
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

8-10-1981

Volume 19 (Part 2)

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

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District Court of the United States for the Northern District of Ohio, Eastern Division, "Volume 19 (Part 2)" (1981). *City of Cleveland v. The Cleveland Illuminating Company, 1980*. 43.
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resolve the issue of Bell's alleged monopoly power.

"The Court's failure to do so constituted reversible error."

Later in a footnote the Court goes on to say:

"WTC argues that the failure to instruct on the nature of the regulation was harmless because Bell presented evidence on regulation during trial and discussed the effect of regulation during its closing arguments.

"Moreover, WTC asserts that the District Court's instruction that liability could not be found if the jury believed that Bell refused to interconnect for legitimate telephone reasons was sufficiently broad to include consideration of regulation."

The Court went on to say, "We disagree. The failure to instruct on the impact of regulations is too central to be harmless error. Bell's presentation of evidence on regulation and instruction during closing arguments cannot in and of itself justify the District Court's failure to provide guidance on the issue, for without specific instructions the jury has no

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1 indication how such evidence was to be used in
2 its deliberations. To hold otherwise would
3 be to abrogate the District Court's duty to
4 instruct the jury accordingly."

5 Now, if that is the precedent that we are
6 confronted with, and if that is the issue that
7 remains as part of this case, two things are
8 apparent:

9 Number one, that the defendant will be
10 permitted to pursue in its defense the
11 introduction of evidence of regulations,
12 including the scope and effect of such
13 regulations to counteract the City's assertions
14 that the Public Utility regulations are ineffective.

15 In addition, it would appear that the
16 resolution of the position of the parties is left
17 to the jury, and thirdly, the defendant would be
18 entitled to and, from the language of the Court,
19 this Court would be remiss in not giving an
20 appropriate instruction to the jury.

21 Now, I think that pretty much summarizes
22 the Court's concern expressed to counsel early
23 on before the taking of evidence in this case.

24 Ms. Coleman, are you desirous of addressing
25 the issue, and the Court is desirous of finding

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out where the parties stand as to pressing this issue as a part of this case.

As I say, it is immaterial to me if it is going to remain an issue, because the necessary guidance has been provided to this Court by the decisions that I have just alluded to.

I recognize that I am probably not making either side very happy here.

MS. COLEMAN: Your Honor, on the matter of contentions of the parties, which I understand is the inquiry of the Court at this point, I would of course like to take the opportunity to confirm this with my colleagues, but it was always our position that CEI has the power, both to exclude competition and to control prices.

The twofold test of monopoly power under the Supreme Court cases, and the recognized law --

THE COURT: -- otherwise we wouldn't be here.

MS. COLEMAN: Precisely.

Now, CEI has contended that it has no powers to control prices, and that this Court should rule that as a matter of law.

Although that issue was claimed to be

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withdrawn in the last case, it popped up in the closing arguments, and for all we know, it may come up again here, so we followed your line of thinking in that if it is to be an issue, it is one on which evidentiary material in the form of testimony or other appropriate matter is needed.

The opinion which you read from, Almeda Mall, evidently depended either on findings or assumptions with regard to the existence of competition, State policy, with regard to competition, and the existence of a natural monopoly market, and the relationship between market share and market power, and the ability or intent to monopolize.

THE COURT: All of the classic elements?

MS. COLEMAN: Right.

For there to be such a finding in this Court, there either has to be a presumption of those things, which we would contend is certainly inappropriate, or findings of fact by the jury after the deliberation of the hearing of this case, and therefore if the defendant is to press this issue, we would agree that we are entitled to put on evidence.

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1 THE COURT: Well, at this posture
2 the City is pressing the issue by tendering the
3 evidence that it seeks to elicit through the
4 cross-examination.

5 MS. COLEMAN: That is correct, in
6 the sense that we are offering evidence to prove
7 the power to control prices, and it is our
8 contention that this evidence goes to that issue.

9 As I said, that is the posture in which we
10 find ourselves now.

11 I am not aware that we would take any
12 different view of the matter, but I might take an
13 opportunity to consult with co-counsel on that.

14 THE COURT: I have no problem with
15 that. I am sorry -- have you concluded?

16 MS. COLEMAN: Yes, unless you
17 have further specific questions.

18 THE COURT: No. I was just
19 wondering if the defendant was desirous of
20 responding.

21 MR. LANSDALE: Yes, your Honor.

22 It is our contention, if your Honor please,
23 that we do not have the power to fix prices or to
24 exclude competition as a matter of law.

25 I direct your attention to the question of

1 prices, which is the one before us.

2 It seems to us that it is very plain and
3 based upon the statutes of Ohio that we do not have
4 the power to fix prices.

5 The only possibility I can see of a
6 contention to that effect would be whether or not
7 on examining of the statute, and I have not looked
8 at those statutes quite recently, there is any
9 room to claim under the statute that the
10 Commission has not the power with respect to
11 individual prices, that is, the prices to
12 residents as distinguished from prices to
13 business and the like.

14 In point of fact, it is very plain to us
15 that the Commission has that power.

16 It is certainly very plain that the
17 Commission does exercise that power.

18 In point of fact, I can't think of any rate
19 case in my memory, and I have been before the
20 Commission in these things since the -- I hate
21 to say how long ago -- certainly more than two
22 decades ago, and every case I can think of there
23 have been people down there objecting, not
24 necessarily to the overall increase that the
25 company is seeking, but to individual rates or

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classes of rates.

Normally we find the City of Cleveland down there representing, purporting to represent the consumers of Cleveland by confining their objections to usually the residential schedules and the small commercial schedules; and similarly large industries are frequently there intervening to object to the rate schedules applicable to them.

But in any event, our position is, if your Honor please, and I am advised in recent years when I have not been in many cases, that the interest of the Commission in the individual rate schedules is such that we are now routinely filing what people like Mr. Bingham call "Cost of Service Studies," which effectively show the cost to each class of customer, the endeavor being, and Mr. Bingham if he testifies on this subject, would testify that irrespective of what the evidence before the Commission is, the endeavor of the company is to avoid what I think of as Economic Discrimination, and that is to say that each customer or each class of customer bears their share of the total cost of service, so that we don't have, so that in the economic

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sense there are no discriminatory rates between the several classes of customers.

Be that as it may, we submit further that the skill of the Commission, the intention of the Commission is to do its duty, whether or not that particular situation, the individual rates are looked at as immaterial. That is not for the Court to inquire into, how well the Commission performs its duty.

As to how well the Commission performs its duty, I suspect that since the Commission is made up of human beings, it is going to differ from year to year, and from personnel on the Commission from time to time with respect to the quality of its staff and a whole lot of other things. And I invite your Honor's attention to the very recent case cited by the Second Circuit, and it is called Northeastern Telephone Company against American Telephone and Telegraph Company, cited by the Second Circuit May 22nd of this year, and I don't have the regular citation, but it is the BNA, Antitrust Bulletin No. 1017, in which there was an antitrust case involving, -- and this is contained in the defendant's supplemental trial brief.

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1 THE COURT:

I think I read it.

2 MR. LANSDALE:

3 This particular case
4 involved a portion of the local telephone
5 company in Connecticut, a business which was not
6 subject to regulation, and the contention was
7 that the telephone company had an unfair
8 advantage and control over the market because,
9 having the major portion of its business
10 regulated, it could conceal its costs of the
11 unregulated portion in the regulated area, and
12 recovering their costs there, so they could
13 unfairly compete in the non-regulated area by
14 lower costs, and the District Court went along
15 with that claim.

16 Judge Kauffman said that, "Finally,
17 Northeastern's fear that Southern New England
18 Telephone will be able to allocate all of the
19 overhead to the monopoly services rests on the
20 premise that the attempt of the Public Utility
21 Commission is either asleep or incompetent.

22 "Northeastern believes the DPUC is unable
23 to perform these functions, and the recourse is
24 to intervene before that body," and it goes on,
25 "If Federalism means anything, they require that
we do not create an exception to the general

1 rules of margin cost pricing on the basis of the
2 plaintiff's assertion that the DPUC cannot perform
3 the duties delegated to it by the State."

4 I submit, your Honor, any contention that
5 this company has the power to fix prices
6 necessarily involves the claim that the Public
7 Utilities Commission of Ohio is not performing
8 its duty.

9 {A}. I don't think that this is a question
10 open to this Court's decision, and {B} certainly
11 it is not this utility's impression that the
12 Commission is failing to perform its duties in
13 that respect.

14 MS. COLEMAN: May I have a brief
15 response?

16 THE COURT: Yes.

17 MS. COLEMAN: Your Honor, as the
18 Northeastern case refers and as we noticed in the
19 statement of Judge Kauffman, in that case it
20 was that the Court of Appeals was unable to
21 premise a finding upon the bald assertion of
22 the party, and that goes to the question of
23 whether one should make a presumption about
24 this type of issue or whether there ought to be
25 evidence on it, and we submit that the latter is

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the case.

Secondly, I just want to point out as to the recent proceedings of the PUCO, whatever they contain, and whatever the regulations or scrutiny that may be done of an individual rate schedule, it is immaterial to the question here. We are dealing with the issue of CEI's persistent monopoly power from July 1st, 1971 to 1975, and finally we would submit, your Honor, --

THE COURT: Well, on that subject, they have to have monopoly power before they can exercise monopoly power.

MS. COLEMAN: Right. And the question of their possession of monopoly power is also within that procedure, and not what happened last year in a rate case.

Finally, we would submit that on the question of the scope of the evidence that dissertations of a witness or instructions from the Court about the chapter and verse of the Public Utility laws are not material and not germane to the issue here.

THE COURT: Well, you take issue with the Fifth Circuit just as Mr. Lansdale takes issue with the Fifth Circuit.

MS. COLEMAN:

I refer your Honor

to the case cited in our last supplement, Sounds, Incorporated vs. American Telephone and Telegraph, 631 Fed. 2nd, Eighth Circuit, 1980, in which the Court stated with regard to the defendant's claim to regulation that regulation by the local Utilities Commission should exempt it from the antitrust laws.

The Court stated, "Bell, not the Utility Commission, proposed the rate issue.

"Bell sought diligently to have those rates accepted, and unsuccessfully opposed the intervening plaintiff's predecessor."

The Court went on to say, "Bell, the defendant in that case, was not deprived of the power to exercise its independent business judgment in determining the rates that it would propose."

We would submit that the scope of the evidence here is the key of the extent of the business discretion exercised by CEI, and a foray into the nooks and crannies of Chapter 4905 and 4909 of the Ohio Revised Code, and it is immaterial and would tend to confuse the jury on this issue.

THE COURT:

The Sixth Circuit

1 says, at least -- not the Sixth Circuit, but the
2 Fifth Circuit, the jury may be confused if the
3 Court does not instruct.

4 Mr. Lansdale, are you desirous of
5 distinguishing between the Northeastern case,
6 in which Judge Kauffman says that the matter
7 of law is a presumption of the validity of the
8 act and holdings of the Commission as versus
9 the Mid-Texas Communications case, which says it
10 is a matter that should be presented on the
11 evidence to the jury?

12 MR. LANSDALE: I approach that -- it
13 has been some time since I read that case. My
14 recollection is that that involved the question of
15 a new telephone company attempting to go into a
16 business in a small city outside of Houston, and
17 the Bell Telephone Company excused or attempted
18 to excuse its refusal to interconnect with this
19 little system that was attempting to in effect
20 take over a small community outside of Houston,
21 and excused their refusal for interconnecting
22 with them on the ground that this company could
23 not proceed to serve that small community unless
24 they had some sort of franchise or license from
25 the Texas Commission.

1 This did not involve in any way the question
2 that we have here of where the question is the
3 power to control prices.

4 Now, the question was, did this small
5 company, was Bell excused from interconnecting on
6 the grounds that the Commission might not have
7 issued this franchise?

8 THE COURT: Why was access to
9 the Commission for?

10 MR. LANSDALE: Why there was
11 access to the Commission by the small company.

12 And, as I remember -- as I remember the
13 question that the jury was permitted to decide
14 was whether there was -- indeed, why the Bell
15 Company had refused to interconnect.

16 Now, I submit to your Honor -- I submit to
17 your Honor that that is a -- is a totally
18 different question than the one before us, which
19 is basically the power to control prices, and
20 there is no -- there just can be no question
21 about the power, indeed, the duty of the Public
22 Utilities Commission of Ohio to control the price
23 at which CEI sells its electric energy.

24 And I want to point out one more point in
25 this respect.

1 Although the inquiry here this afternoon has
2 been directed towards some alleged discretion on
3 our part to move a rate increase around among --
4 around schedules, I am at a loss to understand how
5 this is a relevant question even if it were so --
6 which it is not -- but clearly -- and I find no
7 intentions to the contrary by the plaintiff --
8 the Commission has the power to determine our
9 revenues, the total amount of revenues that we
10 can receive, the total amount of profit that we
11 can make, or, stated another way, place a limit
12 upon the rate of return at which we may earn.

13 And even if it were so, that they either did
14 not have the authority or did not exercise the
15 authority to determine how that was divided up
16 among customer classes, it seems to me not to be
17 material.

18 However, I don't wish your Honor to
19 understand by that argument that I'm in any way
20 backing away from my contention -- which I admit
21 there can be no doubt about -- of the power and,
22 indeed, the duty of the Commission to approve not
23 alone a rate of return of whatnot, but
24 specifically to approve specific rate schedules,
25 which schedules themselves specifically, as we

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have heard this morning, specify the rates of individual customer classes.

THE COURT: Ms. Coleman, at this juncture the ball is in your court, and I don't know where we're going with this particular witness, in light of the fact that we have 15 minutes remaining during which time I would like to take testimony, if at all possible.

What are your suggestions?

{Ms. Coleman and Mr. Norris conferred off the record.}

MS. COLEMAN: Your Honor, I would propose to continue with this witness on completing the line of questioning that I had begun.

I'm not sure what your Honor has in mind with regard to that, so perhaps you could clarify that for me and then I will know how to proceed.

THE COURT: Well, I thought that I indicated that it's my inclination at this juncture to follow the pronouncements of the Fifth Circuit depending on whether or not this is or is not an issue in this case. Irrespective of who makes it initially, I have no party with it. The parties have the problem.

1 MS. COLEMAN: Well, it is an issue
2 in the case, your Honor. There --

3 THE COURT: Very well.

4 Proceed.

5 Call in the jury.

6 Just so I know.

7 -----
8 {The jury entered the courtroom and the
9 following proceedings were had in their hearing
10 and presence.}

11 {The Court and Law Clerk Schmitz conferred
12 off the record.}

13 THE COURT: You may proceed.

14 MS. COLEMAN: Thank you.

15
16 CROSS-EXAMINATION OF WILLIAM N. BINGHAM {Resumed}

17
18 BY MS. COLEMAN:

19 Q Mr. Bingham, before we broke in the testimony
20 earlier, I was asking you about the generalized
21 formula for rate of return, and I believe we
22 established, did we not, that what you call the
23 return equals revenues minus expenses?

24 A That's correct.

25 Q And to determine the rate of return, it's the return,

Bingham - cross

again expressed as revenues, minus expenses, divided by the rate base.

That is an expression of rate of return?

A That's correct.

Q Now, the rate base is understood to be property used in useful -- in the business of providing electricity plus an allowance for working capital, is that essentially accurate?

A At the time period that we're talking about here, the rate base was the reproduction cost new less depreciation of that property deemed to be used -- useful in rendering utility service, plus working capital.

Q And the meaning of "reproduction cost new", that part of the formula which you mentioned means the cost that it would take to build that property as of the specified date, is that right?

