
City of Cleveland v. The Cleveland Illuminating
Company, 1980

Transcripts

8-13-1981

Volume 20 (Part 3)

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

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Recommended Citation

District Court of the United States for the Northern District of Ohio, Eastern Division, "Volume 20 (Part 3)" (1981). *City of Cleveland v. The Cleveland Illuminating Company, 1980*. 62.
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1 Hauser - cross

2 anything that was available to CEI, either on its own
3 system, or someone else's; so, I mean, that obviously
4 would have had an impact on our competitive
5 position.

6 Q But it wouldn't have been injurious to your competitive
7 position unless you lost business as a result of it;
8 isn't that a fair statement?

9 A That is a fair statement.

0 Q And CEI refused to wheel this PASNY power to Muny Light
1 in order to maintain the market position which CEI had
2 in the Cleveland market at that time; is that a fair
3 statement?

4 A That is a fair statement.

5 Q And economic studies were not the only kinds of
6 studies that you received before you wrote that
7 August 30th letter; is that correct?

8 A That is correct.

9 Q Before you wrote that letter of August 30th, you
0 received a legal study prepared by Mr. Murphy, did you
1 not?

2 A I believe we did.

3 Also I had done my own legal research, and I had
4 had discussions with Mr. Lansdale prior to the August
5 meeting.

Hauser - cross

Q Now, which meeting -- the August 8th meeting?

A Yes.

Q Now, Mr. Murphy's memo was dated August 15, wasn't it?

A I believe that is right.

Q And it was 26 pages in length. Do you recall that statistic?

A It is lengthy, but I am not so sure that I read that memo between whenever it was received and August 30th.

Q But you are not sure that you didn't read it, either, are you?

A No.

Q And Mr. Murphy's legal study examined, am I correct, the then present state of the antitrust law to determine whether CEI had viable grounds for refusing to wheel the power to AMP-Ohio for resale to the City of Cleveland, is that correct?

A I believe that's right.

I haven't read Mr. Murphy's memo for quite some time.

Q Well, it's an entertaining document.

MR. NORRIS: Mrs. Richards, would you give Mr. Hauser PTX-1048, please?

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

Hauser - cross

BY MR. NORRIS:

Q Now, Mr. Hauser, address your attention to PTX-1048.

Am I correct that the cover page from Mr. Murphy is dated August 16, 1973?

A That's right.

Q And it's addressed to you, delivered by messenger, is that right?

A That's right.

Q Have you, on more than one occasion, had letters or documents delivered by messenger from Mr. Murphy's office? And is it --

A Quite frequently.

Q Is it a fair statement, Mr. Hauser, that when those letters or memoranda are sent by Mr. Murphy's office, that they arrive at your office?

A Yes.

Q Is it also a fair statement that when you get a 26-page memorandum from Mr. Murphy, that you sometimes get around to read that?

A Sometimes.

Q Now, am I correct that the second page of PTX-1048 is the beginning of Mr. Murphy's 26-page memorandum, and that is dated August 15, 1973, is that a fair statement?

Hauser - cross

A That's a fair statement.

Q And the first paragraph of Mr. Murphy's memorandum or legal study does make reference, does it not, to the meeting held on July 27, 1973 between CEI and AMP-Ohio?

A Yes.

Q And am I correct that this legal study indicated that CEI may have a monopoly with respect to transmission lines?

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

THE COURT: Approach the bench.

{The following proceedings were had at the bench:}

MR. LANSDALE: Apart from going into the question of legal advice to the company, I have been over this in the last trial, and the fact that Mr. Murphy made certain recommendations or conclusions is not binding upon the company, and I submit that it is not relevant, proper to tax the company with the recommendations and conclusions of its counsel, and I just submit, your Honor please, he should not be permitted to

1 Hauser - cross

2 interrogate the witness on this line.

3 We went through this in the last case, and
4 this was not admitted into evidence in the last
5 case, and I just object to going over Mr. Murphy's
6 recommendation to him.

7 MR. NORRIS: Your Honor, in the
8 last trial, the City offered PTX-1048 as party
9 admissions and your Honor ruled against receipt
0 on that context.

1 This time, the City's offering this exhibit
2 as relevant to the intent of Mr. Hauser at the
3 time he wrote his letter of August 30, 1973.

4 MR. LANSDALE: Intent to do what?

5 MR. NORRIS: I'm sorry?

6 MR. LANSDALE: What kind of intent?

7 MR. NORRIS: The intent to
8 monopolize and to attempt to monopolize, because
9 this memorandum from Mr. Murphy states that the
0 refusal to wheel would represent the use of
1 monopoly power in violation of Section 2 of the
2 Sherman Act.

3 And the City's contention, your Honor, is
4 that there is no hearsay problem, because the
5 state of mind of Mr. Hauser with respect to this

1 Hauser - cross

2 document that -- economic study, this is a legal
3 study, and that it is relevant for determining the
4 intent with which Mr. Hauser wrote this letter,
5 by means of which the company refused to wheel.

6 We are not offering it as a party admission.
7 We believe that in spite of the legal studies
8 that Mr. Hauser was aware of at the time he wrote
9 the letter, he went ahead and wrote it anyway,
0 and the City submits that this is probative of
1 the specific intent to violate Section 2 of the
2 Sherman Act.

3 Now, if Mr. Lansdale, as he stated in the
4 last trial at one of the bench conferences, gave
5 contrary advice to the client, that is certainly
6 a matter for rebuttal of this witness, because
7 he indicated that he had talked to Mr. Lansdale
8 prior to the August 8 meeting where the decision
9 was made.

This memorandum came to Mr. Hauser subsequent
to that meeting, and it's up to the jury to
determine the question of fact as to what the
intent was at the time Mr. Hauser wrote the letter
of August 30, 1973.

It's on that basis, your Honor, --

Hauser - cross

THE COURT: Whose intent?

MR. NORRIS: The company's intent, as reflected by the officer who was authorized to write the letter of refusing to wheel.

MR. LANSDALE: We expressed the opinion to the company -- I hope the heck we're right -- that it was not a violation of the antitrust laws to refuse to wheel in this instance.

We discussed it at length and -- the memorandum prepared by Mr. Murphy, who was then an associate in this office -- the legal pros and cons of it, and sent it to Mr. Hauser so that he might have the fullest benefit of the consideration that we had given the problem.

And for you to try to present this to the jury as a conclusion of CEI that they had a monopoly and that they were intending to promote a monopoly I just think is outrageous, and I just object to it.

THE COURT: Sustain the objection.

{Mr. Lansdale leaves the bench to return to counsel table.}

Hauser - cross

MR. NORRIS: Your Honor, may I
put an offer of proof on the record?

THE COURT: Mr. Lansdale.

{Mr. Lansdale returns to the bench.}

THE COURT: Go ahead.

You can proffer the exhibit.

MR. NORRIS: I would like to put
an offer of proof.

MR. LANSDALE: He can't tell us
what this witness would testify to in his
cross-examination.

MR. NORRIS: I would like to put
an offer of proof on the record.

THE COURT: What is your offer of
proof?

MR. NORRIS: The questions that I
would put to this witness and the references in
this memorandum for the benefit of the appellate
court so it has an opportunity to review this
record.

Your Honor, I don't have to do it now, I can
do it at a break.

THE COURT: If it makes you happy,
put it on now, and we'll let the jury go.

Hauser - cross

It's a new procedure for me but, obviously, I'm learning a lot of new procedures when I turn to you, Mr. Norris.

{While respective counsel were at the bench, the Court addressed the jury as follows:}

- - - - -

THE COURT: Ladies and gentlemen of the jury, supposing we take our afternoon break.

Keep in mind the Court's admonition, and you're free to go.

{The jury left the courtroom and the following further proceedings were had at the bench out of their hearing and presence:}

- - - - -

THE COURT: Mr. Norris, I do want to say, I don't recollect my instructing you yesterday to interfere with your witness and the newspaper reporter, and I don't appreciate the fact of you being quoted in the newspaper as telling him I instructed you to go out there and tell him.

If you will check the record, it will indicate that I indicated to you that the parties had gone out, and you can do whatever you wish.

1 Hauser - cross

2 MR. NORRIS: That is correct.

3 And let me correct the record, your Honor, --

4 THE COURT: I'm just telling you
5 what I read in the newspaper -- or was called to my
6 attention as being in the paper this morning.

7 MR. NORRIS: I understand that,
8 your Honor.

9 And it was also called to my attention, and I
0 want to make a representation to your Honor that
1 that was an incorrect statement.

2 I went out there of my own volition --

3 THE COURT: I don't care what you
4 people do, I'm telling you what I told you at the
5 conference before: If this situation comes to a
6 point where this jury has to be sequestered, I
7 will sequester the jury.

8 MR. NORRIS: May I finish my
9 statement, please, because this is a matter that
0 I feel very deeply about, because I don't want
1 there to be any misunderstanding about it.

2 I did not make the statement that was
3 attributed to me in the morning article that was
4 called to my attention.

5 What I did, your Honor, after you kindly

1 Hauser - cross

2 called to my attention the fact that -- I had not
3 noticed that the reporter was going out into the
4 hall -- I went out and, as per our agreement with
5 counsel, as approved by the Court, I admonished
6 the witness, of my own volition, to state to this
7 reporter nothing other than she testified from
8 the witness stand; and I give you my professional
9 representation that I did not indicate that you
10 had sent me out there.

11 THE COURT: All right, I accept
12 your statement.

13 MR. NORRIS: Now, if it please
14 the Court, the offer of proof that I would request
15 the privilege of making with respect to PTX-1048,
16 again going to the issue of intent, as I have
17 stated, is that Mr. Murphy's legal study indicates
18 that CEI may have a monopoly with respect to
19 transmission lines; page 15.

20 Further, that the legal study indicated that,
21 to us, such monopoly power to prevent competition
22 with respect to generating or distribution
23 facilities constituted a violation of Section 2
24 of the Sherman Act; and that's reference page 16,
25 it was an unequivocal statement.

1 Hauser - cross

2 Furthermore, this legal study indicated that
3 a regulated public utility with a total monopoly
4 of transmission lines does have the power to
5 exclude competing generating facilities from
6 introducing their power into the market by means
7 of wheeling; reference page 26.

8 And it further stated on page 26 that while a
9 regulated public utility does not have the power
0 to exclude competition totally, it does have power
1 to exclude some competition. And the City would
2 urge that this is relevant -- that this information
3 is relevant that was received by Mr. Hauser a
4 couple of weeks prior to the writing of the
5 letter of August 30, and that the jury should be
6 given an opportunity to reflect upon that as it
7 might bear upon CEI's specific intent, as well as
8 general intent, to both monopolize and to attempt
9 to monopolize the market.

0 MR. LANSDALE: The memorandum
1 speaks for itself, and I presume it will be
2 part of the record if it goes on appeal.

3 Your interpretation of it is arguable.

4 THE COURT: Thank you, gentlemen.

5 {End of bench conference.}

Hauser - cross

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{Recess taken.}

THE COURT: Please be seated.

Call the jury.

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

THE COURT: Please be seated,

ladies and gentlemen.

You may proceed, Mr. Norris.

BY MR. NORRIS:

Q Mr. Hauser, addressing your attention again to the August 30, 1973 letter that you wrote refusing wheeling:

Did you realize that that letter would have the effect of excluding competition?

A No.

Q Were you aware that had CEI agreed to wheel the PASNY power for Munny Light, that that would have created competition beneficial to the consumers of electric power in the City of Cleveland?

A No.

Q Does competition generally benefit the consuming public?

1 Hauser - cross

2 A Yes.

3 Q Earlier when you said that the injurious consequences
4 to CEI of wheeling the PASNY power was that CEI would
5 lose business, doesn't that represent beneficial
6 competition from the standpoint of the consumers of
7 electric power in the City of Cleveland?

8 A Would you read the question, please?

9 THE COURT: Read the question
10 back, please.

11 {The pending question was read by the reporter.}

12 A I don't think so.

13 Q It would have been harmful from CEI's point of view,
14 do you agree with that?

15 A Yes.

16 Q Now, do you think it would also have been harmful from
17 the point of view of the consumers of electric power
18 in the City of Cleveland?

19 A Not from my standpoint although, again, I'm not an
20 economist.

21 Q I understand that.

22 But you have been for 31 -- 30 years or so in
23 your present position, is that not correct?

24 A Not my present position, but I have been with CEI
25 that length of time.

1 Hauser - cross

2 Q I accept that.

3 Now, are you suggesting that there would be no
4 benefit flowing to the electric power consumers of the
5 City of Cleveland had there been greater competition
6 between CEI and Muny Light?

7 A Again, I'm not an economist.

8 But I will say that, in the electric utility
9 business, that it is a natural monopoly, and the
10 consumers benefit from not having duplication of
11 facilities.

12 Q Well, if Muny Light had gotten the cheaper
13 hydroelectric power that was available from PASNY
14 and if CEI had agreed to wheel back in 1973, isn't it
15 a fair statement that some of the CEI consumers would
16 have switched to have gotten lower electric power
17 rates by becoming Muny Light customers?

18 A Possibly it could have contributed to some customers
19 switching.

20 Q Now, isn't -- wouldn't you agree with me that that
21 is beneficial competition from the standpoint of
22 the consumers -- maybe not from the standpoint of
23 CEI -- but from the standpoint of consumers, wouldn't
24 you agree with that?

25 A I don't think I would agree with that.

Hauser - cross

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Q Am I correct, Mr. Hauser, that CEI's refusal to wheel the PASNY power for Muny Light was one of the means that CEI used in an attempt to eliminate competition from Muny Light?

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A No.

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25
The reasons we refused to wheel PASNY power were those stated in the letter of August 30th, 1973.

Q And what were those reasons?

A As we said before, this would have adversely affected the competitive position of CEI because it would have made available to Muny a source of power at a cost lower than anything that was available to CEI either on its own system or elsewhere.

Q And CEI could well have lost business as a result?

A It would certainly have been a factor contributing to the lost business.

Q Would you agree with me that CEI's refusal to wheel that PASNY power was one of the ways that CEI attempted to accomplish its MELP objective?

A No.

Q In 1974, Mr. Hauser, was CEI carrying on discussions with the Painesville Municipal System?

A Yes.

Q And were you involved in those discussions?

1 Hauser - cross

2 A Yes.

3 Q Did the subject of wheeling power come up in those
4 1974 discussions between CEI and Painesville?

5 A I think it probably did.

6 Q And Painesville asked for a transmission service
7 schedule to CEI; is that correct?

8 A They could have.

9 Q Well, did they?

10 A I am not sure that they asked for a transmission
11 service schedule.

12 As I recall, we did discuss wheeling with the
13 representatives of the City of Painesville.

14 MR. NORRIS: Mr. Lansdale, I
15 direct your attention to NRC transcript 10,719,
16 starting at line 10.

17 MR. LANSDALE: May I approach the
18 bench?

19 THE COURT: Yes.

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

23 MR. LANSDALE: There is no
24 inconsistency here.

25 MR. NORRIS: Could I have the

Hauser - cross

answer read back?

THE COURT: Sure.

{Record read by the reporter.}

THE COURT: Let's go to line 10.

{The Court reading to himself.}

THE COURT: We have no testimony about that, but the first questions are consistent.

MR. NORRIS: I represent that I heard the testimony and it was inconsistent.

MR. LANSDALE: How can you say that that is different than what is there? Maybe there is something I missed.

THE COURT: Go back --

MR. NORRIS: Well, I will ask him the next question.

THE COURT: All right.

{End of bench conference.}

BY MR. NORRIS:

Q Mr. Hauser, during those 1974 negotiations with Painesville your testimony is that Painesville asked for wheeling; is that correct?

A That is correct.

Q And CEI rejected that request; is that correct?

