

23 MR. WEINER: It is not my
24 impression.

25 THE COURT: Will you agree that

1 the record speaks for itself*

2 MR. WEINER: All right. Absolutely.

3 THE COURT: Let the record speak
4 for itself. I interpret the record as I see it,
5 and you have interpreted the record as you see it,
6 and that is why we have the Court of Appeals.

7 MR. WEINER: But you were advised
8 by Mr. Norris -- Mr. Norris told you a number of
9 the witnesses that were just after 1971, and I
10 thought you would be interested that it was 11
11 days after 1971, out of the 18.

12 THE COURT: All right. Go over
13 the witness list, and let us know tomorrow where
14 we are going, and I will rule on it when I am
15 fully advised.

16 Thank you very much, gentlemen.

17 {Court adjourned for the day.}

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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

Transcript

Friday, August 7, 1981

Good Summary of Pre Damage Personal Evidence

KF
228
.C43
1980

1 FRIDAY, AUGUST 7, 1981, 10:10 O'CLOCK A.M.

2
3 {The following proceedings were had out of
4 the hearing and presence of the jury.}

5 LAW CLERK SCHMITZ: City of Cleveland,
6 plaintiff, versus the Cleveland Electric
7 Illuminating Company, defendant. This is Civil
8 Action No. C75-560.

9 THE COURT: Gentlemen, during
10 the adjournment, the Court has reviewed its
11 notes and records, and I find that the following
12 areas of testimony have been covered rather
13 thoroughly as it relates to the pre-damage
14 period, and any evidence concerning these
15 subjects will be cumulative. As a matter of fact,
16 there is an abundance of evidence on all of these
17 subject matters:

18 1. I'm talking now about the period prior
19 to July 1, 1971. CEI's internal planning re
20 Munny Light.

21 2. Continuing surveillance and monitoring
22 of Munny Light.

23 3. The interconnection and, as a part of
24 that, Munny's desire to interconnect.

25 "[b] The consequences of not having the

1 interconnection.

2 {c} CEI's 1966 conditioning of the
3 interconnection upon the City's agreement to
4 equalize rates.

5 The next area of testimony where we have had
6 an abundance of testimony is the load transfer
7 system, and under that we have

8 {a} Basic operational features of the load
9 transfer system; and

10 {b} The relative advantages of a parallel
11 interconnection versus a load transfer system.

12 The next category that has already been
13 addressed is the pre-1971 condition of MELP and,
14 under that, we had an abundance of testimony
15 concerning the equipment and the condition of
16 the equipment of MELP.

17 {b} The personnel and the moral of the
18 personnel; and

19 {c} The financial condition.

20 The next category is the City's pre-1971
21 commitment to the existence of MELP.

22 The next category is CEI's publicly
23 announced opposition to the Painesville-Orville
24 interconnection.

25 And the last area wherein additional evidence

1 would be cumulative is CEI's effort to acquire
2 private industrial generating facilities.

3 Now, approach the bench, gentlemen.

4 - - - - -

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

7 THE COURT: These are the areas
8 that I don't think that we should have any
9 additional evidence on.

10 Now, I understand, Mr. Norris, you are
11 desirous of conferring with the Court in camera
12 concerning areas that you would be desirous of
13 covering during this pre-statute of limitations
14 period; is that correct?

15 MR. NORRIS: Yes, your Honor.

16 MR. LANSDALE: We have no
17 objection.

18 THE COURT: All right; so long
19 as we don't have an objection.

20 MR. HJELMFELT: May I have a
21 clarifying question?

22 THE COURT: Certainly.

23 MR. HJELMFELT: That is only evidence
24 with respecting to July 1st?

25 THE COURT: Absolutely.

1 MR. HJELMFELT: If these matters
2 come up after July 1st --

3 THE COURT: I don't think that is
4 cumulative. I don't know what context these
5 things are going to come up during the 1971
6 and thereafter period.