{Pause.}

Q Reproduce that property at a specified date new?

A Yes; that's what the reproduction cost new part of reproduction cost new less depreciation is.

Q And the "less depreciation" part means subtracting some amount which reflects accounting in some way for the wear on that property or -- pardon me -- let me

Bingham - cross

reformulate that, maybe I can make it easier.

The depreciation is intended to represent the decline in value or usefulness of the property, is that correct?

A In a sense. My recollection of the rule on this was that it was to represent a loss in value resulting from age, obsolescence, wear and tear, lack of utility, and perhaps a couple of other items.

Q So that when we say "reproduction cost new less depreciation," it's this assigned value of the property as of a certain date to reproduce it new less an allowance for age, obsolescence and wear and tear?

A Yes.

Q Now, in fact, of course, the majority of CEI's property used in useful and providing electric power and energy was not purchased new as of the year for that valuation?

A Most of it had been installed prior to the point in time at which the valuation is made.

Q But the PUCO calls for the valuation to be called for at the time the valuation is to be made in terms of reproduction costs new?

A Definitely.

Q Now, the procedure at the PUCO after CEI submitted --

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Bingham - cross

let me rephrase that.

The CEI would provide its analysis of the reproduction costs new less depreciation of its property, is that correct?

A Yes.

Q And would also provide its analysis of the revenues and expenses incurred during the year specified by the PUCO to do that analysis, the test year?

A That's correct.

Q And there would be a review of those calculations at the PUCO and, in fact, some staff might make their own calculations of those numbers, right?

A Yes.

Q Now, having gone through that proceeding, there would be a hearing on the matter, is that correct?

A Yes.

Q And the PUCO would then make findings which would be represented in an order?

A That's correct.

Q The PUCO would then direct CEI to file rates which would recover the amount of revenue that it found CEI was entitled to recover, right?

A Yes.

Q And that's really where you come in to play, is to

1 Bingham - cross

2 decide how to allocate that revenue among the
3 various classes, right?

4 A Well, by and large, it usually had already been done.

5 As I testified earlier, at the time we filed
6 the application for a rate increase, then as well
7 we included in the application the rate schedules
8 proposed by the company.

9 Q Now, on the question of allocating the revenue among
10 the various classes, it is true, isn't it, that a
11 variety of rate designs could combine to produce
12 roughly the same total?

13 A Surely.

14 Q Now, CEI selects the rate design that it files with
15 the PUCO and exercises its own judgment based on the
16 calculations and information that it can compile,
17 right?

18 A Pretty much does it based on the form and design of
19 the rate that existed before the increase.

20 Q And that form and design of the rate that existed
21 before the increase, somewhere back along the line,
22 if you go back far enough, was put together by the
23 Rate Department of CEI by and large, right?

24 A I'm sure we had more input than anyone else, but we
25 weren't the only people with input.

1 Q And CEI brings its input also to the PUCO in terms of
2 the rate design that it feels is the best choice,
3 right?

4 A Yes.

5 Q And seeks to have its selection be the one -- its
6 design -- pardon me -- be the one which is implemented,
7 is that correct?

8 A Yes. Sometimes, I mean, other people do have input
9 to these things.

10 It's not something we sit in our little ivory
11 tower and do by ourselves.

12 Q There are people who attend the hearings at the PUCO,
13 for example, and make presentations?

14 A The City of Cleveland, for example, has intervened in
15 every rate case that I think I have ever been
16 associated with and, believe me, they tell us what
17 they think ought to be done.

18 Q That's right.

19 Now, when the PUCO issues its order approving a
20 rate increase -- talking just about rate increases,
21 if we may, the order relates to total revenue and
22 total rate of return, does it not?

23 A Well, those elements are obviously always included
24 in the order.

25 Q Right.

Bingham - cross

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A And they only will comment on what else they think they ought to comment on, although those are certainly the two most important.

Q Now, when it comes to the question of designing rates to determine the contribution to this total amount of revenue, CEI takes into account a variety of factors, doesn't it?

A Yes.

Q And one of these that they try to take into account is cost of service to the customer class, is that right?

A Yes.

Q CEI made a cost-of-service study by class, which you may call class-wise study, over 30 years ago, isn't that right?

A Well, the last one that was really completed and filed I think probably was about 1948.

Q And then there was another one done in 1979, isn't that right?

A One was filed in 1979 wherein they --

Q Pardon me.

A -- in what they call the 1979 rate case, it may have been filed in February of 1980.

Q Right.

Bingham - cross

Now, CEI had increases and decreases in rates since the 1948 class-wise study and prior to the 1979-'80 class-wise study, right?

A That's correct.

Q And CEI determined what those increases or decreases by class of customers should be pretty much by spreading them across the board so that each customer class got more or less the same percentage increase or the same percentage decrease, right?

A After the 1948 rate case, where that was not the situation, what you say is generally true; that the increases were pretty much spread as an equal percentage to each rate schedule.

Q Now, when this cost-of-service study is done, at the time that it is done, you don't determine precisely how much each kilowatt hour to each customer costs, do you?

A Oh, of course not.

Q You don't even do it for each separate rate schedule of the twenty odd whatever it may be that you had at the time, right?

A Well, a cost-of-service study -- and, here, I'm referring to what we call a class-wise cost of service study --

Bingham - cross

Q Right.

A -- calculates the total cost of supplying service to each rate schedule.

So that if I think -- if I understood your earlier question, I would say yes, we do determine the cost of supplying kilowatt hours to people on, say, the general residential schedule.

Q Well, there were -- if I recall your testimony earlier -- nine different schedules under residential sales on the FPC form, right?

A Yes.

Q And at least some of those -- not all of them -- are denominated some form of residential sales generation, large residential, there is an apartment -- one or two apartment schedules, is that right?

A One apartment schedule.

Q One apartment schedule.

Now, it is true, isn't it, that when CEI did its most recent class-wise study, that all of the residential schedules were grouped together, and the cost was assigned on that basis?

A We only have one residential schedule.

Q Pardon me?

A We only have one residential schedule at present.

Bingham - cross

1
2 Q There is no apartment schedule and no large
3 residential schedule?

4 A That's correct.

5 Q And you, I assume, were not involved in the 1948
6 study?

7 A No, I was not.

8 Q Now, in terms of making this cost analysis, there is
9 some property that can be identified with specific
10 customers, isn't that right?

11 A That's correct.

12 Q Or even with specific classes of customers, is that
13 right?

14 A If you wanted to, you could always identify some
15 particular piece of property to something, to a
16 particular class, I suppose.

17 This is probably not what you meant; but, for
18 example, if you got a pole line which serves only
19 residential customers, you could obviously say
20 that's loaded residential only.

21 Now, we tend not to do that. When we allocate
22 property specifically, it tends to be for large
23 customers where you can get a real handle on the
24 particular item of property and doing it specifically
25 gives you a better answer than some allocation

Bingham - cross

prodedure might give you.

Q And there are, in fact, two general ways that are used together to find out this cost of service estimate:

One is specific assignment, and the other is an allocation procedure, as you stated, isn't that right?

A Yes.

Q Now, as to the meter outside the individual's house, and perhaps even the loop that comes down only to that meter, those can be assigned to that customer if you were to do that?

A If you wanted to go to that trouble, you could do it.

Q And, in fact, you don't need to because you know how many residential meters you have and how many residential customers you have, so you can take that as a group and say, "That's all residential," right?

A That kind of thing is generally done by an allocation process frequently by developing what we would call, say, a weighting factor, which might say that the average cost of a meter for a residential customer is one, a large industrial, the relative cost might be 50; and then by using the number of customers and the weighting factor, you can perform an allocation of the meter account.

Bingham - cross

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2 A similar procedure probably would be used for the
3 wire that you talked about going from the pole to the
4 house:

5 Rather than to try and do it specifically where,
6 in case of residential, you have to go out and
7 inventory or price out by some method six hundred and
8 some odd thousand pieces of wire.

9 Q And that's not a very practical way?

10 A It just is impractical to do.

11 Q And so what you do is take some sort of an averaging
12 factor which you have to base on the information you
13 have at company headquarters on the costs of those
14 items, is that right?

15 A That's right.

16 Q Now, the bulk of the property that CEI uses in
17 providing service is not susceptible allocation to
18 specific customers or specific groups of customers, is
19 it?

20 A That's right.

21 Q And in that large bulk of the property you're referring
22 to the generating stations and to the bulk of the
23 transmission system, for example, right?

24 A And quite a bit more.

25 Q And quite a bit more.

CIVIL LAW LIBRARY

Bingham - cross

1
2 Even including, for example, the office building
3 of CEI and the kind of expenses that are attendant on
4 running that building, right?

5 A Yes, for those office buildings that we own.

6 Q And for those that you rent, you have expenses
7 associated --

8 A They would be similar to.

9 Q Similar.

10 And so in those instances you use an allocation
11 process, right?

12 A Yes.

13 Q And what that essentially is, is some kind of
14 judgment about how the cost of these major items ought
15 to be split up among the various customer classes,
16 right?

17 A It is a matter of informed judgment.

18 Q Now, --

19 THE COURT: Do you think this
20 would be an opportune time for us to adjourn?

21 MS. COLEMAN: Surely, your Honor.

22 THE COURT: It's after 4:00
23 o'clock.

24 MS. COLEMAN: I didn't mean to
25 run over.

Bingham - cross

THE COURT: It's all right.

Ladies and gentlemen of the jury, it's five after 4:00.

So that you may have an opportunity of reviewing the exhibits of the day, you are free to return to your jury room and free to go on your way to your homes for the dinner hour after 4:30 or whenever you finish viewing those exhibits, I don't think there are too many of them today.

So please, during the recess -- I should say -- adjournment, do not discuss the case either among yourselves or with anyone else; keep in mind that you are to keep an open mind until such time as you have heard all of the testimony in the case, the Court's instruction on the law, and until such time as the matter is submitted to you for your final deliberation and judgment.

With that, you are free to retire to the jury room. See you tomorrow morning at 8:30.

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

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

THE COURT: We have the following
exhibits:

Plaintiff's Exhibit 562, CEI memo, Maugans
to Loshing, 2/15/72; and PTX-579 which is, again,
a CEI memo between the same persons, 2/19/73
Mr. Murphy?

MR. MURPHY: No objection to those
two, your Honor.

THE COURT: They may be admitted.
The next one is Defendant's Exhibit 1069.

MR. MURPHY: No objection.

THE COURT: It may be admitted.

Plaintiff's Exhibit 795, a memo to Bingham, --

MR. MURPHY: No objection.

THE COURT: -- 8/18/72.

PTX-796, a memo, Bingham, re price of PASNY,
11/1/72.

MR. MURPHY: No objection.

THE COURT: Plaintiff's Exhibit
1576, CEI memo, Williams to Bingham, 3/26/73.

MR. MURPHY: No objection.

THE COURT: Plaintiff's Exhibits
3121, 3122, and 3123, PUCO tariffs 1973, plus

GARRETT LAW FIRM

1 PTX-3244, CEI Form 1, and 3120, General Rules and
2 Regulations of the PUCO.

3 MR. MURPHY: Your Honor, we are
4 going to interpose an objection to the last group
5 you read consistent with the --

6 THE COURT: 3121 and thereafter?

7 MR. MURPHY: -- consistent with the
8 position of Mr. Lansdale.

9 THE COURT: Overruled; they may be
10 admitted.

11 MR. LANSDALE: Your Honor, may I put
12 something on the record before we adjourn?

13 I want the record to show that I have handed
14 Mr. Norris a short time ago three documents from
15 CEI files:

16 One of them designated 5EE471, being Five -
17 Year Forecast Corporate Earnings dated May 13, 1971.

18 A document dated June 15, 1970 called
19 Preliminary Five-Year Construction Plan,
20 SYCP670; and

21 A document entitled "Five-Year Construction
22 Plan" dated September 17, 1970, designated SYCP
23 970, and I wish to state why, out of the goodness
24 of my heart, I produced three documents when I
25 was only told to produce two.

1 The reason is --

2 THE COURT: That's what the Court
3 suggested.

4 MR. LANSDALE: The reason is, your
5 Honor, that we discovered that in the testimony of
6 Mr. Dobler, as to the existence of certain items
7 in the Five-Year Construction Plan for 1970, he
obviously was referring to something called the
"Preliminary Study" and it was omitted from the
final study, so we gave both of them to Mr.
Norris.

THE COURT: Thank you, gentlemen.

MR. NORRIS: Let me put on the
record that I have already thanked Mr. Lansdale
for that.

THE COURT: Fine.

Good night, gentlemen.

MR. NORRIS: Good night, your
Honor.

THE COURT: I have another matter
scheduled, so be on your way, expedite your
departure, it would be appreciated.

{Court adjourned.}

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

Tuesday, August 11, 1981

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1 TUESDAY, AUGUST 11, 1981, 9:40 O'CLOCK A.M.

2
3 LAW CLERK SCHMITZ: City of Cleveland,
4 Plaintiff, versus the Cleveland Electric
5 Illuminating Company, Defendant. This is Civil
6 Action No. C75-560.

7 {The following proceedings were had out of
8 the hearing and presence of the jury.}

9 MR. HJELMFELT: Your Honor, I would
10 like to raise the matter of Mr. Goldberg's
11 testimony.

12 THE COURT: Yes.

13 MR. HJELMFELT: I am wondering if you
14 have had an opportunity to make a ruling.

15 I'm getting problems of scheduling again as
16 far as bringing him back this week.

17 THE COURT: What is the ruling
18 that I have to make?

19 MR. HJELMFELT: Well, the question
20 was raised as to whether his testimony that he put
21 on on voir dire was going to be allowed to be
22 presented to the jury.

23 THE COURT: I thought that I had
24 ruled --

25 MR. NORRIS: Yes, I think he did

1 rule.

2 MR. LANSDALE: You have ruled except
3 for one item, your Honor please, that is to say,
4 testimony subsequent to the statutory period
5 relating to the City's claim as to unreasonable
6 delay in filing a schedule which we objected
7 to.

8 Your Honor has ruled, however, on the main
9 thrust of his testimony.

10 I can --

11 THE COURT: Yes, my recollection
12 was, and I thought that I instructed the jury to
13 disregard, with the exception of his qualifications,
14 all of the testimony that he had given to that
15 point.

16 My ruling further said that he would be
17 permitted to testify to that portion of his
18 testimony that occurred between 1971 and '75.

19 I don't know if I ruled on the last aspect.

20 MR. LANSDALE: I'll refer your Honor
21 to --

22 THE COURT: I'll have to review --

23 MR. LANSDALE: -- 12,621 and -622
24 of the record and, when your Honor considers it,
25 I draw your Honor's attention to Stipulation No.

1 126 which is relevant to that consideration.

2 THE COURT: There is no necessity
3 for me to make a decision right now. Mr.
4 Goldberg is not here.

5 MR. HJELMFELT: No. It is a question
6 of bringing him back Wednesday or Thursday.

7 THE COURT: Well, whatever day,
8 and I will rule on it at the tail end of this
9 thing.

0 MR. HJELMFELT: We were urging that
1 the latter part was relevant was due to Mr.
2 Lansdale's cross-examination with Mr. Engle
3 raising the question of why the City did not seek
4 the PASNY power in 1977 or 1978, or did not ask
5 for a wheeling schedule or something.