1 Hauser - cross

2 A That is correct.

3 Q And this was still during the period, was it not,
4 that CEI had a policy that it would not make a
5 general commitment for wheeling power to third
6 parties?

7 A That is correct.

8 MR. NORRIS: Mrs. Richards, would
9 you please give Mr. Hauser PTX-3080, 3079, and
10 833 -- excuse me, while we are at it, we may
11 save some time, would you please give Mr. Hauser
12 3235, 3246, 3245, 2628, 2629, and 2626.

13 [After an interval.]

14 THE COURT: You may proceed.

15 MR. NORRIS: All right. Thank you.

16 BY MR. NORRIS:

17 Q Mr. Hauser, after the March, 1972, FPC order requiring
18 the construction of the temporary emergency
19 interconnection, is it a fact that the City Council
20 passed an ordinance in the middle of June with respect
21 to the labor and materials for the construction of that
22 temporary interconnection?

23 A Yes.

24 Q And the understanding was that CEI's costs at its end
25 of that interconnection would be paid for by the City?

1 Hauser - cross

2 A That is correct.

3 Q And you decided -- not "you" necessarily yourself,
4 but CEI estimated that those costs would be around
5 \$62,000, and a letter was sent by CEI to the City
6 so stating?

7 A I think that is right.

8 Q And would you please look at PTX-3080, and do you
9 recognize that as an ordinance, Ordinance No. 642-72,
10 which authorized the payment to CEI for the labor
11 and materials for the construction of that temporary
12 interconnection that we have just -- that the
13 agreement was?

14 A Yes.

15 Q And if you would please look at the other ordinance
16 there, PTX-3079, and I wonder if you could identify that?

17 A This is a copy of that ordinance, which appears in
18 the City record for July 5, 1972, and it is an
19 emergency ordinance authorizing the Director of
20 Public Utilities to enter into a license agreement
21 for the installation and maintenance of the tie-in
22 electrical transmission line between the Cleveland
23 Municipal Light Plant and the Lake Shore Plant of
24 CEI pursuant to the order of the Federal Power
25 Commission.

1 Hauser - cross

2 Q Just to set those two ordinances in a more understandable
3 context, am I correct that the first ordinance, 3080,
4 dealt with the labor and materials to the \$62,000 worth
5 of construction that CEI had to accomplish; and the
6 other, 3079, that exhibit dealt with the license and
7 the right-of-way agreement for placing the poles on
8 CEI's property?

9 A That is right.

10 Q Okay; and you were involved in negotiating with the
11 City, the license agreement, and the right-of-way
12 agreement for this transmission line on CEI property;
13 is that correct?

14 A That is correct.

15 Q And there were a number of points that were the
16 subject of some discussion prior to the reaching of
17 an agreement; is that correct?

18 A That is correct.

19 Q And one question that was raised was whether or not
20 CEI actually owned the land on which the poles would
21 be placed; is that a fair statement?

22 A That is correct.

23 Q And do you also recall that there were discussions
24 as to the amount that should be paid for the
25 right-of-way agreement?

1 Hauser - cross

2 A Yes.

3 Q Initially your company had asked -- do you remember
4 how much a month? -- would you accept \$800 a month?

5 A Yes.

6 Q And that was subsequently reduced to \$600 a month?

7 A Yes.

8 Q Okay.

9 Am I correct that there was also an issue as to
10 whether the right-of-way agreement should apply both
11 to the 69 KV line and the 138 or only to the 69?

12 A I just don't recall.

13 Q You don't recall that.

14 Do you recall, Mr. Hauser, that CEI required that
15 the plans for the pole line had to be approved by CEI
16 before the license and right-of-way agreement would
17 be executed?

18 A Yes.

19 Q Are you aware, just in a general way, of the nature of
20 the work that CEI had to do at its end of the
21 interconnection before it could be placed into
22 operation?

23 A In a very general way.

24 Q Well, what is your awareness in a general way?

25 A Well, the line that was built by Muny had to be tied in

1 Hauser - cross

2 with CEI's facilities, and there were certain
3 facilities that, at CEI's end, that had to be
4 installed, and there were certain controls and
5 regulation equipment, I think at both ends, including
6 CEI's end, and there undoubtedly was much more to it
7 than that, but that is the general concept that I have.

8 Q Now, when CEI is going to render services to the
9 City such as we saw here, where they were going to
10 supply labor and materials and then be reimbursed by
11 the City for those labor and materials, am I correct
12 that the procedure that was frequently followed was
13 for the City to issue a purchase order to CEI in the
14 specified amount for the services in question?

15 A No. I don't think that was the normal way of doing
16 business, particularly between the two systems.

17 Q Let me ask you this:

18 You are aware that that is one procedure that is
19 followed when the City contracts for goods and services
20 to be supplied by an outside party; is that correct?

21 A I am not sure. I don't know.

22 Q Well, are you aware of a different procedure where
23 written contracts are negotiated and then executed
24 between the City and an outside contractor to supply
25 goods and services?

1 Hauser - cross

2 A Again, I am not familiar with the way the City does
3 business other than dealings and transactions between
4 CEI and the Municipal Light Plant.

5 Q Well, Mr. Hauser, did you ever have any other
6 experiences in dealing with the City of Cleveland in
7 terms of the company's supplying goods and services
8 for which it was reimbursed?

9 A Certainly we served a number of City-owned properties,
10 fire stations and police stations, and sewage disposal
11 plants, and water pumping stations, and a variety,
12 but those would be served under the filed schedules
13 of the company, and whatever classification that they
14 would fall in.

15 Q Hasn't it been part of your responsibility in the
16 Legal Department over the past 30 years to actually
17 have taken care of CEI's side of this kind of a deal
18 between CEI and the City, where CEI supplies goods
19 and services to the City?

20 A Yes.

21 Q And can you recall whether those other transactions
22 that you handled or handled with a purchase order or
23 with a written contract?

24 A No. As I say, I would think that they were either
25 served under one of the filed schedules that would be

1 Hauser - cross

2 applicable.

3 If, for some reason, filed schedules were not
4 applicable or different services were required, then
5 I believe it would involve a written contract.

6 Q Let me just ask a different question, and just one
7 more time:

8 Are you aware that the City does have a
9 procedure of either going to the purchase order route
10 or to the written contract route for the supplying of
11 goods and services by outside contractors?

12 A I am not really sure, or don't know what the City's
13 procedures are with regard to entering into
14 contracts for outside services except CEI.

15 Q All right.

16 Isn't it a fact that in this particular situation
17 where CEI was going to supply \$62,000 worth of goods
18 and services for construction of CEI's end of the
19 interconnection, that you agreed that the purchase
20 order procedure would be acceptable to CEI; is that
21 not a fact?

22 A No.

23 Q Do you know Lucian Rego?

24 A I never met the gentleman.

25 I do know that Mr. Rego was in the City Law

1 Hauser - cross

2 Department at some period of time.

3 Q Well, were you aware of Mr. Rego's service in the
4 Department of Public Utilities prior to the time you
5 went to the Law Department?

6 A No, I don't believe I am.

7 Q You are aware that he was one of the City's
8 Assistant Law Directors in July of 1972; is that a
9 fair statement?

10 A That could be, yes.

11 Q I am unclear about one thing:

12 Had you done business with him from time to time
13 prior to July of 1972?

14 A I don't think so.

15 As I say, I never met him. I might have talked
16 with him on the phone once or twice.

17 Q Would you look at the exhibit that should be at your
18 place there, PTX-833.

19 You have seen that exhibit before, have you not?

20 A Yes.

21 Q And that is a July 13, 1972 memorandum from Mr. Rego
22 to Mr. Hinchee; is that correct?

23 A That is correct.

24 Q And you will notice in there that Mr. Rego states
25 that that morning he talked with you?

Hauser - cross

MR. LANSDALE: Objection.

THE COURT: Approach the bench.

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

MR. LANSDALE: He already asked the
witness the substantive question.

I object to reading a contrary statement by
reading in a letter from him to Mr. Hinchee.

MR. NORRIS: Let me rephrase the
question, and I will put it in terms of refreshing
his recollection.

MR. LANSDALE: Oh, for goodness'
sakes.

THE COURT: Fine, let him ask the
question, if it refreshes his recollection, but
the man says, "I don't know this fellow, and I
may have talked to him on the phone," and he
read a statement by some third party to another
outside party. This is a letter from Rego
to Hinchee.

MR. LANSDALE: I guess I
misunderstood you.

THE COURT: The way to get this

1 Hauser - cross

2 into evidence is call Mr. Rego in and say, "Did
3 you talk to him, and did he tell you this?"

4 We are right back reading into the record
5 memos without proper foundation.

6 MR. NORRIS: I will rephrase the
7 question.

8 THE COURT: All right.

9 {End of bench conference.}

10 - - - - -
11 THE COURT: I will sustain the
12 objection.

13 BY MR. NORRIS:

14 Q Mr. Hauser, I would ask you to look at PTX-833.
15 Does that refresh your recollection as to any
16 particular phone conversation that you might have
17 had with Mr. Rego in July of 1972?

18 A No.

19 Q Addressing your attention to PTX-3235, and can you
20 tell the jury what that is?

21 A This is an order from the Division of Purchases and
22 supplies from the City of Cleveland, dated August 8,
23 1972, to the Cleveland Electric Illuminating Company,
24 Illuminating Building, Public Square, attention
25 Mr. Hauser, and it states:

Hauser - cross

"Labor and material as required on CEI's plant for 69 KV temporary electrical interconnection between CEI and the Municipal Light Plant.

"All material purchased under this requisition shall remain the property of the City of Cleveland, Division of Light and Power."

The unit price is \$62,000, and the amount \$62,000.

It is not signed.

Q Well, Mr. Hauser, is this not a copy of the City's purchase order for the \$62,000 worth of goods and services that was sent by the City to CEI, attention to Mr. Hauser, on about August 8th, 1972?

A I don't know. It could be.

Again, as I mentioned before, there is no signature on it, and somehow or other I recall one that we received did have a signature on it, but then I could be wrong.

Q Let me ask you to look again at the date, and you will notice that the ordinance number is on the purchase order, 642-72?

A Yes.

Q And that is the same ordinance that you identified earlier for the goods and services?

Hauser - cross

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A Yes.

Q And do you have any reason to disbelieve that this is a copy of the purchase order issued by the City to CEI under date of August 8th, 1972?

A Other than it isn't signed.

It could have been the exact thing that we received on or about August 8th.

Q Well, I represent to you that it is a file copy that is not signed, and my question is, do you have any reason to believe that is different from the signed copy that was forwarded to CEI?

A No.

Q It is a fact, isn't it, that once CEI received the purchase order, CEI could have invoiced the City for the \$62,000 and received payment?

A I don't know that.

Q Addressing your attention to PTX-3246, please.

A Yes.

Q Am I correct that a couple of years later, or approximately two years later, under date of May 23, 1974, CEI did invoice the City for that \$62,000, plus an additional \$3,500 that represented an overrun in the job?

A Yes.

Hauser - cross

1
2 Q And PTX-3246 is a copy of the CEI invoice?

3 A Yes.

4 Q Did you have anything to do with the issuance of that
5 invoice?

6 A No.

7 Q Did you have anything to do with the directing of the
8 appropriate department in CEI to issue that invoice?

9 A I was involved. I am not certain that I gave the
10 order.

11 Q Addressing your attention to the three other exhibits
12 that I have asked you to look at -- actually there are
13 four.

14 Directing you to PTX-3245, have you ever seen
15 that document before, Mr. Hauser?

16 A Yes.

17 Q And am I correct that when the work was finished, it
18 turned out that instead of the \$62,000 that had been
19 estimated, it actually came to \$65,526.50?

20 A That is correct.

21 Q And 3245 is the City's receiving tally authorizing the
22 additional amount to be paid to CEI; is that a fair
23 statement?

24 A The entire amount, including the additional amount?

25 Q Right; and the next two exhibits, 2628 and 2629 are

Hauser - cross

the photostats of office vouchers and the checks going to CEI from the City in the total amount that we have just identified, \$65,526; is that a fair statement?

A Yes.

Q And then the fourth exhibit that I asked you to look at, PTX-2626, was a receipt that you signed on June 10, 1974, when you picked up these two checks, totalling \$65,526.50; is that right?

A Yes. I think they were delivered to us.

Q In any event, you signed that receipt at the time that you received the check?

A Yes; right.

Q This would be at least one example, would it not, of an outside contractor receiving payment against a purchase order immediately upon that outside contractor's invoicing the City?

A We received the payment in the form of two checks.

Q But my question goes to the timing of your invoice and the checks. Is it not a fact -- strike that.

Is it not a fact that the CEI invoice -- that was dated in late May, and you received payment from the City on or about June 10 of 1974?

A Yes.

1 Hauser - cross

2 MR. NORRIS: Mrs. Richards, would
3 you please give Mr. Hauser PTX-570, please.

4 {After an interval.}

5 BY MR. NORRIS:

6 Q Mr. Hauser, is that a memorandum you wrote to Mr.
7 Rudolph in June of 1972?

8 A Yes.

9 Q What was the subject, please, of that memorandum?

10 A "MELP - Spinning Reserve."

11 Q What is a "spinning reserve"?

12 A As I believe other witnesses have testified, that is
13 generating equipment that is on the line but not
14 loaded to its maximum capabilities, so that it is
15 instantaneously available should there be a trip-out
16 of one of the other generating units that are on the
17 line at the time.

18 Q And you were calling to Mr. Rudolph's attention the
19 fact that there was an obligation from the FPC
20 resting upon the City that at all times the City had
21 to have spinning reserve equal to 15 percent of the
22 system load; is that a fair statement?

23 A That is a fair statement.

24 Q Did you also indicate to Mr. Rudolph that Muny Light
25 could not satisfy that requirement?

Hauser - cross

1
2 A Yes.

3 Q Did you also indicate to Mr. Rudolph that Muny
4 Light's inability to satisfy that requirement would
5 give CEI a legitimate position to refuse to go ahead
6 with the interconnection?

7 A Yes.

8 Q Did you also indicate to Mr. Rudolph that even though
9 you could take that position, that you would not
10 succeed if you took that position?

11 A Yes. I suggested that the solution was for CEI to
12 charge the Municipal System for its carrying
13 Muny's obligation concerning a spinning reserve on
14 CEI's own system.

15 Q So you did not raise as a basis for not going forward
16 with the interconnection the spinning reserve
17 requirement that is described in PTX-570?

18 A That is right.

19 MR. NORRIS: Would you please
20 give Mr. Hauser PTX-2694, please.

21 {After an interval.}

22 Q Could you identify this exhibit for the jury?

23 A It is a copy of a letter dated April 11, 1972,
24 to the "Honorable Richard B. Hollington, Jr.,
25 Director of the Department of Law, City of Cleveland."

1 Hauser - cross

2 and that is a conform copy, but it was signed by
3 L. C. Howley, Vice-President and General Counsel.

4 Q And this letter of April 11, 1972, was about a month
5 after the FPC order on the interconnection; is that
6 right?

7 A Yes.

8 Q And this letter was drafted jointly by you and Mr.
9 Howley; is that correct?

10 A Yes.

11 Q And as a matter of fact, your initials appear along
12 with Mr. Howley's initials in the lower left-hand
13 corner of page 3 of that exhibit; is that right?

14 A That is correct.

15 Q Am I correct that in this letter to the Law Director
16 you and Mr. Howley were stating that the matter of
17 the 69 KV temporary interconnection should be
18 pursued expeditiously?

19 THE COURT:

That is a 69 or 138?

20 MR. NORRIS:

A 69 KV temporary

21 interconnection, your Honor.

22 A I don't see those words in here, Mr. Norris.

23 Q Let me draw your attention to page 2, the mention
24 to the last sentence of the first full paragraph.

25 A Yes.

Hauser - cross

1
2 Q And in addition to stating that this matter should be
3 pursued expeditiously, you and Mr. Howley offered to
4 be of any assistance to the City that you could be
5 in this regard; is that a fair statement?