7 Now, certainly that is an entirely different
8 subject that we address as it evolves during the
9 course of the trial.

10 MR. NORRIS: I need to put a
11 serious matter on the record.

12 THE COURT: Sure.

13 MR. NORRIS: Mr. Lansdale has
14 now produced, pursuant to the request yesterday,
15 the memorandum of May 15, 1969, that was
16 referenced in the Loshing memorandum, PTX-538.

17 I have twice been given representations by
18 counsel for the defendant that the memorandum
19 referred to in PTX-538 as being the comprehensive
20 financial and engineering studies upon which Mr.
21 Loshing based his memorandum were those documents
22 authored by Mr. Moore that had already been
23 delivered to us.

24 THE COURT: Wait a minute. Read
25 that.

1 {Record read.}

2 MR. NORRIS: I believe there were
3 PTX-321 and 337.

4 Now, I am not charging counsel with
5 dereliction. I am simply disadvantaged by the
6 fact that both last fall and this spring, in
7 response to specific requests that we made, that
8 there was an inability on the part of someone to
9 come up with this document, and let us have it,
10 and apparently there was no difficulty coming
11 up with it last night, and I simply cite that as
12 a frustration that the City has had to put up
13 with in this case.

14 THE COURT: Let's see it.

15 {After an interval.}

16 Are you desirous of responding?

17 MR. LANSDALE: I am. At this
18 moment I am unaware of the specific requests to
19 which he referred, number one; and number two,
20 this is a memorandum in which Mr. Moore depended,
21 and the statement that counsel just made as to
22 what he requested does not embrace it; and
23 number three, and I make this item -- make this
24 comment with respect to this and a couple of other
25 items that I would like to mention, that missing

1 two or three documents out of a production of
2 two or three million seems to me pretty good, a
3 pretty good record, and on this very point, your
4 Honor, all this ring-a-ding yesterday about
5 the subpoena of Mr. Hauser -- and I looked at
6 the subpoena, and the subpoena covers two
7 items; to bring in the memorandum that he is
8 alleged to have handed some member of the
9 City Council with respect to the \$9.8 million
10 bond issue, which is clearly protected
11 material; and number two, is to identify the
12 author of the document attached.

13 Counsel knows because we previously advised
14 them that we have made a diligent search, and we
15 were unable to determine the author of it.

16 Is that the document?

17 MR. NORRIS: No. That is another
18 one, another one page, a little document concerning
19 legal conclusions, and secondly, the CEI people
20 tell me it doesn't even look like a CEI document,
21 and I represent that our inability to determine
22 an authorship of a couple of documents out of
23 several million seems to be a good record, and I
24 object to putting stuff on the record that we
25 are not cooperating with them in furnishing material

1 they have subpoenaed when they are talking about
2 material like that. It is beyond the pale, and I
3 don't know what you are talking about on the
4 serious allegations that they bring before you,
5 and I am going to be very, very difficult to
6 get material without your Honor's direct order,
7 I assure you.

8 THE COURT: Let me ask you this,

9 Mr. Norris:

10 Are you desirous of utilizing this?

11 MR. NORRIS: Yes.

12 THE COURT: Are you desirous of
13 analyzing it?

14 MR. NORRIS: I am.

15 THE COURT: How long would it
16 take you?

17 MR. NORRIS: Tonight I will be done.

18 THE COURT: All right; and then
19 are you desirous of conducting an interrogation?

20 MR. NORRIS: Yes.

21 Mr. Loshing specifically referenced that
22 document in his PTX-538, but if he claims
23 ignorance of it on the witness stand, I want the
24 right to call Mr. Beck or have it put in
25 unsponsored.

1 I haven't made a final determination yet.

2 THE COURT: All right. I will
3 permit you to analyze it, and if you conclude
4 with Mr. Loshing today, I will permit you to
5 recall him after you have had an opportunity of
6 analyzing it and interrogate him on it, if that
7 is your desire.