6 THE COURT: Very well. I will
7 address it.

8 Bring in the jury.

9 - - - - -

0 {The jury was seated in the jury box and
1 the trial continued as follows:}

2 THE COURT: Good morning, ladies
3 and gentlemen. Please be seated.

4 You may proceed, Ms. Coleman.

5 - - - - -

1 CROSS-EXAMINATION OF WILLIAM N. BINGHAM {Resumed}

2

3 BY MS. COLEMAN:

4 Q Good morning.

5 A Good morning.

6 Q Mr. Bingham, I want to pick up one thing that we had
7 talked about earlier yesterday afternoon.

8 You said CEI has now only one residential schedule.

9 That is not quite right, is it?

10 A I thought that it was. Which one did I miss?

11 Q Well, you also have at CEI a residential energy
12 conference schedule and another experimental
13 schedule which a few people enlist in, and there are
14 special conditions, and those are both residential
15 schedules as well?

16 A Yes; you are correct.

17 Q Mr. Bingham, the rate schedules that we looked at
18 specifically yesterday arose out of a 1969 application
19 for a rate increase by CEI; is that right?

20 A Yes; that is correct.

21 Q And an order was issued by the Public Utilities
22 Commission in, I believe, July, 1970, ruling on that
23 request; is that right?

24 A Yes.

25 Q In connection with that proceedings, CEI and other

1 Bingham - cross

2 parties to the proceedings reached an agreement and
3 a stipulation, as it was called, as to the amount of
4 recovery of additional revenue CEI should be entitled
5 to recover provided the Commission made certain
6 rulings; is that right?

7 A Yes.

8 Q And the Commission, although it was not bound to do so,
9 essentially accepted those stipulations and
10 recommendations reached among the parties; isn't that
11 right?

12 A I believe that is correct.

13 Q And the amount of that increase that was reached by
14 agreement, was that the same as CEI's initial request,
15 or higher, or lower?

16 A It was lower.

17 Q And when there is that kind of a situation, where CEI
18 on its own comes in with a lower request through
19 agreement with other parties or a lower request than
20 someone else might file, the PUCO doesn't need a
21 protest accepting a lower rather than a higher
22 increase, does it?

23 A I don't think CEI went in on their own.

24 Q I appreciate that.

25 A That was a stipulated agreement and included the

1 Bingham - cross

2 City of Cleveland, as I recall, and I have forgotten
3 whether we would have industrial intervening or not,
4 but it was essentially a recommendation of the people
5 who were parties to the stipulation that the
6 Commission accept the recommendation.

7 They are not compelled to, but they did, and they
8 generally do when all the parties can get together and
9 agree on something, and then generally the
10 Commission accepts it.

11 Q And they did in that case?

12 A Yes.

13 Q And the order was filed on July 17, and the schedules
14 that we looked at yesterday showed that the CEI
15 tariffs were then filed -- issued -- pardon me,
16 August 4, 1970.

17 Does "issue" mean filed with the PUCO, Mr.
18 Bingham?

19 A I think in that case that is probably what it implies.

20 Q They were filed with the PUCO on August 4 or perhaps at
21 an earlier time and were issued from the PUCO at that
22 point?

23 A Well, we issued it, and that is the date that we did it,
24 and it probably corresponds exactly with the date that
25 it was filed with the Public Utilities Commission.

Bingham - cross

Q Thank you.

That date was about two or two and a half weeks after the Commission issued its order; is that correct, given the dates that we have specified?

A Yes.

Q And, in fact, CEI were following up on an order of the Commission approving a rate increase, it issued its tariffs within a matter of a few weeks after that order is entered by the Commission?

A Just as soon as we were able to, if it makes any difference.

Q And generally those go into effect about two weeks after they are issued by the company; isn't that right?

A This varies substantially.

Q It depends on how much lead time is required so that the notice goes through the billing cycle; is that right?

A I think in the case that you are talking about, it was a situation where we probably knew that the rates weren't going to become effective until August 14.

I am dredging to plumb my memory on this, and in that case that wasn't a rush.

What I am trying to distinguish is this:

In today's time the clock starts running from the

1 Bingham - cross

2 time you get the rates approved and filed, so we waste
3 very little time in what you might call turnaround
4 between the Commission's order, the approval by the
5 Commission of the rates, and then our subsequent
6 filing of the rates that they approve, and today we
7 try and cut that down to an absolute minimum.

8 In the case you are citing, there was a
9 one-month delay between the orders and the effective
10 date of the rates.

11 I don't precisely recall why, but I am sure we
12 tried as hard as we could to get it as fast as we
13 could.

14 Q Now, the rate increase following that was submitted
15 by CEI in October, the application in October of
16 '71, is that right?

17 A September or October, I have forgotten which.

18 Q And I believe it was subject to an amendment sometime,
19 some months later, an amended application was put in to
20 the Commission by CEI, is that right?

21 A There was an amended application that I think may have
22 been 1972.

23 Q And as a result of that application, there was
24 initially an order by the PUCO in November of 1973
25 approving approximately 86 percent of the requested

Bingham - cross

1
2 revenue increase by CEI, isn't that right?

3 A I thought it was 92.

4 Q All right, I'll accept that.

5 And the CEI there again tried to get its rate
6 tariffs into place as quickly as it could, is that
7 right?

8 A Yes.

9 Q And, in fact, those took effect in January of 1974,
10 is that right?

11 A That is correct.

12 Q Now, there was some further litigation on that
13 particular rate after which the CEI was permitted to
14 recover an even greater increased revenue than it had
15 been as a result of the first ruling, isn't that
16 right?

17 A That's right; the Supreme Court of Ohio gave us some
18 more money.

19 Q Now, in fact, sir, it has -- it is your opinion that
20 up until 1976, the regulatory scheme in Ohio -- at
21 least, as it applied to CEI -- would, if you pulled out
22 all the stops, let you get more money than perhaps
23 really you needed, isn't that right?

24 A If you succeeded.

25 If you pulled out all the stops and succeeded,

1 Bingham - cross

2 I think the regulatory scheme would have given us a
3 very -- perhaps a slightly more than adequate rate
4 return.

5 Q Mr. Bingham, you recall, I'm sure, having to testify
6 on this subject at earlier times prior to this trial,
7 is that right?

8 A Yes, I do.

9 Q And --

10 {After an interval.}

11 Q Well, let's come back to that, perhaps we're getting a
12 little ahead of ourselves.

13 Let's return for a moment, Mr. Bingham, to the
14 question of the cost-of-service study by class, if and
15 when that is submitted to the PUCO, that is, allotting
16 the cost of CEI's facilities among the various classes,
17 is a process of allocation primarily of making
18 judgments and estimates as to how that allocation should
19 take place, is that right?

20 A Yes; well, there is a great deal of judgment involved.

21 Q Now, one of the greatest costs that has to be
22 allocated is cost of generation, is it not?

23 Cost of generating facilities, let me be specific?

24 A You mean -- you're referring to the investment in
25 property?

1 Bingham - cross

2 Q Right.

3 A That is one of the very largest.

4 Q And, in fact, production -- the cost of production
5 plant has increased over the time period that you have
6 been the Chief Rate Engineer at CEI from approximately
7 40 percent of plant in '65 to almost 60 percent of
8 plant in 1980, isn't that about right?

9 A Yes.

10 Q Now, in dealing with costs such as production plant
11 or any other costs, there are many methods from which
12 you might choose to make the allocations among the
13 classes, isn't that right?

14 A Yes.

15 Q Now, when some new facilities need to be installed
16 because there is a new development or there is
17 increased demand, it is not your practice, is it, to
18 assign the cost of those new facilities to that group
19 which is creating the new need, is that right?

20 A You're talking about a group say, like a new
21 residential allotment?

22 Q No, I didn't mean to define it that way.

23 A I mean, such as.

24 Q Such as, or such as a shopping -- a ring of shopping
25 centers has been developed over a --

1 Bingham - cross

2 A A shopping center like Randall Mall.

3 Q And if you have to install new generating equipment
4 as a result of increased demand, you do not assign
5 the new cost of the generating equipment to that
6 group of customers, do you?

7 A No.

8 Of course, as a practical matter, you could never
9 say that, "This was installed because of that,"
10 anyway.

11 The timing isn't -- the generation is already
12 there when -- hopefully is already there when the
13 customer shows up; so you can't quite say that,
14 "This kilowatt is for that."

15 But, yes, we have to add generation, new
16 capacity, in order to handle new loads in general.
17 And we do not assign the costs of the new generation
18 to the new load.

19 Q Rather, when you go to the question of what cost of
20 service is, you take an average figure based on all
21 the costs of whatever group of facilities you're
22 looking at, is that right?

23 A Yes, including the transmission and even local
24 distribution.

25 Q Now, by the way, on generating facilities, the cost of

1 Bingham - cross

2 adding new generating capacity today is higher than
3 the average cost of the capacity that's already there,
4 isn't it?

5 A Yes; that's true of everything, perhaps more so of
6 generation, but new poles cost many times the average
7 cost of existing poles.

8 Q Now, any cost-of-service study class-wise, if you did
9 it, is really indicative of how to design the rates
0 for a particular class, is that right?

1 A That's our opinion.

2 MR. LANSDALE: May I have that
3 question read, if your Honor please?

4 THE COURT: Read the question back,
5 please.

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

7 A I thought I had heard you say it is "only" indicative.

8 But it's a general guide as to whether the total
9 revenues obtained from that class of customer are
0 reasonable or unreasonable in comparison with the
1 revenues obtained from other classes relative to their
2 costs.

3 It's not a final -- it's not a definitive
4 document where you can say, "This is the answer."

5 Q And you really -- you couldn't do that because this

1 Bingham - cross

2 cost of service is necessarily imprecise because you're
3 having to make estimates and judgments and allocations
4 along the way as you're doing it?

5 A But you would be wrong if you did. And, historically,
6 we have run into people who say, "That's what you should
7 do down to the second or third decimal place." I
8 think it's wrong.

9 Q We're using a lot of language here, and let me make
10 sure that we understand what it is when you say you
11 could do it if you wanted to, you could use the cost
12 of service as the sole guide if you wanted to, but you
13 don't?

14 A You could follow it blindly if you wished.

15 Q And CEI, in fact, uses another criteria in doing the
16 rate design for each of the classes, right?

17 A Yes.

18 Q Recently, for example, one of the concepts which you
19 used is the idea that there should be summer rates and
20 winter rates rather than a single rate schedule
21 throughout the year?

22 A Yes; we implemented that in 1976, I guess.

23 Q There are also other factors of business judgment
24 which enter into the decision making, aren't there?

25 A Yes.

1 Bingham - cross

2 Q And part of the business judgment in determining what
3 rates CEI proposes for retail service is competition
4 from other electric suppliers?

5 A Only to a very limited degree.

6 Q You do consider competition from other electric
7 suppliers in designing the rates, don't you?

8 A Well, I think only to a modest degree.

9 Our experience has been that -- basically, that
10 except in the cases of, say, energy expensive
11 manufacturing processes, things like air reduction,
12 that is, the making of oxygen, the use of electric
13 furnaces, such as Union Carbide has, aluminum
14 production, of which we have none, in those instances,
15 the cost of electricity is really probably the major
16 element of that industry's costs; that's why we have
17 no aluminum here.

18 Q Mr. Bingham, you do consider competition --

19 THE COURT: Had you finished?

20 Just a moment.

21 Have you finished your answer?

22 THE WITNESS: I was going to add

23 just a little bit more, I'm sorry.

24 A {Continuing} An example of where we would take it into
25 account specifically would be, I think, the situation

1 Bingham - cross

2 where we have with Jones & Laughlin.

3 They have two electric furnaces here in their
4 Cleveland plant. They have electric furnaces in some
5 of their other plants, too. I think they have some in
6 Pittsburgh. And if we are able, we would like it
7 to be more economical for J&L to operate the electric
8 furnaces here in Cleveland than to operate the
9 electric furnaces in Pittsburgh if they only need one.

10 There, we do try to stay fairly sensitive to
11 what we think are the relative costs between here and
12 the other places of doing it.

13 I guess I'm finished.

14 Q Mr. Bingham, you do consider competition from other
15 electric suppliers in designing rates for very large
16 industrial customers, don't you?

17 A I think that's what I just said.

18 Q And competition has an effect on -- competition in
19 designing the rate has an effect on the company's
20 rate of return, doesn't it?

21 A I'm not sure I know what you mean when you say
22 "competition in designing the rate."

23 The major factor that would be concerned, I
24 think, would be what is the total amount of revenue
25 we get.

1 Bingham - cross

2 The design of the rate would be of secondary
3 importance.

4 Q Well, the cumulative effect of including competition
5 in your calculation of projected rates is that
6 perhaps your earnings are slightly less or lower
7 than what you might otherwise get, isn't that right?

8 A I can't recall any instance where, even though we
9 may have thought about it, we actually had to or did
0 reduce the level of revenues from electric service
1 because of competition from another electric
2 utility.

3 It was much more common for that to occur in
4 our competition with the gas utility.

5 Q But gas was not the only utility, was it?

6 A It was the toughest competition we had.

7 Q Mr. Bingham, do you recall a proceeding in 1976 where
8 you testified on matters related to the ones you are
9 discussing today?

10 A Yes.

11 Q And at pages 10,330-10,331, you were asked in that
12 proceeding the following questions and answers:

13 "Does competition with other electric suppliers
14 ever enter into your consideration in designing rates?"

15 "A Yes, it does."

1 Bingham - cross

2 And then there was colloquy among counsel, and
3 then you were asked the question:

4 "Q How?

5 "A We have over the years faced continual
6 competition with gas companies, very strongly in our
7 little steam-heating business; and pretty much in all
8 markets, home appliance markets and various
9 industrial heat-treating operations, and many of
0 which can be done either gas or electric, and the
1 impact of this I think has probably been pretty much
2 across the board.

3 "We haven't tried to design a residential schedule
4 specifically to fight the gas company or some other
5 schedule.

6 "It is a general overall impact, and in essence
7 perhaps results in our earning a slightly or somewhat
8 lower return than we might otherwise be entitled to."

9 Now, further, Mr. Bingham, --

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

2 THE COURT: Approach the bench.

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

1 Bingham - cross

2 MR. LANSDALE: Is this supposed to
3 be impeachment?

4 I object.

5 MS. COLEMAN: I haven't gotten to
6 the part --

7 MR. LANSDALE: I can't hear you.

8 MS. COLEMAN: I haven't gotten to
9 the part which is --

10 THE COURT: Why do we read the
11 material that is not relevant?

12 MS. COLEMAN: Well, it's because
13 the question goes back to the beginning, your
14 Honor.

15 THE COURT: That's not the way
16 you do it.

17 You can't go back and read the transcript
18 all the way back and get in all the testimony
19 that --

20 MS. COLEMAN: My understanding --
21 pardon me -- my understanding was I had to begin
22 with the question, and that's how I began.

23 THE COURT: Let's proceed.

24 MR. LANSDALE: I object. I object
25 to the suggested impeachment.

1 Bingham - cross

2 THE COURT: I don't know what
3 the rest of it is.

4 Let's proceed.

5 MR. LANSDALE: Are you authorizing
6 her to read it?

7 THE COURT: I don't know what
8 it says. I don't know if it is consistent or
9 inconsistent.

10 MR. LANSDALE: My point, your Honor,
11 please, is, she asked the witness about
12 competitive considerations; and then she says,
13 "Didn't you testify so and so in another
14 proceeding?"

15 The suggestion is that it's an impeachment,
16 and what she's reading is almost verbatim with
17 what he said, and I object to the suggestion
18 implicit in doing this, that this is an
19 impeachment thing.