6 A The next sentence says, "If we can be of any
7 assistance in this regard, don't hesitate to give
8 me a call."

9 Q And is it not a fact on page 3 you concluded that the
10 letter was an expression of willingness to cooperate
11 with the City concerning the construction of this
12 interconnection; is that a fair statement?

13 A The part of that referred to says, "Again, I wish to
14 reiterate that we would be happy to work with you on
15 all of these matters and to emphasize the importance
16 of receiving a contract containing all procedural
17 proposals and authorizations committing the City to
18 reimburse CEI for its costs for the temporary
19 interconnection, which we estimate to be \$62,000."

20 Q And then subsequent to that, legislation was drawn
21 and introduced and passed by City Council, and we saw
22 that by August 8 of 1972, a purchase order had been
23 issued; is that correct?

24 A That is correct.

25 Q Did CEI cooperate with the City toward the end of

1 Hauser - cross

2 getting the 69 KV temporary tie in operation as
3 quickly as possible?

4 MR. LANSDALE: Objection.

5 THE COURT: Approach the bench.

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

9 MR. LANSDALE: May I have the
10 question read?

11 {Question read.}

12 MR. LANSDALE: I don't know if this
13 is an attempt to bring out the stipulation or not,
14 in the Miller lawsuit. I object to the question
15 on that ground. If that is the only thing that
16 counsel is asking to bring out, I submit that it
17 is not a proper question at this time.

18 MR. NORRIS: They offered their
19 cooperation, and I would like to know if they
20 gave their cooperation, and this is a question
21 that this witness answered in the affirmative,
22 which he was put this question in September.

23 MR. LANSDALE: Well --

24 MR. NORRIS: And he also testified
25 to that earlier this afternoon.

1 Hauser - cross

2 MR. LANSDALE: Just a moment. I
3 know that he did, and this witness has advised
4 me that, he is unaware of Mr. Howley's initiation
5 of the lawsuit; that his participation in the
6 Miller lawsuit was at counsel's direction, and
7 as far as he knew, this was their idea; so,
8 insofar as he was concerned, the questions were
9 answered correctly, but being sensitized by
10 the whole episode of this last trial, I tried to
11 convey at the time we had our, I think,
12 in chambers discussions, of this thing, and I
13 submit that either the witness be permitted to
14 answer in accordance with his understanding of
15 the situation at the time contemporaneously, or
16 else that we have some voir dire proceeding out
17 of the hearing of the jury and the news
18 media.

19 THE COURT: Well, are you saying
20 that it is an improper question?

21 MR. LANSDALE: I am saying that it
22 is an improper question unless -- not
23 intrinsically. It is not improper. It is only
24 improper because of what we know as a background,
25 either requiring a disclosure of the Miller

1 Hauser - cross

2 lawsuit as an after-the-fact circumstance, or
3 else presenting me with a circumstance where I
4 can't rehabilitate the witness or come back on
5 redirect on him, and I submit that knowing the
6 background, that either we proceed under voir
7 dire or the witness be instructed that he may
8 answer it without attempting to disclose.

9 THE COURT: I am going to let
10 the jury go.

11 Go back to your seats.

12 {End of bench conference.}
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1 THE COURT:

Ladies and gentlemen

2 of the jury, we are approaching the adjournment
3 hour. There is a matter that must be resolved as
4 between the lawyers and the Court, and rather
5 than inconvenience you for the weekend, we will
6 give you the exhibits for the day, and you may
7 retire to the jury room and examine the exhibits
8 and be on your way, and hopefully it won't rain
9 during the weekend and you will all have a nice
10 weekend and you will be able to come back here
11 refreshed and ready to go on Monday morning at
12 8:30.

13 Again, as this is the weekend, the Court
14 cannot overemphasize the fact that you are not
15 to at any time read any account of this
16 proceeding in the newspapers or listen to any
17 radiobroadcasts concerning these proceedings,
18 or are you to view any television concerning
19 these proceedings, because you are the only
20 ones that have heard the testimony here, and
21 you are the ones that should decide the facts
22 as they are presented by the witnesses, and I
23 am confident that none of you will permit any
24 assistance from any outside source.

25 Please do not discuss the case with anyone.

1 and not even with your family, and keep an open
2 mind until you have heard all of the testimony and
3 the Court has instructed you on the law and the
4 application of the law to the facts, and until
5 such time as the matter is submitted to you for
6 your deliberations and judgment.

7 With that, ladies and gentlemen, you are
8 free to go, and we will send in the exhibits of
9 the day, and have a nice weekend.

10 {The jury was excused from the courtroom.}

11
12 THE COURT: Now, the following
13 exhibits may be presented to the jury:

14 Plaintiff's Exhibits 1687, 3059, 3060, 3062,
15 and 3063.

16 Plaintiff's Exhibits 581 and 38.

17 Plaintiff's Exhibits 3250, 123, 2679, 288,
18 1743, 36, 307, 309, 137, 270, 301, 292, 3249,
19 2525, 1734, 1735, 1736, 2529, 12, 294, 805, 2279,
20 315, 57, 3077, 3078, 755, 1425, 297.

21 Those may go to the jury.

22 Now, we have objections to the following
23 exhibits: 665, 679, 256, 265, 260, and 92.

24 I don't know where those are.

25 MR. MURPHY: Your Honor, if I might

1 hand the Court our copies so that you may look at
2 them.

3 THE COURT: What is the basis for
4 your objection to 256?

5 MR. MURPHY: 256 and 265, your
6 Honor, are objected to on the same basis, and
7 simply that they are cumulative of documents
already in evidence, particularly Plaintiff's
Exhibits 3103 and 3104, which came in the
precise envelope.

THE COURT: Overruled. What is
the objection to Plaintiff's Exhibit 92?

MR. MURPHY: Your Honor, 92 is a
November, 1960 -- either 3 or 5 -- I can't read
which on my copy -- memorandum concerning the
conversion of the individual customers from Muny
Light to CEI.

Your Honor, let me try to state my position
on this.

THE COURT: I would appreciate
that.

MR. MURPHY: We have not objected
to exhibits that show the CEI program in a generic
sense prior to the statutory period, however, the
memoranda concern only individual customers and do

1 not comment on concerns for the program in
2 general, and to those we take objections because
3 of the fact that they are prior to the statutory
4 period.

5 I might say, I had a number of these
6 sustained at the last trial on this basis.

7 THE COURT: Well, I don't see
8 where it is that probative of anything. It may
9 be admitted.

10 MR. MURPHY: My only point is
11 that the few don't make any difference, I would
12 agree, but a few a day and suddenly there is a
13 whole lot of them, and we don't think they are
14 germane or appropriate of anything.

15 THE COURT: Well, we will let
16 the jury decide as they go through them.

17 The more they get in there the more they are
18 desirous of examining each more closely.

19 MR. MURPHY: I don't disagree with
20 that.

21 My last objections are to Plaintiff's Exhibits
22 665 and 679, which simply summarize customer
23 shifts back and forth.

24 We object on the same basis that we objected
25 to 2009.

1 THE COURT: Sustained.

2 MR. WEINER: They both show the
3 confidential nature of the document, and they show
4 that Mr. Wyman testified to those numbers, that
5 the numbers were kept confidential, and followed
6 from the highest levels of the employees in the
7 company.

8 MR. MURPHY: Not only is that not
9 the testimony, but those exhibits are not
10 probative of anything.

11 THE COURT: You probably don't
12 know, but I have rather exhaustive notes.

13 I will sustain the objection.

14 Anything further?

15 MR. WEINER: Did the clipped
16 document go back from yesterday?

17 THE COURT: Yes.

18 MR. LANSDALE: I hate to bother
19 your Honor at this late hour on Friday, but I
20 understand that Mr. Goldberg is to be called on
21 Monday.

22 I would be remiss if I didn't bring it up.

23 Perhaps we had better approach the bench.
24
25

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

3 MR. LANSDALE: I must confess that
4 I did not fully realize this at the time we had
5 the discussion about Mr. Goldberg's testimony
6 before; however, it is evident that the problem
7 of the time when wheeling was available cannot
8 be explained fully or can't be explained at all
9 without going into the fact that this is the
10 period in which a settlement was entered into
11 by the City and the company in which a contract
12 of sale was approved by Council and accepted by
13 the City.

14 And I didn't go through, because it was
15 delayed during the political campaign, and then
16 the new Mayor succeeded in putting the kibosh
17 on it, so to speak.

18 In any event, Plaintiff's Exhibit 2213 is
19 a letter from Goldberg, I guess, to -- by
20 Hjelmfelt to the NRC, --

21 THE COURT: Off the record.

22 {A discussion ensued off the record.}

23 THE COURT: You may proceed.

24 MR. LANSDALE: There is nothing
25 wrong with Hjelmfelt's letter; the problem is

1 one of the attachments, which is Attachment B.

2 It's a letter from Mr. Bingham to Mr.
3 Pofok, dated June 29th, which acknowledges a
4 request from the City for wheeling and says
5 that he's one of the committee that was set up
6 between the City and the company to work out the
7 settlement, and it says that he supposes the
8 question of wheeling PASNY power is moot.

9 However, in the interim, before the transfer
10 takes place, if the City has to get power, we're
11 perfectly willing to wheel it, and attaches a
12 proposed schedule.

13 Later on, Mr. Pofok testifies before PASNY
14 that this was a perfectly satisfactory schedule
15 for getting PASNY power.

16 And the point I'm trying to make is that
17 there appears to be no question that we told the
18 company they could have the wheeling under a
19 schedule that Pofok says was satisfactory; and I
20 suspect that the reason why nothing was done
21 between then and the end of the year was
22 because of the settlement. I don't know this
23 to be the fact, but it would appear to be
24 perfectly evident.

25 Now, it would be our contention that as is

1 quite plain that wheeling was available from
2 early in the year '77, and that the difficulties
3 that developed later over conditions other than
4 specifically PASNY wheeling, that is, the
5 generalities of the wheeling schedule, and so on,
6 have nothing to do with the question of the
7 availability of PASNY wheeling during the year,
8 and we would contend that we can't be struck
9 with damages because the parties had an
10 agreement of sale which one of the parties
11 later upset.

12 Now, I'm not attempting to get you to agree
13 to my position on this; the only thing I'm
14 pointing out is that there is no way to handle
15 this matter without going into the settlement.

16 And I submit to you --

17 THE COURT: You could stipulate.

18 MR. LANSDALE: We could stipulate --

19 THE COURT: You could formulate
20 some sort of a stipulation or strike out the
21 pertinent parts of the letter.

22 MR. LANSDALE: We might stipulate
23 all these things; and, if we do, it might make
24 unnecessary Goldberg's presence here.

25 Don't misunderstand me, I'm not trying to

1 keep you from having Reuben return.

2 But it would seem to me the circumstances are
3 such that we ought to be able to work something
4 out, because I don't think it is in either one
5 of our interests to discuss this settlement
6 before the jury.

7 All that's going to do is confuse this
8 issue. Not only that, but then we get into all
9 that political activity that has impregnated
10 this proceeding from the word go.

11 MR. HJELMFELT: I'm certainly willing
12 to entertain any stipulation you suggest.

13 I'd say that, as Reuben testified, I think,
14 on his voir dire, the City -- while the City may
15 have been able to accomplish the PASNY wheeling
16 with the schedule that was tendered, it was very
17 unsatisfactory and, as the NRC found and as the
18 FPC found, it wasn't a suitable wheeling
19 schedule and didn't comply with the NRC order.

20 MR. LANSDALE: We can argue about
21 that but -- because, I mean, I think the argument
22 before the NRC and the FPC was about things
23 other than PASNY, but --

24 THE COURT: At least you ought to
25 be able to stipulate to some of those operative

1 facts preliminary to the point where you are
2 going to start disagreeing.

3 And then, if you want to bring him in --

4 MR. HJELMFELT: I suppose we can,
5 but it may -- if we are going to bring him in,
6 there may not be any point in stipulating some
7 of the initial facts; but I'm willing to --

8 THE COURT: What I'm talking
9 about is this hiatus period where the parties --
10 both of the parties suspended all activity -- as
11 a matter of fact, the Court -- they did it with
12 the Court's sanction at that time, because I
13 recollect that they came to me and said, "We
14 have a tentative agreement; can we suspend the
15 proceedings?" which I condescended to.

16 MR. HJELMFELT: I'm willing to talk,
17 your Honor.

18 THE COURT: The biggest concern
19 for me is the issue before us on this --
20 obviously we are now approaching the Miller
21 case, and if you gentlemen would like to come
22 into chambers where it's a little more
23 comfortable, we can discuss the matter probably
24 more satisfactorily.

25 MR. LANSDALE: Shall we bring

1 Mr. Hauser with us or not?

2 MR. NORRIS: No.

3 MR. LANSDALE: You say "No"?

4 MR. NORRIS: No.

5 THE COURT: I just want the
6 lawyers.

7 MR. LANSDALE: No, I'm not asking
8 him in as a lawyer, I just wanted to know
9 whether --

10 THE COURT: No; but you better
11 tell him to stay, there has been some mention
12 about a voir dire or something, I don't know what
13 this is all about.

14 MR. NORRIS: I have no interest
15 in the voir dire.

16 THE COURT: I don't know; all I
17 know is what the generalities have been that were
18 bandied about here, so you better keep him handy
19 because I would like to get some position stated
20 here so that I can consider it over the weekend
21 because I don't want to delay the trial unduly.

22 {The Court and counsel adjourned to the
23 Court's chambers and the following further
24 proceedings ensued.}

25 THE COURT: All right, gentlemen.

1 MR. LANSDALE:

2 Our position on the
3 subject, in substance, is that the Court has ruled
4 that the Miller lawsuit is not to be disclosed to
5 the jury, a Noerr-Pennington situation.

6 At this stage, I am not aware of anything
7 that could be said to have opened the door to
8 such an extent that the Court would consider
9 that he should reconsider his ruling on the
10 Miller lawsuit; and that I do not believe that
11 it is admissible for the plaintiff to attempt to
12 himself open the door as the basis for doing so.

13 Now, this witness has advised me heretofore
14 that his connection with the Miller lawsuit --
15 which, by the way, is set out in the stipulations,
16 consigned to what is in the stipulations -- that
17 he was not privy to the facts which our
18 investigation, after the suggestion of the
19 stipulation by the plaintiff, disclosed, that
20 Howley had himself apparently initiated the
21 litigation with Miller.

22 After he had done this, as the stipulation
23 shows, he asked Hauser to provide the assistance,
24 which the stipulation shows Hauser did.

25 Irrespective of that, to ask a question which
-- or to attempt, by cross-examination, to create

1 a situation that requires -- it may consider
2 requires disclosure of the Miller case, it seems
3 to me, gets us into the circularity that is
4 illogical, and I don't think it's proper for --
5 at this stage -- for the plaintiff to ask
6 questions which require, if pursued, disclosing
7 the Miller lawsuit.

8 MR. NORRIS: Well, I have a
9 couple of responses that I would like to make.

10 In the first place, I don't think Mr.
11 Lansdale is accurate in his reference to the
12 kind of menial and ministerial role that Mr.
13 Hauser played in connection with the Miller
14 lawsuit.

15 I think that the stipulations that we worked
16 out before the first trial make it very clear
17 that Mr. Hauser was a central figure in what
18 went on.

19 So I would submit, first, that I disagree
20 with Mr. Lansdale's characterization that Mr.
21 Hauser was in kind of a ministerial or clerical
22 or subordinate role.

23 THE COURT: These are questions
24 of fact that we can elicit from the voir dire.

25 I'm willing to --

1 MR. NORRIS: Well, your Honor, I
2 also take issue with what Mr. Lansdale has said
3 with respect to what this witness has already
4 testified in front of this jury.