8 MR. NORRIS: Is it also understood
9 that if we feel that following the Dobler
10 deposition tomorrow morning, that we need to
11 recall Mr. Loshing for further testimony, that
12 that would also be permitted?

13 THE COURT: Well, certainly. I
14 told you that I would permit you to conclude with
15 Mr. Loshing concerning what pre-damage period
16 testimony you are desirous of attempting to elicit;
17 so I will permit you to recall him if there is
18 something material in the Dobler deposition.

19 MR. LANSDALE: I think we better
20 have all requests specifically in writing and
21 on the record, and I request that.

22 THE COURT: Well, Mr. Lansdale,
23 I don't know what you people are doing as between
24 yourselves, whether your requests have or have not
25 been in writing.

1 I would suggest and urge a spirit of
2 cooperation among counsel so as to expedite the
3 trial.

4 I can understand emotion that is evolving
5 here as among counsel, but gentlemen, we are
6 still confronted with conducting this trial on a
7 professional basis, and we should not permit
8 personalities to enter into it, and absent a
9 spirit of cooperation, this trial is just going
10 to drag on and on.

11 If we are going to have a hassle, gentlemen,
12 on every little collateral matter, we will be
13 here until next year.

14 MR. LANSDALE: That is right.

15 If counsel keeps insisting that every
16 communication is an effort to conceal something
17 or lie, we are continuing, we will continue
18 having this trouble, and I am tired of being told
19 I am dishonest and that I am concealing material,
20 and I am not going to put up with it.

21 MR. NORRIS: Mr. Lansdale, it is a
22 fact that I made a specific request last fall and
23 again this spring for the documents that are
24 referenced in Mr. Loshing's memorandum.

25 Now, I have put on the record already that

1 I am not charging you or Mr. Murphy with any
2 dereliction, but I hope you can understand my
3 sense of frustration when I am confronted with
4 this situation.

5 THE COURT: Fellows, I appreciate
6 both of your frustrations, but I don't think either
7 one of you are thinking about the frustrations
8 that you are causing me.

9 MR. NORRIS: May we come back
10 into chambers?

11 THE COURT: Yes.

12 Mr. Norris, would you rather do it here, or
13 do you want to do it in chambers?

14 MR. NORRIS: Let me just ask a
15 question.

16 {Mr. Norris and Mr. Weiner conferred off the
17 record.}

18 THE COURT: If you would rather --

19 MR. NORRIS: It doesn't make any
20 difference, where we do it.

21 We just wanted to respond to your Honor's
22 request and we're ready to respond. If you want to
23 do it at a break, we can do it then; whenever
24 you're ready.

25 THE COURT: Bring in the jury.

1 unless there are some other matters these
2 gentlemen are desirous of bringing to my
3 attention at this time.

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

8 THE COURT: Good morning. Please
9 be seated.

10 You should be all rested up.

11 We have been attending to legal matters.
12 - - - - -
13

14 C L E M E N T T. L O S H I N G

15 resumed the stand and testified further as
16 follows:

17 MR. NORRIS: Mrs. Richards, would
18 you give Mr. Loshing his memorandum, PTX-538,
19 please?
20

21 {Exhibit handed to the witness by Mrs.
22 Richards.}

1 CROSS-EXAMINATION OF CLEMENT T. LOSHING {Resumed}

2
3 BY MR. NORRIS:4 Q Mr. Loshing, at the break or last night, we were
5 discussing your memorandum of June 17, 1969, and am I
6 correct that at the time you wrote that memorandum,
7 you had some concern that the FPC might impose on
8 CEI a mutual standby, pay-only-when-used type of
9 interconnection with Muny Light, is that a correct
10 statement?

11 A Yes.

12 Q And you were concerned that this might result in CEI
13 not achieving its MELP objective, is that a correct
14 statement?

15 A Yes; because of the burden that would relieve Muny of.

16 Q Isn't it a fact that one of the reasons you felt that
17 way was because an FPC-dictated interconnection would
18 give Muny Light both reliability and reductions in
19 operating expenses, isn't that correct?