20 She said she hadn't gotten to it.

21 THE COURT: Well, may I see it?
22 May I see what comes afterwards?

23 {Ms. Coleman leaves the bench.}

24 {Mr. Murphy steps to the bench and hands a
25 transcript to Mr. Lansdale.}

Bingham - cross

{Ms. Coleman returns to the bench with a page of transcript and hands it to the Court, and the Court reads silently.}

MS. COLEMAN: I've got a different transcript, Jack.

This is the problem, it's nested in something else. We get the question asked in the last proceeding, which can only be understood by what came before.

I think perhaps what I should have done is returned to the last fall transcript rather than the NRC.

{The Court continuing to read silently.}

MR. LANSDALE: You remember that you made --

MS. COLEMAN: I said --

MR. LANSDALE: -- you made a few suggestions that this produced a lower rate of return, and this is not accurate.

It says here "return," it doesn't say "rate of return."

MS. COLEMAN: All right.

{Law Clerk Schmitz brings a volume of the transcript from the last trial to the bench and

1 Bingham - cross

2 reads it silently with Mr. Lansdale.]

3 MR. LANSDALE: That's in another
4 case.

5 MS. COLEMAN: That's in this case,
6 last fall.

7 MR. LANSDALE: That's what?

8 MS. COLEMAN: That's in this case,
9 last fall.

10 MR. LANSDALE: Oh, all right.

11 MS. COLEMAN: One is nested inside
12 the other.

13 MR. LANSDALE: I don't know, what are
14 we going to do with this?

15 MS. COLEMAN: I don't know; I think
16 this is up to his Honor.

17 THE COURT: Well, we're talking
18 about a 1976 hearing at pages 10,330 and 10,331.

19 Now, I can do one of two things:

20 I can order that testimony stricken and
21 instruct the jury not to consider it because there
22 were no inconsistencies in the statements, and
23 then you can pick it up from there.

24 MR. LANSDALE: Or you can just let
25 it go.

1 Bingham - cross

2 THE COURT: I'm perfectly content
3 to let it go, unless counsel is going to suggest
4 that --

5 MR. LANSDALE: There are no
6 inconsistencies there.

7 THE COURT: There certainly isn't
8 any inconsistency that I can see in the two
9 answers.

10 MS. COLEMAN: As far as we've gone,
11 there is not.

12 But I should have referred to this hearing
13 rather than the NRC; that's probably where I got
14 off the track.

15 THE COURT: Well, all right.

16 I'm going to let you proceed on that one,
17 but I'm going to have this one stricken and tell
18 them to disregard it because there are no
19 inconsistencies.

20 Let's proceed.

21 MS. COLEMAN: Your Honor, this
22 answer was part of the other answer. I think
23 that can only create --

24 THE COURT: This is not the
25 hearing that you prefaced your question with.

1 Bingham - cross

2 You're talking about a hearing -- as I
3 recollect, the leading question was, "Do you
4 recall testifying before a hearing in 1976?"

5 MS. COLEMAN: Yes, your Honor.

6 THE COURT: Pages 10,330 and
7 10,331.

8 MS. COLEMAN: I should have --

9 THE COURT: This is not that
10 hearing.

11 MS. COLEMAN: I'm not making
12 myself clear.

13 I should have prefaced my question with
14 regard to the prior trial where the '76 hearing
15 testimony was read.

16 It becomes somewhat complicated.

17 {After an interval.}

18 THE COURT: Well, --

19 MR. LANSDALE: We haven't gotten to
20 that yet; that is a different question.

21 THE COURT: I don't know.

22 MR. LANSDALE: I must confess --

23 THE COURT: Obviously, in the
24 1976 hearing, there was nothing inconsistent with
25 his answer today.

1 Bingham - cross

2 If the inconsistency exists at all, it
3 exists in the previous trial testimony.

4 MS. COLEMAN: That's right, your
5 Honor.

6 But this is all part of the question that
7 was asked and, you're right, I should have
8 referred to the previous trial testimony.

9 The problem is, one is nested to the other,
10 and this is part of the question.

11 THE COURT: If you're going to
12 use a document to impeach him, I don't understand
13 "one is nested in the other"?

14 How is one nested in the other?

15 MS. COLEMAN: In that, in the prior
16 trial, the '76 testimony was read as part of the
17 question, and then this question was asked, "Is
18 it your testimony --"

19 THE COURT: Well, I don't know
20 that, because you have given me page 2905 of
21 something, and I don't know what comes before, I
22 don't know what comes after.

23 So unless I have the context of the entire
24 testimony so that I can see how it evolves in the
25 testimony, it would have to be read from the last

1 Bingham - cross

2 trial testimony, the questions and answers.

3 MS. COLEMAN: That's right.

4 That's what I was doing, my reference was
5 wrong.

6 THE COURT: No, you weren't; you
7 were reading from here, from the transcript of
8 the 1976 hearing, as I understand it.

9 MS. COLEMAN: May I get the
10 previous trial testimony pages, and I'll show
11 you -- I'll explain it to you.

12 MR. LANSDALE: Is it suggested that
13 he was inconsistent in the last case; are you
14 suggesting that this impeaches him?

15 MS. COLEMAN: Only the very last
16 part there.

17 {Mr. Lansdale reading silently.}

18 THE COURT: I can't tell anything
19 from that.

20 We have to read it in context.

21 {Ms. Coleman leaves the bench momentarily and
22 returns with two pages of transcript from the
23 previous trial.}

24 MS. COLEMAN: Your Honor, I'm
25 giving you the two previous pages.

1 Bingham - cross

2 {The Court reading silently.}

3 THE COURT: Well, that's still
4 not -- bring me back starting at page 2900,
5 where we can pick it up.

6 I can't get the context of this. Obviously
7 we're right in the middle of the cross-examination.

8 Get me -- let's go back to at least 2900,
9 or bring the entire transcript up.

10 {Ms. Coleman leaves the bench momentarily and
11 returns with several more pages of the transcript
12 from the previous trial, and the Court commences
13 reading silently.}

14 MR. LANSDALE: What page are you
15 starting with?

16 THE COURT: 2900.

17 {After an interval.}

18 THE COURT: Well, we will start
19 on page 2902, where it gets into the issue
20 confronting us here.

21 At page 15 -- or line 15, and the question
22 is:

23 "Now, in determining what rate it would
24 propose to retail service, did CEI consider
25 competition from other electric energy suppliers?"

Bingham - cross

"A Not really.

"Q Would the same be true if I limited the question to large industrial customers?

"A Let me see if I understand that question.

"Would we be concerned about competition from other suppliers for large industrial customers?

"Q Would you take that into consideration in designing rates?

"A Not directly.

"I can't say that I ever compared one of my proposed large industrial rates against that of any other company."

So far, we are consistent.

"Q But did you consider competition from other sources when proposing rates for large industrial customers?

"A Well, there may have been provisions in the large industrial schedule.

"As a matter of fact, there is a provision in the large industrial schedule that imposes certain additional conditions.

"If the customer is generating a portion of

1 Bingham - cross

2 his own power and is operating in parallel with
3 the company, then I suppose that you would say
4 that that is a separation of someone else's
5 generating. I am not sure that it has anything
6 to do with competition."

7 So far, he is consistent.

8 "Q Do you recall testifying in another
9 proceeding in May of 1976, in Silver Springs,
10 Maryland?

11 "A Yes.

12 "Q And referring to page 10,329 of
13 the transcript of those proceedings, and I will
14 ask you if you recall this question and this
15 answer:

16 "Q You were asked questions this
17 morning about when you designed rates, whether
18 you took competition into consideration, and I
19 believe you referred possibly to the case of very
20 large industrial customers; do I summarize
21 roughly your testimony?

22 "A Yes.

23 "Q In giving that answer, were you
24 thinking of competition only between electrical
25 energy suppliers?

1 Bingham - cross

2 "A Yes.'

3 "Do you agree with those answers?

4 "A Well, there might be cases where we
5 would -- yes.

6 "Q Now, does the consideration of
7 competition in proposing or designing rates for
8 large customers have an impact on the company's
9 rate of return?

10 "A No.

11 "Q Do you recall in the same
12 proceeding, page 10,330 to 10,331, the following
13 questions and answers:

14 "Q Does competition with other
15 electric suppliers ever enter into your
16 consideration in designing rates?"

17 Now, I don't know if that is an
18 in correction of the transcript, it shows
19 "electric suppliers", "suppliers" is scratched
20 out and "energy" inserted, I don't know, is that
21 a correction of the --

22 MS. COLEMAN: It's a correction
23 of --

24 THE COURT: -- of the transcript?

25 MS. COLEMAN: -- of his description,

Bingham - cross

your Honor.

{The Court reading silently.}

THE COURT: "A Yes."

And, let's go back because this is critical here.

"Q Do you recall in the same proceeding, page 10,330 to 10,331, the following questions and answers:

"Q Does competition with other electric suppliers ever enter into your consideration in designing rates?

"A Yes, it does."

And then there was colloquy among counsel, and then:

"Q How?

"A We have over the years faced continual competition with gas companies, very strongly in our little steam-heating business, but also in the electric business; and pretty much in all markets, home appliance markets and various industrial heat-treating operations, and many of which can be done either gas or electric, and the impact of this I think has probably been pretty much across the board.

1 Bingham - cross

2 "We haven't tried to design a residential
3 schedule specifically to fight the gas company
4 or some other schedule."

5 So far, he's consistent.

6 He goes on at line 10, page 2905:

7 "It is in a general overall impact, and in
8 essence perhaps results in our earning a
9 slightly or somewhat lower return than we might
10 otherwise be entitled to."

11 "Now, is it your testimony that the only
12 competition that impacted rates was with the
13 gas company?"

14 "A That was the primary one, and what
15 you are really talking about there is that up
16 until 1976, the regulatory scheme in Ohio, at
17 least as it applied to CEI, wouldn't -- if you
18 pulled out all the stops, perhaps it would let
19 you get more money than you really needed.

20 "It was the competition that kept us below
21 that rate of return, but I think generally we
22 felt that we got an adequate rate of return."

23 That's where --

24 MR. LANSDALE: It seems to me that
25 is exactly what he's testified to here.

1 Bingham - cross

2 THE COURT: Yes.

3 Where do you claim an inconsistency appears?

4 MS. COLEMAN: The inconsistency
5 relates to two questions.

6 MR. LANSDALE: I can't hear you.
7 I'm sorry.

8 MS. COLEMAN: The inconsistency
9 relates to two questions:

10 One is as to whether gas was the only
11 competition; and since he states here that it is
12 the primary one, it implies that there was other
13 competition as well.

14 We also come back to the portion I didn't
15 read earlier because of the problem of context,
16 and that is he earlier testified that he could
17 get more money than he really needed from the
18 PUCO if he pulled out all the stops.

19 THE COURT: He already testified
20 to that.

21 MR. LANSDALE: He testified to that.

22 THE COURT: You asked him the
23 specific question.

24 MR. LANSDALE: Moreover, he's already
25 testified about the J&L electric rates and whatnot.

1 Bingham - cross

2 where he's competitive with Pittsburgh.

3 I just don't understand --

4 THE COURT: I will sustain the
5 objection.

6 I think the best thing to do is just let it
7 go and ask him another question.

8 MS. COLEMAN: All right.

9 I will proceed to something else.

10 {End of bench conference.}

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Bingham - cross

1
2 THE COURT: You may proceed,

3 Ms. Coleman.

4 MS. COLEMAN: Thank you, your

5 Honor.

6 BY MS. COLEMAN:

7 Q Mr. Bingham, you agree, don't you, that it was
8 competition that kept CEI below the rate of return
9 that CEI may have gotten out of the PUCO if it
10 pulled out all of the stops?

11 A Yes. I think I already said that.

12 MS. COLEMAN: Pardon me. May I
13 approach the bench?

14 THE COURT: Yes.

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

18 MS. COLEMAN: Your Honor, I should
19 have brought this out before, but would you read,
20 please, Stipulation 7B.

21 MR. LANSDALE: No objection.

22 MS. COLEMAN: Thank you.

23 {End of bench conference.}

24 THE COURT: Ladies and gentlemen
25 of the jury, Stipulation 7B reads as follows:

1 Bingham - cross

2 "CEI with the approval of the PUCO sets
3 uniform rates by customer classification
4 throughout its service area."

5 MS. COLEMAN: Thank you, your
6 Honor.

7 BY MS. COLEMAN:

8 Q Mr. Bingham, CEI could charge different rates in
9 different parts of its service area?

10 A Yes.

11 Q So CEI has chosen to have uniform rates; is that
12 right?

13 A That has been our policy for many years.

14 Q Now, it would be possible to determine a cost of
15 service for a customer who lives in the City of
16 Cleveland as opposed to the cost of service for a
17 customer who lives outside of the City of Cleveland?

18 A Not only possible, but it has been done.

19 Q And it was done in 1944?

20 A It was done for what we refer to as the 1944 rate
21 case, and the work was probably done in 1945-1946.

22 Q And then another one was done in what you referred to,
23 I think, as the 1979 rate case?

24 A I think that was the one. It would have been heard
25 in the spring of 1980.

1 Bingham - cross

2 Q And the 1944 study and the 1977-1980 study were the
3 only two you know of that ever got finished and
4 filed with the Commission; is that right?

5 A Did you say "1944"?

6 Q Yes.

7 A You are getting a little bit mixed up.

8 The 1944 rate case was an appeal from an
9 ordinance passed by the City of Cleveland that was not
0 acceptable to the company.

1 Under those conditions we appealed the ordinance
2 to the Public Utilities Commission, and they have the
3 jurisdiction to settle it.

4 The customers covered by that rate ordinance were
5 those on the residential schedule and general
6 commercial schedule in the City of Cleveland, and at
7 that time an allocation or a cost-of-service study was
8 made that separated out those two rate schedules in
9 the City of Cleveland from all of the rest of the
0 system.

1 In what we referred to as the 1948 rate case,
2 this was a proposal by the company to increase rates
3 for the large commercial and large industrial -- or
4 whatever they were called at that time -- and
5 schedules only.

1 Bingham - cross

2 There was no increase for residential, general
3 commercial, and perhaps the miscellaneous.

4 Our industrial customers took great exception to
5 this proposal of the company, and at that time we
6 did a class-wise cost-of-service study for use in
7 that rate case.

8 Then in, I guess we have referred to it as the
9 1979 rate case, heard in the spring of 1980, the
0 company did a territorial allocation separating the
1 City of Cleveland, all classes, I believe, from the
2 system.

3 Now, in between, other people have done
4 cost-of-service studies; the City has --

5 Q I will ask you again, Mr. Bingham, isn't it true that
6 the 1944 study and the 1979 study were the only two
7 that you know of that CEI did which were ever finished?

8 A I just testified that we did one in 1948. It was
9 submitted in the rate case.

0 Q It was a territorial study.

1 A As a class-wise --

2 Q My question goes to the study as between the City of
3 Cleveland and others.

4 A I didn't hear the word "territorial" in the question.

5 They would have been probably the only ones that

Bingham - cross

1
2 we completed and filed.

3 Other people have done it, though.

4 Q It is CEI's belief that there is very little
5 difference in the cost of service for a customer
6 within the City of Cleveland and a customer outside
7 of the City of Cleveland?

8 A That is correct, it is.

9 Q And that is your opinion; is that right?

10 A It is my opinion, and it was developed from the cost
11 studies that have been done.

12 MS. COLEMAN: May I request a
13 bench conference, please?

14 THE COURT: Yes.

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

18 MS. COLEMAN: If your Honor please,
19 we would request that Stipulation 77 be read.

20 MR. LANSDALE: I have no objection.

21 THE COURT: Okay.

22 {End of bench conference.}

23 THE COURT: Ladies and gentlemen
24 of the jury, Stipulation No. 77 reads as follows:

25 "Approximately 30 percent of CEI's revenues

1 Bingham - cross

2 come from sales made within the City of
3 Cleveland."