5 This witness has taken the opportunity himself
6 to state, this afternoon, that CEI didn't do
7 anything to delay the interconnection; and it is
8 the City's position -- wholly apart from your
9 Honor's ruling on Noerr-Pennington -- that, as
10 the Court ruled in the May 18, 1981 impact
11 order, that notwithstanding the Court's ruling
12 on the Noerr-Pennington issue, that the
13 stipulations on the Miller suit may very well be
14 admissible to demonstrate the character and the
15 nature of the acts that are here under
16 consideration.

17 And it does strike me that --

18 THE COURT: As to the character
19 and the acts; of what acts?

20 MR. NORRIS: Of CEI's actions
21 with respect to trying to delay the
22 interconnection and to, by that device, as the
23 City has alleged --

24 THE COURT: Because it doesn't
25 go to -- certainly doesn't go -- it's not

1 admissible for the substantive portion of his
2 case, --

3 MR. NORRIS: But, your Honor --

4 THE COURT: -- namely, as an
5 intent to show -- or conduct to show an intent
6 to violate the Sherman Antitrust Act. It's out
7 as to that, in all respects.

8 MR. NORRIS: I understand that
9 your Honor has so ruled.

0 Now, the witness, however, has himself
1 testified that they didn't -- CEI didn't do
2 anything to delay the interconnection; at the
3 same time, as your Honor has heard counsel argue
4 before, the City -- CEI's public statements were
5 statements of cooperation while, at the same time,
6 as we all know, behind the scene, the activity
7 by CEI was anything but cooperative.

8 THE COURT: Well now, you're
9 getting back to the sham exception.

0 MR. NORRIS: No, sir -- yes, your
1 Honor --

2 THE COURT: Mr. Norris, please
3 address the issue that's confronting the Court.

4 My concerns are twofold, and so the
5 parties may understand:

1 Number one. Under the facts and circumstances
2 presented by this case, at this juncture of the
3 case may the City initiate the foundation
4 question to bring about the introduction of the
5 evidence to reflect upon acts which rebut the
6 defendant's witness's testimony that, to their
7 knowledge, they knew nothing that CEI did that
8 interfered with, obstructed, or made more costly
9 the construction of the interconnection.

0 Now, I really don't have any problem with
1 the contemporaneous aspect of this thing.

2 The question is directed as of the time, not
3 at some subsequent time, so then I get to my
4 next question. This is directed to the defendant:

5 Is the defendant's position that, assuming
6 arguendo, that every witness that the defendant
7 may produce or is called by the adversary,
8 testifies, and testifies truthfully and
9 accurately that as of the time that this
10 activity was going on they knew of no conduct
11 on the part of CEI that obstructed, interfered,
12 or made more costly the interconnection, that
13 the City is thereby precluded from bringing
14 testimony of whatever nature to rebut that?

15 MR. LANSDALE:

 No, sir, it is not.

1 Let me respond to that in two ways:

2 In the first place, I think I want to get
3 in Mr. Norris's claims that Mr. Hauser made
4 some statements on the witness stand today
5 about this.

6 Mr. Hauser, as I think the record will show,
7 was responding to questions concerning the 138
8 KV interconnection, not the 69 KV tie or
9 arrangements that you were talking about.

10 There was nothing, as far as I'm aware,
11 that CEI did that interfered or obstructed or
12 made more expensive an interconnection.

13 What CEI did through the agency of Mr.
14 Howley was to initiate action which might have
15 had the effect of interfering or making more
16 costly the interconnection, but did not, in fact,
17 have an effect whatsoever --

18 THE COURT: That's the question
19 of fact that has to go to the jury.

20 MR. LANSDALE: Well, sir, if --
21 I submit that there are no facts which would
22 permit this question to go to the jury.

23 The whole episode lasted 11 days, the
24 construction company kept constructing and,
25 at most, it indicates that Howley is a bastard --

1 don't -- withdraw that.

2 THE COURT: He was your bastard,
3 that's the --

4 MR. LANSDALE: I don't have any --
5 I don't have any -- I'm not attempting -- I'm
6 not attempting to deny this.

7 What I'm saying is that -- what I'm saying
8 is that this was whatever, however, we may
9 characterize what Lee did, it was permitted
10 activity under Noerr-Pennington.

11 And I submit that that the fact that it
12 might have had a bad effect upon the defendant --
13 I mean, the plaintiff, but it does not compel
14 its admission.

15 Now, at most, it shows some kind of an
16 intent. The fact of the matter is, that the
17 record is very, very clear that all of the other
18 evidences will show that the things which we
19 actually did that had an effect -- or didn't
20 have an effect -- were in no wise designed to,
21 and nor did they have any effect in interfering
22 with it.

23 Now, for counsel now to ask a lot of
24 questions that call for conclusory statements
25 that -- of design or intent, which are

1 themselves matters of opinion or relevance as
2 a mere foundation for trying to get, as they
3 were trying to get -- in privileged testimony
4 to have this color a lot of other acts is the
5 same as saying that's not -- that is the same
6 as taking privilege away, and --

7 THE COURT: Well, that's the
8 net effect of it, but it doesn't come under
9 that theory of law?

0 MR. LANSDALE: It doesn't what?

1 THE COURT: That's the net
2 effect of it, but it comes under -- comes in
3 under a different theory of law, it doesn't
4 come in as Noerr-Pennington activity.

5 MR. LANSDALE: No. It comes in
6 on the fact that if the Court thinks that it
7 is probative and not unduly prejudicial, the
8 Court may, in its discretion, admit it.

9 I suggest that this is highly prejudicial,
0 and its prejudicial effect, in view of its
1 total ineffectiveness to have effect upon the
2 plaintiff, that it has no probative effect
3 whatsoever on the substantive issues; and in
4 view of its total lack of success in making an
5 interference, that it could have no other purpose

1 than its prejudicial effect. And I would -- I
2 assume that this kind of judgment is what is
3 indicated to the Court the validity of the
4 opinion the Court has issued heretofore.

5 And to -- for the plaintiff to be able to
6 attempt to force testimony which would have
7 characterizations that the Court would then be
8 led to hold that has to be rebutted --

9 THE COURT: Let me ask you this,
10 for the purposes of argument:

11 Assuming -- forget about the Miller lawsuit.

12 MR. LANSDALE: Yes.

13 THE COURT: What if you had one
14 or fifteen acts that the defendant engaged in
15 that were either questionable or obviously had
16 an obstructing or interfering effect or making
17 a more costly effect on the construction of the
18 interconnection, what you are saying to me that
19 that could not be permitted in because it's
20 prejudicial?

21 MR. LANSDALE: Oh, no, I'm not
22 saying that.

23 THE COURT: Well, --

24 MR. LANSDALE: I'm not saying that.

25 What I'm saying is that --

1 THE COURT: Everything is
2 prejudicial.

3 MR. LANSDALE: Of course, it is.

4 THE COURT: Every piece of
5 evidence that comes in is prejudicial to one
6 side or the other.

7 MR. LANSDALE: Yes. Well --

8 THE COURT: Every decision that
9 I make is prejudicial to one side or the other.
10 When the jury comes back with a verdict,
that's prejudicial.

MR. LANSDALE: Yes, I agree with
that.

I agree with that; however, --

THE COURT: When the jury comes
back, that is unduly prejudicial.

MR. LANSDALE: Yes, it sure is.

{Laughter.}

THE COURT: It is to one side,
depending on the verdict.

MR. LANSDALE: I come back to the
proposition that the rule of law stated in the
footnote in the Pennington case is that it may
be admitted to give content to other acts
providing the Court does not find probative for

this purpose and not unduly prejudicial --

THE COURT: But, Jack, you're talking about its admissibility as it relates to the substantive issues of the case, namely, the antitrust issue.

And I'm not discussing it in that context; I have ruled as to that context, and under no circumstances is it admissible there at this juncture or at any juncture; I mean, I finalized that ruling on three different occasions.

Well, we are not talking about it in that context, and that isn't what concerns me.

As I stated, there are two things that concern me:

Number one, can the plaintiff initiate or set the groundwork for it; and

Number two -- in other words, can I preclude at this juncture the plaintiff from asking a question, "Do you know of any act which made more costly, interfered with, or obstructed?"

MR. LANSDALE: That's an easy question; the witness can answer that.

THE COURT: All right.

If the answer is "No," --

MR. LANSDALE: Plainly he can

1 answer that "No", because nothing that we did
2 obstructed it, or interfered with it, or made
3 it more costly.

4 Now, there was something that we did
5 through this activity of Lee that could fairly
6 be said to be designed to do so, in my opinion;
7 and what I'm objecting to is -- and the most
8 that it could be brought in on, would be a
9 credibility issue, and what I'm objecting to is
10 the plaintiff deliberately creating a
11 credibility issue which can only be resolved
12 by the disclosure of the Miller lawsuit, no
13 matter how the witness answers, because if the
14 witness answered in a way that Mr. Norris
15 thinks is contrary to the facts, or which is
16 contrary to his belief that the witness,
17 unlike what he's told me, was a central
18 participant in and initiated it, and so on,
19 he's going to demand the right to cross-examine
20 him about this thing at length.

21 I mean, --

22 THE COURT: Where does the
23 credibility issue -- I don't see where there is
24 a credibility issue coming in.

25 MR. NORRIS: It goes to the

substantive issue as to whether or not they did anything that obstructed, interfered, delayed, or made more costly.

I think it goes to both, your Honor.

THE COURT: Whose credibility?

MR. NORRIS: Mr. Hauser's; because

he was a central actor, I agree with Mr. Lansdale, --

THE COURT: That's your conclusion,

Mr. Norris.

Now you're getting into fact situations; I don't want to get into fact situations.

I'm assuming that he's telling the truth when he says, "I don't know anything about it."

And I'm assuming that everybody else is telling the truth when they say, "I don't know anything about it; I know of no such conduct that interfered, obstructed, or made more costly the construction of that."

I'm assuming that those statements are true.

So that's not my concern.

Assuming that is true, --

MR. NORRIS: Try this one, your

Honor.

Let's assume that while I had Mr. Loshing on the stand, I asked him this question.

1 Now, he was not a central participant, and
2 he could be telling the truth that he didn't
3 know of anything that CEI did that was designed
4 to interfere with, et cetera.

5 Now, I think, even under those circumstances
6 where you have got a top officer of the company,
7 that the plaintiff is permitted to rebut the
8 inference that is drawn by an answer to that
9 question.

10 But, here where you have got one of the
11 central actors himself on the witness stand,
12 Mr. Hauser, as the stipulation very clearly
13 points out what his role was, he can't get out
14 of it by saying that he was told to do this by
15 his boss.

16 MR. LANSDALE: That's your opinion.

17 MR. NORRIS: Just a moment.

18 Now, he's a central actor; and I'm drawing
19 the distinction between a central actor saying
20 that CEI didn't do anything that was designed to
21 interfere with and delay, and another witness
22 that might not have been a central actor but
23 would respond in the same way.

24 Now, I also don't want this question that
25 the Court has asked about, "Is there anything

wrong with the plaintiff --" I think the Court used the term -- "-- initiate the foundation question?"

We don't want a situation where the plaintiff has initiated the foundation question, because what is Mr. Hauser's own testimony.

Now, I would submit, your Honor, that even absent the Hauser testimony --

THE COURT: Mr. Hauser's testimony where?

MR. NORRIS: Today.

And the record will demonstrate that he stated to the jury that CEI didn't do anything to interfere with the interconnection or to delay --

THE COURT: Which interconnection is he testifying --

MR. NORRIS: The interconnection that he was testifying to, and the pole line, your Honor --

THE COURT: Was that the same interconnection?

MR. NORRIS: Sure, it is.

MR. LANSDALE: It was not.

MR. NORRIS: It's the same pole line,

1 Mr. Hauser agreed with me that it was the
2 identical pole line; that there was different
3 equipment, at either end to turn it from a 69
4 to a 138.

5 But, your Honor, I submit that we have
6 every right to probe the substance of what the
7 company's conduct was.

8 It goes to intent, it goes to what their --

9 THE COURT: You keep talking
10 about "intent."

11 What intent?

12 MR. NORRIS: To monopolize and
13 to attempt to monopolize.

14 THE COURT: It does not go to
15 that, and it's not admissible under the
16 Noerr-Pennington doctrine, so let's forget about
17 that. I'm not going to go through that; I have
18 gone through it three times, Mr. Norris.

19 Now, let's address ourselves to the issues
20 that we're talking about here that give me some
21 concern.

22 If you don't understand what I'm talking
23 about, I'll explain it to you again.

24 MR. NORRIS: Well, perhaps I
25 misspoke myself.

1 But the testimony that the company did not
2 do anything to delay or interfere with is already
3 in the case, and the City should have a right to
4 probe that and to rebut that inference, and it
5 goes both to rebutting that testimony that's
6 already in, and I also submit that it has an
7 additional impact on the credibility of the
8 particular witness that is on the stand now
9 because of his testimony.

10 MR. LANSDALE: May I respond?

11 THE COURT: Sure.

12 MR. LANSDALE: Two things.

13 Number one. The testimony of Mr. Hauser
14 that he alludes to deals with the 138 KV
15 interconnection, the record will bear it out,
16 and the record is there, I don't want to argue
17 about it any more myself.

18 Secondly, the questions that Mr. Norris is
19 talking about are not questions that he really
20 wants an answer to, but are only for the purpose
21 of laying a foundation to bring the witness on.

22 The third question --

23 THE COURT: I thought I made
24 that clear.

25 The thing that is concerning me now -- I may

have not -- may not have articulated it right,
but I think my language is:

May the plaintiff initiate through a line of
questions a foundation to bring into evidence
this type of testimony? And that's one of the
issues that concerns me.

MR. LANSDALE: Yes.

And this is actually the sole issue before
us.

THE COURT: No. There is another
issue before me, too.

MR. LANSDALE: We have diligently
searched, your Honor, and I don't think that
even Joe Schmitz can find --

THE COURT: There isn't anything,
we have researched that, three people, and there
is nothing.

MR. LANSDALE: And my position is
that the plaintiff may not initiate such a
question for the following reason:

A. The questioning is not designed to
bring out information which he desires an answer
to the question but solely to lay the foundation;
and

Secondly, the questions, as they relate to

1 this case, are solely for the purpose of
2 introducing the prejudicial testimony, because
3 the facts are that there was no delay or
4 interference and the like.

5 And those two things seem to me to say that
6 the sole issue is the introduction of the
7 Miller testimony, not introduction -- or not
8 securing other information and not trying to
9 characterize other specific acts which have some
10 definite relation to them, but are designed and
11 pursued solely to get the Miller testimony in;
12 and there is surely no difference between that
13 and just offering the stipulation, if your
14 Honor please.

15 MR. MURPHY: I might add if the
16 plaintiff initiates a question of this sort and,
17 as a result of the answer, places into evidence
18 the material that the Court already has said
19 is excluded under Noerr-Pennington, that then I
20 cannot ever see a situation in any antitrust
21 litigation where Noerr-Pennington excluded
22 evidence would be kept from the jury.

23 The Noerr-Pennington exclusion would amount
24 to a mere charade because you can always ask
25 an appropriate question at, say, a legislative

1 forum, "Did you do anything to interfere with
2 the business practices of the opposing party?

3 "No, I didn't."

4 All the legislative activity comes into
5 evidence.

6 The methodology suggested by the plaintiff
7 here would totally subsume the Noerr-Pennington
8 exception.

9 THE COURT: Is anybody else
10 desirous of speaking?

11 MR. NORRIS: Well, you can't get
12 around the fact that the witness has already
13 poisoned the jury's mind that CEI was a really
14 good fellow and they were just cooperating with
15 the City all the way down the line.