20 A Not exactly.

21 That part of it is true.

22 It was the proper compensation for the value of
23 services that were to be employed by the -- by an
24 interconnection that was our concern.

25 Q Let me ask you if this paragraph you will acknowledge --

1 Loshing - cross

2 strike that.

3 Addressing your attention to your summary on
4 page 4.

5 A Yes, sir.

6 Q Address your attention to the third paragraph, and I
7 would like to repeat my question:

8 Is it not a fact that an FPC-dictated
9 interconnection might result in CEI's not achieving
10 its MELP objective because such an interconnection
11 would give Muny Light both reliability and reductions
12 in operating expenses, is that not correct?

13 A Reading the third paragraph, it says:

14 "If the FPC imposed a mutual standby,
15 pay-only-when-used interconnection, or we were
16 otherwise unable to sustain a proper standby charge,
17 MELP would enjoy system reliability" and the others
18 would follow, yes, as a matter of proper compensation."

19 Q I would like to finish the reading of what you have
20 begun.

21 A All right.

22 Q You stated that:

23 "If the FPC imposed a mutual standby,
24 pay-only-when-used interconnection, or we were
25 otherwise unable to sustain a proper standby charge,

1 Loshing - cross

2 MELP would enjoy system reliability and also realize
3 substantial reductions in operating expenses. This
4 would deprive us both of the necessary factors, which
5 are presently going for us, in order to achieve our
6 MELP objective," is that correct?

7 A That is correct.

8 Q And by avoiding such an interconnection with Muny
9 Light or interconnection that was permanent and
10 synchronous, you felt that Muny Light would continue
11 to have poor system reliability and high operating
12 expenses, is that correct?"

13 A It would have poor reliability and not be relieved of
14 their system unreliability, yes.

15 Q And it would have higher operating expenses as well,
16 is that correct?

17 A Yes.

18 Q And in your summary on that page, Mr. Loshing, you
19 indicated that there were three courses of action
20 open to the company, is that right?

21 A That is correct.

22 Q And in these three courses of action that you have
23 identified, you, of course, were only identifying
24 those courses of action that would permit the
25 company to achieve its MELP objective, is that not

Loshing - cross

correct?

A Yes.

Q There were other courses of action that CEI could have followed that would have permitted Muny Light to achieve system reliability and reduced operating expenses, but you did not set forth those courses of action in this memorandum?

A That is correct.

Q Please refer to your summary on page 4, and would you kindly indicate what those three courses of action were that you concluded were open to the company?

A Yes.

The first course of action was:

Avoid an interconnection and then run the risk of an FPC-dictated interconnection, hoping that the financial and service problems will eliminate MELP as a competitive threat.

Q What was the second course of action?

A The second course alternative which was being explored was:

"Take the initiative in establishing an interconnection with proper standby charges, to give them reliability but increase the financial pressure on them," as I indicated earlier that --

1 Loshing - cross

2 Q That would be a result, wouldn't it? _____

3 A Yes.

4 Q What was the third course of action?

5 A The third course was:

6 "Make an all-out effort to purchase the
7 Municipal Light Plant now while the reliability and
8 financial pressures are still present."

9 Q And the first course of action, of course, is the one
10 that was followed in connection with Munny Light, is
11 that correct?

12 {The witness reading silently.}

13 A No.

14 We -- I'm having trouble with the word
15 "interconnection."

16 Q Well, --

17 A The copy here --

18 Q Let me ask you this, Mr. Loshing:

19 You did not pursue the third course of action to
20 make an all-out effort to purchase MELP; that's
21 correct, isn't it?

22 A Yes.

23 Q And you did not take the initiative in establishing
24 an interconnection; that was the second course of
25 action?

Loshing - cross

1
2 A That's correct.