4 BY MS. COLEMAN:

5 Q The technique of doing the allocation study by
6 region, which you just described, in 1944 and 1979,
7 is much the same as the techniques that would have
8 been used in a class-wise study; isn't that right?

9 A They frequently are the same.

10 On the other hand, they are frequently -- there
11 frequently are shortcuts that you can take that you
12 can't do in a class-wise study.

13 Q We were in one of the less-talked-about allocation
14 studies or the estimating study?

15 A Yes.

16 Q And in many cases in the most recent studies that
17 you have done, the allocation factor that is used to
18 divide costs between the City and the outside is
19 around 30 percent, which also includes contributions
20 for total energy sales; is that right?

21 A There is no such thing as the allocation factor.

22 Q Yes; there were several different ones?

23 A There are hundreds -- I may have exaggerated -- there
24 are over 50, I am sure, and it depends on the class
25 of property that you are talking about.

1 Bingham - cross

2 For example, a system would be 11 KV underground
3 conduit and cable, and the vast majority of that, I
4 believe, is located in the City of Cleveland, so its
5 allocation factor for that kind of property would
6 be very, very high, much higher than 30 percent.

7 There are other kinds of property, for example,
8 until recently, anyway, the 13 KV overhead
9 distribution system, and relatively little of that
10 is in the City of Cleveland, and in that area it
11 would have a very low allocation factor, so these
12 things range all over.

13 Now, if you want to get up to the top, say, to
14 the power plant, you would be near 30 percent.

15 Kilowatt hours -- kilowatts don't necessarily
16 always match revenue percent by percent, but they are
17 not going to be greatly different, either.

18 Q In the City the 11 KV conduit underground was used
19 primarily to serve industrial customers?

20 A Yes. It is primarily a service for the downtown of
21 Cleveland.

22 Q Let me expand my question to ask you that that
23 service was for primarily commercial and industrial
24 customers?

25 A No, I guess I have to decline that. The service was

1 Bingham - cross

2 to most of the substations on the east side of
3 Cleveland and out the Lake Shore, which would
4 probably be out to, say, around East 120th Street,
5 and that would be mostly in the 11 KV system.

6 I would agree that there is probably more
7 commercial and industrial on it than is typical in
8 other areas.

9 Q That conduit was laid in some time ago?

10 A Most of it.

11 Q And it is underground and consideration of the
12 density of the population and the difficulty of
13 building overhead; isn't that right?

14 A Yes.

15 Q There are differences, aren't there, in the amount of
16 electricity used for typical residential customers in
17 the City of Cleveland and the typical residential
18 customers outside of the City of Cleveland?

19 A Yes.

20 Q The residential customers inside the City of
21 Cleveland use less, on average, than the residential
22 customers outside of the City of Cleveland?

23 A That is correct.

24 Q And there were probably two reasons for this; and one
25 is that the houses are, on average, smaller in the

1 Bingham - cross

2 city; and the other is that the houses are older and
3 probably have less demand for electric energy than
4 the newer developments outside the city; is that
5 right?

6 A Yes, houses and apartments, dwelling units, really.

7 Q We spoke a minute ago concerning the question of
8 density.

9 One aspect of the cost at the level of the
10 distribution is the density, is it not?

11 A Yes.

12 Incidentally, the denser the load, the lower
13 the unit cost.

14 Q Density can be measured in terms of the number of
15 electric customers per mile or kilowatt hour per
16 mile -- pardon me -- let me rephrase that:

17 Density in general parlance is people per square
18 mile of territory, isn't it?

19 A There are really two major considerations:

20 One would be customers per square mile, and the
21 other would be kilowatts per square mile.

22 Q The land area of the City of Cleveland is about 76
23 square miles?

24 A Yes. I think we usually say 75, but you are probably
25 more accurate than I am.

1 Bingham - cross

2 Q And CEI has about 100 -- had, in 1979, about 186,000
3 customers in the City of Cleveland; right?

4 A In 1979?

5 Q In 1979.

6 A It sounds right.

7 Q So that the density of customers per square mile in
8 the City of Cleveland was about 2,480 customers per
9 square mile?

10 A What was that number again?

11 Q 2,483.

12 A Yes.

13 Q Now, the CEI service is an area of 1,700 square miles?

14 A Roughly.

15 Q And the total customers in the CEI service area is
16 about 708,000 customers in 1979?

17 A It sounds right.

18 Q So that the density in the service area incidentally
19 is only 417 customers per square mile; right?

20 A I will accept that, subject to check.

21 Q Now, since the general statistics about the service
22 area include the City of Cleveland, if you wanted to
23 find out the density of the area outside of the
24 City of Cleveland, you would have to subtract the
25 land area of the City of Cleveland from the land

1 Bingham - cross

2 area of the service area, 1,700 minus 76, which is
3 1,624 square miles?

4 A Okay.

5 Q And if you wanted to get the number of customers
6 outside of the City of Cleveland in the service area,
7 you subtract the City of Cleveland's customers from
8 the service area customers; right?

9 A Yes.

10 Q And will you accept that that is approximately
11 519,000 customers?

12 A Yes.

13 Q So that the density outside the City of Cleveland is
14 about 320 customers per square mile?

15 A I will accept that.

16 Q And if we compare that 320 outside the City to the
17 2,400 customers per square mile in the City, we find
18 in the City that the density is about eight times as
19 great as outside; isn't that right?

20 A That is the way it works out.

21 Q And given this difference in density cost, the cost
22 to service within the City ought to be lower on the
23 density criteria alone?

24 A All other things being equal, yes.

25 MR. LANSDALE:

May I approach the

1 Bingham - cross

2 bench?

3 THE COURT: Yes.

4 - - - - -

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

7 MR. LANSDALE: I want to interpose
8 an objection to this entire line of questioning.
9 I must confess that I am wondering, I have been
0 wondering for the last hour what we are going into
1 this for, and I object on the grounds of
2 relevance and on the grounds of redundancy, and
3 I object to continuing detailed examination into
4 the matters which are totally irrelevant to this
5 case.

6 THE COURT: I am having difficulty
7 following it myself. Maybe you can tell us. I
8 don't know.

9 MS. COLEMAN: Your Honor, we are
10 talking about an antitrust case where the question
11 is competition and what actions CEI took and it
12 considers in rate-making and related issues,
13 and they are very germane.

14 THE COURT: You have been talking,
15 but you really haven't said anything. All you have

1 Bingham - cross

2 done is generalize.

3 Tell me where it is material? I mean, it is
4 one thing to say that, "I think it is material,"
5 but tell me where and how. I don't know. That
6 is why I am asking, does it go to the issue of
7 ability to fix rates?

8 MS. COLEMAN: No. The questions
9 I am now asking go to their ability to charge a
10 different rate in the City of Cleveland.

11 THE COURT: So what?

12 MS. COLEMAN: -- which goes to the
13 question of how CEI could compete against Muny
14 Light.

15 THE COURT: I think you asked that
16 in one single question, and he answered, "Yes."

17 MR. LANSDALE: He already testified
18 to that.

19 THE COURT: I think you asked
20 him the question, "Can CEI set different rates
21 for the City of Cleveland than it does outside
22 of the City of Cleveland," and the answer was,
23 "Yes."

24 MR. LANSDALE: I will stipulate
25 that we charged that lower rate, but not if I am

1 Bingham - cross

2 going to be subjected to hour upon hour of this
3 kind of stuff.

4 MS. COLEMAN: I don't think it is
5 going to be hour upon hour.

6 MR. LANSDALE: It seems like it.
7 Maybe it is minute after minute.

8 MS. COLEMAN: I think it would be
9 helpful to have the facts in the record which
10 indicate and support that ability.

11 THE COURT: Why?

12 MS. COLEMAN: If you can stipulate
13 the conclusion --

14 THE COURT: It is now 10:30, or
15 a quarter of 11:00, and we have been in this
16 ever since we started this morning, since we
17 began at twenty after 9:00, but if we could have
18 stipulated it in one sentence -- and he answered
19 the question, he answered, "Yes."

20 MR. LANSDALE: I can't escape the
21 feeling I have been getting that this is some
22 attempt to secure information relative to our
23 natural legal monopoly and affirmative defense,
24 and if so, it is anticipatory of something that
25 we have the burden of proof on, and it is not

1 Bingham - cross

2 relevant now anyway.

3 THE COURT: I don't know what we
4 are going, where we are going with it, frankly.

5 Assuming for the sake of argument that CEI
6 can set different rates within the City than it
7 can set outside of the City, and in fact the rate
8 could be lower in the City, and what does that
9 prove?

10 MS. COLEMAN: It proves that CEI
11 had open to it the opportunity to take that approach
12 to competition other than the one it did take.

13 THE COURT: What difference does
14 that make?

15 We are here to determine whether or not they
16 engaged in predatory and unreasonable conduct.

17 I think we are getting into academic areas.
18 I am appreciative of the fact that you have made
19 all these mathematical computations to which the
20 witness concedes, but what does it prove? It
21 doesn't prove anything.

22 If you are desirous of getting into the
23 record the fact that CEI can set different rates
24 within the City and without the City and the
25 rates can be lower within the City --

1 Bingham - cross

2 MR. LANSDALE: Yes. The statute
3 provides that we can approve rates without any
4 affirmative order of the Commission, but the
5 witness has already testified that we can set
6 different rates.

7 THE COURT: I have the feeling,
8 counsel, that I have permitted this on both sides.

9 We have stipulations -- I don't know, maybe
10 counsel have overlooked the purpose of the
11 stipulations.

12 The purpose is to eliminate the necessity of
13 putting on evidence, actual evidence that
14 develops the conclusions of the stipulations.

15 The purpose of stipulations is to reduce
16 a protracted trial, and I have permitted both
17 sides to introduce evidence that parallels the
18 stipulation, but this is a redundant procedure,
19 and that is why we are going so long in trying
20 this thing.

21 Why don't you see if you can work out a
22 stipulation, and we will take a break, and then
23 we will go on to something else.

24 {End of bench conference.}

25 - - - - -

1 Bingham - cross

2 THE COURT: Ladies and gentlemen,
3 perhaps this is an opportune time to take our
4 morning break. Remember the admonitions heretofore
5 given. We will see you in a little bit.

6 {Recess taken.}

7 THE COURT: What have we
8 accomplished during the recess?

9 MS. COLEMAN: If your Honor please,
10 we have a stipulation which we have reached --
11 perhaps we should approach the bench.

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

15 MS. COLEMAN: This deals with one
16 feature of the matter that is being discussed
17 here, and I will read the stipulation that was
18 reached into the record:

19 "At all times relevant to this case the
20 defendant CEI had the legal right if it elected
21 to charge lower rates to customers within the
22 City of Cleveland than to customers outside the
23 City of Cleveland."

24 MR. LANSDALE: The change represents
25 the difference of what was suggested to me and what

1 Bingham - cross

2 I was willing to agree to.

3 THE COURT: Is this the stipulation?

4 MS. COLEMAN: Yes.

5 THE COURT: All right. I will
6 read it. What else?

7 MS. COLEMAN: That is all. Then I
8 will proceed with other matters.

9 MR. LANSDALE : I think it may be
10 pertinent to tell you that the reason I objected
11 to the use of the language "could have" is
12 because of the ambiguity in it, that I didn't know
13 what the plaintiff's claim, whether the plaintiff
14 would claim that the economics would have dictated
15 it, and now, when I recognize in the question
16 that they did indeed intend that, and I am not
17 prepared to make a stipulation in that respect.

18 THE COURT: Well, I can understand
19 why.

20 If the thrust is to show that you "could have"
21 and the economics of it -- I mean, if you have
22 established a rate in the city lower than the
23 City's rate to its customers, that could have been
24 a charge of predatory action, if the economics
25 didn't warrant setting it down that low.

1 Bingham - cross

2 Okay, let's move this along.

3 I still don't see the purpose of this, but
4 let's move it.

5 MR. LANSDALE: I don't, either.

6 {End of bench conference.}

7 - - - - -

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

10 THE COURT: Ladies and gentlemen
11 of the jury, in an effort to move the case along,
12 counsel have entered into a stipulation, which I
13 shall for the record identify as a stipulation
14 of 8-11-81, as follows:

15 "At all times relevant to this case the
16 defendant CEI had the legal right if it elected
17 to charge lower rates to customers within the
18 City of Cleveland than to customers outside the
19 City of Cleveland."

20 MS. COLEMAN: Thank you, your Honor.

21 BY MS. COLEMAN:

22 Q Mr. Bingham, we have been considering what you have
23 taken into account in designing rates.

24 After you designed them, they must be filed and
25 approved by the PUCO; is that correct?

1 Bingham - cross

2 A Generally speaking, yes.

3 Q In the case of rate schedules reflective of rate
4 increases, that is the case?

5 A Yes.

6 Q And you can't charge a customer a higher rate than
7 is on file without a full filing of approval?

8 A No.

9 Q Nor can you charge a lower rate without filing an
10 approval?

11 A My recollection -- I am not sure about "approval," --
12 but my recollection is they had to accept it for
13 filing, and that is what the statute said.

14 Q But you would have to file it if you were charging
15 a lower rate?

16 A Yes.

17 Q Now, we spoke yesterday about the CEI rules and
18 regulations which in part define the terms and
19 conditions of service; is that right?

20 A Yes.

21 Q And other terms and conditions of service were set
22 forth in the rate schedules themselves for the
23 individual class of customers; right?

24 A For the individual rate schedules, yes.

25 Q Now, the terms and conditions of service are also

1 Bingham - cross

2 filed with the PUCO, aren't they?

3 A They both are filed with the PUCO.

4 Q And the terms and conditions of service in those
5 filings are applied uniformly throughout CEI's
6 service area?

7 A Generally speaking, yes.

8 Q You can't change the filed terms and conditions unless
9 you go down and file new ones?

10 A That is right.

11 Q And you could if you wished file new terms and
12 conditions as applied only to customers within the
13 City of Cleveland, as opposed to all customers
14 throughout the area; right?

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

17 THE COURT: Approach the bench.

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

21 MR. LANSDALE: I believe that we
22 have established in the last case that whether or
23 not in the so-called Munny Displacement Program --
24 where they violated the provision of tariffs as
25 to which we don't admit that we did, but the

1 Bingham - cross

2 question whether or not we did is irrelevant to
3 this case and irrelevant in any antitrust case,
4 and it seems to me that we are getting -- that
5 this question is designed to suggest the
6 contrary, and I object to going into this aspect
7 of it at all.

8 THE COURT: Ms. Coleman.

9 MS. COLEMAN: The question which I
10 am asking Mr. Bingham, those questions are drawn
11 from the law related to required filings, and
12 we would submit, your Honor, that those laws as
13 to what is required to be filed are material
14 here, particularly in light of the fact that the
15 PUCO has since the last time issued an order on
16 this question, responding to a 1976 application
17 by the company for a tariff -- pardon me -- a
18 filed schedule or term and condition of service,
19 that would permit it to provide allowances in
20 the competitive areas, and the PUCO ruled that
21 that was not an appropriate schedule to be
22 filed by the CEI.

23 We can make that order available to your
24 Honor. We have some stipulations concerning the
25 applicable Ohio statutes, and they are stipulations

1 Bingham - cross

2 80 through 82, and two additional stipulations
3 relating to other filing requirements, and two --
4 relating to the order, and we can make all that
5 available to your Honor.