16 And we all know in this room that that
17 is not accurate. We all know in this room
18 what actually took place, and it is not the
19 City's doing.

20 I think that it is most inappropriate to
21 suggest the City is trying to use some trickery
22 here to take some right away from the defendant.

23 I think that the witness has himself
24 opened the door to this; and I think that even
25 if the witness had not opened the door, your

1 Honor, that the question that I put that is
2 presently objected to, to which there has been
3 no answer:

4 "Did CEI cooperate with the City toward the
5 end of setting the 69 KV temporary tie into
6 operation as quickly as possible?"

7 Mr. Hauser answered in the affirmative in
8 the last trial. This is a question that I
9 presume he would answer affirmatively today
10 because it would be consistent with what his
11 other testimony has been today.

12 I submit that if the City is not permitted
13 to rebut the inferences that are developed by
14 either the answer to this question, your Honor,
15 or the other side of the coin question:

16 "Did you do anything to delay or obstruct",
17 and if we are not permitted to put in evidence
18 to rebut the inference that Mr. Hauser has
19 already created, that this would be prejudicial
20 and unduly prejudicial to the City's interest.

21 THE COURT: Let me ask you
22 this:

23 What do you claim that they did that was
24 an obstruction that caused delay and made more
25 costly --

1 MR. NORRIS: Well, there were --

2 THE COURT: -- the construction
3 of the interconnection?

4 MR. NORRIS: The issue that is the
5 substance of the pending question is cooperation.

6 Now, --

7 THE COURT: Mr. Norris, do you
8 understand my question?

9 If you would please answer my question. I
10 get confused with your answers.

11 What acts does the City claim obstructed,
12 interfered with or made more costly?

13 MR. NORRIS: Or were designed to
14 do so?

15 THE COURT: I didn't ask
16 "designed".

17 I said, "What acts did they do?"

18 After you answer this one, I'll get to the
19 next one.

20 MR. NORRIS: Well, there were
21 many instances of --

22 THE COURT: "Many" doesn't
23 mean anything to me.

24 MR. NORRIS: Well, your Honor,
25 I'm sorry, I can't respond as you want me to;

1 I'm doing my best.

2 THE COURT: All right.

3 Tell me what act or acts did they do?

4 MR. NORRIS: There were many
5 instances of a Catch 22 that CEI laid on the
6 City.

7 They said, "We won't execute the right-of-way
8 agreement with you until you give us the precise
9 location of the eight or ten or twelve, or
10 whatever the number was, poles that you want to
11 put on to our property; and you're not going to
12 come on our property to find those poles, and
13 we won't tell you where the underground cables
14 are."

15 But the City was unable, your Honor, to
16 bring to CEI the precise pole layout that would
17 permit agreement on the line.

18 And so while, on the one hand, CEI was
19 saying, "We're not going to go ahead until you
20 can give us the precise location," the
21 information that was needed for arriving at
22 those precise locations was in CEI's possession
23 and they refused to be cooperative in terms of
24 sharing information with the City that the City
25 had no way of discovering without it coming from

1 CEI.

2 Now, that's one thing.

3 There were delays that CEI occasioned to
4 the actual construction process.

5 By the time we got down to late -- in the
6 year 1972 --

7 THE COURT: What were those --
8 that was a generality.

9 Tell me what they were, specifically.

10 MR. NORRIS: I would prefer to
11 do this in camera, your Honor.

12 If your Honor is putting a question to me,
13 why do I have to lay out the evidence that I'm
14 going to be putting on in this courtroom in
15 front of my adversary?

16 This is still an adversary proceeding,
17 your Honor.

18 THE COURT: Well, the last time
19 we went through this, Mr. Norris, we spent I
20 don't know how much time in camera, and
21 everything you had said to me you could have said
22 in open court.

23 Step outside for a minute.

24 MR. LANSDALE: Yes.

25 {Mr. Lansdale and Mr. Murphy stepped out

of the Court's chambers while the Court and plaintiff's counsel had an in-camera discussion."

- - - - -

{Thereupon Mr. Lansdale and Mr. Murphy returned to the Court's chambers, and the following further proceedings were had.}

THE COURT: Is there anything anyone else is desirous of saying, or are there any citations that anyone is desirous of directing the Court's attention to?

MR. LANSDALE: I have none.

THE COURT: Well, I think everyone has had an opportunity of saying what they want to say.

I have expressed to you my concerns in light of the fact that this thing is coming up in a different posture than it came up last time.

I do have serious reservations as to -- I want to tell you -- which way I'm going to go at this juncture.

See you on Monday.

MR. LANSDALE: Thank you, your Honor.

MR. NORRIS: Thank you, your Honor.

1 MR. MURPHY: Have a good weekend.

2 {The foregoing proceedings were had in
3 the Court's chambers out of the hearing and
4 presence of the jury.}

5 {Court adjourned.}

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1 MONDAY, AUGUST 17, 1981; 2:35 O'CLOCK P.M.

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

7 THE COURT: Bring in the jury.

8 {The following proceedings were had out of
9 the hearing and presence of the jury:}

10 MR. NORRIS: Your Honor, may we
11 approach the bench?

12 THE COURT: Yes.

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

16 MR. NORRIS: Your Honor, we have
17 just been handed your order dated August 17 on
18 the matter of the Miller stipulation.

19 From a hurried reading, I do want to place on
20 the record that the City does not concede, as
21 stated on page 9 of the Memorandum and Order
22 that the lawsuit did not actually affect the
23 construction of the 69 KV intertie.

24 The City would intend very soon -- I am not
25 prepared to do this now -- but the City would like

1 with respect to their design.

2 We believe that wholly apart from the Court's
3 ruling on Noerr-Pennington, that evidence that
4 CEI conducted itself in a certain way in the
5 design to delay or make more costly the
6 construction of the 69 KV intertie goes to the
7 repeated inferences that have already been raised
8 to the contrary, and also goes to the credibility
9 of the witness on the stand.

10 THE COURT: That evidence on
11 inferences are you talking -- you're talking in
12 generalities, and I have to have, for my own
13 benefit, as well as for the record, what we are
14 talking about.

15 MR. NORRIS: For example, I think
16 it's 2594, the letter from CEI to the City --

17 MR. LANSDALE: Are you talking
18 about an exhibit number?

19 MR. NORRIS: Yes; PTX, I think
20 it's 2594, we had the letter in evidence
21 yesterday with Mr. Hausen, wherein CEI is making
22 statements that easily add up to the fact that
23 they're doing everything they can to cooperate
24 with the City. That's an inference that has
25 already been put forward by the defendant's

1 witnesses.

2 Secondly, Mr. Hauser --

3 THE COURT: Elicited through
4 your examination.

5 MR. NORRIS: Through my
6 examination, your Honor, Mr. Hauser frequently
7 went beyond the questions that I asked and made
8 speeches that were intended to create the
9 inference of total cooperation on behalf of the
10 City --

11 THE COURT: I checked the
12 record --

13 MR. NORRIS: -- on behalf of CEI
14 towards the City; and we believe that we should
15 be permitted to put in this proof both to
16 rebut the inference that Mr. Hauser has created,
17 and to explore the credibility of Mr. Hauser
18 because of prior inconsistent statements and,
19 obviously, because of the conduct that is
20 already the subject of the Miller stipulation.

21 THE COURT: There is nothing
22 foreclosing you from attacking his credibility,
23 but you can't do it with Noerr-Pennington material,
24 that's all.

25 And there is nothing to foreclose you from

1 showing what acts were undertaken by CEI that had
2 the effect of impeding, obstructing, and making
3 more costly the 69 KV interconnection as compared
4 with the 138 KV synchronous permanent
5 interconnection; and I'm not foreclosing you from
6 that.

7 MR. NORRIS: I would also like to
8 have the record show that the testimony of Mr.
9 Hauser at 144191-192 talks about the decision
10 made by CEI in 1970 that they would do nothing to
11 prevent or delay the interconnection.

12 From 1970 forward, your Honor, we had the
13 load transfers, we had the 69 temporary, and not
14 until 1975 did we have the 138 permanent
15 interconnection.

16 And I respectfully submit that the testimony
17 that the witness has already adduced goes far
18 beyond purely the 138 permanent interconnection,
19 and this we would like to make a portion of the
20 offer of proof that we would like to submit.

21 THE COURT: You are free to make
22 it now.

23 MR. LANSDALE: The record shows
24 what it shows.

25 I object to an offer of proof as to what the

1 record shows; the record shows what it shows.

2 MR. NORRIS: Well, your Honor,
3 would you grant me the privilege of reading the
4 order more carefully and coming in tomorrow --

5 THE COURT: No, no, not tomorrow,
6 no offer of proof tomorrow; you make it on the
7 record now, that's procedure.

8 You can take issue with my ruling in the
9 Court of Appeals; that's the proper place to do
10 that.

11 MR. NORRIS: First of all, we do
12 not concede, as page 9 of the Memorandum and
13 Order suggests, that the conduct of CEI did not
14 actually affect the construction of the 57 KV
15 tie.

16 For example, the City had to appear in a
17 lawsuit brought by Mr. Miller; the City incurred
18 legal expense with respect to defending the
19 Miller lawsuit.

20 The Collier Construction Company was a
21 defendant in this lawsuit, and the plaintiff
22 Miller sought relief against Collier --

23 THE COURT: Who had interfered
24 with Collier's procedures and with its ability to
25 perform promptly and --

1 MR. NORRIS: There is nothing in
2 there --

3 THE COURT: Pardon me; go ahead.

4 MR. NORRIS: And the letters
5 written by CEI to the City during this 1972
6 period of the Miller lawsuit offered publicly
7 total cooperation, full cooperation; and the
8 stipulations that are already agreed to by both
9 sides do not bear out the conduct of CEI.

0 We have a right to rebut the inferences
1 shown by CEI's correspondence.

2 Thirdly, the issue of Mr. Hauser's
3 credibility is something that we should have a
4 right to explore, and this has to do with his
5 prior statements with respect to the design of
6 CEI with respect to this very subject matter.

7 And we submit that it is prejudicial to
8 preclude the City from going into this exploring
9 of this witness's credibility in this respect.

0 THE COURT: I direct your
1 attention to the stipulations -- are you desirous
2 of responding?

3 MR. LANSDALE: No, your Honor.

4 THE COURT: -- as to what the
5 net effect of the lawsuit was.

1 I think it's quite clear from the
2 stipulations that construction was not interfered
3 with, that it proceeded, there was no restraining
4 order issued as a result of the Miller action, and
5 how the construction company continued throughout.

6 I'm reading Stipulation No. 231:

7 "On May 9, 1972, Miller filed a taxpayer
8 action against the City of Cleveland {Case No.
9 905,940 in the Court of Common Pleas of
10 Cuyahoga County, Ohio} praying for a temporary
11 restraining order and injunction against the
12 construction and installation of the temporary
13 emergency interconnection.

14 "Subsequently, on May 11, 1972, the Court
15 issued a temporary restraining order {to be in
16 effect for six days} enjoining the payment of any
17 money on account of the work on the temporary
18 interconnection then going forward but declining
19 to restrain the work. Miller immediately reported
20 this to Howley by telephone."

21 But, anyway, I think that the decision
22 addresses each of the issues; and, of course,
23 contrary to what our initial research disclosed, --
24 this is that comes of not reading your own orders
25 and reading the stipulations upon which we

1 predicated those orders -- a careful reading of
2 Household Goods contains procedurally
3 ramifications of how the matter in that case
4 ended in the first case came to bar.

5 So, anyway, exceptions are noted, and we
6 will proceed accordingly.

7 {End of bench conference.}

8 - - - - -

9 THE COURT: Call in the jury.

10 {The jury was seated in the jury box and
11 the trial continued as follows:}

12 THE COURT: Please be seated.

13 You may proceed.

14 - - - - -

15
16 D O N A L D H. H A U S E R

17 resumed the stand and was examined and
18 testified further as follows:

19
20 CROSS-EXAMINATION OF DONALD H. HAUSER {Resumed}

21
22 BY MR. MORRIS:

23 Q Mr. Hauser.

24 A Mr. Morris.

25 Q Yesterday -- I am sorry -- Friday, you indicated that

1 you would check your files to see if those economic
2 studies that were referred to in your August 30,
3 1973 letter are still in existence.

4 Have you had a chance to do that?

5 A Yes I have; and we have been unable to find them in
6 our files.

7 Q Is there any other place that you can think of to look
8 that might disclose those economic studies?

9 A Not that I know of, although we are continuing to look,
10 and if we should discover them, we will so advise you.

11 Q And are they files outside of the company that you
12 think would be worth checking to see if those
13 economic studies might exist outside the company?

14 A I don't believe so.

15 We are checking our archives, which is a company
16 facility, to ascertain if there might be some material
17 there that would bear on the subject.

18 Q If there are any files outside of the company's where
19 these copies might be contained, such as in your
20 lawyer's files, would you be willing to check that?

21 A Sure.

22 Q Thank you.

23 MR. MORRIS: Mrs. Richards, would
24 you give the witness PTX-1552.

25 {After an interval.}

1 Hauser - cross

2 {After an interval.}

3 Q Mr. Hauser, you have seen that exhibit before, and it
4 is already in evidence, and you are familiar with
5 that, are you not?

6 A Yes, I am.

7 Q And would you -- well, addressing your attention to
8 the second paragraph, Mr. Hauser, where Mr.
9 Stefanski is addressing himself to the three-phase
10 project at the completion of which would be a
11 permanent interconnection.

12 Do you see that paragraph?

13 A The second paragraph?

14 Q Not the second page, the first paragraph.

15 A I am sorry -- yes.

16 Q And would you consider that language in the first
17 paragraph on the second page not only a request for a
18 permanent interconnection, but a confirmation of a
19 request for a permanent interconnection?

20 A Yes.

21 Q Have you ever failed to identify this January 15, 1970
22 request from Mury Light for a permanent interconnection
23 to anyone in an official capacity who sought
24 information concerning such request?

25 A I don't believe so.

1 Hauser - cross

2 Q Mr. Hauser, last week I had asked you about your role
3 in negotiating a license agreement for the
4 right-of-way for the pole line along the Shoreway;
5 do you recall that?

6 A Yes.

7 Q And can you identify PTX-1552 for the jury?

8 A It is a letter dated May 12, 1972, directed to the
9 Honorable Richard Hollington, Jr., Director of Law,
10 and the Honorable Warren D. Hinchee, Commissioner of
11 the Division of Light and Power, concerning the
12 license agreement for right-of-way for the 69 KV
13 temporary emergency transmission line across The
14 Illuminating Company Lakeshore plant property,
15 and the letter was designed by me, and copies were
16 directed to Mr. Phil Ardery, attorney for the City
17 and Harry Poth, attorney for CEI, and Robert Wood,
18 an attorney for the Federal Power Commission at that
19 time, and Fred Senar, one of the engineers for CEI.

20 Q And that letter was part of your activities in
connection with negotiating that license agreement;
is that right?

A That is correct.

MR. MORRIS:

Mrs. Richards, would
you hand Mr. Hauser PTX-1485, please.

1 Hauser - cross

2 MR. NORRIS: Mrs. Richards, would
3 you hand Mr. Hauser PTX-2736.

4 {After an interval.}

5 BY MR. NORRIS:

6 Q Mr. Hauser, would you look over PTX-2736 for a moment.

7 {After an interval.}

8 Q Let me ask you this question:

9 Do you remember responding to an inquiry from the
10 Antitrust Division of the United States Department of
11 Justice in March of 1971?

12 A Yes.

13 Q And is PTX-2736 a copy of the response that you
14 prepared to a series of questions from the Antitrust
15 Division in March of 1971 -- and I direct your
16 attention particularly to D-1 through D-28.