3 Q And that leaves only one, isn't that the first course
4 of action that actually was followed by the company?

5 {After an interval.}

6 A No; it was halfway between the first two.

7 Q Well, in what respect?

8 A We --

9 THE COURT: Take your hands away
10 from your mouth.

11 THE WITNESS: I'm sorry.

12 A We avoided -- we were not interested in pursuing an
13 interconnection.

14 Q You actually avoided it, didn't you?

15 A Yes.

16 Q All right. What else?

17 A We were before the FPC pursuing our rights to get a
18 proper charge for the services provided by the
19 interconnection.

20 Q You were also before the FPC in response to the City's
21 initiative to compel that interconnection, weren't you?

22 A Yes.

23 Q And part of the proceeding dealt with the proper
24 charge --

25 MR. LANSDALE: I object to that.

1 Loshing - cross

2 your Honor.

3 THE COURT: Approach the bench.

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

7 MR. LANSDALE: Counsel knows well
8 we -- there wasn't anything before the Federal
9 Power Commission in May, 1979, and if you suggest
10 to the witness that they were before the Federal
11 Power Commission then is totally erroneous.

12 MR. NORRIS: He suggested it to
13 me, Mr. Lansdale.

14 MR. LANSDALE: I beg your pardon?

15 MR. NORRIS: If you will read the
16 testimony, you will hear it.

17 THE COURT: Go back and read
18 the testimony.

19 {The record was read by the reporter as
20 follows:

21 "Q And you did not take the initiative in
22 establishing an interconnection; that was the
23 second course of action?

24 "A That's correct.

25 "Q And that leaves only one, isn't

1 Loshing - cross

2 that the first course of action that actually was
3 follows by the company?

4 "A No; it was halfway between the
5 first two.

6 "Q Well, in what respect?

7 "A We avoided -- we were not
8 interested in pursuing an interconnection.

9 "Q You actually avoided it, didn't you?

10 "A Yes.

11 "Q All right. What else?

12 "A We were before the FPC pursuing our
13 rights to get a proper charge for the services
14 provided by the interconnection.

15 "Q You were also before the FPC in
16 response to the City's initiative to compel that
17 interconnection, weren't you?

18 "A Yes.

19 "Q And part of the proceeding dealt
20 with the proper charge --"

21 THE REPORTER: And then Mr. Lansdale
22 objected.

23 MR. LANSDALE: Counsel -- I don't
24 know what the witness means by that -- but counsel
25 says: You were also before the FPC resisting the

1 Loshing - cross

2 City's pursuit of this interconnection; and
3 counsel knows full well that the City was not --
4 had not done anything before the FPC.

5 THE COURT: Read the whole
6 question.

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

9 "Q All right. What else?

10 "A We were before the FPC pursuing our
11 rights to get a proper charge for the services
12 provided by the interconnection.

13 "Q You were also before the FPC in
14 response to the City's initiative to compel that
15 interconnection, weren't you?

16 "A Yes."

17 MR. LANSDALE: You know that's wrong.

18 MR. NORRIS: In the context of the
19 question, it is not --

20 THE COURT: All right.

21 Let's go back, and I will instruct the jury
22 to disregard it.

23 There was no proceeding pending before the
24 FPC -- what was the date of this?

25 MR. LANSDALE: 1969.

1 Loshing - cross

2 MR. NORRIS: May I request, your
3 Honor, that it be done in such a way that it is
4 apparent that the witness's reference -- he said
5 that they were in front of the Federal Power
6 Commission, I didn't start that.

7 MR. LANSDALE: May I comment on that,
8 if your Honor please?

9 THE COURT: Sure.

10 MR. LANSDALE: It is not -- it is
11 for counsel, knowing that the witness has made a
12 mistake as to the date, to try to lead the witness
13 on by suggesting things that he knows to be
14 erroneous.

15 MR. NORRIS: I was not doing that.

16 MR. LANSDALE: You were doing it.

17 THE COURT: Just a minute.

18 I'll just have Nick read the questions and
19 answers back, and I'll just tell them there was
20 nothing pending.

21 MR. NORRIS: Right. Thank you.

22 {End of bench conference.}

23
24 THE COURT: The court reporter
25 will read the last series of questions.