6 THE COURT: For what purpose?

7 MS. COLEMAN: The order of the PUCO
8 provides the necessary foundation which you called
9 for at the last trial for referring to the
10 statute as being relevant to CEI's conduct during
11 this period.

12 THE COURT: That was a 1976 order.
13 How is that pertinent to what occurred between
14 July 1, 1971, and 1975?

15 MS. COLEMAN: We can argue they came
16 to this conclusion. Now, they could have come to
17 this conclusion earlier.

18 THE COURT: I am not changing my
19 ruling from the previous case as it relates to this
20 purpose. You may proffer into the record what
21 you intend this evidence to be beyond that what
22 you have already said, but to me it just appears
23 that it just fortifies my previous decision,
24 namely, whether or not that activities
25 engaged in by CEI during the actionable period

1 Bingham - cross

2 constitutes a violation of State law was within
3 the jurisdiction of the PUCO.

4 They took jurisdiction, and they decided
5 it, and unfortunately they decided it in 1976,
6 so it is not material to this case, and whether
7 they would have under the same or similar
8 circumstances made the same ruling back in 1971,
9 '72, '73, I don't know, but I am not going to
10 conjecture on it.

11 MS. COLEMAN: Your Honor, we will
12 proffer the order to which I referred and the
13 statutes, and I will do that in a written form.

14 THE COURT: Just do it right now.

15 MS. COLEMAN: Well, I want to give
16 you the order.

17 THE COURT: We are not going to
18 start proffering in written form. Proffers are
19 made at the time that the testimony is tendered,
20 and they are not made days afterwards, so any
21 proffer that you are desirous of making, you are
22 free to make it, or you can argue to the Court
23 of Appeals. It is a question of law anyway. It
24 is not a question of evidence.

25 MS. COLEMAN: Let me return and get

1 Bingham - cross

2 the order and the other related materials.

3 THE COURT: All right.

4 {After an interval.}

5 MS. COLEMAN: If your Honor please,
6 this is a proffer concerning the order of the
7 PUCO that I related to you.

8 THE COURT: All right.

9 {Above-mentioned order handed to the Court.}

10 MR. LANSDALE: Is this the date it
11 was issued, April 14, 1981?

12 MS. COLEMAN: That is my
13 understanding.

14 THE COURT: That is an order in
15 Case No. 76467ELATA, issued by the Public
16 Utilities Commission of Ohio on 4-14-81.

17 MS. COLEMAN: This order is
18 submitted in response to the Court's request at
19 the last trial that we lay a foundation for the
20 reading of the Stipulations 80 through 82, and we
21 would proffer those stipulations as well at this
22 time.

23 In addition to that, I have reference to
24 Sections 4905 --

25 THE COURT: Just a moment. I want

1 Bingham - cross

2 to read the Stipulations 80 through 82.

3 {After an interval.}

4 MR. LANSDALE: I would object to the
5 reading of the Stipulations; moreover, I point
6 out with respect to the order tendered of April
7 14, 1981, that this order was issued, and the
8 hearing representing it entertained under the
9 new statute which permits the Commission to
10 consider in advance provisions not to increase
11 under the law as it existed under the time --
12 the relevant period in this case.

13 The law required for the application for rate
14 change was not for an increase, and the Commission
15 had to accept it for filing and fix its effective
16 date; so that the suggestion that they even might
17 have, let alone probably would have issued the
18 same order, I submit is wrong as a matter of law.

19 MS. COLEMAN: If your Honor please,
20 I feel I have to respond to that. I don't think
21 the question is whether the Commission might have
22 taken up this matter on its own motion at the time
23 of the application for rate increase, at the time
24 it was presented to it in the relevant period.

25 The question is whether or not this program

1 Bingham - cross

2 should have been filed with the Utilities
3 Commission, and in support of that we would refer
4 to Ohio Revised Code 4905.30 and 4905.31.

5 I don't have the copies of the statute with
6 me, but I have prepared Stipulations of the facts
7 that set forth the substance of those two laws,
8 and I would include that in my proffer as well,
9 your Honor. That is these two items {indicating}.

10 MR. LANSDALE: What is -- a
11 suggested stipulation?

12 MS. COLEMAN: Yes, but it is moot
13 now, but it is a paraphrase of the laws that I am
14 referring to.

15 MR. LANSDALE: 4905.30 and 4905.31?

16 MS. COLEMAN: Yes.

17 MR. LANSDALE: Well, here is .30.
18 It happens to be dated 1954, but it is still the
19 relevant law during the period.

20 My question is, "So what?"

21 From time to time anybody could go down to the
22 Commission and file a complaint about anything,
23 and the Commission could hold a hearing and change
24 it.

25 We are prepared to show, as a matter of fact,

1 Bingham - cross

2 that many things that are done with respect to
3 individual customers and promotions and the like
4 that are customarily -- that customarily have not
5 been filed, but I submit it is all irrelevant.
6 It is an antitrust case, and it is not properly
7 before the PUCO, and under the antitrust laws
8 we are entitled to meet competition, and if
9 meeting competition involves a change in the
10 rates, and we did this unlawfully, insofar as
11 the Commission is concerned, it doesn't affect
12 our right under the antitrust laws to do so,
13 and I think that is well established.

14 MS. COLEMAN: We have cited the
15 authorities that we believe support the
16 proposition and evidence that a defendant in an
17 antitrust case is willing to violate State law
18 to pursue its monopolization plan goes to the
19 predatory nature of the conduct, and that is in
20 our brief.

21 THE COURT: Well, I am not at
22 that juncture at this point.

23 What I am saying, it is the conduct that
24 you complain of that is a matter -- no, no --
25 the conduct that you claim in the charge was

1 Bingham - cross

2 contrary to Ohio Statute is a matter which is
3 within the adjudication and authority of the
4 Public Utilities Commission, and this Court
5 cannot as a matter of law impose upon the
6 Commission's jurisdiction and determine in this
7 case what the Public Utility Commission of Ohio
8 had to determine in any action brought in front
9 of them.

10 MS. COLEMAN: I think that to be
11 your ruling, and I am submitting these materials
12 as a proffer in response to that.

13 THE COURT: Fine. Very good.
14 Here is your book back.

15 MS. COLEMAN: Did you get the
16 order? -- fine.

17 THE COURT: The stipulation does
18 not become a part of the record unless counsel
19 agrees to the accuracy of the stipulation, and
20 in that event the question of whether it should
21 or should not be read is interposed, and then it
22 would become a part of the record, but I don't
23 know --

24 MR. LANSDALE: If counsel wishes to
25

1 Bingham - cross

2 have these stipulations as part of the proofer,
3 I will take a look at them during the recess.

4 MS. COLEMAN: That is my intention.

5 MR. LANSDALE: It is -- on the
6 surface it looks okay, but I want to examine it.

7 THE COURT: Okay.

8 {End of bench conference.}

9
10 THE COURT: You may proceed.

11 Ms. Coleman:

12 MS. COLEMAN: Thank you, your

13 Honor.

14 BY MS. COLEMAN:

15 Q Mr. Bingham, turning to another subject, if we may,
16 please, there has been some testimony on a few
17 occasions in this trial concerning the CEI's contract
18 with the Union Carbide Company.

19 Do you recall that?

20 A Yes.

21 Q And you have been identified as the person who is
22 familiar with the relationship between CEI and the
23 Union Carbide Company; is that right?

24 A Yes, I am familiar with it.

25 Q Now, when we looked yesterday at the set of schedules,

1 Bingham - cross

2 we looked at the line, "Other - Contracts," under
3 "Industrial"?

4 A That is right.

5 Q And one of the -- I don't want to say "schedule,"
6 but one of the groupings or classifications under
7 which sales are made by CEI to retail customers; right?

8 A Yes.

9 Q And one of those contracts is CEI's contract with the
10 Union Carbide Company?

11 A That is correct. It would have been about 80 percent
12 of that line.

13 Q In fact, CEI has had a contract with the Union Carbide
14 Company as early as 1949; is that right?

15 A Probably long before that. I suspect that we had
16 some kind of a contract with Union Carbide as long as
17 they have been there.

18 Q Under that contract, and its successive amendments,
19 from time to time there have been agreements between
20 the two companies to supply start-up power, off-peak
21 power, and emergency power, and interruptible
22 off-peak power; is that right?

23 A There was start-up power.

24 I don't recall whether it was -- whether it was
25 specifically off-peak power. I think it may have been

Bingham - cross

1
2 interruptible, and off-peak. I could be wrong.

3 Q And there was a provision for emergency power in the
4 contract developed?

5 A There was a provision that Union Carbide would sell
6 emergency power to CEI.

7 Q For the purposes of these interchanges, the 138 KV
8 transmission -- that line was completed between CEI
9 and Union Carbide; is that right?

10 A Yes.

11 Q And the capacity was 100 megawatts, if you recall?

12 A I am not sure of the line's capacity.

13 The transformer that we hung on it initially, I
14 think, was somewhat less than that. I could be wrong.

15 Q After the time that the Union Carbide contract was in
16 effect with CEI, up through 1972, Union Carbide
17 generated some of its own power?

18 A All right. You are referring to the things that we
19 classified as an interconnection contract between the
20 two.

21 Q There was such a contract?

22 A And that would have been in effect, I believe, from
23 1949 through almost the end of 1972.

24 Q And at that time Union Carbide had its own generating
25 facilities?

1 Bingham - cross

2 A Yes.

3 Q And in December, 1972, CEI purchased that generating
4 plant, didn't it?

5 A Yes.

6 Q And the plant at that time consisted of four 40-megawatt
7 units, two of which were 23 years old, and two of which
8 were 17 years old?

9 A Actually they were something over 40 megawatts each.

10 Q Am I correct about the age of the units?

11 A Two were installed in 1948 or '49, and two additional
12 were installed in 1952.

13 Q Now, the price which CEI paid was more than Union
14 Carbide's depreciated book value for those units,
15 wasn't it?

16 A I don't know.

17 Q Are you aware that Union Carbide Company reported
18 making a profit of \$3.9 million after taxes on that
19 sale?

20 A No, I am not.

21 Q Let me refer you to an exhibit.

22 MS. COLEMAN:

Mrs. Richards, would

23 you get that for me.

24 {After an interval.}

25 Q Mr. Bingham, would you accept that this is a cover and

1 Bingham - cross

2 pages from the Union Carbide annual report for 1972?

3 A Yes.

4 Q And if you would turn to page -- well, we have no page
5 numbers.

6 A About the fourth page.

7 Q About the fourth page under, "Extraordinary Items."

8 MR. LANSDALE: Object.

9 THE COURT: Approach the bench.

10 - - - - -

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

13 MR. LANSDALE: I object to this, if
14 your Honor please. This is obviously hearsay
15 material, and we know nothing about Union
16 Carbide's accounting methods, which could have
17 had a major effect upon what it shows on the
18 books insofar as profit, and it does not have
19 the necessary relevance to the question.

20 Any testimony about what Union Carbide
21 profited, we should have somebody that knows what
22 the basis is, and he has to come on the stand and
23 testify, and I object to this.

24 MS. COLEMAN: I believe if we look
25 at the Rules of Evidence we will find this is

1 Bingham - cross

2 the hearsay exception to the type of public
3 report, and we can rely on that as a fact in
4 this case.

5 It is, if nothing else, under 808.23, under
6 Rule 808.23, is an exception for information
7 that ought to be considered reliable.

8 THE COURT: Apart from the
9 procedural aspect, what is the purpose of it?

10 MS. COLEMAN: The purpose, your
11 Honor, goes to show that in --

12 MR. LANSDALE: It is 803, and which
13 paragraph?

14 MS. COLEMAN: I think it is 23.
15 The very last one. Maybe it is 24, the other
16 exceptions.

17 MR. LANSDALE: Well, this is a
18 catchall that puts it into the Court's discretion
19 to let in almost anything it wants to.

20 MS. COLEMAN: I think there may have
21 been something specific, if I may borrow your book.

22 I would submit this also falls within the
23 exception, Exception 17 to the hearsay rule.
24 I will give this to you, "Market quotations,
25 tabulations, and lists, and directories generally

1 Bingham - cross

2 relied upon."

3 I think it has more reliability than
4 directories that are specifically reference.

5 THE COURT: Well, getting back to
6 my original question, what is the purpose of the
7 testimony, apart from the procedural aspect of
8 it?

9 MS. COLEMAN: The purpose of the
10 testimony is to show that CEI was willing to pay
11 a premium in order to eliminate competition.

12 THE COURT: How is it that they
13 didn't know about it? They didn't know about
14 any profit that may have been made by Union
15 Carbide.

16 As I understand it, your question was
17 something like this, that they purchased a
18 generation system of Union Carbide in 1972, and
19 that Union Carbide made \$3.3 million profit,
20 and he said --

21 MS. COLEMAN: My question was
22 3.9.

23 THE COURT: -- and he said, "No."

24 MS. COLEMAN: I was wondering at
25 his answer, given his knowledge of the

1 Bingham - cross

2 circumstances, whether he didn't know the precise
3 number?

4 THE COURT: Well, the fact that
5 he made \$3.9 million is presently before the
6 jury from a financial report, but he disclaimed
7 any knowledge of what profit if any was made or
8 loss.

9 MS. COLEMAN: He hasn't done that.
0 He might, but he has not.

1 MR. LANSDALE: Let me point this
2 out: We have a footnote that says, "Some kinds
3 of non-recurring profit result from sales of
4 businesses and other property, including 3.9
5 million or 6 cents per share for the sale of
6 the power station," and how do we know it is this
7 power station, and number two, how do we know
8 what their mode of accounting was.

9 They may have had fast write-offs, and they
0 may have it written down to nothing, because of
1 the fast depreciation.

2 It is absolutely -- even if it were
3 relevant, a relevant question, it falls far short,
4 and to say that it is reliable for the purposes
5 for which you are offering it, I submit, is

1 Bingham - cross

2 totally wrong.

3 THE COURT: I will sustain the
4 objection.

5 {End of bench conference.}

6 - - - - -
7 THE COURT: I will sustain the
8 objection. The jury will disregard the last
9 answer.

10 BY MS. COLEMAN:

11 Q Mr. Bingham, the amount which CEI did pay for that
12 plant would be reflected, wouldn't it, in the
13 difference in the value of the Ashtabula plant as
14 reported in the FPC Form No. 1 in 1972 before the
15 acquisition, and in 1973, after the acquisition?

16 A That, and all other changes, additions or retirements,
17 that the Ashtabula Station would be reflected.

18 Q When CEI makes a purchase of that nature, they
19 consider it part of its property, the power plant
20 property?

21 A Yes.

22 Q And the Union Carbide purchase was preceded by three
23 weeks, was it not, by a new contract with Union
24 Carbide for interruptible power; is that correct?

25 A I recall there was an agreement signed on December 4,

1 Bingham - cross

2 which, to my recollection, tells me was the purchase
3 agreement.

4 My recollection of the interruptible contract
5 -- it was effective December 28, as I recall, and maybe
6 it was signed on December 4, effective February 28,
7 but there were two more contracts involved in the
8 whole transaction.

9 Q --which were the two contracts that were part of the
10 same transaction, weren't they?

11 A Yes. There were at least three contracts.

12 Q The contracts were the interruptible power contract,
13 and the contract for the sale of the plant, and you
14 recall there was one other?

15 A Yes.

16 Q What was that?

17 A It covered the sales of auxiliary service systems,
18 water and air.

19 Q That interruptible contract was then one of the three
20 which CEI had in effect in 1973, is that correct?

21 A Three or four or five, depending on how you define
22 them.

23 I think there were four pure interruptible, and
24 I believe Air Products might have been -- I have
25 forgotten when they quit on interruptible.