17 MR. LANSDALE: I object.

18 Q {Continuing} You can ignore the rest of the exhibit.

19 MR. LANSDALE: I object.

20 THE COURT: Approach the bench.

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

24 MR. LANSDALE: We went through this
25 in the last case, if you remember, and it is an

1 Hauser - cross

2 attempt to impeach Mr. Hauser, his statement
3 describing what was in the Toledo Edison
4 application for a license for Davis-Besse, which
5 is attached the response of CEI.

6 THE COURT: Was that before the
7 NRC?

8 MR. NORRIS: No, the Department.

9 THE COURT: The Department of
10 Justice?

11 MR. LANSDALE: It is an attempt to
12 impeach Mr. Hauser on the basis of this answer,
13 and it doesn't do it, and I object to it.
14 We went through this precise question, and we
15 went through this precise issue and precise
16 answer in the last trial.

17 THE COURT: Where is it?

18 {Transcript handed to the Court.}

19 MR. LANSDALE: It starts over on
20 page 2642.

21 THE COURT: Page 2642.

22 MR. LANSDALE: On my exhibit the
23 question and answer -- I am sorry --

24 THE COURT: Where is question
25 No. 13?

1 Hauser - cross

2 MR. LANSDALE: D-20.

3 MR. NORRIS: D-20, your Honor.

4 It is the part of the exhibit that starts
5 on D-1, and that is the CEI part of the document.

6 THE COURT: D-20 -- yes.

7 I will sustain the objection. It is
8 precisely the same question under the same
9 circumstances.

10 MR. NORRIS: I would like to argue.
11 the point, your Honor.

12 THE COURT: Certainly.

13 MR. NORRIS: Mr. Hauser has just
14 testified that the Stefanski letter of January
15 15, 1970, which was more than a year before these
16 questions to the Department of Justice --

17 THE COURT: That is what he
18 testified in the prior case.

19 MR. NORRIS: If I may make my
20 statement. It comes up different than in the
21 first trial.

22 THE COURT: All right.

23 MR. NORRIS: Mr. Hauser already
24 testified that the January, 1970 request from
25 Mr. Stefanski was not only a request for a

Hauser - cross

permanent interconnection, but a confirmation for the request for a permanent interconnection. He also testified that he doesn't recall ever failing to identify that January, 1970 request for a permanent interconnection to anyone in an official capacity who sought information concerning such a request, and if you will look at the Hauser response, A-13 on D-20.

THE COURT: I have it right here in front of me.

MR. NORRIS: Mr. Hauser addresses only the load transfer request in his answer to Question No. 13, and Question No. 13 says:

"List and describe all requests for interconnection and/or coordinate for the purchase and sales of coordinating power," and so forth.

And Mr. Hauser's response is in direct contradiction to what he already testified to.

He viewed the January, 1970 request from Stefanski as a request for a permanent interconnection, and Mr. Hauser finally seeing in his answer, he says, "There had been no other request for service."

Hauser - cross

In A-13 -- and this is a material variance from what he just now testified to, and this is proper impeachment material, and I submit that I should be permitted to put it in front of the jury.

MR. LANSDALE: My response is that I continue to be amazed at what Mr. Norris regards as credible issues.

The Exhibit 1488 says -- the clear understanding is that CEI has placed its good faith and committed itself to continuing negotiations with the City in order to effect such a permanent tie-in between our respective facilities.

This is a statement that Mr. Norris is talking about, and we both know, and it is already in evidence by this time.

THE COURT: That is the Stefanski letter -- all right.

MR. LANSDALE: We already know by this time that Mr. Howley addressed the letter dated September 30, 1970, to Mr. Bergman who, by this time, was in office, and reciting Bergman's statement to him that the City no longer was seeking a synchronous interconnection.

1 Hauser - cross

2 but was wanting a permanent tie, thus demonstrating
3 that this statement by Mr. Stefanski in this thing
4 was a statement that was exactly what it says, to
5 enter into negotiations in good faith respecting,
6 and so forth, and they had concluded.

7 Now, this is not, as I view it, it is not
8 what the circumstances show was requested here in
9 this Question No. 13, and Mr. Hauser, in his
10 answer he is perfectly correct, and this gets
11 into interpretation of the nuances as to whether
12 or not an understanding that they negotiated in
13 good faith to effect a permanent tie-in, which
14 negotiations were conducted and ended, and is a
15 request for supplying for an interconnection or
16 coordination.

17 MR. NORRIS: I would address the
18 Court's attention --

19 THE COURT: Just a minute. One
20 at a time.

21 MR. NORRIS: I would address the
22 Court's attention to the language of Question 13:

23 "List and describe all requests for
24 interconnection and/or coordination and for
25 purchases or sales of coordinated power and

1 Hauser - cross

2 energy, adjacent utilities listed in Item 9,
3 since 1960, and state applicant's response
4 thereto.

5 "List and describe all requests for supply
6 of full or partial requirements of bulk power
7 for the same period and state applicant's
8 response thereto."

9 Now, that is a question that asks for
10 information about neighboring utilities identified
11 in answer to Question No. 9.

12 MR. LANSDALE: Question No. 8.

13 MR. NORRIS: And Question 9 does
14 identify The Cleveland Municipal Electric
15 Light Plant, and the answer prepared by Mr.
16 Hauser to Question 13 omits a substantial
17 amount of territory.

18 The only thing the answer to Question 13
19 states is that there was a request for load
20 transfer service, and Mr. Hauser's responses
21 are inadequate in the sense that it does not
22 respond to the question that was put by the
23 Department, and it omits any reference to a
24 request for a permanent interconnection, and
25 Mr. Hauser already testified that he viewed the

1 Hauser - cross

2 January, 1970 letter as a request for a permanent
3 interconnection, and that is a direct inconsistency
4 and a material variance, and therefore it goes to
5 the issue of credibility, and to the inferences,
6 and it is not for counsel to draw the inferences.
7 It is for the jury to draw the inferences.

8 THE COURT: Go ahead, Mr.
9 Lansdale.

10 MR. LANSDALE: I can't help them
11 observing that the original question which he
12 now seeks to impeach Mr. Hauser for
13 answering -- I probably should have objected to
14 as irrelevant.

15 You cannot escape the impression that the
16 first question was asked not to elicit
17 information relevant to this case, but to try to
18 get Mr. Hauser to answer a question inconsistently,
19 and if there be an inconsistency to an
20 irrelevant question, it hardly goes to the
21 issue that need concern the jury; but I don't
22 wish by my statement in that respect to indicate
23 I am backing away at all, and in fact the matter
24 is the first question was answered truthfully
25 and factually, and the documentation makes

1 Hauser - cross

2 perfectly clear what was happening; and the
3 response to the Department of Justice reflected
4 in the exhibit, Plaintiff's Exhibit 273b, is a
5 truthful and accurate response, and his answer
6 on the stand is truthful and accurate, and I
7 submit --

8 THE COURT: Well, your argument
9 now is an argument that was made before on page
0 2644 of the record. There you say, "The point
1 is Mr. Hauser testified that the January 15, 1970,
2 letter was a request for permanent interconnection,
3 and then when he responds a year later to the
4 Department of Justice asking him to list all
5 requests for permanent interconnections, and then
6 omits this, and the jury can infer this was an
7 untruthful response."

8 I will sustain the objection.

{End of bench conference.}

BY MR. NORRIS:

Q Mr. Hauser, is it your testimony that CEI refused a
request for a permanent interconnection in 1971?

THE COURT: Are you objecting or
not?

1 Hauser - cross

2 MR. LANSDALE: I would like to
3 approach the bench.

4 THE COURT: All right.
5

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

9 THE COURT: Read the question.

10 {Pending question read.}

11 MR. LANSDALE: I don't recall any
12 such testimony.

13 Is this a fresh question or a reference to
14 previous testimony?

15 MR. NORRIS: It is a reference to
16 last week's testimony.

17 He stated the company refused the request
18 for an interconnection because the City hadn't
19 paid its bill.

20 MR. LANSDALE: All right. I will
21 withdraw. I didn't remember such testimony.

22 {End of bench conference.}

23 - - - - -
24 THE COURT: Read the question.

25 {The pending question was read by the
reporter as follows:

1 Hauser - cross

2 "Q Mr. Hauser, is it your testimony
3 that CEI refused a request for a permanent
4 interconnection in 1971?"}

5 A No, Mr. Norris. I think I previously testified that
6 until the City had paid the delinquent amounts, or
7 made an arrangement for payment of the delinquent
8 amounts in 1971, that we would not discuss further a
9 permanent interconnection.

10 Q Your unwillingness to discuss the permanent
11 interconnection was based upon Muny Light's
12 non-payment of bills; is that your testimony?

13 A Yes.

14 Q It is a fact, isn't it, Mr. Hauser, that CEI did not
15 refuse to provide load transfer service at any time
16 because of Muny Light's non-payment of bills; is that
17 correct?

18 A That is correct, although we were very conscious
19 when we were providing load transfer service that the
20 City was delinquent in paying for that service.

21 Q But on the non-payment of bills, that did not stop CEI
22 from providing the load transfer service; is that
23 right?

24 A That is correct.

25 Q But the on-payment of bills was sufficient in your

1 Hauser - cross

2 view to prevent the company's sitting down on a
3 good-faith basis to discuss the engineering for the
4 permanent interconnection; is that your testimony?

5 A Yes, it is.

6 Q Am I correct that in 1970, CEI advised the City that
7 the permanent 138 interconnection would cost
8 somewhere between \$3 million and \$5 million?

9 A Yes. As I recall it was three to four million
10 dollars, but it could have been three to five
11 million dollars.

12 Q And is it not accurate, Mr. Hauser, that at that very
13 time, in 1970, that representation was made to the
14 City; that CEI had information in its possession that
15 the cost could actually have been much less than this
16 amount; is that not correct?

17 A Not to my knowledge.

18 MR. NORRIS: Mrs. Richards, would
19 you hand Mr. Hauser PTX-531.

20 {After an interval.}

21 Q Mr. Hauser, is PTX-531 a memorandum from Mr. Howley,
22 Fitzgerald and Loshing, in February of 1968?

23 A The date is a little blurred, but it could be
24 February 27 of 1968.

25 Q Look at the paragraph at the bottom of the first

1 Hauser - cross

2 of the first page and read that to yourself.

3 A Paragraph 4?

4 Q Yes.

5 A {The witness complies.}

6 Q Mr. Hauser, am I correct that you were indicating as
7 part of any interconnection between CEI and Muny Light
8 that CEI would demand a territorial restriction upon
9 Muny Light so that in return for the interconnection
10 Muny Light would have to give up customers; is that a
11 fair statement?

12 MR. LANSDALE: Objection -- well, I
13 will withdraw the objection.

14 A That could be an interpretation, yes.

15 Q Look at the first paragraph of your memo, Mr. Hauser.
16 Tell me whether you have read the first paragraph?

17 A I have read it.

18 Q Am I correct that what you were saying to Mr. Howley
19 and Mr. Fitzgerald and Mr. Loshing was that Muny
20 Light, as an isolated system without an interconnection
21 would -- and assuming that it had a reliable source of
22 electricity, that this would be an important reason
23 not to have an interconnection because of the safety
24 and other governmental functions performed by the
25 City?

1 Hauser - cross

2 A Yes. This is one of the statements that Mr. DeMelto,
3 who was with the Municipal Electric System, had made
4 publicly subsequent to the Northeast Power blackout.

5 Q But this is your memo that you have in front of you,
6 and I am asking you whether or not this is what you
7 were stating to Mr. Howley, that Muny Light,
8 continuing as an isolated system and not interconnected,
9 would have a benefit -- that the City would have a
10 benefit from the standpoint of the City and other
11 governmental functions?

12 A In the preceding paragraph it states, "The following
13 are some of the arguments," and Paragraph 1 is
14 primarily an argument of Mr. DeMelto's.

15 Q Then you didn't believe the argument?

16 A I can't quarrel with the argument. You would have to
17 consider the argument in favor of maintaining an
18 independent system in comparison with the arguments
19 for an interconnected system.

20 Q But you put that argument in this memorandum, did
21 you not?

22 A Yes, I did.

23 Q Am I correct that you also put another argument in
24 this memorandum that argued against interconnection
25 on the basis of Muny Light's purchasing power from CEI

1 Hauser - cross

2 over the interconnection, and Muny Light would thereby
3 lose its independence and be dependent on CEI, and it
4 would be the beginning of the end of MELP.

5 Isn't that an argument you put forth?

6 A That is correct, and that was also advanced by Mr.
7 DeMalto and Mr. Turkel, one of the City's engineers.

8 Q Did you believe this argument at the time you wrote
9 this memorandum?

10 A This is the argument that was made, and I would
11 certainly think that there was some basis for the
12 argument.

13 Q Did you believe the argument; that is my question.

14 A Yes, I think I did.

15 Q And did you also believe that Muny Light would thereby
16 no longer be a yardstick?

17 A Yes.

18 Q And isn't it a fact you believed all the arguments
19 that were contained in your memorandum, PTX-531, is
20 that correct?

21 A With the exception of No. 1.

22 Q Thank you.

23 MR. NORRIS:

Mrs. Richards,

24 please give Mr. Hauser PTX-538 and PTX-3255.

25 Is there a copy of 3255 for Judge Kupansky?

1 Hauser - cross

2 MRS. RICHARDS: Yes.

3 {After an interval.}

4 BY MR. NORRIS:

5 Q Mr. Hauser, please look at PTX-538, Mr. Loshing's
6 June 17, 1969 memorandum to Mr. Howley, and you have
7 seen that memorandum before, have you not?

8 THE COURT: Just a moment -- 538?

9 MR. NORRIS: Yes, your Honor.

10 THE COURT: Go ahead. I have it.

11 A Yes; I have seen it before.

12 Q And in the second paragraph of Mr. Loshing's June 17,
13 1969 memorandum, he makes reference to a comprehensive
14 engineering study on Muny Light performed recently by
15 Mr. L. O. Beck, and I would like to inquire, do you
16 have knowledge as to whether or not the other exhibit,
17 3255, is the Beck comprehensive engineering study on
18 Muny Light which Mr. Loshing mentioned in his
19 memorandum?

20 A I don't know, Mr. Norris, whether it is or not.

21 Q All right.

22 Have you ever seen PTX-3255 before?

23 A Yes, this morning for the first time.

24 MR. NORRIS: May I approach the

25 bench?

1 Hauser - cross

2 THE COURT: Yes.

3 - - - - -

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

6 MR. LANSDALE: We have no objection
7 to their stating to the jury that the Exhibit 3255
8 is indeed the document referred to in PTX-538.

9 MR. NORRIS: In the second
10 paragraph --

11 MR. LANSDALE: In the second paragraph.

12 MR. NORRIS: We agree, and we would
13 appreciate your so informing the jury.}

14 THE COURT: All right. 3255
15 is the Beck report?

16 MR. NORRIS: Yes, the Beck memo
17 is dated May 15, 1969.

18 THE COURT: All right.

19 {End of bench conference.}

20 - - - - -

21 THE COURT: Ladies and gentlemen
22 of the jury, I am informed, and I so inform you,
23 that the Beck report referred to in Exhibit 538,
24 namely, the Loshing letter to Howley, dated
25 June 17, 1969, is Plaintiff's Exhibit No. 3255.

Hauser - cross

namely, the Beck report, dated May 15, 1969.

MR. NORRIS: Thank you, your Honor.

BY MR. NORRIS:

Q Mr. Hauser, during 1972, and 1973, did you do anything designed to delay or make more difficult or that might have had an effect of delaying or making more difficult the City's obtaining of capital improvement funds for the benefit of Muny Light?

MR. LANSDALE: Objection.

THE COURT: Approach the bench.

- - - - -

{The following proceedings were had at the bench:}

MR. LANSDALE: I assume that this is an attempt to lay the foundation to get in a claim that some lobbying activity was engaged in at the City Council, and I object to it.