1 Loshing - cross

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

4 "Q And you did not take the initiative
5 in establishing an interconnection; that was the
6 second course of action?

7 "A That's correct.

8 "Q And that leaves only one, isn't
9 that the first course of action that actually
10 was followed by the company?

11 "A No; it was halfway between the
12 first two.

13 "Q Well, in what respect?

14 "A We avoided -- we were not
15 interested in pursuing an interconnection.

16 "Q You actually avoided it, didn't you?

17 "A Yes.

18 "Q All right. What else?

19 "A We were before the FPC pursuing our
20 rights to get a proper charge for the services
21 provided by the interconnection.

22 "Q You were also before the FPC in
23 response to the City's initiative to compel that
24 interconnection, weren't you?

25 "A Yes."

1 Loshing - cross

2 THE COURT: Ladies and gentlemen
3 of the jury, you will disregard that testimony
4 since there were no pending proceedings before
5 the Federal Power Commission in 1969.

6 Objection sustained.

7 BY MR. NORRIS:

8 Q Your reference to being in front of the FPC, Mr.
9 Loshing, in an attempt to resolve the charge for the
10 load transfer service didn't occur until after 1972,
11 is that correct?

12 A That is correct, yes.

13 MR. NORRIS: Mrs. Richards, would
14 you please give Mr. Loshing PTX-54?

15 [Mrs. Richards complies.]

16 Q Now, later in 1969, Mr. Loshing, Muny Light's big unit
17 had an outage in the Christmas week; do you recall
18 that?

19 A Yes, I do.

20 Q And Muny Light asked CEI for assistance; you're aware
21 of that, too?

22 A Yes.

23 Q And there were discussions inside the company, as to how
24 to respond to Muny Light's request for assistance, is that
25 correct?

1 Loshing - cross

2 A That is correct.

3 Q And you participated in some of those discussions, is
4 that right?

5 A Some of those, yes.

6 Q Can you identify PT-X-54, please?

7 A Yes. This is a memo from Mr. Bill Bingham to me dated
8 September 29 -- a copy of a memo -- 1969, entitled
9 "MELP Emergency Tie."

10 Q Now, this memorandum was written, if I'm not mistaken,
11 shortly after the outage, shortly after the Mayor had
12 set up a task force and Munny Light had asked CEI for
13 assistance, is that correct?

14 A That is the proper time frame, yes.

15 Q And Mr. Bingham in this memorandum speaks about a
16 meeting held last Friday.

17 Now, the date of the memo being December 29, my
18 calendar tells me that the last Friday must have been
19 the 26th or the day after Christmas, is that accurate,
20 as far as you can recall?

21 A Yes.

22 Q And you met with Mr. Bingham on that date to discuss how
23 CEI should respond to Munny Light's request for
24 assistance, is that right?

25 A It appears from this memo, yes.

Loshing - cross

1
2 Q And can you recall who else was in on that discussion
3 with you and Mr. Bingham?

4 A No, I cannot.

5 Perhaps Mr. Bingham can.

6 Q Now, the memorandum states that there were several
7 alternatives discussed at the meeting held on the
8 26th -- I'm looking at the second paragraph, the first
9 sentence.

10 And in addition, Mr. Loshing, to the alternative
11 that Mr. Bingham described in this memorandum, do you
12 have any recollection of any other alternatives that
13 were discussed between you and Mr. Bingham?

14 A I'm not sure which -- whether it was a meeting between
15 Mr. Bingham and myself or a meeting -- if I read the
16 memo here --

17 Q Well, take your time and read the memo.

18 {The witness reading silently.}

19 A Yes, this was a meeting which explored several
20 alternatives open to us to get relief to the
21 Municipal Light Plant in a timely fashion.

22 Q Tell me, does your rereading the memorandum help you
23 recall whether it was just you and Mr. Bingham, or
24 were other people present at that meeting?

25 A I cannot recall.