1 Bingham - cross

2 Q There were contracts with Jones & Laughlin and
3 Detrex Company?

4 A Yes; and I think Air Products.

5 Q And those customers were all served on individual
6 contracts?

7 A Yes.

8 Q And those would be under the class of service
9 contracts on the FPC Form No. 1 that we looked at
10 yesterday?

11 A I believe so.

12 Q And in all of those cases the rates applicable was
13 the product of negotiations between the customers and
14 the CEI company?

15 A Yes.

16 Q There being an effort in doing that to fit the
17 particular needs of the customers; is that right?

18 A That and how much we felt we could get out of them.

19 Q Now, under the Union Carbide contract, the terms of
20 that contract entered into around December 4, 1972,
21 were in fact much more favorable than the Detrex or
22 Jones & Laughlin interruptible contract, wasn't it?

23 A I am not sure I would say "much more favorable."

24 I guess I would certainly agree that they were
25 more favorable from the standpoint of Union Carbide.

1 Bingham - cross

2 Q In the case of Union Carbide, in the case of that
3 agreement, there was a guaranteed level of billing
4 demand for the first two and a half years of the
5 contract, billing demand rates?

6 A Yes. I believe the rate was fixed for the first
7 two and a half years.

8 Q And then it increased to the next two and a half
9 years to a five-year contract?

10 A That is my recollection.

11 Q The total cost of energy which Union Carbide was
12 buying under that interruptible contract was in
13 effect less than the average price that the whole
14 group of contract customers were paying, wasn't it?

15 A Oh, of course, they were far and away the largest
16 customer in the group.

17 Q And because of that, and because of the nature of
18 the rate included in that contract, they would --
19 they were paying substantially less than the
20 average; is that right?

21 A I don't recall the relative rates. I would have to
22 check those.

23 Q We could go through the service numbers, Mr. Bingham.

24 I wonder if perhaps we could shortcut through
25 that.

Bingham - cross

If you would accept that for 100 kilowatts of interruptible demand used in 1973, and assuming that Union Carbide is buying power- 80 percent of the total hours and months, that their average bill would come out to 5.22 mills per kilowatt hour?

A I would be happy to check it over the luncheon recess.

Q All right; and we would compare that in terms of seeing what is higher and what is lower and look at Plaintiff's Exhibit 3224, the FPC list, and look at the average revenue for all contracts which was 7.8 mills per kilowatt hour.

MS. COLEMAN:

It is 3244, Ms.

Richards.

{After an interval.}

A Your figure was 5.22 mills?

Q Right.

A That is the one I am going to check.

Q Okay.

A -- and, yes, there is -- this is less than 7.8 mills, so it is a meaningless comparison.

As I indicated, Union Carbide, there were in that group a billion 400 million kilowatt hours, and Union Carbide tells me there was something like a billion 200 million of that amount.

1 Bingham - cross

2 And when you take one customer in that class,
3 and he is six times as big as the remaining seven put
4 together, I just don't think you can compare simple
5 rates.

6 Q Rather than comparing rates, we might look at the cost
7 of getting that energy to Union Carbide.

8 Would you accept, subject to check, that the Union
9 Carbide rate of its 5.22 was less than the average
10 fuel cost per kilowatt hour generated in 1973?

11 A Well, in your computation of 5.22 did you include
12 fuel adjustment?

13 Q No. There is no fuel adjustment in 1973 for Union
14 Carbide, is there?

15 A I am sure there was. I would have been fired if there
16 hadn't been.

17 Q Well, let me provide you with a copy of that contract,
18 Mr. Bingham, and you may look at it during the lunch.

19 THE COURT: And, ladies and
20 gentlemen, now it is the lunch hour, so we will
21 take our noonday recess, and please during the
22 recess keep in mind the admonitions that the
23 Court has given you.

24 You will return at 1:30. Thank you very much.
25 {Luncheon recess had}

1 TUESDAY, AUGUST 11, 1981, 1:50 O'CLOCK P.M.

2
3 THE COURT: Please be seated.

4 Bring in the jury.

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

7 MS. COLEMAN: Your Honor, I have
8 a matter for a bench conference.

9 THE COURT: All right.

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

12 MS. COLEMAN: On the question of
13 the proffer made earlier, Mr. Lansdale has had
14 an opportunity now to look over the language
15 and has a suggested change.

16 Your Honor please, I would like to have it
17 retyped and incorporate his change and put it in
18 the record tomorrow.

19 THE COURT: No problem.

20 MS. COLEMAN: Thank you.

21 {End of bench conference.}

22 - - - - -

23
24
25

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

2 resumed the stand and testified further as
3 follows:

4
5 THE COURT: You may proceed,
6 Ms. Coleman.

7
8 CROSS-EXAMINATION OF WILLIAM N. BINGHAM {Resumed}

9
10 BY MS. COLEMAN:

11 Q Mr. Bingham, during lunch both of us had a chance to
12 look at the Union Carbide contract, and I was wrong
13 and you were right and kept your job.

14 There is a fuel clause in there, isn't there?

15 A Yes.

16 Q And the fuel clause is stated in the same terms as
17 is set forth in the other schedules -- in schedules
18 of the company for other rate classifications, is
19 that correct?

20 A I think it's identical to the one that was in effect
21 for the standard schedules, all of the other
22 schedules, regular schedules.

23 Q One might be able to estimate then if not having the
24 precise information about CEI's fuel clause at the
25 time what the effect of the fuel additive to the

1 Bingham - cross

2 Union Carbide contracts is by determining how the
3 fuel additive of the large industrial concerns is
4 reported in the FPC Form 1; would that be a fair
5 statement?

6 A You probably could, although I have the exact number,
7 if you want it.

8 Q What is the exact number?

9 A 2.15 mills.

10 Q 2.15 mills at that time on to the --

11 A Average 1973.

12 Q -- average 1973 cost for Union Carbide, or for everybody?

13 A For Union Carbide.

14 Q So did you determine that the 5.22 mills per
15 kilowatt hour figure for base charged to Union
16 Carbide was essentially accurate?

17 A No. I think that is wrong, too.

18 Q Based on the assumption of 100 -- pardon me.

19 Based on the assumption of 100,000 kilowatts and
20 57,600,000 kilowatt hours in a month, what did you
21 come up with as a charge?

22 A You are talking about now the interruptible part only?

23 Q Right.

24 A And that was 100,000 kilowatts?

25 Q Right.

1 Bingham - cross

2 Had you used those assumptions in your
3 calculations?

4 A Not exactly, but you said 57,600,000?

5 Q Right.

6 A I get 5.65 mills.

7 I will look again to be certain that I didn't
8 make a mistake.

9 Q We have \$30,000 worth of demand charges.

10 A I think I have made a mistake. I think I may have
11 overlooked a factor -- 5.22 right on the head.

12 Q And we add to that your estimate of fuel
13 additive which was 2.22?

14 A I think I said 2.4; and I believe it is 7.36.

15 Q -- as compared to the 7.8 mills for the class of
16 contracts?

17 A Yes. There are some funny things in that class
18 though.

19 Q Mr. Bingham, would you look at the Union Carbide
20 contract. Did you also find that the contract
21 provided the contract would be canceled if Union
22 Carbide used any other power supplier than CEI?

23 A I didn't look for that.

24 Q Do you recall that as a provision in the contract?

25 A No, sir. Specifically can you direct me to a page?

1 Bingham - cross

2 Q Page 10, Paragraph 2.7.

3 A That is what it says.

4 Q And that was intended, wasn't it, to preclude Union
5 Carbide's having its own generation as well as
6 possibly from buying from others; is that right?

7 A Yes. I think that is probably the reason.

8 We had bought a power plant from them, and we
9 expected to sell them power, and we wanted to be
10 certain that we would.

11 Q Mr. Bingham, turning more broadly to the question of
12 what is interruptible power, how do you distinguish
13 interruptible power and firm power?

14 A Let me start with firm power.

15 I believe the common definition of firm power is
16 power which has a general expectation that it will
17 always be available when needed.

18 Now, the contrast is that interruptible power,
19 at least in the cases of CEI, is available only when
20 CEI believes that it is available.

21 We have the right under our contract to curtail
22 the customer's use of interruptible power, so there
23 is the first distinction in the reliability of the
24 service.

25 The second distinction -- and it grows directly out

1 Bingham - cross

2 of the first one, is that it generally has a
3 significantly lower rate, which recognizes the fact
4 that it is less reliable, but more directly
5 recognizes the fact that there are major components
6 of a utility's investment or plant that does not have
7 to be installed in order to supply service to an
8 interruptible customer.

9 Q They don't have to be installed, but they are used?

10 A Yes. I was going to cover that point.

11 One of the witnesses, I believe yesterday, was
12 talking about operating reserve. This is capacity
13 which is running but not fully loaded, and every
14 well-run utility has a certain amount on their system
15 in order to take care of contingencies, and under
16 ordinary circumstances that is all it does. It sits
17 there and runs unloaded.

18 The CEI concept of interruptible power is that
19 we will sell energy out of that operating machinery,
20 the operating capacity, to an interruptible customer.

21 He agrees that if CEI needs its operating
22 capacity suddenly, it can have it back.

23 I believe that in every case our load dispatcher
24 at the System Operating Center has a button that he can
25 push to have that load tripped off instantaneously if

1 Bingham - cross

2 he needs it.

3 Obviously we try to call ahead of time.

4 I think also in the case of Union Carbide, the
5 controls are probably in the power plant that we
6 bought from them, because that is where they were
7 when we bought them, so it may take a phone call from
8 our dispatcher to somebody in the Ashtabula plant to
9 push the button.

10 Q Now, it is a fact, isn't it, that the experienced
11 interruptions in 1973 were very minimal?

12 A To the contrary, they were very high.

13 Q They were only 2 percent of the time?

14 A My records show that Union Carbide was interrupted 45
15 times in 1973.

16 Q Rather than speaking about the number of
17 interruptions, if we talk about the minutes of
18 interruption for all three of the interruptible
19 customers in 1973, they were interrupted for only 2
20 percent of the time that they were taking the power
21 from CEI?

22 A That could well be.

23 If you don't make the service available that you
24 have, they are not going to want it.

25 Q Well, they got the service 98 percent of the time?

1 Bingham - cross

2 A Sure; that is the objective.

3 Q Mr. Bingham, if some other customers wanted
4 interruptible power, could CEI provide it to that
5 customer?

6 A If we had it available.

7 Q Let's turn to another subject, and you can set the
8 Union Carbide contract aside, Mr. Bingham.

9 MS. COLEMAN: Your Honor, may I
10 approach the bench?

11 THE COURT: Yes.

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

15 MS. COLEMAN: Would you read
16 Stipulation 266, and if your Honor please, it
17 might expedite things if I say that I wish to ask
18 you in a few minutes to read Stipulation 267, and
19 if I get authority now, it will save a trip up.

20 MR. LANSDALE: I object to 266 and
21 to 267 on the ground of relevancy. I object on
22 the ground of relevancy. This is an antitrust
23 case, and what they specifically provided,
24 and whether or not we conformed to them, I submit
25 is an irrelevance, and this is an antitrust case.

1 Bingham - cross

2 It is not a rate case or a complaint about
3 discrimination.

4 MS. COLEMAN: Your Honor ruled in
5 your impact order of May 18 that the question of
6 whether or not the service is provided in
7 connection with the conversion of many customers
8 were publicized by the tariff lists still in issue,
9 and that is what these stipulations relate to.

10 The question is not the State law question,
11 but what was provided was what the customer was to
12 pay and what CEI was to pay, whether that was
13 publicly stated.

14 MR. LANSDALE: I am sorry --

15 THE COURT: Well, I think that was
16 a pretty good ruling, and I think I will stand by
17 it.

18 They can show -- but certainly there can be no
19 argument that those were contract law.

20 It may go to -- there is a question in my
21 mind -- did I read both of these stipulations?

22 MS. COLEMAN: Yes, you did, on
23 October the 3rd.

24 MR. LANSDALE: I don't see how we can
25 have testimony that is contrary to the rule and

1 Bingham - cross

2 regulations without suggesting --

3 THE COURT: Well, I think the
4 City can argue if it desires that it may have
5 constituted predatory conduct without being in
6 violation of State law.

7 MR. LANSDALE: Oh, sure.

8 THE COURT: Well, it is the
9 import of my ruling.

10 MS. COLEMAN: Thank you, your Honor.
11 I request you read Stipulation 266 now, and if I
12 may request to have 267 read from the podium?

13 THE COURT: All right.

14 {End of bench conference.}

15 - - - - -
16 THE COURT: Ladies and gentlemen
17 of the jury, Stipulation No. 266 reads as follows:

18 "At all times relevant to this case, CEI's
19 rules and regulations on file with and approved
20 by the Public Utilities Commission of Ohio
21 provided that for overhead service, CEI shall
22 furnish, install, construct and maintain at its
23 own expense:

24 "A. One standard overhead loop.

25 "B. Standard transformers for one

1 Bingham - cross

2 transformation of voltage, and

3 "C. Standard metering apparatus."

4 BY MS. COLEMAN:

5 Q Mr. Bingham, as to underground service, the Court has
6 just -- let me preface that, the Court has just read
7 the provisions of service with regard to overhead
8 service.

9 With regard to underground service, if that was
10 all that was available, CEI would also pay for the
11 underground service drop, wouldn't it?

12 A We had varying rules, I believe.

13 Say, in the downtown area, voltages other than
14 11,000 volts, we would take the underground cable to
15 the property line -- I would have to read back on this
16 to be certain -- and that we would furnish the main
17 switch and the meter and whatnot inside the building,
18 and transformer -- if, for example, this were an
19 office building that had what we call a "vault," --
20 it's a small room in the basement where you put the
21 transformer and the switch gear, and whatnot, we
22 furnish the transformer.

23 In case of 11 KV, I believe our rule --

24 Q Mr. Bingham -- excuse me -- I asked you about
25 underground lines.

Bingham - cross

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2 A That is what I'm talking about.

3 I think I told you I believe voltages below 11
4 KV, we would carry the cable to the property line of
5 the customer.

6 In the case of 11 KV, we would carry it to the
7 first vault on the customer's premises and, in
8 addition, a lateral -- I'm sorry -- carry it to the
9 first manhole on the customer's premises and, beyond
0 that, a lateral to the customer's vault or mat.

1 Again, this is 11 KV underground service. So
2 that we had no uniform rule.

3 Q There is a rule on underground service specifically
4 provided in the rules and regulations, isn't there, at
5 PTX-322 on original sheet No. 4, Paragraph 9-B?

6 {The witness reading silently.}

7 A That's more or less what I testified to with respect
8 to the less than 11 KV underground.

9 It says, "We will extend --" where we have
10 existing underground lines, presumably out in the
11 street -- these are general distribution facilities --
12 "We will extend from such lines to the property line
13 of the consumer --" and I missed this one -- "-- or to
14 such point on the consumer's premises as agreed upon
15 by the company."

1 Bingham - cross

2 Q Now, as to any other facilities than those which the
3 Court read in the stipulation and the underground
4 facility we have just discussed, the customer was to
5 pay for those, is that right?