MR. NORRIS: It goes to credibility, and if the Court refuses me to ask that question, I will in any respect fully request the Court to bring in an offer of proof as we did in the first trial on this issue.

THE COURT: Sustained as to the

1 Hauser - cross

2 procedure, Mr. Norris.

3 In cases such as this the procedure is that
4 if the Court permits a proffer of evidence to an
5 objection that is sustained, the proffer must be
6 made at the time. It is not to be brought in
7 two days later or the next day or afterwards.

8 MR. NORRIS: We can make the
9 proffer now.

10 THE COURT: -- because I have got
11 to know what the proffer is when I evaluate the
12 objection.

13 Read the question back, please.

14 {Pending question read by the reporter as
15 follows:

16 "Q Mr. Hauser, during 1972, and 1973,
17 did you do anything designed to delay or make
18 more difficult or that might have had an effect
19 of delaying or making more difficult the City's
20 obtaining of capital improvement funds for the
21 benefit of Munny Light?"

22 THE COURT: Now, tell me what
23 the proffered answer is.

24 MR. NORRIS: In the voir dire
25 Mr. Hauser was asked questions about the

1 Hauser - cross

2 deposition taken in 1975, and he indicated in
3 that deposition, and again in the voir dire the
4 other day, that he had designed and had drafted
5 amendments to Ordinance 2104-72, and the proffer
6 that I would make would consist of questions
7 designed to elicit testimony that Mr. Hauser
8 already had given on other occasions, detailing
9 his participation in the amendment of Ordinance
10 2104-72.

11 THE COURT: I don't know what
12 that is.

13 MR. NORRIS: That is the bond
14 ordinance.

15 THE COURT: I assume that it is
16 the bond ordinance, but I don't know beyond the
17 generalizations that you just indicated to me
18 what he testified to in his deposition or on the
19 voir dire.

20 MR. LANSDALE: May I ask a question?
21 Are you in effect proffering the testimony of
22 Mr. Hauser, that Mr. Hauser gave on the voir dire
23 in chambers?

24 MR. NORRIS: I am proffering, yes.
25 I have a reference to that.

1 Hauser - cross

2 MR. LANSDALE: Well, we have been
3 through this, then.

4 MR. NORRIS: Well, I have to make
5 my record, and I am raising for the Court's
6 consideration the City's need to explore the
7 credibility of this witness, not on Noerr-Pennington
8 grounds, but on credibility grounds, and, yes, the
9 evidence --

10 THE COURT: Well, was it -- well,
11 go ahead. Finish. I am sorry.

12 MR. NORRIS: -- and among other
13 things I would proffer the Hauser testimony at
14 Transcript 13853, line 22 through 13856, line 7.

15 I would also proffer --

16 THE COURT: Is that the voir dire?

17 MR. NORRIS: Yes, your Honor, and
18 I would also proffer --

19 THE COURT: Joe, get me that.

20 MR. NORRIS: I would also proffer
21 the deposition. I mean, I would proffer questions
22 to elicit the material testimony put to Mr.
23 Hauser in July of 1975, at his deposition, pages
24 111, 112, 113, and 114, and 200.

25 Now, this testimony in substance is as

1 Hauser - cross

2 follows; that Mr. Hauser proposed amendments to
3 the bond ordinance, and Mr. Hauser drafted
4 amendments, and that these amendments were given
5 to one or more members of the City Council, and
6 one amendment was that the bonds be sold to other
7 than the Sinking Fund, and that these amendments
8 would have made the bonds more difficult for the
9 City to sell, and that the amendments which Mr.
10 Hauser prepared had the effect of precluding the
11 sale of the bonds to the Sinking Fund, and I
12 would also --

13 THE COURT: Are you claiming that
14 that is not Noerr-Pennington legislative activity?

15 MR. NORRIS: If the witness
16 denies that he did these things, then I would
17 submit that.

18 MR. LANSDALE: I am told you can be
19 heard all the way down to the end.

20 MR. NORRIS: I am saying, your
21 Honor, that if this question to which objection
22 has been interposed is answered truthfully, that
23 there would be no credibility issue.

24 If it is answered negatively, as I suspect
25 that it would be answered, then the City would

Hauser - cross

seek to put in this evidence that would contribute the response that the witness has made to the question to which objection has now been interposed.

Now, just one last point on the proffer:

The voir dire examination, your Honor, 13,853 to 13,856 goes to the proposition that Mr. Hauser stated that he did have conversations with Mr. Gaul with respect to the amendment of Section 3 of 2104-72, so that my proffer would include questions designed to elicit whatever those conversations were and what Mr. Hauser's role was with respect to bringing about the amendment to Section 3, 2404-72.

MR. LANSDALE: May I respond?

THE COURT: Yes.

MR. LANSDALE: I cite to your Honor Rule 608. It is perfectly plain that what in a nutshell -- what Mr. Norris said is that he can show evidence inadmissible under Noerr-Pennington on the merits for the purposes of showing that the witness has made inconsistent statements about it and to on that basis attack his credibility.

Rule 608 provides that, "In specific

1 Hauser - cross

2 instances the conduct of a witness for the
3 purposes of attacking its credibility other than
4 conviction of crime may not have been proven from
5 extrinsic evidence.

6 "It may however in the discretion of the
7 Court if a problem of truthfulness be inquired on
8 cross-examination of the witness concerning
9 {1} concerning his character for truthfulness
10 or untruthfulness or {2} concerning the
11 character for truthfulness or untruthfulness of
12 another witness."

13 This is evidence to attack the credibility
14 of this witness generally, and to ask questions
15 generally solely for the purposes of attacking
16 credibility. This is the initial foundation
17 decision not designed to eliminate admissible
18 evidence but designed to ask the question that
19 he thinks he may be able to find an inconsistent
20 statement to attack credibility; therefore, this
21 is clearly Rule 608 stuff, which is not
22 admissible, and I object to this whole proceeding.

23 THE COURT: Yes. Rule 608 is
24 clear in its requirement, Mr. Norris. Do you
25 wish to respond?

1 Hauser - cross

2 MR. NORRIS: I have nothing
3 further to say.

4 THE COURT: I will sustain the
5 objection.

6 MR. NORRIS: I have one other
7 item to put on the record:

8 The rest of Mr. Hauser's examination would
9 have dealt with the transmission line issue, and
10 I will defer going into that kind of material
11 because it is more appropriately reserved for
12 the rebuttal case, but I would like to put on the
13 record now my desire to call Mr. Hauser back if
14 the defendants put on evidence, as I suspect
15 they will, and I would then reserve the right to
16 call Mr. Hauser back on rebuttal and put
17 additional questions to him dealing with the
18 transmission area.

19 MR. LANSDALE: I don't wish by my
20 silence to indicate what I have in mind is or
21 is not proper rebuttal.

22 THE COURT: I don't see any
23 reason -- if the evolution of the evidence
24 warrants your recalling Mr. Hauser for
25 further examination on rebuttal, it may be done.

1 Häuser - cross

2 MR. LANSDALE: If it is proper
3 rebuttal, I have no objection.

4 MR. NORRIS: Thank you.

5 {End of bench conference.}

6 - - - - -

7 MR. NORRIS: No further questions.

8 THE COURT: Are you desirous of
9 making any inquiry?

10 MR. LANSDALE: Yes, your Honor.

11 - - - - -

12
13 REDIRECT EXAMINATION OF DONALD H. HAUSER

14
15 BY MR. LANSDALE:

16 Q Mr. Häuser, on direct examination you were
17 interrogated concerning --

18 THE COURT: "Cross-examination."

19 MR. LANSDALE: Sir?

20 THE COURT: You mean on Mr.
21 Norris's cross-examination.

22 Q Mr. Häuser, you were interrogated by Mr. Norris on
23 cross-examination concerning the demand of CEI for
24 acquiescence of the City of Cleveland in its street
25 light contract as a condition in giving them service

1 Hauser - redirect

2 over the 69 KV line.

3 Will you please tell us the circumstances
4 concerning that street lighting contract and why the
5 company took such action, if you know?

6 A Well, we took a number of factors into consideration.

7 As I mentioned, street light contract, also, the
8 liability, in addition, at that time, the City had
9 paid nothing for street light rates from January
10 through October, they finally made some payments in
11 November --

12 THE COURT: What year?

13 THE WITNESS: of 1972.

14 A {Continuing} In November of 1972, they did make
15 payments, I think, the total of \$400,000. But as of
16 the date of the request for service over the 69 KV
17 line, they were delinquent some \$590,000 plus a few
18 for street lighting service, and they were
19 delinquent for the load transfer service at that
20 point in December of 1972 of -- the delinquency was
21 around \$761,000.

22 Q When did you finally get the street lighting arrangements
23 straightened out?

24 A The street lighting contract was not signed until
25 November 27 of 1973.

1 Hauser - redirect

2 Q And how long has the City been holding the street
3 lighting contract without signing or paying its bills?

4 A Since about early 1971.

5 Q And what is the fact as to the similarity of the
6 proposed street light contract with the City of
7 Cleveland in relation to similar contracts with
8 the other municipalities in your service area?

9 MR. LANSDALE: Objection, your

10 Honor.

11 THE COURT: Approach the bench.

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

15 MR. LANSDALE: Objection on the
16 ground of relevance.

17 I don't see what that has to do with the
18 issues in this case whether it was like other
19 contracts in the area or whether it wasn't like
20 other contracts in the area.

21 MR. NORRIS: I think I'm entitled
22 to show that when they tried to impose anything
23 discriminatory on the City of Cleveland, it's
24 the same thing we're getting from everybody else,
25 part of the equities of refusing to go ahead until

1 Hauser - redirect

2 they signed.

3 THE COURT: Yes, I think that
4 that -- let me ask you this.

5 I don't know -- read the question back.

6 The form of the question is not well taken.

7 {The pending question was read by the
8 reporter as follows:}

9 "Q And what is the fact as to the
10 similarity of the proposed street light contract
11 with the City of Cleveland in relation to similar
12 contracts with the other municipalities in your
13 service area?"}

14 THE COURT: Whether the proposed
15 contract -- are you talking about --

16 MR. NORRIS: Yes, sir.

17 THE COURT: -- that was finally
18 adopted?

19 Clarify the question.

20 Sustain the objection as to form.

21 MR. NORRIS: I'm also going to
22 interpose objections if your questions become
23 unduly leading, because it's my understanding
24 that, with your own witness, that you are under
25 the same constraints as if you were on direct

Hauser - redirect

examination.

MR. LANSDALE:

THE COURT: All right.

{End of bench conference.}

- - - - -

BY MR. LANSDALE:

Q Mr. Hauser, with respect to the contract you were trying to get the City to sign in connection with this episode, what is the fact as to the similarity of that contract to other contracts with municipalities in the company's service area?

A It was almost identical, with one exception:

The payment terms were more liberal insofar as the City of Cleveland was concerned; and, in fact, while the contracts were identical, the new contract rates were not changed for the year 1972.

Q Thank you.

Now, Mr. Hauser, you indicated that one of the problems -- I forget, my notes are unclear whether it was in 1973 or 19 -- 1973, I think, relative to load transfer service, was the existence of a coal strike -- do I have the right year?

A Yes.

Q What difference would it make whether there was a

1 Hauser - redirect

2 coal strike in the coal mines to CEI's problem
3 relative to providing load transfer service?

4 A One, you would have difficulty getting -- it would be
5 very difficult to get normal rail shipments of coal,
6 which is a problem in and of itself.

7 Secondly, that would mean that coal would have
8 to be taken from the coal stockpiles at each of the
9 generating plants.

10 Being during the wintertime, the stockpiles, of
11 course, had some moisture in them and, in freezing
12 weather, it makes -- coal freezes, it makes it more
13 difficult to remove the coal from the stockpile,
14 which is a burden on operating personnel at any time
15 that they have to take coal from the stockpile, even
16 in the middle of the summer.

17 Q Now, you were asked whether or not CEI refused -- made
18 an attempt to stop load transfer service for
19 non-payment of bills.

20 What is the fact, Mr. Hauser, as to the ground
21 of -- one of the grounds of the attempt by the City
22 to secure permission of the Federal Power Commission
23 to cease load transfer service relative to the
24 payment of bills?

25 Do you recall that?

1 Hauser - redirect

2 A I wonder if I could have the question reread.

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

5 {The pending question was read by the
6 reporter.}

7 MR. LANSDALE: I just used the
8 wrong party, I was thinking --

9 THE COURT: Rephrase your
10 question.

11 BY MR. LANSDALE: . . .

12 Q My question relates to an application by CEI to the
13 Federal Power Commission with respect to the
14 discontinuance of load transfer service?

15 A When we filed an application to terminate the load
16 transfer service in May of 1971, the principal
17 ground was the failure of the City to pay for load
18 transfer service almost since the beginning when
19 load transfer service first started.

20 We had earlier in 1971, February, filed an
21 action in Common Pleas Court here in Cuyahoga County
22 to recover the delinquent indebtedness which, at that
23 time, was a million three hundred thousand dollars
24 plus a few dollars.

25 MR. LANSEALE: I have no further

Hauser - redirect

questions.

- - - - -

RE-CROSS-EXAMINATION OF DONALD H. HAUSER

BY MR. NORRIS:

Q Mr. Hauser, in 1973, during the time of the CEI strike was also a period of an energy shortage in this Northeast Ohio area, is that not correct?

A In CEI's service area, there were times that we had to interrupt interruptible customers; we were generating all we could plus purchasing all that we could from external sources.

Q And when you were purchasing power from external sources in 1973, had there been an interconnection, those purchases -- strike that.

Had there been an interconnection between CEI and Muni Light in 1973, those purchases that CEI was making from external sources during the period of the strike could conceivably have benefited Muni Light, is that correct?

MR. LANSDALE:

I object, if your

Honor please.

May I approach the bench?

1 Hauser - recross

2 THE COURT: Approach the bench.

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

6 THE COURT: Read the question
7 back.

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

10 "Q Had there been an interconnection
11 between CEI and Munny Light in 1973; those
12 purchases that CEI was making from external
13 sources during the period of the strike could
14 conceivably have benefited Munny Light, is that
15 correct?"}

16 MR. LANSDALE: My objection is to
17 the fact that this is not proper recross.

18 He's inquiring about the CEI strike. I
19 inquired about the coal strike. It's a different
20 subject and a different time period.

21 MR. NORRIS: The examination by
22 Mr. Lansdale was directed to all of the
23 difficulties that CEI had during 1973, the coal
24 strike being one of them.

25 MR. LANSDALE: Well, if your Honor

1 Hauser - recross

2 please --

3 THE COURT: Just a moment.

4 MR. NORRIS: And my question --

5 I mean, that's why they have interconnections,
6 so that if there are these operating problems
7 that, for reliability purposes, an interconnection
8 will supply reliability to the neighboring
9 utility system.

10 THE COURT: Here's the redirect
11 examination sequence.

12 First, inquiry was made as to the City's
13 acquiescence to the -- I'm sorry -- let me find
14 it.

15 {After an interval.}

16 THE COURT: As a condition for
17 providing 69 KV service, he testified the City
18 still owed from January to November, '72 money.

19 In November, it made a \$400,000 payment;
20 still had some 800,000 plus delinquency.

21 Street lighting contract was signed November
22 19, 1973, was held by the City. 1971, the
23 similarity between proposed contract with the
24 City of Cleveland and contracts with other
25 municipalities almost identical except payment

1 Hauser - recross

2 terms more liberal for Muny. New rates were not
3 interposed -- or were not imposed for the year
4 1972.

5 Then we go to the coal strike, and the
6 question was: Did the coal strike in 1973
7 affect CEI's service?

8 That's the substance of the question.

9 The answer: Yes; it would become more
10 difficult to get normal coal shipments, and it
11 required reduction of stockpiles which made it
12 more difficult for operating personnel.