6 A Not necessarily.

7 Q Well, the general rules and regulations so provide,
8 don't they?

9 A That's what they say.

10 But I have always felt that these provide, in
11 essence, the minimum facilities that the company
12 must provide.

13 Q That's your opinion?

14 A It carries a lot of weight in the company.

15 MS. COLEMAN: May we approach the
16 bench, your Honor?

17 THE COURT: Yes.

18 MS. COLEMAN: Thank you.

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

22 MS. COLEMAN: It is my intention to
23 request your Honor to read the stipulation we
24 discussed, 267.

25 I would also contend, at this juncture, your

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Bingham - cross

Honor, that where the witness claims that the tariffs are in minimum, and the law clearly indicates otherwise, that the stipulations we discussed this morning ought to be admissible at this juncture.

THE COURT: On what basis?

MS. COLEMAN: On the basis that the witness claims they are in minimum, and that's not what the law provides.

The law provides that such services as are rendered shall be filed in --

MR. LANSDALE: That's your opinion.

This witness speaks from a good many decades of experience with the Commission, and --

{Document shown to Mr. Lansdale by Mr. Murphy.}

THE COURT: I will overrule the objection, I am going to permit the answer to stand; and I will read Stipulation 267, but I will not read the proffered stipulations.

Let's proceed.

MS. COLEMAN: All right, your Honor.

{End of bench conference.}

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THE COURT: Stipulation No. 267

Bingham - cross

1
2 BY MS. COLEMAN:

3 Q Mr. Bingham, in the event that CEI performed such
4 work as was listed by -- listed in the stipulation,
5 if CEI did it, they would charge the customer what is
6 called a "red card charge", is that right?

7 A Not necessarily.

8 Q If they charged the customer for it, it would be
9 considered and is called a "red card charge"?

10 A Generally speaking, that's correct.

11 Q And if the red card charge is waived, waiver of the
12 red card charge means that the customer doesn't have
13 to pay for that work for additional facilities, is
14 that right?

15 A That's correct.

16 Q Now, for construction, reconstruction or relocation
17 of electric facilities, CEI would ordinarily charge
18 what is called a "white card charge", isn't that right?

19 THE WITNESS: May I have that
20 read back, please?

21 THE COURT: Read the question back,
22 please.

23 [The pending question was read by the
24 reporter.]

25 A I don't believe so.

1 Bingham - cross

2 I'm sorry; whose facilities?

3 Q The customer's facilities?

4 A That's different.

5 If we were to do that work and charge for it, it
6 might have been done under a white card.

7 There were a large number of standard kinds of
8 transactions that we don't really get that formal with.

9 Q Now, --

10 A For example, aluminum siding is sort of popular.

11 We find a lot of people are putting that on their
12 houses.

13 If you've got a pipe on the outside of the house,
14 obviously somebody has to come along and loosen the
15 pipe so that the new siding can be put under it, and
16 refasten the pipe.

17 As a company practice, if you will, we have
18 determined that we would prefer to do that work.

19 The customer owns that pipe, at least, if he is a
20 residential customer, he owns it. We like to do it
21 because I don't think -- I'm not trying to brag, but
22 we will get it done right.

23 We're afraid if somebody else does it, a contractor
24 might try to cut a few corners, and if the pipe falls
25 off the house, we're going to have to go out there to

Bingham - cross

1
2 repair it.

3 So we prefer to do it ourselves to see that it's
4 done right. And we do it at a subsidized cost to
5 encourage the customer to use us rather than someone
6 else.

7 Now, we have a fewer number of these, we don't
8 go through the formality of what you call a
9 "white card charge", but in the final analysis, it's
10 the same thing: It's just that there is no piece of
11 paper signed.

12 Q There is such a thing, I assume, as a white card?

13 A Yes, there is.

14 Q And there is a white card charge would be associated
15 with certain reconstruction or relocation work that
16 the company would do?

17 A Actually it's associated with work of the nature where
18 the company is acting as a contractor.

19 Q And when there is a waiver of the white card charge,
20 that means there will be no charge to the customer for
21 that work where the company is acting as the
22 contractor, right?

23 A If the white card were to be waived, that means there
24 would be no charge.

25 Q Now, Mr. Bingham, from 1971 through 1973, CEI had a

1 Bingham - cross

2 practice, did it not, of -- a program -- pardon me --
3 of converting Muny Light customers to CEI service?

4 THE COURT: What was that time
5 frame?

6 MS. COLEMAN: From 1971 through
7 1973.

8 A Yes; I think in the period we're talking about here is
9 roughly July 1, '71, and I think we quit around the
10 middle of -- we quit signing up new people around the
11 middle of '73, I believe.

12 Q Well, in fact, the program had gone on for some time
13 before July of 1971, right?

14 A Sure; it started in 1959.

15 Q And this program involved from time to time CEI paying
16 for certain facilities over and above that or perhaps
17 not even the same type that CEI would normally furnish
18 if the customer would convert from Muny Light to CEI?

19 A That's right.

20 Q This was available only in the area where Muny Light --
21 where there were Muny Light customers, those kinds of
22 services were not provided outside that area, right?

23 A It sort of followed.

24 Q Now, one means which CEI used to provide these
25 non-standard services to customers was to pay contractors --

1 Bingham - cross

2 third-party contractors to do the electrical work, right?

3 A I believe that was almost exclusively the method used,
4 with the possible exception of the house pipe.

5 Q There were also from time to time, weren't there,
6 instances where CEI would do the work and waive the
7 red card charge?

8 A I think you just switched gears on me: You went from
9 white card type work to red card type work.

10 Q We defined both red card type and white card type,
11 didn't we?

12 A Yes.

13 Q And in connection with converting Muny Light customers
14 to CEI, CEI would at times waive either the red card
15 charge or the white card charge where CEI did the work
16 to convert that customer from Muny to CEI?

17 {Pause.}

18 A I don't want to split hairs here unnecessarily, but to
19 my -- it would be my feeling that if it's a problem of
20 converting an existing Muny customer to CEI, in most
21 instances we wouldn't have a red card involved.

22 MS. COLEMAN: Mrs. Richards, would

23 you please get out the following exhibits:

24 Plaintiff's Exhibit 100, Plaintiff's Exhibit
25 114, and Plaintiff's Exhibit 2530.

1 Bingham - cross

2 {After an interval.}

3 BY MS. COLEMAN:

4 Q Mr. Bingham, while she's getting those exhibits,
5 let's go on to some related questions on this same
6 subject.

7 One of the charges that CEI may make to a customer
8 is when the customer requests a change of the point
9 where the line enters his property, is that right?

10 A Yes, sometimes we will charge for that kind of a change.

11 Q And CEI does make this charge when the change is simply
12 one for the customer's convenience, isn't that true?

13 A Not exactly. Close, but not exactly.

14 {Exhibits handed to the witness by Mrs.

15 Richards.}

16 BY MS. COLEMAN:

17 Q Well, in a situation where if the customer had a
18 service attachment at the back of his house and he
19 wanted it moved because he wanted to do a different
20 kind of landscaping, there you would charge the customer
21 for that, is that right?

22 A Quite likely.

23 Q Now, that policy would apply to consumers wherever they
24 were located in the CEI service area, right?

25 A Yes.

1 Bingham - cross

2 Q But CEI changed the service entrance location for the
3 customer's convenience sometimes as part of the
4 program of converting Muny customers to CEI, isn't
5 that true?

6 A Yes.

7 Q Now, also, in another part of that program of
8 providing service to induce Muny customers to switch
9 to CEI, was to install a third wire to a two-wire
10 service to increase the capacity of the service
11 switch to permit the handling of what might then be
12 the load, isn't that true?

13 A We did that system-wise.

14 We have always been willing to switch from a
15 three- to a two-wire service and to increase the service
16 to any customers.

17 Q This was specifically done as part of the program of
18 converting Muny Light customers, wasn't it?

19 A It was specifically done for every customer in our
20 system -- or specifically available to every customer
21 in our system.

22 MS. COLEMAN: Mrs. Richards, could
23 you give me those same exhibits?

24 THE COURT: I don't have them either.

25 MS. COLEMAN: Please give them to the

1 Bingham - cross

2 Court, too.

3 {Exhibits handed by Mrs. Richards to Ms.

4 Coleman and to the Court.}

5 BY MS. COLEMAN:

6 Q Mr. Bingham, do you recall testifying concerning some
7 aspects of this program of allowances for the conversion
8 of Muny Light customers to CEI in 1974 in February, in
9 Columbus, Ohio?

10 A Is that the OPA case?

11 Q Yes.

12 A Yes, I did.

13 Q And do you recall questions being asked about the nature
14 of the services provided under what you referred to there
15 as standardization of customer service?

16 A Yes.

17 Q And you were asked the question: "What sort of activities
18 are necessary to prepare the Muny facilities to receive
19 your electricity?"

20 And you answered, did you not: "It conceivably
21 could be the installation of a third wire to a two-wire
22 service increasing of service, which would permit the
23 handling of what might then be the load"?

24 A I guess I did.

25 Q Let's turn, now, Mr. Bingham --

1 Bingham - cross

2 MS. COLEMAN: Object, if your Honor
3 please.

4 THE COURT: Yes. Approach the bench.

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

8 MR. LANSDALE: We have the reading of
9 former testimony where it says exactly the same
10 thing he did before. I don't understand the
11 purpose of this, and I object to the suggestions
12 implicit in doing so. What's the idea?

13 MS. COLEMAN: Your Honor, in the
14 proceeding from which I read, Mr. Bingham's
15 testimony was that that service was specifically
16 to that program, and there was no statement there
17 that they gave it to everyone. The statement in
18 this court was, well, they give it to everyone;
19 that is why I --

20 THE COURT: The statement was
21 certainly not inconsistent with his testimony here.
22 So let's proceed.

23 {End of bench conference.}

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25

1 Bingham - cross

2 THE COURT: Ladies and gentlemen,
3 you will disregard the reference to a previous
4 hearing and the testimony, since it was not
5 inconsistent with anything that was said here.
6 Let's proceed.

7 BY MS. COLEMAN:

8 Q Mr. Bingham, on the matter of whether white card or
9 red card charges would be waived for Muny conversion,
10 would you look, please, at Plaintiff's Exhibit 100 --

11 THE COURT: In the future, when
12 we are going to use transcripts for the purpose of
13 credibility testimony, counsel that intends to use
14 it will direct adversary counsel to the page and
15 permit adversary counsel to review the testimony,
16 and then we can approach the bench instead of
17 having to go through it in the manner that we
18 just did.

19 BY MS. COLEMAN:

20 Q Have you had the exhibit to look at, PTX-100?

21 A I skimmed it quickly.

22 Q That memo mentioned you as a consultant in the
23 question of converting this customer from Muny Light
24 service to CEI, doesn't it, in the third paragraph?

25 A Yes.

Bingham - cross

Q And the exhibit furthermore shows that a portion fo the cost for the converstion was to be a red card waiver; isn't that right?

A Yes. I believe that one would have been a red card.

Q Mr. Bingham, you personally were not involved in administering this program; is that right?

A I was involved to a degree.

Q I'm sorry. I should have used the word "involved."

You certainly were consulted, as this exhibit shows; right?

A Yes.

Q But it was by and large run out of the Marketing Department; is that correct?

A They would have the primary responsibility.

Q And you were aware of certain aspects of it through the consultations that the Marketing Unit might make with you; is that right?

A That, and I was involved rather specifically when the program was set up in 1959.

Q And you are familiar then with the amounts that had been spent for these purposes from time to time over the years?

A Well, that is only from looking it up in the records subsequent to the occurrence.

1 Bingham - cross

2 Q You are testifying then that you had no knowledge of
3 how those amounts have changed over time?

4 A Not quite to that, but I don't have much.

5 Q Well, there was an increase, was there not, in the
6 expenditures around 1965?

7 A Oh, sure.

8 Q Now, with respect to any work which was performed by
9 contractors or by CEI under the red card waiver, when
10 CEI paid for those facilities which would have been
11 paid for by the customer, whose property did those
12 items become?

13 A It would have depended on the item that you are
14 talking about.

15 In the exhibit that you just recently directed to
16 my attention, the impression I got here is that these
17 facilities would have remained the property of the
18 company.

19 Q Now, in a situation where CEI paid someone else to do
20 the work, that always ended up as the customer's
21 property?

22 A I think that is universally the case, because it was
23 not going to be our property when we paid a contractor.

24 Q And the cost of the work, whether performed by a
25 contractor or performed by CEI, would become part of

1 Bingham - cross

2 the cost of CEI's doing business, and it would be
3 spread out through the rates of all customers; is
4 that right?

5 A There would be an expense of some nature created now.

6 Now, whether that in fact increased rates or
7 costs to other customers, I can't tell you.

8 If the new customer provided more revenue than
9 the expenses associated with supplying him, the
10 other customer benefited.

11 Q I asked you wheter the cost as a cost got spread out,
12 as a cost of doing business throughout the service
13 area; isn't that so?

14 A I am not sure what you mean by spreading the cost of
15 business throughout the service area.

16 Q CEI's costs of providing the service for the customer
17 was spread out through the rates over all of CEI's
18 customers, wasn't it?

19 A To the extent that there were expenses, it would have
20 been shown up some place on the books as a part of the
21 total expenses in whatever account it was charged to.

22 Q It was in fact charged as a promotional expense,
23 wasn't it?

24 A Yes, I believe it ended up in what we were then allowed
25 to call "selling expenses."

Bingham - cross

Q And that was Account 912 of the uniform account, wasn't it?

A I will accept your word for it.

Q Now, in terms of promotional expenses, there was an inquiry into all forms of promotional expenses by the PUCO in 1973 and 1974, wasn't there?

MR. LANSDALE: Objection.

THE COURT: Approach the bench.

{The following proceedings were had at the bench:}

MR. LANSDALE: I object to this continuing effort to suggest something is wrong about it with respect to the PUCO regulations.

We keep getting rulings by the Court that it is forbidden, whether the PUCO approved, but it is irrelevant, and we continue to have these discussions. What difference does it make?

THE COURT: I don't know what comes after this.

Was an inquiry conducted, and was there something found that was irregular, and then it becomes material.

MS. COLEMAN: The inquiry was

Bingham - cross

conducted, and we had this evidence at the last trial, and the report was made to them which called the expenditures for these programs "Standardization of customer service," and it was not candid about the expenses, and that is the point I am coming to.

THE COURT: Did you object?

MR. LANSDALE: To be specific, your Honor, I have forgotten. I am sure I did. I objected throughout. I objected throughout as to the bringing of the Public Utilities Commission into this at all. I don't think it is a relevant consideration.

THE COURT: Well, in the PUCO, if the PUCO conducted inquiries and they found something that was irregular, then it becomes material, but it is not -- I mean, the mere fact that they conducted an inquiry and came up with some inconclusive decision or no decision, and to attempt to create an inference as to wrongdoing is highly prejudicial.

I don't know where you are going to go with it.

MS. COLEMAN: As I stated, your Honor, an investigation was conducted, and CEI

1 Bingham - cross

2 was asked to prepare a report on all of its
3 promotional expenses, and that is the only
4 general question I have asked now.

5 In doing so, they called the Muny contractor
6 payments and perhaps other expenses, "Standardization
7 of Customer Service." And my point is, they were
8 not being candid in that investigation as to what
9 they were doing.

10 THE COURT: Who?

11 MS. COLEMAN: The CEI.

12 MR. LANSDALE: Did the Commission
13 say anything about this? Are you contending the
14 Commission said anything about it?

15 MS. COLEMAN: No.

16 MR. LANSDALE: Are we going to have
17 to try it out?

18 THE COURT: Just a moment, please,
19 ladies and gentlemen.

20 The testimony that the Commission conducted
21 an inquiry, assuming that it is permitted it, and
22 that they came up with some kind of a finding --
23 with what kind of a finding?

24 MS. COLEMAN: I wasn't going into
25 the finding, but the order was to not have any