13 MR. LANSDALE: On that point.--

14 THE COURT: And --

15 MR. LANSDALE: -- my point, your
16 Honor please, is that Mr. Norris went into both.

17 THE COURT: I understand.

18 MR. LANSDALE: I'm trying to find
19 out -- I didn't think it was clear to the jury --
20 I think it's clear to the jury why a strike on
21 CEI's system would create problems for them; I
22 didn't think it was apparent to the jury why a
23 coal strike in the coal mines would create a
24 problem.

25 THE COURT: I don't understand the

1 Hauser - recross

2 purpose of your question, Mr. Norris.

3 It appears to be going beyond his redirect
4 examination.

5 Read the question back again.

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

8 "Q Had there been an interconnection
9 between CEI and Muny Light in 1973, those
10 purchases that CEI was making from external
11 sources during the period of the strike could
12 conceivably have benefited Muny Light, is that
13 correct?"}

14 THE COURT: Sustain the objection.

15 MR. NORRIS: It's during the period
16 of the strike, your Honor, the same strike Mr.
17 Lansdale's question was going to.

18 THE COURT: I understand that; but
19 the substance of your question attempts to go
20 off on another trend.

21 MR. NORRIS: I would respectfully
22 submit that Mr. Lansdale is suggesting in his
23 question that the pendency of a coal strike should,
24 for some reason, make it difficult for CEI to
25 provide service to Muny Light.

1 Hauser - recross

2 And I think my question, your Honor,
3 addresses the other side of that coin, namely,
4 that that's why you have interconnections, and I
5 think it's a perfect response to the question put
6 by the --

7 THE COURT: Read the question
8 back.

9 That's not what the question was.

10 Read the question back.

11 [The question was reread by the reporter as
12 follows:

13 "Q Had there been an interconnection
14 between CEI and Muny Light in 1973, those
15 purchases that CEI was making from external
16 sources during the period of the strike could
17 conceivably have benefited Muny Light, is that
18 correct?"]

19 THE COURT: Sustain the objection.

20 Let's proceed.

21 BY MR. NORRIS:

22 Q Mr. Hauser, is it a fact that CEI has had the same
23 kind of difficulty in obtaining coal as Muny Light has
24 had during the time that both systems were generating
25 systems?

1 Hauser - recross

2 A I don't know anything about the difficulties that
3 Munny Light had.

4 Q Do you recall ever testifying about that subject
5 before?

6 A No, not that I recall.

7 {After an interval.}

8 MR. NORRIS: Mr. Lansdale, I
9 address your attention to page 241 of the
10 deposition on July 18, 1975, lines 1 through 5,
11 but the pickup is on the previous page.

12 {After an interval.}

13 MR. LANSDALE: Your Honor, I ask to
14 approach the bench.

15 THE COURT: Approach the bench.

16 - - - - -

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

19 MR. LANSDALE: If your Honor please,
20 I don't know what it has to do with the redirect.

21 {A copy of the deposition turned to the
22 page referred to by Mr. Norris was handed to the
23 Court by Mr. Lansdale.}

24 MR. LANSDALE: But, in any event,
25 he has got testimony here in that he speculates

1 Hauser - recross

2 that they would have had the same problems that
3 we have, and then he says he's heard from
4 somebody else what problems they had.

5 He said here that he doesn't know about Muny
6 Light's problems.

7 MR. NORRIS: This witness --

8 MR. LANSDALE: It's true he has no
9 knowledge of his own.

10 MR. NORRIS: This witness says
11 he doesn't know anything about the coal problems
12 of Muny Light and, yet, on the deposition he knew
13 something about the coal problems that Muny Light
14 had, and that's certainly a variance, and I have
15 a right to not be interfered with in my
16 recross-examination.

17 {The Court reading silently.}

18 THE COURT: What do you claim the
19 probative value of the parent question is:
20 Did Muny Light have similar problems that CEI
21 had in purchasing coal, assuming that they did
22 have?

23 MR. NORRIS: Credibility, your
24 Honor.

25 THE COURT: You're asking a

1 Hauser - recross .

2 question for the sole purpose of trying to get an
3 answer that is not substantive nor probative in
4 nature for the purpose of -- sustain the
5 objection.

6 MR. NORRIS: Any material
7 variation that the witness utters is fair game
8 on credibility.

9 THE COURT: Very well.

10 Sustain the objection.

11 {End of bench conference.}

12 - - - - -

13 MR. NORRIS: No further questions.

14 MR. LANSDALE: No further questions.

15 THE COURT: Step down.

16 - - - - -

17 MR. NORRIS: Your Honor, could we
18 call one more witness and try to get Mr. Rego on
19 the stand today, Mr. Lucian Rego.

20 THE COURT: How long will he be?

21 MR. NORRIS: I think it's very
22 short, your Honor.

23 THE COURT: I don't know what
24 "very short" means.

25 Can you give me --

1 MR. NORRIS: I have no control
2 over cross-examination.

3 THE COURT: It may not be
4 "very short" to me, something that may be "very
5 short" to you.

6 How long do you anticipate?

7 MR. NORRIS: I anticipate ten
8 minutes, your Honor.

9 MR. LANSDALE: Do you expect me not
10 to cross-examine?

11 THE COURT: It's now ten minutes
12 to 4:00.

13 MR. NORRIS: Well, I simply make
14 the request for the witness's convenience.

15 THE COURT: Ladies and gentlemen
16 of the jury, do you mind remaining over? You've
17 been resting for a while, so maybe we'll stay
18 over past 4:00 o'clock.

19 There aren't that many exhibits of the day
20 for you to look at.

21 - - - - -
22
23
24
25

1 LUCIAN C. REGO,

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

5
6 DIRECT EXAMINATION OF LUCIAN C. REGO

7
8 BY MR. NORRIS:

9 Q Mr. Rego, would you state your full name?

10 A Lucian C. Rego.

11 Q And your address, please?

12 A 19113 Coffinberry Boulevard, Fairview Park.

13 Q What is your educational background?

14 A Graduate of Xavier University, Cincinnati, Ohio,
15 with a Bachelor's degree; and a graduate of
16 Cleveland Marshall School of Law with a Jurist
17 Doctor degree.

18 Q And a brief description, please, of your employment
19 history after getting out of college?

20 A I worked, beginning in January of 1970, for the City
21 of Cleveland for the Utilities Department basically
22 as an assistant to the director.

23 When I passed the Bar in May of 1971, I joined
24 the Law Department, and I was in the Law Department
25 until March of 1973.

1 Rego - direct

2 Q Mr. Rego, addressing your attention to the time that
3 you were in the Law Department of the City of
4 Cleveland, were you an Assistant Law Director?

5 A Yes, I was.

6 Q To what extent did your responsibilities as an
7 Assistant Law Director pertain to the City's
8 purchasing of goods and services from outside parties?

9 A I worked a good deal on contracts for purchases of
10 goods and services, basically dealing with the
11 Utilities Department, preparing contracts, negotiating
12 where necessary.

13 Q At what point does the procurement of goods and
14 services by purchase order have to be authorized by
15 ordinance passed by City Council?

16 A Anything over \$3,500 had to be authorized by City
17 Council.

18 Q Now, after an ordinance is passed -- and assume it is
19 something over \$3,500 -- after an ordinance is passed
20 and a purchase order is issued for a specific goods
21 and services, what does the outside contractor have
22 to do in order to obtain payment from the City?

23 A Well, first, perform the service or supply the goods,
24 or whatever was to be purchased; and, upon satisfactory
25 completion, submit an invoice for payment.

1 Rego - direct

2 MR. NORRIS: Mrs. Richards, would
3 you please give Mr. Rego all three exhibits at the
4 same time:

5 PTX-3080, PTX-833, and PTX-3235.

6 {Exhibits handed to the witness by Mrs.
7 Richards.}

8 BY MR. NORRIS:

9 Q Mr. Rego, addressing your attention, first, to
10 PTX-3080, can you identify that for the jury?

11 I'm addressing your attention to the lower
12 right-hand corner of the first page of 3080, then
13 continuing on to the second page.

14 A You're referring to Ordinance No. 642-72?

15 Q Yes.

16 Are you familiar with Ordinance 642-72?

17 A Insofar as it's a standard City Ordinance, --

18 Q Well, there has been testimony already, Mr. Rego, by
19 Mr. Hauser, that this is the ordinance that authorized
20 the purchase order for the \$62,000 worth of goods and
21 services for the work at CEI's end of the interconnection;
22 and were you familiar with that ordinance at the time
23 it was going through City Council and subsequent
24 thereto?

25 A I'm sure I was.

1 Rego - direct

2 I was familiar with virtually all of the
3 Utilities Department legislation at that time.

4 Q And it was passed June 12, 1972, is that correct?

5 A Yes.

6 Q Would you kindly address your attention to PTX-3235?

7 {The witness complies.}

8 Q Can you identify 3235?

9 A It's a purchase order of the City of Cleveland,
10 purchase order dated August 8th, '72, refers to
11 Ordinance No. 542-72.

12 Q And it's issued to whom?

13 A To The Cleveland Electric Illuminating Company,
14 attention Mr. Hauser.

15 Q And in the amount of how much?

16 A \$62,000.

17 Q Now, how soon could CEI have received payment from
18 the City following its receipt of this purchase
19 order?

20 A Upon completion of the work and submittal of an
21 invoice.

22 Q Mr. Rego, -- were you through?

23 A Well, I was just going to say that the funds are
24 certified according to the ordinance and the purchase
25 order, so that the funds were available for payment.

1 Rego - direct

2 Q Do you know Donald Hauser?

3 A Yes, I do.

4 Q And did you have occasion to work with him from time
5 to time when you were an Assistant Law Director?

6 A Yes, I did.

7 Q Would you please turn your attention to PTX-833?

8 {The witness complies.}

9 Q Can you identify PTX-833?

10 A This -- it's a City of Cleveland inter-office
11 memorandum which I wrote on July 13th, 1972, it's
12 directed to then Commissioner Warren Hinchee,
13 Division of Light & Power.

14 Q What was the subject of this memorandum?

15 A The subject is -- apparently Commissioner Hinchee
16 had asked me a question relative to 542-72, and I am
17 responding in this memorandum with respect to my
18 opinion regarding the question he asked concerning
19 a formal contract with CEI.

20 I indicated in the memorandum that I had on that
21 date talked to Mr. Hauser, and he had indicated to me
22 that the issuance of a purchase order would be
23 acceptable to CEI as the contract.

24 Q Can you state the date upon which that conversation
25 took place with Mr. Hauser?

1 Rego - direct

2 A July 13th, 1972.

3 Q And what did you do following that conversation with
4 Mr. Hauser concerning this issue?

5 A I believe what I did is I wrote this memorandum to
6 Commissioner Hinchee in response -- because after
7 having talked to Mr. Hauser, I had the response that
8 I was going to give Commissioner Hinchee, and I
9 wrote the memorandum to him --

10 MR. NORRIS: No further questions.

11 A -- indicating it:

12 MR. NORRIS: No further questions.

13
14
15 CROSS-EXAMINATION OF LUCIAN C. REGO

16
17 BY MR. LANSDALE:

18 Q Mr. Rego, do you have any present recollection of these
19 events, or are you just reading from memoranda?

20 A My present recollection is based on my reading of the
21 memorandum.

22 Q What memoranda and material did you read in preparation
23 for your testimony?

24 A I saw the Exhibit 833, 8225, and 8080.

25 Q That's the ordinance?

1 Rego - cross

2 A Yes.

3 Q The latter is the ordinance. . . .

4 And your memory is limited to what's contained
5 in those memoranda and documents?

6 A Yes; in addition to the fact that I obviously signed
7 the memorandum, No. 833.

8 Q Yes, I said you obviously did.

9 But your present recollection is limited to what
10 is disclosed in these memoranda?

11 A Yes.

12 Q Mr. Rego, I note in Exhibit 3235 that it says --
13 do you have it in front of you?

14 A Yes.

15 Q -- "All material purchased under this requisition
16 shall become and remain the property of the City of
17 Cleveland, Division of Light & Power."

18 What's the significance of that statement?

19 A I believe that just is an indication that because
20 the City was paying for it, it would become their
21 property.

22 Q I see.

23 A The material.

24 Q Pardon your pardon?

25 A The material.

1 Rego - cross

2 Q The material, right, that's what it said.

3 And do I -- is it a fair statement that purchase
4 orders are usable only in cases where the material
5 purchased is to become the property of the City?

6 {Pause.}

7 Q Or material paid for, let me say it that way?

8 A Purchase orders were used for every purchase, whether
9 it was a service or a good, if you will, in the terms
10 of purchasing of goods, it would always become the
11 property --

12 Q It was used for the purchase of goods or services
13 which became the property of the City of Cleveland,
14 were they not?

15 A That's probably a fair statement, yes.

16 Q All right.

17 Now, I notice that the ordinance itself says
18 that "the Director of Public Utilities be and he
19 hereby is authorized and directed to make a written
20 contract with CEI."

21 Do you regard this as a written contract within
22 the terms of the ordinance? By this, I mean the
23 Exhibit 3235?

24 A It was my opinion at that time that it was a
25 sufficient contract, and it's always been my opinion

1 Rego - cross

2 that every purchase order constituted a contract.

3 Q Constituted a contract if accepted by the -- if it was not
4 accepted by the vendor to whom it was directed? (unclear)

5 A Offered and accepted. -- (unclear) the property of the City?

6 Q Right.

7 Now, do you have any present knowledge as to
8 whether the property to be paid for under Ordinance
9 642-72 was, in fact, to become the property of the
10 City of Cleveland?

11 A No, I don't.

12 Q You do not.

13 MR. LANSDALE: Thank you.

14 I have no further questions.

15 MR. NORRIS: No further questions,
16 your Honor.

17 THE COURT: Thank you.

18 You may step down.

19 THE WITNESS: Thank you, your Honor.

20
21 THE COURT: That wasn't so bad,
22 ladies and gentlemen.

23 We'll adjourn for the day, and you are free
24 to return to the jury room and view the exhibits
25 of the day and then be on your way.

1 And please, during the adjournment, do not
2 discuss the case either among yourselves or with
3 anyone else; keep an open mind until you have heard
4 all the evidence and the Court's instructions on
5 the law, and until such time as the matter is
6 submitted to you for your deliberation and
7 judgment.

8 We will see you tomorrow morning at 8:30
9 and, hopefully, we will start bright and early
10 tomorrow.

11 We want you to know that we have been working
12 while you were in the jury room on some legal
13 questions that had to be addressed, so don't think
14 that we haven't been working.

15 You are free to go. Thank you very much,
16 and good night.

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

20 -----
21 {The Court and Law Clerk Schmitz conferred
22 off the record.}

23 THE COURT: I understand,
24 gentlemen, that Plaintiff's Exhibits 1488 and
25 582 have already been admitted, and they may go

1 submit that if we excerpted only page D-20 and
 2 put a cover page on it, none of the rest of the
 3 stuff need go in.

4 THE COURT: I don't know, what
 5 is on that page?

6 MR. MURPHY: Your Honor, page
 7 D-20 is the question 13 about which there was
 8 substantial discussion at the bench.

9 THE COURT: Question 13, that has
 10 been excluded.

11 MR. MURPHY: That is correct, your
 12 Honor.

13 THE COURT: Is that all you are
 14 objecting to?

15 MR. MURPHY: That is correct, your
 16 Honor.

17 THE COURT: The rest may go to
 18 the jury.

19 MR. WEINER: I think there was one
 20 from Friday, that 1048, do we have that?

21 MR. NORRIS: It has been excluded.

22 LAW CLERK SCHMITZ: It has been excluded
 23 at a bench conference.

24 MR. NORRIS: Yes.

25 THE COURT: Thank you, ladies and

1 gentlemen.

2 {Court was adjourned.}

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